ISSUED SEPTEMBER 8, 1999

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

GILBERT ESQUEDA dba El Vuelve a La Vida 8406-08 Topanga Canyon Blvd. Canoga Park, CA 91306, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7218 File: 41-286004 Reg: 97041862 Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen Date and Place of the Appeals Board Hearing: July 1, 1999 Los Angeles, CA

Gilbert Esqueda, doing business as El Vuelve a La Vida (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked the on-sale general public eating place license which had been issued to Gilbert Esqueda and Jeronimo Esqueda.

Appearances on appeal include appellant Gilbert Esqueda, appearing through his counsel, Minh Nguyen-Duy, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

[1]The decision of the Department, dated August 6, 1998, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

The on-sale beer and wine public eating place license involved in this appeal was issued on September 16, 1993. Thereafter, on November 24, 1997, the Department instituted a two-count accusation against the license. The first count of the accusation charged that continuance of the license would be contrary to welfare and morals in light of the conviction of co-licensee Jeronimo Esqueda of a crime involving moral turpitude, namely the sale or transportation of a controlled substance, in violation of Health and Safety Code §11379, subdivision (a). The second count of the accusation charged a violation of Business and Professions Code §§23300 and 23355, alleging that the co-licensees were not the true owners of the business conducted under the license which had been issued, and that the true owner or part owner was a California corporation.

An administrative hearing was held on June 8, 1998. Neither Esqueda attended the hearing. At the hearing, Department counsel introduced a series of documents which, in summary, evidenced the following: the issuance of the license in question, to the Esquedas; the formation by them of a California corporation with a name almost identical to the name of the restaurant for which they had been licensed, a street address identical to that of the licensed premises, its type of business described as "restaurant," and the Esquedas as its only corporate officers (Exhibits 2 through 5); the entry of a guilty plea by Jeronimo Esqueda to a charge that he violated Health and Safety Code §11379, subdivision (a) (transportation and/or sale of a controlled substance), the sentence imposed as a result of his plea,

and the terms of his probation (Exhibit 1); and the purported termination of Jeronimo Esqueda's ownership interest in, and employment by, the corporation (Exhibits 6 through 11).

Subsequent to the hearing, the Department issued its decision which determined that the charges of the accusation had been proven, and ordered the license revoked.

Appellant Gilbert Esqueda thereafter filed a timely notice of appeal. In his appeal, appellant contends that the decision is not supported by the findings or by substantial evidence. He argues that the fact that Jeronimo severed his relationship with the corporation prior to his guilty plea defeats the charge in count 1, and explains the unlicensed operation by the corporation as the product of negligence, rather than a conscious desire to conceal ownership.

DISCUSSION

Appellants assert that the decision is not only not supported by the evidence, but that it actually contradicts the evidence.

Count 1.

Appellant argues, with respect to count 1, that the evidence shows that Jeronimo Esqueda severed all financial and legal ties to the business prior to his conviction. Building on this argument, appellants contend the Administrative Law Judge (ALJ), without factual support, "chose to assume the worst about an offense committed by someone no longer connected to appellant's business" [App.Br., p.3].

Appellant's argument is somewhat disingenuous. While it may be true that

Jeronimo severed his legal and financial ties with the corporation (assuming, as Department counsel apparently did, that the documents purporting to show this are genuine), there is no evidence that his involvement with the business was terminated entirely. The record lacks information regarding the relationship between Jeronimo and Gilbert - are they brothers, father and son? - and who is Luz Esqueda, the new corporate secretary (see Exhibit 5) and vice-president (see Exhibit 6)?

Appellant ignores the fact that, according to Exhibit 1, the crime which Jeronimo admitted by his guilty plea of having committed, was alleged to have been committed on or about August 23, 1996, **while he was still an officer of the corporation, and, presumably, a shareholder**.

There is no evidence that any attempt was ever made to transfer the license from the Esquedas to their corporation. That being the case, the severance of Jeronimo's ties to the corporation did nothing to purge the license of the taint of his conviction.

It has also been argued (there is no evidence on the point) that Jeronimo's arrest did not take place on the premises, nor was it connected in any way to the business. This is irrelevant, even if true.

In this regard, it may be noted that the terms of probation imposed upon Jeronimo by the criminal court included a requirement that he submit the restaurant to a warrantless search and seizure at any time, day or night, by any probation officer or peace officer (see Exhibit 1). This condition of probation was imposed on a date well after Jeronimo's supposed disengagement from the business, and suggests that, to the criminal court, at least, Jeronimo still had enough of an attachment to the business to

warrant such a condition.

This brings us to the last aspect of appellant's contention, and that is whether it makes any difference to the validity of the charge that the guilty plea followed, rather than preceded, Jeronimo's departure from the corporate scene.

We do not believe so. The accusation alleged only that there had been a guilty plea. The ALJ found that as a fact. He also took official notice of the fact that Jeronimo Esqueda and Gilbert Esqueda were the current licensees for the premises located at the Topanga Canyon Boulevard address.

There is no inconsistency between a finding that the corporation operated the business without a license (which appellant's brief seems to concede), and a finding that one of the actual licensees had committed a crime of a magnitude warranting license revocation, and the evidence presented by the Department, indulging all reasonable inferences, was sufficient to sustain both.

Count 2.

Appellant contends that the failure to seek a transfer of the license from the individuals to the corporation was the product of negligence, rather than a conscious attempt to conceal ownership.

That may well be true. We suspect that had this been the only reason for the accusation, the ALJ would have gone along with the Department's recommendation of a suspension and reissuance of the license to a corporate entity.

The non-appearance of either Esqueda did not help matters. The ALJ was clearly influenced by his belief that there was no evidence in the record to show that Jeronimo no longer held any financial stake in the corporation, and, of course, there

was no one at the hearing who could have answered that serious concern.

Exhibit 7, entitled "Notice of Transaction Pursuant to Corporations Code Section 25102 (f)," purports to show the issuance of securities by the corporation for $5000, paid in consideration other than cash, but it does not disclose to whom issued or the type or number of the security. The notice is dated July 2, 1997, well after Jeronimo's guilty plea. If this is supposed to evidence a severance of any financial connection between Jeronimo and the corporate entity, it falls far short.

In the last analysis, the ALJ and the Department were vested with wide discretion in determining an appropriate penalty. (Martin v. Alcoholic Beverage Control Appeals Board & Haley (1959) 52 Cal.2d 287 [341 P.2d 296].) The order of revocation was within the scope of that discretion. The Appeals Board has sustained orders of revocation in a variety of cases where a conviction of a crime involving moral turpitude was the basis for the order, including cases involving violations of the controlled substance offenses in the Health and Safety Code. That Department counsel in this case may have recommended something less than outright revocation is only one consideration in assessing whether there was an abuse of discretion in the imposition of discipline.

ORDER

The decision of the Department is affirmed.[2]

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

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[2] 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.