

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

AB-8794

File: 47-310421 Reg: 07065436

DALLAS AFFOLTER, dba Dallas Place
699 Oceana Boulevard, Pacifica, CA 94044,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: April 2, 2009
San Francisco, CA

ISSUED JULY 30, 2009

Dallas Affolter, doing business as Dallas Place (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which revoked his license for conducting and aiding and abetting an illegal gambling operation, violations of sections 2 and 1955 of title 18 of the United States Code, and for being convicted in a federal district court of violating sections 2 and 1955 of title 18 of the United States Code.

Appearances on appeal include appellant Dallas Affolter, appearing through his counsel, Eric J. Messersmith, and the Department of Alcoholic Beverage Control, appearing through its counsel, Robert Wieworka.

¹The decision of the Department, dated January 8, 2008, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on October 18, 1995. On March 30, 2007, the Department instituted a two-count accusation charging that appellant willfully or knowingly assisted or conspired with another person to conduct an illegal gambling business and aided and abetted the conduct of an illegal gambling business, in violation of sections 1955 and 2 of title 18 of the United States Code from about September 2002 until June 2006 (count 1), and pleaded guilty on January 9, 2007, in the United States District Court to violation of sections 1995 and 2 of title 18 of the United States Code, crimes involving moral turpitude, in violation of article XX, section 22, of the California Constitution and section 24200, subdivision (a), of the Business and Professions Code (count 2).

At the administrative hearing held on October 25, 2007, documentary evidence was received and testimony concerning the violations charged was presented by appellant and by IRS Special Agent Carol Ann Quigley. Appellant stipulated that he had entered a plea of guilty and been convicted in federal district court as alleged in count 2.

Subsequent to the hearing, the Department issued its decision which determined that the violations charged were proved and ordered the license revoked. Appellant filed a timely appeal raising the following issues: (1) The findings and decision are not supported by substantial evidence and (2) the penalty is excessive. Appellant's argument in his brief discusses substantial evidence as it relates to both issues raised and we will discuss both issues together.

DISCUSSION

Appellant contends that the findings and decision are not supported by substantial evidence and the penalty, revocation, is excessive. Appellant

acknowledges stipulating to his plea and conviction in federal district court, but emphasizes that he did not admit to the allegations of count 1.

The basis of appellant's argument appears to be that the Department did not prove there was gambling on the premises. He points out that the Department attorney, in both his opening and closing arguments, stated that the Department's recommendation of revocation was based on the existence of gambling on the premises. He then asserts that the testimony and documents presented or identified by Special Agent Quigley connecting the gambling to the licensed premises were all hearsay and, therefore, could not constitute substantial evidence of gambling on the premises.

The Department's purported reliance on gambling taking place on the premises for imposing revocation is a non-issue. Appellant has the burden of showing there was no cause for discipline. It is the *result*, not the reasoning, that this Board reviews.

Clearly, there was substantial evidence supporting the imposition of discipline. This is true even if we were to disregard the exhibits and witness presented on behalf of the Department. The findings supporting the determination that count 1 was established (Findings of Fact V-VIII) were all based on *appellant's* testimony.

Appellant's testimony also makes all the hearsay testimony and exhibits admissible as administrative hearsay, because they support or explain appellant's testimony.

Substantial evidence has little to do with our review of the penalty imposed. 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].)

We have no problem concluding that the Department did not abuse its discretion in this case. Appellant had been disciplined for another gambling violation (maintaining a gambling device on the premises) in 2002. He was clearly on notice that discipline could, and would, be imposed for gambling violations. The federal gambling violation to which he pleaded guilty was not an isolated incident, but a continuing course of conduct for almost four years. Appellant's insistence, despite his guilty plea and the evidence presented at the hearing, that he did nothing wrong certainly supports a conclusion that he is unsuitable to be a licensee.

ORDER

The decision of the Department is affirmed.²

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

²This 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.