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

AB-9455
File: 48-433738; Reg: 13079061

GERALD LEE GORMLEY,
dba Ghostriders Tavern
508 Bell Street, Los Alamos, CA 93440,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Nicholas R. Loehr

Appeals Board Hearing: May 7, 2015
Los Angeles, CA

ISSUED MAY 20, 2015

Gerald Lee Gormley, doing business as Ghostriders Tavern (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked his license because he was convicted of public offenses involving moral turpitude, to wit: Penal Code sections 136.1(b)(1) and 148(a)(1), such convictions being grounds for revocation under Business and Professions Code section 24200, subdivision (d), and because appellant attempted to prevent a witness to a crime from reporting it to a police officer in violation of Penal Code section 136.1(b)(1); obstructed a peace officer in the discharge of his duties in violation of Penal Code section 148(a)(1); and destroyed evidence in violation of Penal Code section 135.

Appearances on appeal include appellant Gerald Lee Gormley, appearing through his counsel, Richard D. Warren, and the Department of Alcoholic Beverage

---

[1]The decision of the Department, dated June 26, 2014, is set forth in the appendix.

Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on August 3, 2007. There is no previous history of disciplinary action on this license. On August 13, 2013, the Department instituted a 7-count accusation against appellant charging that on August 2, 2012, appellant was convicted in Santa Barbara Superior Court of a public offense involving moral turpitude, and that such convictions are grounds for suspension or revocation of the license under Business and Professions Code section 24200(d) (counts 1 and 2); that on February 16, 2012, appellant attempted to prevent a witness to a crime from reporting it to a police officer in violation of Penal Code section 136.1(b)(1) (count 3); that on February 29, 2012, appellant attempted to prevent a witness to a crime from reporting it to a police officer in violation of Penal Code section 136.1(b)(1) (count 4); that on February 16, 2012, appellant obstructed a peace officer in the discharge of his duties by failing to produce a videotape relating to a criminal investigation at the licensed premises, and lying about the existence of that videotape, in violation of Penal Code section 148(a)(1) (count 6); and that on February 16, 2012, appellant destroyed evidence by cleaning up blood at the licensed premises, after law enforcement had been contacted, with the intent to conceal evidence in violation of Penal Code section 135 (count 7). Count 5 of the accusation was dismissed by the Department.

At the administrative hearing held on December 11, 2013, documentary evidence was received and testimony concerning the violation charged was presented by Bridgett Newfield (formerly known as Bridgett Mack), appellant's bartender in February of 2012; Michael McNeil, a deputy sheriff with the Santa Barbara County

Sheriff's Department; and the appellant, Gerald Lee Gormley.

Testimony established that on February 16, 2012, there were a series of arguments and fights between patrons in the licensed premises. One individual, Dale McCoy, was ejected by the licensee with the help of several customers, and the licensee locked the front door. The licensee told the bartender, Bridgett Mack, to keep serving but not to let anyone else in. She asked him if she should call the police, and he said "no."

Shortly thereafter, McCoy re-entered the premises through a patio door and fights erupted again. During one of these fights, McCoy pulled Jessie Taylor off his barstool, and Taylor responded by striking McCoy in the head with a drink glass. McCoy fell to the floor and appeared to be unconscious with blood on the floor around him. Fighting continued between other patrons, so the bartender called 911.

The licensee asked her who she was talking to, and when she said it was 911, he yelled at her three to four times to hang up — which she did after alerting the authorities. McCoy's brother carried him out the rear door. The licensee told the bartender to clean up the blood, but she refused because she thought it might be important to the police. The licensee and other customers cleaned up the blood.

Gormley told Mack to close down the bar and collect all the proceeds. He told her "we do not want any witnesses." The bar was cleaned up and everyone had exited before the police or medical personnel arrived. Upon arrival at the premises, Deputy McNeil told Gormley he would like to see the surveillance footage but was told that Gormley would have to get it from the surveillance company. He also told the deputy that he could provide some still photographs from the video, but that he would have to do this from his home. McNeil returned on February 17, 2012, but the licensee was not

at the premises.

