

ISSUED MARCH 31, 1998

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

| | | |
|-----------------------------|---|--------------------------|
| FABIAN and IGNACIA G. LOPEZ |) | AB-6879 |
| dba La Tapatia Market #2 |) | |
| 1909 Front Street |) | File: 20-311645 |
| Oceano, California 93445, |) | Reg: 97038619 |
| Appellants/Licensees, |) | |
| |) | Administrative Law Judge |
| v. |) | at the Dept. Hearing: |
| |) | John P. McCarthy |
| DEPARTMENT OF ALCOHOLIC |) | |
| BEVERAGE CONTROL, |) | Date and Place of the |
| Respondent. |) | Appeals Board Hearing: |
| |) | January 7, 1998 |
| |) | Los Angeles, CA |

Fabian and Ignacia G. Lopez, doing business as La Tapatia Market #2 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which revoked their license for co-licensee Fabian Lopez having pleaded guilty to misdemeanor charges of receiving stolen property, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from violations of Penal Code §§664 and 496, and Business and Professions Code §24200, subdivision (d).

¹The decision of the Department, dated May 29, 1997, is set forth in the appendix.

Appearances on appeal include appellants Fabian and Ignacia G. Lopez, appearing through their counsel, Gerald C. Carrasco, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on June 5, 1996. Thereafter, the Department instituted an accusation against appellants charging that on October 7, 1996, in the Superior Court of San Luis Obispo County, appellant Fabian Lopez pleaded guilty to an information charging him with attempted receipt of stolen property, in violation of Penal Code §§664 and 496, a public offense in circumstances involving moral turpitude.

An administrative hearing was held on March 25, 1997, at which time documentary evidence relating to the entry of the guilty plea in the criminal proceeding was received. Appellants' counsel, although presenting no witnesses, and not contesting the fact that appellant Fabian Lopez had pled guilty to the criminal charges, offered into evidence the transcript of the preliminary hearing in the criminal proceeding, and the report of the probation department, arguing that the documents demonstrated that any penalty should be mitigated.

Subsequent to the hearing, the Department issued its decision which ordered appellants' license revoked.

Appellant thereafter filed a timely notice of appeal. In their appeal, appellants raise the following issue: the Administrative Law Judge (ALJ) failed to make any findings with respect to issues of mitigation and aggravation.

DISCUSSION

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].) 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].)

Appellants contend that the failure of the ALJ to make any findings with respect to matters in mitigation constituted an abuse of discretion. Appellants argue (App.Br. 4) that "the record is completely devoid of any weighing process in the exercise of discretion in fixing the appropriate remedy."

Appellants' contention is incorrect. The ALJ clearly weighed factors relevant to an exercise of discretion in fixing an appropriate remedy, including the following:

- (a) the Department's concern not to punish, but to protect the public from an unscrupulous and dishonest licensee;
- (b) appellants had been licensed a relatively short period of time;
- (c) appellants had operated their business (a grocery) for a period of time before they received their license from the Department; and
- (d) since the license had not cost appellants a great deal of money, protection of the public could be had at no significant penalty to appellants.

The ALJ reviewed the transcript of the preliminary hearing in the criminal proceeding, as well as the probation report. Both of these documents were

tendered by appellants in support of their argument for a more lenient penalty. To the extent these materials contained anything tending to mitigate the offense, it would appear that the ALJ found them inadequate to warrant less than outright revocation.

We cannot say that the Department has abused its discretion by revoking the license in the circumstances of this case. The Department has no interest in its licenses, valuable or not, being in the hands of dishonest licensees.

The appropriateness of the penalty in this case must be left to the discretion of the Department. The Department having exercised its discretion reasonably, the Appeals Board will not disturb the penalty.

CONCLUSION

The decision of the Department is affirmed.²

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

²This 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.