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

AB-9325
File: 21-191605 Reg: 03056300

Maria and Nabil Masannat, and Naim and Nofa Younan, dba Highlander
303 West Sierra Madre Boulevard, Sierra Madre, CA 92104,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing:

Appeals Board Hearing: May 5, 2005
Los Angeles, CA

ISSUED JUNE 30, 2005

Maria and Nabil Masannat, and Naim and Nofa Younan, partners doing business as Highlander (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which revoked their license for co-licensee Nabil Masannat having entered pleas of nolo contendere to charges that he attempted to purchase stolen property and conspired to purchase stolen property, public offenses involving moral turpitude, in violation of Penal Code sections 496 and 664 and constituting grounds for discipline under Business and Professions Code section 24200, subdivision (d).

Appearances on appeal include appellants Maria and Nabil Masannat and Naim and Nofa Younan, appearing through their counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

---

[1]The decision of the Department, dated August 5, 2004, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on September 22, 1986. On November 20, 2003, the Department instituted an accusation charging, among other things, that co-licensee Nabil Masannat and an employee of appellant, Imad Masannat, bought cigarettes and spirits represented to have been stolen. On March 2, 2004, the Department filed an amended accusation against appellant charging that colicensee Nabil Masannat was convicted upon his plea of nolo contendere of having attempted to purchase stolen property in violation of Penal Code sections 496 and 664, and having conspired to receive stolen property in violation of Penal Code section 182, subdivision (a)(1).[2]

An administrative hearing was held on July 2, 2004, limited to the charges of the amended accusation. The Department placed in evidence a transcript (Exhibit 3) of the court hearing in which Nabil Masannat entered pleas of nolo contendere to three counts of having attempted to receive stolen property, and one count of having conspired to do so, and a certified copy of the court register of the proceeding (Exhibit 4) which recorded the pleas and the convictions thereon. Appellants presented the testimony of Bill Hunnel, Molly Masannat, Karla Pope, and Nabil Masannat on the issue of mitigation. Subsequent to the hearing, the Department issued its decision which determined that the charges of the accusation had been established, and which ordered appellants' license revoked.

Appellants thereafter filed a timely notice of appeal. In their appeal, appellants raise the following issues: (1) appellants' due process rights were violated; (2) the

[2]Nabil Masannat owns 25 percent of the business.

penalty is unduly harsh; and (3) the administrative law judge (ALJ) erred in excluding evidence that appellant Nabil Masannat did not understand the potential consequences of his plea of nolo contendere.

DISCUSSION

I

Appellants assert the Department violated their right to procedural due process when the attorney (the advocate) 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. Appellants 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

---

[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 *Dept. Of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2005) 127 Cal.App.4th 615 [25 Cal.Rptr.3d 821]. In response to the Department's petition for rehearing, the court modified its opinion and denied rehearing. (127 Cal. App.4th 615; ___ Cal.Rptr.3d ___). The Department has petitioned the California Supreme Court for review. The court has yet to act on the petition.

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.

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 administrative law judge (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 appellants at the hearing. Appellants

have 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 appellants have 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 appellants, it appears to us that appellants received the process that was due them in this administrative proceeding. Under these circumstances, and with the potential of 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, appellants are 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. Appellants' motion is denied.

II

Appellants argue that, in light of the numerous mitigating factors demonstrated at the hearing, including Nabil Masannat's dedication to community service, his charitable contributions, and the business as his sole source of income, the order of revocation is unnecessarily harsh and not necessary to protect the public interest.

The Appeals Board will not disturb the Department's penalty orders in the absence of an abuse of the Department's discretion. *(Martin v. Alcoholic Beverage Control Appeals Board* (1959) 52 Cal.2d 287 [341 P.2d 296].) However, where, as here, an appellant raises the issue of an excessive penalty, the Appeals Board will examine that issue. (*Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board*

(1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183].)

The ALJ considered and rejected the same arguments that appellants now present to the Board. He cited and quoted from several decisions of the Appeals Board in which the Board affirmed Department orders of revocation in cases where the underlying ground for revocation was a licensee's commission of a public offense involving moral turpitude. (*Velasquez* (2003) AB-7936; *Abdeljawad* (2001) AB-7648; *Taleb* (2001) AB-7639.)

Appellants are correct in their observation that Business and Professions Code section 24200, subdivision (d), does not mandate revocation where a licensee has pled nolo contendere to a public offense involving moral turpitude. The section does, however, authorize revocation in such circumstances, and this Board is not empowered to reverse such an order.

