

ISSUED SEPTEMBER 11, 1998

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

JOSE S. and SOCORRO TORRES	)	AB-6906
dba Foothill U-Save Liquors)	
21 South White Road	)	File: 21-244971
San Jose, CA 95127,	)	Reg: 96037257
Appellants/Licensees,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Robert R. Coffman
DEPARTMENT OF ALCOHOLIC)	
BEVERAGE CONTROL,	)	Date and Place of the
Respondent.	)	Appeals Board Hearing:
	)	June 3, 1998
	)	Sacramento, CA

Jose S. and Socorro Torres, doing business as Foothill U-Save Liquors (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which revoked their off-sale general license for appellant Jose S. Torres having been convicted of possession of a controlled substance (cocaine) for sale, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code §24200, subdivision (a), and Health and Safety Code §11351.

¹The Department's Decision Under Government Code §11517, subdivision (c), dated July 2, 1997, and the proposed decision of the Administrative Law Judge, are set forth in the appendix.

Appearances on appeal include appellants Jose S. and Socorro Torres, appearing through their counsel, Arturo Hernandez-M., and the Department of Alcoholic Beverage Control, appearing through its counsel, Thomas M. Allen.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on May 25, 1990.

Thereafter, the Department instituted an accusation against appellant charging that on or about January 5, 1994, appellant Jose S. Torres was convicted of possession of cocaine for sale, in violation of Health and Safety Code §11351.

An administrative hearing was held on December 10, 1996, at which time oral and documentary evidence was received. Testimony was presented by appellants concerning the criminal conviction and their claim of hardship should the license be revoked,² as the Department requested. A police officer also testified about the circumstances that led to the criminal charges.

Subsequent to the hearing, the Department issued its decision pursuant to Government Code §11517, subdivision (c), ordering appellants' license revoked pursuant to Business and Professions Code §24200, subdivision (a), based upon appellant Jose S. Torres' criminal conviction. The proposed decision of the Administrative Law Judge had also ordered the license revoked, but provided that

² This testimony was for the most part in the form of written statements by each of appellants. Socorro Torres explained the circumstances which she believed demonstrated the degree to which she relied upon the income from the store to support her family, while Jose Torres stressed the fact that his wife had nothing to do with the crime for which he was convicted.

appellants could transfer the license within 120 days, with the license to be suspended in the interim. If not transferred during the 120-day period, the Department could revoke the license without further notice. The Department rejected appellants' written post-hearing argument challenging the penalty ordered in the proposed decision as one which would pose an unnecessary and improper hardship on appellant Socorro Torres.

Appellants thereafter filed a timely notice of appeal. In their appeal, appellants raise the following issues: (1) the Administrative Law Judge (ALJ) relied on non-existent case law cited by Department counsel; and (2) revocation will work a severe hardship on Socorro Torres.

DISCUSSION

Appellants contend that Department counsel cited non-existent case law to the ALJ, who relied on the representation, to the effect that there was no necessity of any connection between the crime committed by Jose Torres and his qualifications as a licensee. Appellants cite Brandt v. Fox (1979) 90 Cal.App.3d 737 [153 Cal.Rptr. 683], a case in which the court held that a conviction for distribution of a controlled substance was not a bar to the issuance of a real estate license. Brandt v. Fox relied principally on language in Business and Professions Code §490, which provides that a board may suspend or revoke a license on the ground the licensee has been convicted of a crime "if the crime is substantially related to the qualifications, functions, or duties of the business or profession for

which the license was issued.”

It could be said that there is a connection between a crime of possessing for sale a controlled substance noted for its mood-altering qualities, and the business of selling alcoholic beverages, since each involve the dangers from actual or potential chemical substance abuse.

However, that question does not have to be reached. Business and Professions Code §476, which, like §490, is part of division 1.5 of the Business and Professions Code, provides that the provisions of division 1 shall not apply to division 9 of the Business and Professions Code, beginning with §23000 - the Alcoholic Beverage Control Act.

Moreover, Business and Professions Code §24200, subdivision (d), provides that the Department may suspend or revoke a license for the plea, verdict or judgment of guilty, or a plea of nolo contendere, to any public offense involving moral turpitude. Possession of a controlled substance for sale is a crime involving moral turpitude.

II

Appellants contend that revocation of the license will work a severe hardship upon Socorro Torres, who depends upon the income from the store to support her family, and that such hardship could be avoided by allowing the license to be transferred to her.

Rule 58 (4 Cal.Code Regs. §58) provides, in substance, that the spouse of a licensee must also possess the qualifications to be licensed. Although the rule does not spell out the reasons behind it, we could speculate that the likelihood that the unlicensed spouse will have a community property interest or other involvement in the business, and/or will share in the income it generates, may well be among the factors which led to its adoption.

The Department may have been skeptical of appellants' claims that Jose Torres would have no future involvement in the business.

Although a memorandum asserting that appellants were being divorced was filed with the Department following the submission of the proposed decision, the appeal brief is silent on the subject, and there are no court documents in the record indicating such proceedings were instituted.

This is not a case where the Department can be faulted as to the penalty. In addition to Jose Torres' conviction, appellants had two prior disciplines, in 1992 and 1995, both involving sales to minor decoys.

Where an appellant raises the issue of an excessive penalty, the Appeals Board will examine that issue. (Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183].) However, the Appeals Board will not disturb the Department's penalty orders in the absence of an abuse of the Department's discretion. (Martin v. Alcoholic Beverage Control Appeals Board & Haley (1959) 52 Cal.2d 287 [341 P.2d 296].) We find none

here.

CONCLUSION

The decision of the Department is affirmed,³

RAY T. BLAIR, JR., CHAIRMAN
JOHN B. TSU, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

BEN DAVIDIAN, MEMBER, did not participate in the oral argument or decision in this matter.

³This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.