On February 18, 2012, Mack reported for her shift and was told by the licensee that a police officer would be coming by for some photos, but that they wouldn't show anything significant about the fight, and that "that's the point, we're not going to make this easy."

McNeil picked up the photos later that evening, but after reviewing them asked to see the video which he believed would show more about the fights. He spoke to Gormley on February 21, 2012, and was told that the video was on a four-day loop so that the earlier video had been erased. McNeil obtained a search warrant for the videotape, executed it on February 23, 2012, and was able to review the videotape of the fight.

On February 29, 2012, McNeil contacted one of the patrons who had been present on the night of the fights, Michael Steinwand. Steinwand told the deputy that the licensee was aware that the fight had been videotaped and had told him not to talk to the police because it could implicate people. McNeil asked Steinwand to make a call to Gormley, which was monitored and recorded. (Exh. 9.) In the call, Gormley tells Steinwand "don't tell them nothin'."

A criminal complaint was filed against the licensee charging three counts of dissuading a witness from reporting a crime (Penal Code section 136.1(b)(1)) and one count of unlawfully resisting, obstructing, or delaying a peace officer in the execution of his/her duties. (Penal Code section 148(a)(1).) He was found guilty on counts 1, 3, and 4, and not guilty on count 2.

After the hearing, the Department issued its decision which determined that the charges had been proven and no defense had been established. As a result,

appellant's license was revoked.

Appellant then filed a timely appeal raising the following issues: (1) the crimes for which appellant was convicted are not crimes of moral turpitude, and (2) the penalty is excessive and fails to consider evidence of mitigation.

DISCUSSION

I

Appellant contends the crimes for which he was convicted are not crimes of moral turpitude. It is not disputed that appellant was found guilty, in a criminal trial, of attempting to prevent or dissuade a victim or witness of a crime from reporting the crime, and for obstructing a peace officer in the discharge of his duties.

This Board is bound by the factual findings in the Department's decision if supported by substantial evidence. The standard of review is as follows:

> We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. [Citations.] We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor [an appellate] court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. [Citations.] The function of an appellate board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (*Masani*) (2004) 118 Cal.App.4th 1439, 1437 [13 Cal.Rptr.3d 826].)

Business and Professions Code section 24200, subdivision (d), provides as grounds for revocation of an alcoholic beverage license "[t]he plea, verdict, or judgment of guilty, or the plea of nolo contendere to any public offense involving moral turpitude." Appellant maintains that "no court has ruled the crimes for which Mr. Gormley was

convicted are crimes of moral turpitude." (App.Br. at p. 5.)

In addition to subdivision (d), however, Business and Professions Code section 24200, subdivision (a) provides:

> The following are the grounds which constitute a basis for the suspension or the revocation of licenses:
>
> (a) When the continuance of a license would be contrary to public welfare or morals. However, proceedings under this subdivision are not a limitation upon the department's authority to proceed under Section 22 of Article XX of the California Constitution.

Article XX, section 22, of the California Constitution provides in part that "[t]he department shall have the power in its discretion, to deny, suspend or revoke any specific alcoholic beverage license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals." (*Vallerga v. Dept. of Alcoholic Bev. Control* (1959) 53 Cal.2d 313, 318 [1 Cal.Rptr. 494], internal quotation marks omitted.) This provision is self-executing, and revocation against a license may be based on that ground alone if the licensee is otherwise accorded due process of law. (*Ibid*.)

Various courts have attempted to define “moral turpitude” as well as the various offenses which may or may not be classified as crimes of moral turpitude:

> The elusive concept of “moral turpitude” has long been the subject of judicial scrutiny; our courts have grappled with the amorphous term in a variety of factual contexts largely involving disciplinary proceedings. [Citations.]
>
> Notwithstanding its frequency of use as a legislatively imposed standard of conduct for purposes of discipline,[fn.] the concept by nature defies any attempt at a uniform and precise definition.
>
> [¶ . . . ¶]
>
> While not every public offense may involve conduct constituting moral turpitude without a showing of moral unfitness to pursue a licensed

> activity [citation], conviction of certain types of crimes may establish moral turpitude as a matter of law. [Citation.] Thus, moral turpitude is inherent in crimes involving fraudulent intent, intentional dishonesty for purposes of personal gain or other corrupt purpose [citation] but not in other crimes which neither intrinsically reflect similar inimical factors nor demonstrate a level of ethical transgression so as to render the actor unfit or unsuitable to serve the interests of the public in the licensed activity. [Citations.]