In *MacFarlane v. Dept. of Alcoholic Bev. Control* (1958) 51 Cal.2d 84, 91 [330 P.2d 769], an order of revocation was claimed to be excessive. In language that provides guidance to the Board in this case, the court said:

Petitioner also urges that revocation, rather than mere suspension, of license is too harsh. On the record this might appear to some of us to be a just criticism. But no such determination is within our proper function. The conduct for which the license was revoked constituted a crime under the laws of this State, and was thus at least technically contrary to public welfare or morals. The Constitution (art. XX, § 22) expressly authorizes license revocation in the discretion of the department under such circumstances, and this court is not free to substitute its own discretion as to the matter, even if it were inclined so to do.

In the present case Business and Professions Code section 24200, subdivision (d), expressly authorizes revocation, in the discretion of the Department, and this Board is likewise not free to substitute its own discretion in the matter, even if it were inclined to do so.

III

Appellants complain that the ALJ refused to consider appellant Nabil Masannat's testimony that he had "no clue" about, and did not understand, the warning given him by the Los Angeles Municipal Court judge of potentially adverse consequences to his alcoholic beverage license when he entered his pleas of nolo contendere to the charges of conspiracy and attempt to purchase stolen goods. They argue that the ALJ erred in finding that "[t]his incredible testimony, even if true, is not relevant."

The ALJ's finding (Finding of Fact III) reads as follows:

> Before making his nolo contendere pleas, Respondent Nabil Masannat was warned by the judge that his pleas could jeopardize his alcoholic beverage license.
>
> At the hearing, Mr. Masannat testified that he had "no clue" about the warning which he received from the judge. This incredible testimony, even if true, is not relevant. The present case is based on allegations that Mr. Masannat pled nolo contendere to certain criminal violations, not that he understood the warning from the judge.

We read the finding as rejecting the testimony on two grounds - the ALJ did not believe that Nabil Masannat did not understand the warning, and even if he were to believe such testimony, it was irrelevant. That said, the ALJ did permit Nabil Masannat to explain why he chose to plead no contest. The reason given - he did not want to go to jail. This persuades us that he knew what he was doing.

The transcript of the Municipal Court hearing when Nabil Masannat entered his nolo pleas (Exhibit 3) reveals that the warning could hardly have been more clear:

The Court: So, gentlemen,[4] what I've indicated is this: If you plead guilty to the four counts each, I will treat them all as misdemeanors, put you on probation for three years, summary probation, time served, and I will impose search and seizure conditions. You will have to pay a $100 restitution fine. No penalties.

As I understand it, you are facing charges before the A.B.C. about your license. You may suffer some very severe economic consequences from these pleas.

If you want to accept my indicated sentence, you need to plead guilty or no contest. But if you plead no contest, I will treat that as a plea of guilty.

Do you understand that, Nabil Masannat?

The defendant N. Masannat: Yes.

The Court: Do you understand that, Mr. Imad Masannat?

The defendant I. Masannat: Yes.

The Court: Also, a no contest plea could be utilized by another body such as the A.B.C. as proof of moral turpitude offense.

The Court: Do you understand, Nabil Masannat?

The defendant N. Masannat: Yes.

The Court: Do you understand, Imad Masannat?

The defendant I. Masannat: Yes.
The Court: So by pleading no contest in this case, you could make it very easy for the A.B.C. to prove that you are in violation of your license.

Do you understand that, Nabil Masannat?

The defendant N. Masannat: Yes.

The Court: Imad Masannat?

The defendant I. Masannat: Yes.

The transcript also confirms that Nabil Masannat and Imad Masannat were each

[4] Imad Masannat, who does not appear to be a member of the Highlander partnership, also entered a pleas of nolo contendere to charges against him.

represented by counsel when their pleas were entered.

The thrust of appellants' argument is that Nabil Masannat did not understand the consequences of his plea, and that if he had understood, he might have acted in some different manner. Appellants cite the California Supreme Court's decision in *People v. Howard* (1992) 1 Cal.4th 1132 [5 Cal.Rptr.2d 268], to the effect that a plea is valid only if the record affirmatively shows that it is voluntary and intelligent under the totality of circumstances, and argue that Nabil Masannat's's plea was not voluntary and intelligent. The plea may have been a poor choice, but we cannot say it was not voluntarily or intelligently made, especially in light of the fact that he was represented by counsel when he entered the pleas.

There is nothing in the record to indicate that Nabil Masannat ever attempted in Municipal Court to withdraw his plea on the ground it was not voluntarily and intelligently made. Were he to have done so, he would face the risk that, if successful, and going to trial, he could be convicted and sent to jail.

We do not believe it in the interest of justice to permit what is essentially a collateral attack in another forum upon a plea voluntarily and intelligently made in the context of a plea bargain in a criminal proceeding. We think the ALJ was correct in concluding that Nabil Masannat's motives were irrelevant

ORDER

The decision of the Department is affirmed.[5]

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

[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.