ISSUED MARCH 30, 2000

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

FEDERICO and MARIA ISABEL ALVAREZ dba El Casino Club 4512-14 East Whittier Boulevard Los Angeles, CA 90022, Appellants/Licensees, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7288 File: 40-324665 Reg: 98042956 Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen Date and Place of the Appeals Board Hearing: February 3, 2000 Los Angeles, CA

Federico and Maria Isabel Alvarez, doing business as El Casino Club (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which revoked their license for violations involving license conditions, false ownership, refusal to produce in timely fashion records requested by the Department, and having permitted an employee to solicit a drink, being contrary to the universal and generic public welfare and morals provisions of the California

[1]The decision of the Department, dated November 25, 1988, is set forth in the appendix.

Constitution, article XX, §22, arising from violations of Business and Professions Code §§23804, 23300, 23355, 25616, and Rule 143.

Appearances on appeal include appellants Federico and Maria Isabel Alvarez, appearing through their counsel, Armando H. Chavira, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale beer license was issued on February 4, 1997. Thereafter, the Department instituted an accusation against appellants charging, in five separate counts, various violations of the Alcoholic Beverage Control Act.

An administrative hearing was held on June 29 and September 16, 1998, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision, sustaining the charges relating to violations of license conditions (count 1), false ownership (count 2), production of records (count 3), and permitting an employee to solicit a drink (count 5). A charge that appellants employed a person under a commission, percentage or profit sharing plan or conspiracy to solicit drinks was not sustained.

Appellants have filed a timely appeal, and now raise the following issues: (1) the penalty, to the extent it is based only upon the condition violations, constitutes an abuse of discretion; (2) the findings with regard to false ownership are not supported by substantial evidence; (3) the findings with regard to the incomplete and untimely production of records are not supported by substantial evidence; (4) there is no statutory authority for the suspension or revocation of a license for late

and partial compliance with the request for records; (5) the penalty of revocation for appellants' first Rule 143 violation is an abuse of discretion; and (6) it was an abuse of discretion to combine the counts of the accusation for purposes of revocation when the counts on an individual basis would not support such an order. Issues 1, 5, and 6 will be discussed together as related issues, following a discussion of the other issues raised by appellants. Issues 3 and 4 are also related and will be discussed together.

DISCUSSION

I

Appellants contend that the finding that they are not the true owners of the business is not supported by substantial evidence. They argue that documents showing Adrian Campa as an owner were simply prepared that way as a convenience to appellants, and did not evidence ownership by Campa.

The Department cites statements by the bartender as to Campa's ownership, documents it concluded evidenced such ownership interest, and Campa's statements to the Department investigator that he was operating the business on a trial basis.

The false ownership findings are the most critical, since, as appellants argue, it is questionable whether the Department would have ordered revocation for a first time condition violation, failure and refusal to produce records in timely fashion violation, and drink solicitation violation, even taking into account the short period of time they possessed their license.

The Administrative Law Judge found that Federico Alvarez

> "had a second licensed premises which required his full attention, and on or about February, 1997 had offered to sell the establishment for $20,000, with a $10,000 down payment.
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> "Campa began to make arrangements to finance the purchase of the business. During the period of February to May, 1997, the respondents took steps to transfer ownership and control to Campa, pending completion of the sale. However, Campa was unable to obtain the necessary financing and the sale fell through in May or June, 1997.
> "During the investigation on May 22, 1997, the Alcoholic Beverage Control investigators discovered a number of documents at the premises showing that Adrian had taken over the ownership and operation of the establishment. Further, Gregoria Rios, a bartender at the premises told investigator Pacheco that Campa was the owner of the bar. Rios also stated that she was in effect Campa's girl friend. Campa upon being asked about his ownership interest, initially admitted that he was the owner, and then added that he was in the process of purchasing the establishment or was planning to take over. However, Campa denied that he said anything more than that he was the bar manager."

