

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

AB-8912

File: 40-382166 Reg: 07067369

MARIA ROSARIO HERNANDEZ and RAUL HERNANDEZ, dba La Barca Cantina
527 West Anaheim Street, Wilmington, CA 90744,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John W. Lewis

Appeals Board Hearing: June 4, 2009
Los Angeles, CA

ISSUED AUGUST 19, 2009

Maria Rosario Hernandez and Raul Hernandez, doing business as La Barca Cantina (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which revoked their license for having permitted drink solicitation pursuant to a commission scheme, violating a condition on their license prohibiting live entertainment and dancing, and purchasing alcoholic beverages from other retail licensees, violations of Business and Professions Code sections 24200.5; 25657, subdivision (a); 23804 and 23402.²

Appearances on appeal include appellants Maria Rosario Hernandez and Raul

¹The decision of the Department, dated August 6, 2008, is set forth in the appendix.

² Unless otherwise stated, all statutory references are to sections of the Business and Professions Code.

Hernandez, appearing through their counsel, Armando Chavira, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

PROCEDURAL HISTORY

Appellants' on-sale beer license license was issued on March 4, 2002.

Thereafter, the Department instituted a multi-count accusation against appellants charging that they employed persons to engage in drink solicitation pursuant to a commission scheme, violated a condition on their license, and purchased alcoholic beverages from retailers.

An administrative hearing was held on May 15, 2008, at which time documentary evidence was received and testimony concerning the violation charged was presented by Department investigators Enrique Alcala, Victoria Brown, and Danny Vergara.

Subsequent to the hearing, the Department issued its decision which sustained the charges in counts 1, 4, 8, 12, 15, 18, 21, and 25 of the accusation, charging violations of section 24200.5 (solicitation counts); counts 16 and 26, charging violations of section 25657, subdivision (a) (solicitation counts); counts 11, 24, and 28, charging violations of section 23804 (condition violations); and counts 29 through 35, charging violations of section 23402 (purchases of alcoholic beverages from retailers). The decision contains a lengthy discussion of the facts relating to those charges sustained by the Department.

Appellants filed a timely notice of appeal in which they raise the general statutory grounds set forth in Business and Professions Code section 23804.

Written notice of the opportunity to file briefs in support of the appellants' position was given on March 5, 2009. Appellants' brief was not received until June 2, 2009, only two days before the scheduled Appeals Board hearing. We have reviewed that brief

and the notice of appeal. Appellants contend the penalty is excessive. The Department has filed a brief urging the Board to affirm the Department's decision.

The Appeals Board may 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].)

In this case, appellants' untimely brief has failed to demonstrate an abuse of discretion. The administrative law judge determined that the violations were blatant and continuing, and that all of the employees at the premises were active participants in the drink solicitation activities. Appellant showed no evidence of mitigation. The penalty was consistent with the Department's penalty guidelines. (Department Rule 144 (4 Cal. Code Regs., §144).)

ORDER

The decision of the Department is affirmed.³

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

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

Any party may, before this final decision becomes effective, apply to the appropriate district 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.