(*Rice v. Alcoholic Bev. Control Appeals Bd.* (1979) 89 Cal.App.3d 30, 36-37 [152 Cal.Rptr. 285].) "Where a criminal conviction involves fraud the conviction necessarily also involves moral turpitude." (*Kirby v. Alcoholic Bev. Control Appeals Bd.* (1969) 270 Cal.App.2d 535, 540 [75 Cal.Rptr. 823].) "In cases such as those involving convictions of murder, forgery, extortion, bribery, perjury, robbery, embezzlement and other forms of theft, no difficulty would attend the determination of the question of moral turpitude from a consideration of the record of conviction alone." (*In re Rothrock* (1940) 16 Cal.2d 449, 453-454 [106 P.2d 907].) Possession of drugs for purpose of sale has been held to be a crime of moral turpitude as a matter of law. (*H. D. Wallace & Assoc., Inc. v. Dept. of Alcoholic Bev. Control* (1969) 271 Cal.App.2d 589, 593 [76 Cal.Rptr.749].)

The Board shares the *Rice* court's concern about the "elusive concept of moral turpitude" as used in subdivision (d) in section 24200. (*Rice*, *supra*, 89 Cal.App.3d at p. 36, internal quotation marks omitted.) The line of cases defining crimes that constitute moral turpitude are extremely fact-specific — and even conflicting at times — and thus are confusing and unhelpful in determining whether those crimes for which appellant was convicted fit the definition, especially when no court has so held. Were the Board to seek to definitively resolve this issue, it would have to enunciate a clear, workable, and unambiguous standard for moral turpitude, a task that has apparently eluded courts and even the Legislature itself.

Fortunately, we need not resolve this issue here. Even assuming, *arguendo*, that the Department erred in finding that the crimes for which appellant was convicted were crimes of moral turpitude, said error would only touch the charges alleged in counts 1 and 2 of the accusation. Counts 3, 4, 6, and 7 were also sustained — and any one of them could be the basis for discipline on the license as being contrary to public welfare and morals under section 24200(a). Therefore, regardless of whether it was erroneous for the Department to sustain counts 1 and 2, the error resulted in no prejudice to appellant because, as will be discussed in Section II, *infra*, those two counts were not necessary for the Department to impose discipline under the authority of section 24200(a). Indeed, counsel for the Department conceded as much during oral argument. That aside, we advise the Department to draft its accusations more carefully in the future so as not to include any charges unnecessary for the discipline of the license, particularly where, as in this specific case, the standard governing those charges is patently amorphous on the facts of the case.

II

Appellant contends the penalty of revocation is excessive. The Appeals Board may examine the issue of excessive penalty if it is raised by an appellant. (*Joseph's of Cal. v. Alcoholic Bev. Control Appeals Bd.* (1971) 19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183].) However, it will not disturb the Department's penalty order in the absence of an abuse of discretion. (*Martin v. Alcoholic Bev. 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 Bev. Control Appeals Bd.* (1965) 62 Cal.2d 589, 594 [43 Cal.Rptr. 633].)

Rule 144 provides:

> In reaching a decision on a disciplinary action under the Alcoholic Beverage Control Act [citation], and the Administrative Procedures Act [citation], the Department shall consider the disciplinary guidelines entitled "Penalty Guidelines" . . . which are hereby incorporated by reference. Deviation from these guidelines is appropriate *where the Department in its sole discretion* determines that the facts of the particular case warrant such a deviation — such as where facts in aggravation or mitigation exist.