The documents discovered by the investigators included receipts for the payment of Los Angeles County license fees which indicated the fees had been paid by Campa (who admitted he made the payments using his own funds [II RT 75-77]);[2] utility and phone bills showing Campa as the customer; and a "Location Agreement," for the placement in the premises of a coin-operated pool table and a juke box, with Campa's signature over his printed name and the word "owner." Although Campa testified he did not place the printed words on the document, his name also appears at the top of the document as a party to the agreement.[3]

Appellants' position is that, although a sale transaction was contemplated, no sale or transfer of ownership occurred because Campa was unable to make the initial

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[2] These documents were enclosed in a picture frame, as if for display, when discovered by the investigators.

[3] Except for the word "owner" beneath his signature, there is nothing on the face of the document that would indicate Campa executed it in any other representative capacity. The document was admitted into evidence without objection [II RT 129].

$10,000 payment toward a total purchase price of $20,000. They argue that Campa was acting without their authority when he changed the gas and phone bills to his name, and made the payment to the County of Los Angeles reflected in the receipts found during the investigation.

Without evidence of a written agreement of sale, the precise terms and conditions of the proposed sale cannot be ascertained. However, it is highly unlikely that Campa would have changed the utility billings to his name, entered into a contact involving the placement of coin-operated devices in the premises without first consulting Alvarez, or expended thousands of dollars of his own money toward license fees billed to his name, if he did not deem himself an owner.

The ALJ's conclusions also derive support from the almost complete absence of documentation for the period in question that would reflect appellants' ownership, control and operation of the business.

The Department, by a document dated December 3, 1997, and entitled "NOTICE TO PRODUCE RECORDS," requested the production by appellants of 16 categories of business records relating to the period August, 1996 through May, 1997, including requests for workers' compensation payroll reports, quarterly wage reports to the California State Employment Development Department, monthly bank statements, cancelled checks for the purchase of alcoholic beverages, cancelled payroll checks, invoices, utility bills, etc. Presumably, such a request would have generated at least colorable documentation to support appellants' contentions that they, and not Campa, owned the business during that time period.

Virtually none of the documents requested by the Department were ever produced. Appellants say that the Department never followed up after they initially

produced records on April 1, 1998 (almost four months after the request). Even were there any merit to that contention, it does not answer appellants' inability to offer documentation at the hearing that they, and not Campa, owned and operated the premises from the time it was licensed until shortly after the visit by the Department investigators on May 22, 1997.[4]

Finally, Campa's admissions to investigator Pacheco that he was in the process of buying the business suggest that the transfer of ownership was being effected over a period of time, but that the process had commenced almost coincident with the Department's issuance of the license.

We believe that the record, viewed as a whole, contains substantial evidence which, together with reasonable inferences to be drawn therefrom, amply demonstrates that Campa had acquired an ownership interest in the premises without such having been disclosed to or approved by the Department. The charge of false ownership must be sustained.

II

Appellants contend it was an abuse of discretion for the Department to impose a penalty of revocation for a single violation or for first time violations, or to impose a single, unallocated penalty for all violations combined.

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[4] Two rental receipts were produced, one dated May 1, 1997, and the other February 1, 1998. Investigator Pacheco testified that he saw one of the receipts at the premises on May 22, 1997. This, presumably, would have been the receipt dated May 1, 1997. As to that receipt, Campa told Pacheco he had paid it with his own money. Since the lease was in appellant Alvarez's name, it is not surprising that the receipt Pacheco saw showed the payment to have come from Alvarez, even if, in truth, it was Campa's money.

Given our conclusions regarding the false ownership charge, the only part of this contention which need to be addressed is the contention that the Department abused its discretion by imposing an unallocated penalty.

While it is helpful for the Department to delineate specific penalties for specific violations, it is not obligatory for it to do so. In assessing whether there is good cause for suspension or revocation, it seems reasonable for the Department to be able to look at the overall record developed at a disciplinary hearing when deciding, within the broad discretion it has been granted, what is necessary for the protection of public welfare and morals in connection with the sale of alcoholic beverages.

