

ISSUED NOVEMBER 14, 2000

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

MOHINDER SANWAL	)	AB-7423
dba The New Bait Shop)	
One Gate Six Road	)	File: 21-321433
Sausalito, CA 94965,	)	Reg: 97041705
Appellant/Licensee,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Jeevan S. Ahuja
)	
DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	September 21, 2000
	)	San Francisco, CA

Mohinder Sanwal, doing business as The New Bait Shop (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which revoked the off-sale general license issued jointly to appellant and his spouse, Kirwan Sanwal, but stayed revocation for 180 days, conditioned upon the sale of the business during the 180-day period of the stay, and the right of the Department to revoke the license without notice if not sold within such period, for Kirwan Sanwal having entered a plea of nolo contendere to a charge of grand theft under Penal

¹The decision of the Department, dated May 27, 1999, is set forth in the appendix.

Code §487, subdivision (a), a public offense involving moral turpitude, 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, subdivisions (a) and (b), in conjunction with §24200, subdivision (d).

Appearances on appeal include appellant Mohinder Sanwal, appearing through his counsel, Ronald Doyle Blair, and the Department of Alcoholic Beverage Control, appearing through its counsel, Thomas M. Allen.

FACTS AND PROCEDURAL HISTORY

The off-sale general license involved in this appeal was issued to appellant and his spouse, Kirwan Sanwal, on September 10, 1996. Thereafter, on November 6, 1997, the Department instituted an accusation charging the entry by Kirwan Sanwal of a plea of nolo contendere to a charge of grand theft under Penal Code §487, subdivision (a).

An administrative hearing was held on April 30, 1998, at which time the Department presented documentary evidence of the entry of the plea of nolo contendere, together with a voluminous crime report prepared by the Benicia Police Department.² Both Kirwan Sanwal and Mohinder Sanwal testified, and introduced documentation relating to the home care services provided by Kirwan Sanwal which underlay the criminal charge, as well as documentation relating to their marital

² This document was admitted as “administrative hearsay.” [RT 17.]

separation and petition for dissolution of marriage,³ as well as copies of a motion to withdraw the plea to the criminal charge.⁴

Subsequent to the hearing, the Department issued its order of conditional revocation, following which appellant filed a timely notice of appeal.

In his appeal, appellant raises the following issues: (1) the Administrative Law Judge (ALJ) erred in holding that Rule 58 put Mr. Sanwal on notice that his wife's plea of nolo contendere would operate to deprive him of his license; (2) the ALJ erred in ruling that Mrs. Sanwal's nolo contendere plea disqualified the Sanwals pursuant to Rule 24200, subdivision (d); (3) Kirwan Sanwal has divested herself of any ownership in the business; therefore, she is not an owner or partner who must be included in the license; (4) good cause was lacking for revocation, since there is no rational relationship between the crime alleged and operation of the licensed business; (5) suspension or revocation of the license would punish Mr. Sanwal rather than protect the public; and (6) it is a denial of due process to revoke a liquor license where the nolo contendere plea was entered by a factually innocent defendant who is no longer married to the licensee. In addition, appellant contends that he has never been convicted, has not acted in any manner which adversely affects the honesty or integrity of the licensed business, and has not engaged in any business practices or personal conduct indicative of dishonesty or illegality.

³ Appellants have attached to their brief to the Appeals Board a copy of the decree of dissolution filed on October 19, 1998.

⁴ The motion was denied. (See appellant's brief at page 14, and note 2 to Decision.)

DISCUSSION

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.⁵

Where there are conflicts in the evidence, the Appeals Board is bound to resolve them in favor of the Department's decision, and must accept all reasonable inferences which support the Department's findings. (Kirby v. Alcoholic Beverage Control Appeals Board (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857]; Kruse v. Bank of America (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 271]; Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control (1968) 261 Cal.App.2d 181 [67 Cal.Rptr. 734, 737]; and Gore v. Harris (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

The Department is authorized by the California Constitution to exercise its discretion whether to deny, suspend, or revoke an alcoholic beverage license, if the

⁵ California Constitution, article XX, § 22; Business and Professions Code §§23084 and 23085; Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

Department shall reasonably determine for "good cause" that the granting or the continuance of such license would be contrary to public welfare or morals.

In this case, the Department has determined that for it to permit the continued ownership of the license issued to Kirwan Sanwal and Mohinder Sanwal would be inconsistent with its duty to protect the public welfare and morals with respect to the sale and consumption of alcoholic beverages. Appellant Mohinder Sanwal now challenges the Department's order revoking the license, but staying revocation to permit the sale of the business and transfer of the license to a new owner.

