

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

AB-8434

File: 48-265885 Reg: 04057722

TIM TAYLOR, dba Tarpey Tavern
4077 North Clovis Avenue, Fresno, CA 93727,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Jerry Mitchell

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

ISSUED: MARCH 23, 2006

Tim Taylor, doing business as Tarpey Tavern (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which revoked his license for his entry of guilty pleas to charges of mail fraud and tax evasion, a violation of Business and Professions Code section 24200, subdivision (d).

Appearances on appeal include appellant Tim Taylor, appearing through his counsel, Neal E. Costanzo, and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean R. Lueders.

¹The decision of the Department, dated April 14, 2005, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale public premises license was issued on February 24, 1997. On July 28, 2004, the Department filed an accusation against appellant charging that on May 11, 2004, appellant entered pleas of guilty to federal charges of six counts of mail fraud (18 USC 1341) and two counts of tax evasion (26 USC 7201), public offenses involving moral turpitude.

At the administrative hearing held on February 23, 2005, documentary evidence was received regarding appellant's guilty pleas. Charles Jury, who managed the finances and operation of the licensed premises, testified concerning appellant's lack of connection with the business.

The Department's decision determined that the allegations of the accusation were proved. Appellant filed a timely appeal raising the following issues: Substantial evidence does not exist to support revoking appellant's license because there is no nexus between the crimes to which appellant pled guilty and the operation of the licensed premises, and the administrative law judge (ALJ) abused his discretion by excluding relevant evidence at the hearing.

DISCUSSION

I

Appellant contends that there is not substantial evidence to support the Department's decision because it did not prove a nexus between the illegal activity and the operation of the licensed premises. Appellant relies on the case of *Santa Ana Food Market, Inc. v. Alcoholic Beverage Control Appeals Bd.* (1999) 76 Cal.App.4th 570 [90 Cal.Rptr.2d 523] (*Santa Ana*), for the proposition that there must be a nexus between the acts that cause the Department to impose discipline and the sale of alcoholic beverages.

Appellant made this same argument at the administrative hearing. The Department's decision addresses the argument in Legal Conclusion 2:

Counsel for respondent-licensee argued there was no "nexus" between the illegal activities of respondent-licensee and the sale of alcoholic beverages. The nexus is that a person licensed to sell alcoholic beverages has pleaded guilty to public offenses involving moral turpitude, which is all that is required under Business and Profession Code Section 24200(d). This case is distinguishable from one in which an employee, rather than the licensee, is the one who engaged in illegal activity.

Appellant was charged in the accusation with violation of Business and Professions Code section 24200, subdivision (d), which 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.

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].)

It seems clear that the decision correctly found (Finding of Fact 6) that appellant, the licensee, entered pleas of guilty to crimes involving moral turpitude. Therefore, under section 24200, subdivision (d), grounds existed for suspension or revocation. When this subdivision applies, there is no requirement that the illegal activity have some other connection with the licensed business. (*Rice v. Alcoholic Beverage Control Appeals Bd.*, *supra*, at p. 38.)

Santa Ana, supra, is readily distinguishable. In *Santa Ana*, an employee, at great pains to hide the transaction from the licensee, surreptitiously and for her own personal gain, committed food stamp fraud. In addition, the licensee had taken substantial measures to prevent such criminal activity by its employees. That case held that some "minimal nexus" with the licensed activity was required, but *Santa Ana* did not involve the licensee pleading guilty to, or being convicted of, a crime involving moral turpitude, as is the case here.

Appellant also argues that the penalty of revocation imposed here was arbitrary and excessive, because there was an application to transfer the license pending. 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].)

Although this license had suffered no disciplinary action before, the crimes committed by appellant were serious. For a number of years, appellant engaged in a scheme to defraud individuals of money by conducting "seminars" during which he convinced people to invest in a fraudulent "auction program." Through this scheme, he defrauded hundreds of people out of hundreds of thousands of dollars. He also defrauded the federal government out of more than \$230,000 in taxes by concealing

cash income and opening bank accounts using false social security numbers. He was sentenced to 87 months in federal prison for these offenses. There was no evidence of mitigation or rehabilitation presented.

In light of the extent of these crimes, we cannot say that the Department abused its discretion in ordering outright revocation in this case. The existence of an application to transfer the license is irrelevant to the determination of penalty.

II

Appellant contends the ALJ abused his discretion in excluding evidence relating to an application to transfer the license to someone else. Appellant argues that the evidence is relevant to whether the license should be revoked because if the license is transferred to someone who has not engaged in any criminal activity, there would be no basis for revoking the license.

The Department points out its long-standing policy not to transfer licenses while disciplinary proceedings are pending. This serves to prevent a licensee from evading discipline by transferring the license to someone else before discipline becomes final.

The Board addressed an argument similar to that made by appellant, in a slightly different context, in *Fairfield Bowl Bar & Restaurant Company* (2003) AB-7212. In that case, the appellant argued that the Department could not discipline it for being a disorderly house and creating a law enforcement problem because, even before the accusation was filed, it had corrected the problems, and there was no evidence of any problems up to the time of the administrative hearing. Therefore, the appellant argued, there was no longer any need for the Department to impose discipline in order to protect the public. The Appeals Board responded:

All of these arguments are premised on appellant's "cure" of the problems at the premises before the accusation was filed. Appellant does not deny or contest any of the violations found by the Department decision, but appears to argue that it cannot be disciplined for violations

that occurred in the past which no longer occur, since (appellant contends) the Department can only impose discipline to protect the public welfare and morals from presently existing violations.

The Department's disciplinary actions are not for the purpose of punishment, but to protect the welfare and morals of the public and to ensure compliance by licensees. Following appellant's reasoning, licensees could commit violations with impunity, as long as there was no existing violation at the time an accusation was filed or a hearing was held. Such a practice would neither protect the public welfare and morals nor ensure licensees' compliance.

Appellant in the present case is arguing essentially the same thing; that it should be able to expunge its own record with no penalty, simply by transferring the license to someone else, and the Department should not be allowed to interfere with its ability to do so. The appropriate response, we think, is to reiterate the last two sentences quoted above: "Following appellant's reasoning, licensees could commit violations with impunity, as long as there was no existing violation at the time an accusation was filed or a hearing was held. Such a practice would neither protect the public welfare and morals nor ensure licensees' compliance."

The ALJ did not abuse his discretion by excluding evidence regarding the application for transfer; he properly rejected it because it was not relevant to the issue of the discipline to be imposed on appellant's license.

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.