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

AB-8420
File: 41-333837 Reg: 04057653

MARCO A. RONDON, dba Andiamo Pizza & Café
5220 North First Street, San Jose, CA 95002,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Stewart A. Judson

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

ISSUED MAY 4, 2006

Marco A. Rondon, doing business as Andiamo Pizza & Café (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked his license because he pled nolo contendere to a charge of violating Penal Code sections 484/488 (theft), a public offense involving moral turpitude and thus a ground for suspension or revocation under Business and Professions Code section 24200, subdivision (d).

Appearances on appeal include appellant Marco A. Rondon, appearing through his counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Thomas Allen.

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[1]The decision of the Department, dated March 10, 2005, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine license was issued on October 14, 1997. On November 22, 2004, the Department filed a first amended accusation against appellant alleging his plea of nolo contendere to a charge of theft in violation of Penal Code sections 484/488 as a ground for discipline under Business and Professions Code section 24200, subdivision (d).[2]

At the administrative hearing held on January 26, 2005, the Department submitted exhibit 2 (court docket, dated 01/29/2003), exhibit 3 (general waiver and plea, dated 04/17/2002), and exhibit 4 (court docket, dated 04/17/2002). The exhibits were received into evidence and the Department rested its case. Appellant testified about his restaurant and his family, and was cross-examined by counsel for the Department and by the administrative law judge (ALJ) regarding the circumstances surrounding his arrest, his plea, and his sentencing.

After the Department issued its decision revoking appellant's license, appellant filed an appeal contending his right to due process was violated by the Department's ex parte communication, the Department failed to prove that his plea was to a crime involving moral turpitude, he did not plead to the offense alleged by the Department, and the penalty of revocation constitutes an abuse of the Department's discretion. The second and third contentions are related and will be discussed together.

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[2]Business and Professions Code section 24200, subdivision (d), provides, in pertinent part:

> The following are the grounds that constitute a basis for the suspension or revocation of licenses: [¶] . . . [¶] (d) The plea, verdict, or judgment of guilty, or the plea of nolo contendere to any public offense involving moral turpitude . . . charged against the licensee.

DISCUSSION

I

Appellant asserts the Department violated his right to procedural due process when the attorney representing the Department at the hearing before the ALJ provided a document called a Report of Hearing (the report) to the Department's decision maker (or the decision maker's advisor) after the hearing, but before the Department issued its decision. Appellant also filed a Motion to Augment Record (the motion), requesting that the report provided to the Department's decision maker be made part of the record.

The Appeals Board discussed these issues at some length, and reversed the Department's decisions, in three appeals in which the appellants filed motions and alleged due process violations virtually identical to the motions and issues raised in the present case: *Quintanar* (AB-8099), *KV Mart* (AB-8121), and *Kim* (AB-8148), all issued in August 2004 (referred to in this decision collectively as "*Quintanar*" or "the *Quintanar* cases").[3]

The Board held that the Department violated due process by not separating and screening the prosecuting attorneys from any Department attorney, such as the chief counsel, who acted as the decision maker or advisor to the decision maker. A specific instance of the due process violation occurs when the Department's prosecuting attorney acts as an advisor to the Department's decision maker by providing the report before the Department's decision is made.

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[3]The Department filed petitions for review with the Second District Court of Appeal in each of these cases. The cases were consolidated and the court affirmed the Board's decisions. In response to the Department's petition for rehearing, the court modified its opinion and denied rehearing. The cases are now pending in the California Supreme Court and, pursuant to Rule of Court 976, are not citable. *(Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2005) 127 Cal.App.4th 615, review granted July 13, 2005, S133331.)

The Board's decision that a due process violation occurred was based primarily on appellate court decisions in *Howitt v. Superior Court* (1992) 3 Cal.App.4th 1575 [5 Cal.Rptr.2d 196] (*Howitt*) and *Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81 [133 Cal.Rptr.2d 234], which held that overlapping, or "conflating," the roles of advocate and decision maker violates due process by depriving a litigant of his or her right to an objective and unbiased decision maker, or at the very least, creating "the substantial risk that the advice given to the decision maker, 'perhaps unconsciously' . . . will be skewed." (*Howitt*, *supra*, at p. 1585.)

Although the legal issue in the present appeal is the same as that in the *Quintanar* cases, there is a factual difference that we believe requires a different result. In each of the three cases involved in *Quintanar*, the ALJ had submitted a proposed decision to the Department that dismissed the accusation. In each case, the Department rejected the ALJ's proposed decision and issued its own decision with new findings and determinations, imposing suspensions in all three cases. In the present appeal, however, the Department adopted the proposed decision of the ALJ in its entirety, without additions or changes.

Where, as here, there has been no change in the proposed decision of the ALJ, we cannot say, without more, that there has been a violation of due process. Any communication between the advocate and the advisor or the decision maker after the hearing did not affect the due process accorded appellant at the hearing. Appellant has not alleged that the proposed decision of the ALJ, which the Department adopted as its own, was affected by any post-hearing occurrence. If the ALJ was an impartial adjudicator (and appellant has not argued to the contrary), and it was the ALJ's decision alone that determined whether the accusation would be sustained and what discipline,

if any, should be imposed upon appellant, it appears to us that appellant received the process that was due him in this administrative proceeding. Under these circumstances, and with the potential for an inordinate number of cases in which this due process argument could possibly be asserted, this Board cannot expand the holding in *Quintanar* beyond its own factual situation.

Under the circumstances of this case and our disposition of the due process issue raised, appellant is not entitled to augmentation of the record. With no change in the ALJ's proposed decision upon its adoption by the Department, we see no relevant purpose that would be served by the production of any post-hearing document. Appellant's motion is denied.