Appellant's arguments, which often overlap, can be condensed to the following four questions, each of which will be addressed:

(1) Can the Department revoke a license held jointly by a husband and wife when one of them pleads nolo contendere to a charge of having committed a crime involving moral turpitude but there is no question concerning the honesty or integrity of the other?

2) Is the Department barred from ordering revocation where the nolo contendere plea was allegedly entered on the basis of a combination of bad legal advice and a desire to avoid the expense of trial?

(3) Are the dissolution of the marriage, and Kirwan Sanwal's divestiture of her ownership interest in the business and license, separately or in combination a barrier to the Department's order?

(4) Are the consequences of the order such that it amounts to an abuse of

discretion? Is the penalty so excessive as to amount to an abuse of discretion?

DISCUSSION

I

Appellant argues that, although Business and Professions Code §24200⁶ makes a plea of *nolo contendere* to a crime involving moral turpitude grounds for suspension or revocation, “nothing in the Business and Professions Code or the Code of Regulations gives the licensees notice that such a plea will be held against the other *non-offending, former-spouse* who has not been convicted of a crime.” (App. Br., page 7, emphasis in original.)

The power of the Department to revoke a license held jointly by co-licensees, because of the misconduct of only one of the co-licensees, has long been established.

In Coletti v. State Board of Equalization (1949) 94 Cal.App.2d 61, 64 [209 P.2d 984, 986], violations of the Alcoholic Beverage Control Act by one co-licensee resulted in the revocation of a license which had been issued to that co-licensee and his business partner jointly. The Department’s order was upheld on appeal, the court stating:

“Revocation of a partnership license brings about a harsh result as to an innocent partner, but this result cannot be avoided under the present circumstances. The innocent partner must suffer unless the guilty one goes unpunished. Certainly the board does not act arbitrarily in revoking a partnership license where one party has been found guilty of violations of law which call for revocation. When two or more persons apply for a

⁶ Unless otherwise stated, all statutory citations are to the Business and Professions Code.

partnership license, each of them necessarily assumes responsibility for the acts of the others with relation to the conditions under which the license is held.”

A similar result was reached in Rice v. Alcoholic Beverage Control Appeals Board (1979) 89 Cal.App.3d 30 [152 Cal.Rptr. 285], where the license which was revoked had been held by a husband and wife as co-licensees, and the husband had entered guilty pleas to charges that he had possessed cocaine and marijuana for sale. In Rice, the court rejected the contention that unconditional revocation of the license was an abuse of discretion, citing the earlier decision in Coletti v. State Board of Equalization, supra, and stating (at page 39):

“The fact that unconditional revocation may appear to be too harsh a penalty does not entitle a reviewing agency or court to substitute its own judgment therein ...; nor does the circumstance of forfeiture of the interest of an otherwise innocent colicensee sanction a different and less drastic penalty.”

Thus, it is unnecessary to consider appellant’s claims that his own moral character is beyond reproach. He may well be the “innocent partner” who suffers because of the other partner’s wrongdoing.

II

Appellant claims that his wife entered the plea of nolo contendere in spite of her belief in her innocence, because she was pressured to do so by her attorney prior to the preliminary hearing, when he allegedly told her the district attorney and the judge would be angry if she did not immediately accept the “deal of no jail, probation, and \$50,000 restitution” which had been offered. She claims her attorney told her the plea of nolo contendere was not a plea of guilty, that she could avoid a long and expensive trial, and she would be able to go back to

business as usual. Appellant further claims the attorney disclaimed any knowledge of any impact the plea might have on their business, including their license, although he knew their business was dependent upon sale of alcoholic beverages. Finally, they claim he never told them that the consequence of the entry of the plea of nolo contendere could be an action by the Department of Alcoholic Beverage Control against the license.

Appellant's contentions amount to an attack upon the competency of the attorney retained to represent his wife, and an attempt to blame their present unfortunate circumstances upon bad legal advice.

The Board is neither empowered nor equipped to explore the merits of the criminal charges leveled against Kirwan Sanwal, nor to relieve appellant of the consequences of any alleged malpractice by his wife's attorney.

Appellant argues that Kirwan Sanwal's plea of nolo contendere does not disqualify her from holding a license. His argument, that this follows because imposition of her sentence was suspended by the court, she was placed on probation for a period of three years, and the District Attorney stipulated to a reduction of the offense to a misdemeanor once probation was completed, is a strained reading of the law. The reference in appellant's brief (at page 11) to "the Kirby case" would appear to be to Kirby v. Alcoholic Beverage Control Appeals Board (1969) 3 Cal.App.3d 209 [83 Cal.Rptr.89].

In that case, the court rejected the contention of the Department that the nolo contendere plea was the equivalent of a guilty plea. The court noted that,

while the California Legislature had amended a number of statutes in the Business and Professions Code to ensure that convictions following the entry of such a plea could be the basis for administrative discipline, §24200 was not one of them.