(Cal. Code Regs., tit. 4, § 144, emphasis added.) The regulation itself expressly grants the Department discretionary authority to mitigate or aggravate a penalty as it sees fit.

Additionally, the Penalty Guidelines outline factors potentially relevant to mitigation, but explicitly use permissive language to reaffirm the breadth of the Department's discretion:

> The California Constitution authorizes the Department, in its discretion[,] to suspend or revoke any license to sell alcoholic beverages if it shall determine for good cause that the continuance of such license would be contrary to the public welfare or morals. The Department may use a range of progressive and proportional penalties. This range will typically extend from Letters of Warning to Revocation. These guidelines contain a schedule of penalties that the Department usually imposes for a first offense (except as otherwise indicated). These guidelines are not intended to be an exhaustive, comprehensive or complete list of all bases upon which disciplinary action may be taken against a license or licensee; *nor are these guidelines intended to preclude, prevent, or impede the seeking, recommendation, or imposition of discipline greater or less than those listed herein, in the proper exercise of the Department's discretion*.
>
> Higher or lower penalties from this schedule *may* be recommended based on the facts of individual cases where generally supported by aggravating or mitigating circumstances.
>
> [¶ . . . ¶]
>
> Mitigating factors *may* include, but are not limited to:
>
> 1. Length of licensure at subject premises without prior discipline or

problems
2. Positive action by licensee to correct problem
3. Documented training of licensee and employees
4. Cooperation by licensee in investigation

(*Id.*, Penalty Guidelines Appendix, emphasis added.)

Appellant argues that the "Department's penalty decision was likely based in part on its conclusion that Mr. Gormley was convicted of a crime of moral turpitude. Because such moral turpitude is lacking here, the case should be remanded to determine a more just penalty." (App.Br. at p. 7.) Appellant also argues that the licensee has held this and previous licenses for a period of approximately 19 to 20 years without any violations and that this should serve to mitigate the penalty.

Again, we find that appellant makes too much of the moral turpitude issue. Even striking grounds 1 and 2 from the accusation, the remaining sustained charges still provide ample grounds for heavy discipline of the license. Counts 3, 4, 6, and 7 each charge that appellant engaged in serious conduct that was intended to interfere with or impede a law enforcement investigation into an incident occurring on the licensed premises. While revocation may seem harsh, we cannot say the imposition of that penalty was an abuse of discretion, particularly when revocation appears to be within the range of allowable penalties contemplated by the Penalty Guidelines for similar offenses.[2] Because the Department did not abuse its discretion in imposing a revocation, the Board's proverbial hands are tied; it cannot disturb the penalty.

Also, with regard to appellant's concern over mitigation, the Penalty Guidelines

---

[2]For instance, the Penalty Guidelines recommend a 35-day suspension to revocation for a single, first-time offense of a licensee or employee resisting arrest or interfering with an investigation on the premises in violation of section 24200(a) and (b) and Penal Code section148.

are precisely what they purport to be — *guidelines*. While they offer suggestions regarding the sort of conduct the Department wishes to encourage, and which *may* lead to a mitigated penalty, nothing in their language requires an ALJ to reduce a penalty simply because one or more of these factors exist. The rule grants the Department broad discretion, provided the penalty is reasonable.

On a final note, we observe that while the penalty imposed by the Department is within its discretion, appellant's recommended penalty of a revocation conditionally and temporarily stayed to allow for transfer of the business and license to a new owner — subject, of course, to the Department's approval of the transferee — is perhaps a more viable option. Such a penalty achieves the goals of all parties concerned, including the community of Los Alamos — appellant will no longer be a licensee but will be able to sell his business, and Los Alamos will benefit from the continued operation of the bar, presumably under more responsible ownership. We reiterate, however, that the decision to reconsider the penalty and to allow a transfer lies exclusively in the hands of the Department.

ORDER

The decision of the Department is affirmed.[3] The Department is advised, however, to consider appellant's proposal of a revocation stayed to allow transfer of the license and sale of the business.

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
PETER J. RODDY, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD ORDER

[3]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.