In any event, the Department's findings on the false ownership issue, by itself, are enough to support an order of revocation. Public safety is jeopardized when an establishment selling alcoholic beverages is owned and operated by persons who, by concealing their ownership, have prevented the Department from investigating them to determine whether they have the requisite moral character required of an alcoholic beverage licensee.

III

Appellants contend that there is not substantial evidence of a refusal to produce records or failure to permit inspection under Business and Professions Code §25616, and, alternatively, that there is no statutory authority for a suspension or revocation of a license for late and partial compliance with such request. Appellants further argue that the Department has pursued the wrong remedy; they contend the Department was obligated first to file an accusation for failure to produce books and records, and then pursue a motion to compel production of the documents which had not been produced.

Finally, they contend that they never refused to produce the documents, but simply failed to do so.

Appellants' contention that there is no statutory authority for suspension or revocation for mere non-compliance with a Department request for documents is correct. There must, according to the terms of the statute, be a refusal to produce the records which have been requested.

Business and Professions Code §25616 provides that a misdemeanor is committed by

> "[a]ny person who knowingly or wilfully files a false license fee report with the department and any person who refuses to permit the department or any of its representatives to make any inspection or examination for which provision is made in this division, or who fails to keep books of account as prescribed by the department, or who fails to preserve such books for the inspection of the department for such time as the department deems necessary or who alters, cancels or obliterates entries in such books of account for the purpose of falsifying the records of sales of alcoholic beverages ..."

The issue is whether, by producing, in untimely fashion, only a few documents in response to the Department's request, appellants may be deemed to have "refused" to permit the Department to make an inspection or examination.

The ALJ concluded in his Findings of Fact that appellants "failed or refused to provide [the requested] books and records or to permit the department to examine said books and records within a timely manner." In his supplemental findings, he concluded that a failure to comply with a lawful request for in excess of three months from the time of the request, without explanation, is deemed a refusal.

Richard Henry, a District Administrator, testified that he prepared the written request for documents, and that he was the person who met with Federico Alvarez on April 1, 1998, when Alvarez brought documents to the Department that supposedly

were in response to that request. Henry testified that he told Alvarez the document submission was insufficient, that Alvarez should carefully review the letter request and, to the best of his ability, produce the documents which were requested. Henry testified that he heard nothing further from Alvarez.

In the circumstances of this case, where true ownership is an important issue, it does not seem extreme to characterize a failure to produce records as a refusal to produce them. Indeed, the nature of the response suggests that appellants selectively produced documents and withheld others.

A total of 28 documents was produced to the Department in response to the 16 separate categories of documents requested. Most of those produced are dated after the time period specified in the document request. There were no bank statements, utility bills, invoices, employment lists, bookkeeping documents, canceled checks, or quarterly wage reports produced, all documents which it would be expected to be within appellants' possession if they were the true owners and operators of the premises. The inference the Department could have drawn is obvious.

Appellants' contention that the Department is first obligated to file an accusation and then pursue a motion to compel production if there is non-compliance is incorrect. Appellants have confused the inspection procedure authorized by Business and Professions Code §25616 with the discovery procedures of the Administrative Procedure Act, which apply once litigation has commenced. The Department is not obligated to pursue a motion to compel when there has been a refusal to produce under §25616. And, where a failure to produce occurs in circumstances which warrant an inference that the failure is intentional, it may be deemed a refusal.

IV

Appellants appear not to challenge the finding and determination that there was a violation of Rule 143. Instead, they argue that it was error to order revocation where there was no license history of similar violations.

The ALJ believed investigator Pacheco's testimony regarding the solicitation, as well as his description of her activities as a waitress, so it is understandable why appellants have not challenged the Rule 143 violation on the merits.

Their contention that the order of revocation was an abuse of discretion is, again, an attempt to isolate the solicitation charge and suggest the order is based solely on the act of solicitation.

Although, as indicated earlier, it is helpful when the penalty for each violation is set forth separately, it is not reversible error when that is not done, especially where one of the charges which was sustained by itself supports an order of revocation.

ORDER

The decision of the Department is affirmed.[5]

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[5] 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.