

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

AB-8531

File: 40-371352 Reg: 05060673

MARILU BERNARDINA LOPEZ dba Campesino
807 South Mirage Avenue, Lindsay, CA 93247,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: None

Appeals Board Hearing: October 5, 2006
San Francisco, CA

ISSUED DECEMBER 20, 2007

Marilu Bernardina Lopez, doing business as Campesino (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which revoked her license for having permitted sales of methamphetamine; employing a minor in an area of the premises where alcoholic beverages were sold and served; permitting a performer whose breasts and buttocks were exposed to dance while not on a stage; and permitting the solicitation of prostitution; violations of Business and Professions Code sections 24200.5, subdivision (a), and 25663, subdivision (a); Health and Safety Code section 11379; Penal Code section 647, subdivision (f); and Department Rule 143.3(2).

Appearances on appeal include appellant Marilu Bernardina Lopez, appearing in pro. per., and the Department of Alcoholic Beverage Control, appearing through its

¹The decision of the Department, dated March 10, 2006, is set forth in the appendix.

counsel, Nicholas R. Loehr.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine license was issued on December 12, 2000. Thereafter, the Department instituted an accusation against appellant charging violations of Business and Professions Code sections 24200.5, subdivision (a), and 25663, subdivision (a); Health and Safety Code section 11379; Penal Code section 647, subdivision (f); and Department Rule 143.3(2).

The 15-count accusation charged the selling and/or knowingly permitting the sale of methamphetamine (Counts 1, 2, and 6 through 13); employing a person under the age of 21 in a portion of the premises used for the sale and service of alcoholic beverages (Counts 3, 4, and 14); permitting a female whose breasts and buttocks were exposed to perform while not on a stage (Count 5); and permitting an employee to solicit an act of prostitution (Count 15).

An administrative hearing was held on March 2, 2006. Neither appellant nor her attorney, James P. Hurlbutt, appeared. Subsequent to the hearing, the Department issued a Decision Following Default, which, among other things, found that the charges of the accusation were true, and ordered appellant's license revoked.

Appellant has filed a timely notice of appeal, and contends that she was not given notice of the hearing date. She has filed a brief in which she sets forth factual arguments that she contends refute or explain the matters alleged in the accusation, and blames her failure to attend the hearing on her attorney's failure to notify her.

The Department acted pursuant to Government Code section 11520. Its order recites the events leading to the entry of default, including reference to the notice of hearing served on appellant and her attorney, makes factual findings and conclusions

of law with respect to the charges of the accusation, and orders appellant's license revoked. The order also includes a notice that any motion to vacate the decision must be filed in accordance with section 11520. Under that section, a defaulted party has seven days in which to file with the Department a motion to vacate the decision, stating by affidavit or declaration the ground relied on. Such grounds include failure to receive notice of the hearing pursuant to Government Code section 11505 (service by mail), or mistake, inadvertence, surprise, or excusable neglect. The grant or denial of such a motion, had one been filed, would have been at the discretion of the Department. Appellant did not file such a motion with the Department.

By letter dated November 14, 2005, attorney James P. Hurlbutt advised the Department that he was the attorney for appellant, and returned a signed notice of defense. There is nothing in the file to indicate if or whether he withdrew as her attorney.

The notice provided by the Department was in accordance with the applicable statutory requirements, and appellant has not pointed out any departure from such obligations. She offers only her version of the facts which led to the accusation. The Board may not consider those facts on this appeal. (See Bus. & Prof. Code, §23084; Cal. Const., art. XX, §22.)

The only issue properly before the Board is whether there is any merit to appellant's claim that she did not receive notice of the hearing. At odds with such claim is the documented service by mail upon her and her attorney, as well as the statement in her brief that her attorney failed to notify her.

Our review of the record confirms that this is the case. Appellant either received the notice of hearing in the Department's mailing , and ignored it, or was notified of the

hearing by her attorney and disregarded it.

This case appears to be an unfortunate instance of a failure of communication between an appellant and her attorney, and not anything the Board can cure. The Department followed the rules; appellant and her attorney did not.

ORDER

The decision of the Department is affirmed.²

TINA FRANK, ACTING CHAIRPERSON
SOPHIE C. WONG, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

² 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.