

ISSUED NOVEMBER 4, 1998

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

ARTHUR W. and MARIETTE E.	)	AB-6983
HACKWOOD)	
dba 7-Eleven Store #2211-17464B	)	File: 20-250535
860 Perry Lane	)	Reg: 97038759
Petaluma, California 94954,)	
Appellants/Licensees,	)	Administrative Law Judge
	)	at the Dept. Hearing:
v.	)	Michael B. Dorais
)	
	)	Date and Place of the
DEPARTMENT OF ALCOHOLIC	)	Appeals Board Hearing:
BEVERAGE CONTROL,	)	September 2, 1998
Respondent.	)	San Francisco, CA
)	

Arthur W. and Mariette E. Hackwood, doing business as 7-Eleven Store #2211-17464B (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which revoked their off-sale beer and wine license, but stayed revocation upon condition that the license be transferred within the stayed period to a person or persons acceptable to the Department, and that no cause for disciplinary action occur during such period, for co-licensee Mariette E. Hackwood having entered a plea of nolo contendere to criminal offenses which involved moral

¹ The decision of the Department, dated November 21, 1997, made pursuant to Government Code §11517, subdivision (c), and the proposed decision of the Administrative Law Judge, are set forth in the appendix.

turpitude (the felonious use of another person's credit card), 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), in conjunction with Penal Code §459.

Appearances on appeal include appellants Arthur W. and Mariette E. Hackwood, appearing through their counsel, Paul A. Neuer, and the Department of Alcoholic Beverage Control, appearing through its counsel, Nicholas R. Loehr.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on August 30, 1990. On January 24, 1997, the Department instituted an accusation against appellants and co-licensee The Southland Corporation, charging that Mariette E. Hackwood had entered a plea of nolo contendere to the charge she committed burglary, a crime involving moral turpitude.²

An administrative hearing was held on March 12, 1997. At that hearing, appellants testified in mitigation of the charges, to the effect that Mariette E. Hackwood committed the criminal offenses during a period of time when, while separated from her husband and not involved in the operation of the business, she was addicted to methamphetamine. She is currently on probation, no longer uses methamphetamine, and is actively involved in a twelve-step recovery program. Arthur W. Hackwood testified that he had no knowledge of his wife's drug

² The crime, use of another's credit card, a form of identity theft, is covered by the broad terms of the burglary statute, Penal Code §459. Mrs. Hackwood admitted to having made between \$7,000 and \$8,000 in purchases during the two-week period the credit card was in her possession [RT 30].

addiction until he was informed by an acquaintance that his wife had been arrested. The two have now reconciled, and she has assisted him in the store on a part-time basis. Appellants argued, successfully, to the Administrative Law Judge (ALJ), that revocation was an inappropriate remedy under the circumstances, because the public welfare and morals could be protected by some lesser form of discipline. Appellants suggested, and the ALJ included in his proposed decision, a requirement that appellants agree to the imposition of conditions on the license banning Mrs. Hackwood's involvement in the operation of the store.

The Department, acting pursuant to Government Code §11517, subdivision (c), rejected the proposed decision, and instead ordered revocation, with revocation to be stayed for 180 days, subject to the condition that during that 180-day period, appellants transfer the license to a person or persons acceptable to the Department. This action was taken after the Department's receipt of post-hearing briefs from the parties directed to the penalty issue, and to the issue whether Department Rule 58 (4 Cal.Code Regs. §58) permitted the imposition of some measure of discipline short of revocation.

Appellants thereafter filed a timely notice of appeal. In their appeal, appellants contend that the Department abused its discretion by its application of Rule 58. Appellants argue that revocation is not necessary to protect the public welfare or morals, and that the Department failed to consider other means of protecting the public welfare or morals which would not require penalizing the innocent spouse. Specifically, appellants (and Southland, which, although it did not file an appeal, has filed a brief in support of appellants) contend that the proposed

decision, which the Department rejected, provides a result more in accord with the public interest.

DISCUSSION

The issue on this appeal turns on whether Department Rule 58 mandates an order of revocation when one spouse has been found to have engaged in conduct that renders that spouse not qualified to hold a license, and under what circumstances must or may the spouse be considered rehabilitated and, therefore, no longer not qualified to hold a license.

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. The Appeals Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing.³

The issue in this case is whether the Department abused its discretion by ordering revocation. Appellants argue that Rule 58 does not require such a result, and that the Department erred in relying on the rule.

³ The California Constitution, article XX, § 22; Business and Professions Code §§23084 and 23085; and Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

Rule 58 is clear in its mandate that "the unlicensed spouse must have the qualifications required of a holder of a license unless the husband and wife are not living together and have not lived together for at least six months." As a convicted felon, and on probation until the year 2000, Mrs. Hackwood is clearly not qualified to be a holder of a license. No one contends that she is.

Appellants and Southland argue that the imposition of a condition on the license that Mrs. Hackwood be isolated from the business is enough to protect the public welfare, and at the same time assist the Hackwoods in their efforts to restore the family structure.

To afford appellants the relief they seek, the Board would have to hold that the Department may, and in this case must, ignore Rule 58. The Board would have to do so in the face of the fact that Mrs. Hackwood not only is unqualified to hold a license, but the end result would permit her to own one-half of a licensed business, as a result of her spousal community property rights.

The Department expresses its concern that, having once demonstrated a proclivity for dishonesty when under stress, Mrs. Hackwood at some time in the future, in her position as Mr. Hackwood's wife, might gain access to customers' credit card numbers and once again engage in the conduct for which she is presently on probation following a felony conviction for an offense involving moral turpitude. Given the relatively short period of time which has elapsed since Mrs. Hackwood had to confront her addiction and her criminal conduct, there is no certainty that something akin to what the Department fears will not happen.

Should the Department be required to expose the public welfare to risk so

that the impact upon the Hackwoods is less onerous? We do not think so. As stated in Rice v. Alcoholic Beverage Control Appeals Board (1979) 89 Cal.App.3d 30, 39 [152 Cal.Rptr. 285, 289]:

“Under the relevant constitutional and statutory provisions, the Department is expressly empowered to suspend or revoke an issued license. ... The propriety of the penalty rests solely within the discretion of the Department whose determination may not be disturbed in the absence of a showing of palpable abuse. ... The fact that unconditional revocation may appear too harsh a penalty does not entitle a reviewing agency or a court to substitute its own judgment therein ... nor does the circumstance of forfeiture of the interest of an otherwise innocent co-licensee sanction a different and less drastic penalty.” (Citations omitted).

In any event, Rule 58 controls the result in this case. Although the rule is titled “Applications by Married Persons,” its text makes it clear that for an alcoholic beverage license to be “issued or held” (emphasis supplied), both spouses must be qualified unless they are eligible for one of the exceptions set forth in the rule. The rule contains no exception which fits the Hackwoods’ situation.

ORDER

The decision of the Department is affirmed.⁴

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

⁴ This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of its filing, as provided by §23090.7 of said code.

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