II

Appellant contends that the court documents (exhibits 2, 3, and 4) show his plea was entered only to a charge of violating Penal Code section 488, and in doing so, he did not plead to a crime at all. Section 488, he asserts, is not a "charging offense" but merely a definitional statute, which says, in its entirety, "Theft in other cases is petty theft."[4] He argues that he did not plead as charged in the Department's accusation, which alleged a plea to Penal Code sections 484/488, and, therefore, the evidence does not support the findings.

Even if his plea had been entered to the Penal Code sections alleged in the accusation, appellant argues, the Department did not prove that he pleaded nolo contendere to a crime involving moral turpitude.

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[4]The court in *In re Mitchell* (1961) 56 Cal.2d 667, 669 [16 Cal.Rptr. 281, 365 P.2d 177], explained in footnote 2 that "Most of the sections of the Penal Code immediately preceding § 488 define grand theft and then § 488 provides: 'Theft in other cases is petty theft.' "

Appellant's first contention is, as described by the ALJ in the decision, "an extreme example of parsing." (Det. of Issues IV.) Calling appellant's argument "parsing" is being kind; appellant simply ignores the facts shown on the exhibits.

Appellant is correct that exhibit 2 does not show "finality of the judicial process." It does show, however, that appellant completed at least one part of his sentence by paying his fine, totaling $565.00, in full. More to the point, it shows the charges as Penal Code sections 484/488, just as alleged in the Department's accusation. The other court docket (exhibit 4), dated April 17, 2002, shows the charge as Penal Code section 666 in the top part where data about the case is typed in, but in the lower section, where additional information can be added by hand, presumably during the hearing, it shows the charge was amended to Penal Code sections 484/488. The only documents that show Penal Code section 488 by itself are the General Waiver and Plea and the Plea In Absentia, both of which were completed by appellant or on his behalf, probably by his lawyer.

Whether or not appellant, or the lawyer representing him before the Santa Clara County Superior Court, intended the plea to section 488 to create some kind of loophole doesn't matter. First, the Santa Clara County Superior Court obviously accepted the plea as to sections 484 and 488. (Ex. 4.) Second, in practice, section 488 is used as a "charging offense" for petty theft. (See, e.g., *In re Mitchell*, *supra*, 56 Cal.2d at p. 669; *In re Bryant R.* (2003) 112 Cal.App.4th 1230, 1233-1234 [5 Cal.Rptr.3d 734]; *People v. Mitchell* (1981) 125 Cal.App.3d 715, 717, 718 [178 Cal.Rptr. 188] [in all of which, defendants were charged with petty theft, with section 488 as the "charging statute"].)

Appellant also contends that the Department was required, but failed, to prove that the offense to which he entered a plea was a crime involving moral turpitude. The

only evidence presented by the Department was the court documents, and those, appellant says, do not show the circumstances behind that plea.

Although the Legislature has provided no definition of "moral turpitude" the courts have held that it clearly includes fraud and "the related group of offenses involving intentional dishonesty for purposes of personal gain" such as petty theft, grand theft, attempted bribery, forgery, extortion, and receiving stolen property. (*In re Hallinan* (1954) 43 Cal.2d 243, 247-248 [272 P.2d 768]*;* accord, *In re Rothrock* (1944) 25 Cal.2d 588, 589-590 [154 P.2d 392]*; People v. Brown* (1985) 169 Cal.App.3d 800, 806 [215 Cal.Rptr. 494]; *Rice v. Alcoholic Beverage Control Appeals Board* (1979) 89 Cal.App.3d 30, 37 [152 Cal.Rptr. 285].)

The ALJ found (Finding of Fact VI) that appellant "was convicted of theft, a crime involving moral turpitude." Based on the case law, the ALJ was correct.

III

Appellant contends the penalty imposed, outright revocation, is an abuse of the Department's discretion. He points out his history as a licensee for 16 years with no disciplinary action by the Department, which the ALJ did not consider because it preceded appellant's conviction. He also compares his case to that in *Choi* (1996) AB-6564, in which the Appeals Board found the penalty of revocation, stayed for 180 days to allow transfer of the license, to be excessive and reversed the Department's decision and remanded it for reconsideration of the penalty.

The Appeals Board may examine the issue of excessive penalty if it is raised by an appellant (*Joseph's of California. v. Alcoholic Beverage Control Appeals Bd.* (1971) 19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183]), but will not disturb the Department's penalty order in the absence of an abuse of discretion. *(Martin v. Alcoholic Beverage*

Control Appeals Bd. & Haley (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) If the penalty imposed is reasonable, the Board must uphold it, even if another penalty would be equally, or even more, reasonable. "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." (*Harris v. Alcoholic Beverage Control Appeals Bd.* (1965) 62 Cal. 2d 589, 594 [43 Cal.Rptr. 633].)

In *Choi*, co-licensee Linda Choi had entered a plea of nolo contendere to a crime involving moral turpitude (petty theft, a misdemeanor), but that fact was not revealed when the Chois applied for their alcoholic beverage license. The Board's reversal and remand of the Department's decision was influenced by several factors, prime among them being the inability of co-licensee Linda Choi to understand English well and the Board's perception that the Department was deficient in making sure that the applicants understood the application.

The facts in *Choi* are too dissimilar for the result in that case to be persuasive as to the appropriate result in the present case. Although outright revocation may appear harsh, given appellant's long discipline-free years as a licensee, we cannot say it is an abuse of the Department's discretion to impose it, under the circumstances.

ORDER

The decision of the Department is affirmed.[5]

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[5]This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 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 section 23090 et seq.