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

AB-8942
File: 41-347178 Reg: 07067562

GREGORY HERBERT BAILEY, dba Aptos Pizza
7945 Soquel Drive, Aptos, CA 95003,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: August 5, 2010
Los Angeles, CA

ISSUED SEPTEMBER 15, 2010

Gregory Herbert Bailey, doing business as Aptos Pizza (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked his license for his having been convicted on a plea of nolo contendere to unlawful sexual intercourse with a person under 18 years of age, a violation of Business and Professions Code section 24200, subdivision (d), in conjunction with Penal Code section 261.5, subdivision (c).

Appearances on appeal include appellant Gregory Herbert Bailey, appearing through his counsel, Phillip A. Passafuime, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kelly Vent.

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[1]The decision of the Department, dated September 25, 2008, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine public eating place license was issued on October 9, 1998. Thereafter, the Department instituted an accusation against appellant alleging that he had entered a plea of nolo contendere to a charge of having unlawful sexual intercourse with a minor.

An administrative hearing was held on August 13, 2008, at which time documentary evidence was received and testimony presented concerning the matter charged in the accusation. The parties stipulated to the factual basis for the charge. Appellant testified on his own behalf, and Santa Cruz County Sheriff's Deputy Jarrod Patrick testified as a rebuttal witness for the Department.

Subsequent to the hearing, the Department issued its decision which ordered appellant's license revoked.

Appellant filed a timely notice of appeal, and now contends that the order of revocation was excessive; an appropriate penalty, he asserts, would have been a suspended revocation. He argues that the administrative law judge (ALJ) should not have considered a report written by a police detective who interviewed the female victim, her father, and her brother, that the Department ignored or accorded insufficient weight to evidence of mitigating factors, that the penalty should not have been based on the ALJ's perception that appellant was insufficiently remorseful, and that the offense in question was not one involving moral turpitude.

DISCUSSION

Appellant was convicted in a criminal court proceeding, on his plea of nolo contendere for the offense of unlawful intercourse with a minor, of a felony violation of Penal Code section 261.5, subdivision (c). That section provides:

> (c) Any person who engages in an act of unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator is guilty of either a misdemeanor or a felony, and shall be punished by imprisonment in a county jail not exceeding one year, or by imprisonment in the state prison.

An accusation by the Department filed November 16, 2007, charged appellant with a violation of Business and Professions Code section 24200, subdivision (d), based upon appellant's plea in the criminal proceeding.[2] Appellant stipulated that the charge of the accusation was true, and to the admission in evidence of documents from the criminal court proceeding in which his nolo contendere plea was entered.[3]

Appellant's objection is to the order of revocation. Relying on *Quintero-Salazar v. Keisler* (9th Cir. 2007) 506 F.3d 688, he argues that the Department did not prove or make findings consistent with the requirements set forth in that decision that would automatically classify the crime of statutory rape as a crime of moral turpitude. He also argues that the penalty of revocation is excessive, that the Department improperly considered portions of a police report based entirely on hearsay statements, and that the administrative law judge ignored factors in mitigation and lacked sufficient evidence to conclude appellant had not shown remorse for his acts.

Quintero -Salazar v. Keisler, *supra*, deals with the standard under federal immigration law in determining whether a crime is one involving moral turpitude so as to justify an order of deportation or exclusion of an alien under the Immigration and Nationality Act. It is not an application of California law, which, as case authority

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[2] Section 24200 sets out grounds which can constitute a basis for the suspension or revocation of a license. Subdivision (d) states as one of those grounds "the plea, verdict, or judgment of guilty, or the plea of nolo contendere to any public offense involving moral turpitude."

[3] The accusation alleged that appellant "was convicted of a public offense involving moral turpitude, to wit: Unlawful sexual intercourse with person under 18 ..."

shows, recognizes the offense as a crime involving moral turpitude. (See *People v. Fulcher* (1987) 194 Cal.App.3d 749 [236 Cal.Rptr. 845] ["Under the Penal Code and under *People v. Hernandez* [(1964) 61 Cal.2d 361 [393 P.2d 673] we hold that the crime of 'statutory rape' or 'unlawful sexual intercourse' indicates a 'general readiness to do evil,' and that it is thus necessarily a crime involving '*moral turpitude*'"]; see also *People v. Ratz* (1896) 115 Cal. 132, 135 [46 P. 915], overruled on other grounds in *People v. Hernandez*, *supra* ["The object and purpose of the law are too plain to need comment, the crime too infamous to bear discussion."].)

At no time during the administrative hearing did appellant contend that the crime to which he admitted, unlawful sexual intercourse, was not a crime involving moral turpitude.[4] The thrust of his argument for a more lenient penalty than revocation was that the court in the criminal proceeding exhibited, by the terms and conditions of probation it ordered, an expectation, if not intent, that appellant would continue to operate his business. Of course, it is within the exclusive jurisdiction and discretion of the Department whether and under what circumstances an alcoholic beverage licensee will be permitted to remain a seller of alcoholic beverages after the commission of an

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[4]In the course of his argument to the ALJ about the importance of the felony charge potential of being reduced to a misdemeanor upon completion of appellant's probation, appellant's counsel stated:

> [A]t some point this case will be a misdemeanor, and that may not be important to the court, but in terms of the crime of moral turpitude which he has committed, which is currently a felony, that will be reduced to a misdemeanor at the appropriate time ... . [RT 15.]

Prior to the hearing, appellant filed a certified copy of an order entered by the Superior Court for the County of Santa Cruz reducing the felony count to a misdemeanor and expunging the conviction, pursuant to Penal Code section 1203.4. Appellant argues this is a factor in mitigation which the Board may consider.

offense involving moral turpitude.

The Appeals Board may 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 & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) However, where 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 sale of alcoholic beverages is, understandably, a highly regulated activity. The problems commonly associated with the sale and consumption of alcoholic beverages are well known and a legitimate subject of public concern. It is the Department's responsibility to acknowledge those concerns in its licensing and disciplinary actions. In this case, appellant, through his counsel, stipulated that "some of the conduct occurred on the premises and some of the conduct we would stipulate involved alcohol that came from the premises." [RT 23.]

Despite counsel's candor, appellant himself could not recall whether, prior to the first sexual encounter with the victim, she was supplied with intoxicating beverages from the premises [RT 24-25], or that she was ever supplied with alcohol at the premises. [*Id*. at 28.] Appellant did admit to "2, 3" sexual encounters at the premises.

We are satisfied that the Department acted reasonably in revoking appellant's license. The fact that the loss of the license may well have an adverse affect on his ability to operate or sell the pizza business profitably is an unfortunate result of his own poor judgment. He did not display the trust and judgment the Department expects and must demand from its licensees. The order of revocation was well within the

Department's discretion, and consistent with its penalty guideline in Department rule 144. We reject the contention that the ALJ failed to consider appellant's mitigation evidence (see Finding of Fact VIII), or accorded too much weight to appellant's apparent lack of remorse.

Finally, we are of the view the ALJ did not commit error in his treatment of the 18-page police report. He did not base any of his findings on the content of the report,[5] and we cannot assume he did not limit his consideration of the document as he said he would.[6]

ORDER

The decision of the Department is affirmed.[7]

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

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[5] Government Code section 11513, subdivision (d) provides that "hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions."

[6] We can not help but note that, based on their emotionally charged remarks at the hearing and during oral argument before this Board, Department counsel were influenced by the content of this report far more than was the ALJ.

[7] 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.