ISSUED MAY 8, 2000

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

NARY TY and SRUN VENG TY dba Korner Grocery 1255 Buena Vista Avenue Stockton, CA 95203, Appellants/Licensees, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7383 File: 21-186127 Reg: 98044913 Administrative Law Judge at the Dept. Hearing: Jeevan S. Ahuja Date and Place of the Appeals Board Hearing: March 16, 2000 San Francisco, CA

Nary Ty and Srun Veng Ty, doing business as Korner Grocery (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which revoked their license, but stayed the revocation for 180 days to allow appellants to transfer the license to a person or persons acceptable to the Department, revocation to occur if a transfer has not been effected within the 180 days, and suspended the license for 60 days and indefinitely thereafter until the license is transferred or revoked, for appellant Srun Veng Ty pleading nolo contendere to a charge that he exchanged food stamps for cash and alcoholic beverages, a crime

[1]The decision of the Department, dated March 4, 1999, is set forth in the appendix.

under the circumstances involving moral turpitude, 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 (d), and Welfare and Institutions Code §10980, subdivision (g)(2).

Appearances on appeal include appellant Nary Ty and Srun Veng Ty, appearing through their counsel, William J. Wallace, and the Department of Alcoholic Beverage Control, appearing through its counsel, John Peirce.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on May 5, 1986. Thereafter, the Department instituted an accusation against appellants charging that, on March 17, 1998, appellant Srun Veng Ty pled nolo contendere to a charge of violating the provisions of the Food Stamp Program, as noted above.

An administrative hearing was held on December 23, 1998, at which time oral and documentary evidence was received, and testimony was presented by appellants concerning mitigation of the penalty.

Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred as charged. Appellants' Petition for Reconsideration, submitted March 18, 1999, was denied by the Department on March 24, 1999.[2]

Appellants thereafter filed a timely notice of appeal. In their appeal, appellants contend that the penalty is excessive.

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[2] The Order regarding appellants' Petition for Reconsideration is set forth in the appendix.

DISCUSSION

Appellants do not dispute the imposition of discipline, but argue that, under the facts presented at the hearing, the penalty of revocation "is harsh and unnecessary." (App. Br. at 5.)

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].) However, where an appellant raises the issue of an excessive penalty, we will examine that issue. (Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183].)

Appellants contend that a period of suspension followed by a period of probation would be the appropriate discipline in this matter. They note their 14 years without any prior disciplinary history, appellant's admission of and remorse for his mistake, his coming to the United States as a Cambodian political refugee, his service with the U.S. Army in Cambodia, his hard work to become a productive U.S. citizen, and the adverse financial consequences to their family as mitigating factors.

The Department notes that the ALJ did take the mitigating factors into consideration when he imposed a stayed revocation with the opportunity to sell the license instead of the outright revocation recommended by the Department.

Although the penalty may appear harsh, there has been no evidence of an abuse of the Department's discretion in imposing it. "If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the

conclusion that the Department acted within the area of its discretion." (Harris v. Alcoholic Beverage Control Appeals Board (1965) 62 Cal.App. 2d 589, 594 [43 Cal.Rptr. 633, 636].)

ORDER

The decision of the Department is affirmed.[3]

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[3]This 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 order as provided by §23090.7 of said code.

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