

**BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD
OF THE STATE OF CALIFORNIA**

AB-8655

File: 48-315355 Reg: 03054533

J. JESUS FERNANDEZ and VIRGINIA FERNANDEZ, dba Maria's Club
728 North 13th Street, San Jose, CA 95112,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Stewart A. Judson

Appeals Board Hearing: October 2, 2008
San Francisco, CA

ISSUED DECEMBER 26, 2008

J. Jesus Fernandez and Virginia Fernandez, doing business as Maria's Club (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which revoked their license for their employee, Florencia Aramburo, having purchased cigarettes and distilled spirits on five separate dates in June and July, 2002, believing them to have been stolen, violations of Penal Code sections 664/496, subdivision (a).

Appearances on appeal include appellants J. Jesus Fernandez and Virginia Fernandez, appearing through their counsel, Donald A. Tenenbaum and Michael G. Regan, and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean Lueders.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale general public premises license was issued on February 15, 1996. On February 15, 2003, the Department instituted an accusation against

¹The decision of the Department, dated November 16, 2006, is set forth in the appendix.

appellants charging they permitted an employee to purchase cigarettes and distilled spirits believing them to have been stolen.

At the administrative hearing held on September 17, 2003, March 9 and 10, 2004, and November 9, 2005, documentary evidence was received and testimony concerning the violations charged was presented.

Subsequent to the hearing, the Department issued its decision which determined that the charges of the accusation had been established.

Appellants have filed an appeal making the following contentions: (1) the Department communicated ex parte with its decision maker; (2) appellants were entrapped; and (3) the penalty is excessive. Appellants have also moved to augment the record with the report of hearing sent to the Department's decision maker.

DISCUSSION

The Department's brief states, in its entirety:

The Appellants' brief simply requests the Appeals Board to rehash the evidence and to come to a different conclusion than the conclusion reached by the ALJ. Such is not the proper role of the Appeals Board.

The Appellant [*sic*] also raises an issue regarding an alleged ex parte contact (Quintanar issue) and the Department requests that this case be remanded to the Department for consideration of this issue.

There being no objection from appellants' counsel, we will remand this matter to the Department for an evidentiary hearing on the ex parte communication issue, in accordance with the Department's request, but without prejudice to other issues raised in their brief by appellants.

ORDER

This matter is remanded to the Department for an evidentiary hearing in

accordance with the foregoing opinion.²

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

²This order of remand is filed in accordance with Business and Professions Code section 23085, and does not constitute a final order within the meaning of Business and Professions Code section 23089.