However, §24200 was amended in 1977 by the addition of language to subdivision (d) making the entry of a plea of nolo contendere to a public offense involving moral turpitude a basis for license suspension or revocation. (See Historical and Statutory Notes to §24200.)

We do not read the decision in Kirby as turning on the sentencing factors itemized by appellant. Rather, it appears to be simply a recognition that California case law had taken a certain position with respect to the permissible uses of such a plea in administrative proceedings, and the court decided the case accordingly - resulting, it would appear, in action by the Legislature to reverse by statute the rule theretofore prevailing.

We also see little merit in appellant's claim that there is no relationship between the crime to which his former wife entered her plea of nolo contendere and the operation of a business licensed to sell alcoholic beverages. Her crime was one of moral turpitude, involving dishonesty in connection with the handling of money. We see a direct relationship between proven dishonesty in financial matters and the qualification to hold an alcoholic beverage license.

Wallace v. Department of Alcoholic Beverage Control (1969) 271 Cal.App.2d 589 [76 Cal.Rptr. 749], the case cited by appellant, is inapplicable. The conduct involved did not involve moral turpitude. Indeed, there is language in Wallace that

strongly supports the Department's order:

“The moral turpitude provision is absolute, permitting license termination for an offense coming within its terms regardless of its effect upon the conduct of the licensed business.” (76 Cal.Rptr. at 752.)

III

Appellant contends that it no longer matters that Kirwan Sanwal is disqualified from holding an alcoholic beverage license, because they are now divorced and she has divested her ownership interest in the business.

Appellant's brief is accompanied by a document purporting to be a copy of the order dissolving his marriage to Kirwan Sanwal. Additionally, appellant claimed at the hearing that Kirwan Sanwal had divested herself of any ownership in the business. Appellant relies upon language in Department Rule 58 which delineates circumstances in which a license may be issued to only one spouse, and upon §24071, which authorizes the transfer of licenses between spouses when the application for transfer is made prior to the entry of a final decree of divorce.

We agree with the Department that appellant's unilateral attempt to escape the consequences of the rules established in Coletti v. Board of Equalization and Rice v. Alcoholic Beverage Control Appeals Board, supra, is ineffective. Section 24071, on its face, requires that any transfer under that section must be by way of application to the Department. Appellant did not apply for any transfer, and, had he, we seriously doubt the Department would have entertained an application in view of the circumstances.

Nor do we think appellant derives any assistance from Department Rule 58

(4 Cal. Code Regs. §58.) We think the separate residence exception to the requirement that an unlicensed spouse have the qualifications required of a holder of a license applies only in connection with the initial issuance of a license. We do not read Rule 58 to permit a license to be held by a co-habiting spouse whose unlicensed spouse is not qualified to be licensed. One clearly would not be issued, given the same circumstance.

Therefore, we do not think it necessary to consider the effect on the Department's order of the petition for dissolution and appellant's move to a separate residence. Appellant and Kirwan Sanwal were husband and wife, living together, and co-licensees when she committed the crimes for which she entered her plea of nolo contendere.

Finally, we do not equate appellant's ignorance of the consequence of the plea of nolo contendere with a deprivation of due process. Appellant's wife was represented by counsel when the plea was entered, and there has been no showing of improper conduct on the part of any court or law enforcement official.

IV

Appellant claims that the loss of the license will effectively destroy the value of the store, depriving him of his livelihood and ability to meet existing and future financial obligations. He cites existing mortgage obligations, educational needs of his two sons, alimony obligations to his wife, obligations under the store lease, money owed to the prior owner of the business, and a substantial investment in store inventory at risk of loss.

Appellant paints an impressive picture of the hardship loss of the license could cause. This Board would be less than sincere if it denied being moved by appellant's situation.

However, the Board's ability to afford relief is measured by law, and not sympathy.

It is well settled that the propriety of a penalty imposed by an administrative agency is a matter resting in the sound discretion of the agency, and its decision will not be disturbed unless there has been an abuse of discretion. (Harris v. Alcoholic Beverage Control Appeals Board (1965) 62 Cal.App.2d 589 [43 Cal.Rptr. 633].) In Harris, the court stated: "If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within the area of its discretion." (62 Cal.App.2d at 594.)

The penalty is admittedly harsh. However, given that the offense underlying the plea of nolo contendere was one involving moral turpitude, we cannot say that no reasonable person would agree with the Department that the penalty was appropriate. The Department had the power to order immediate and outright revocation, but stayed its hand, permitting appellant time to sell the business and recoup some or all of his investment. That being so, we cannot say the penalty was so excessive as to amount to an abuse of discretion.

ORDER

The decision of the Department is affirmed.⁷

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

⁷ 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.