

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

AB-9087

File: 40-334719 Reg: 09071040

ROSA LOMBERA DELGADO, dba Alma's Café and Bar
3837-39 Whittier Boulevard, Los Angeles, CA 90023,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley

Appeals Board Hearing: May 5, 2011
Los Angeles, CA

ISSUED JUNE 17, 2011

Rosa Lombera Delgado, doing business as Alma's Café and Bar (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which revoked her license for her conviction of a public offense involving moral turpitude (possession of cocaine for sale), a violation of Health and Safety Code section 11351 and Business and Professions Code section 24200, subdivision (d).

Appearances on appeal include appellant Rosa Lombera Delgado, appearing through her counsel, Armando H. Chavira, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jennifer M. Casey.

¹The decision of the Department, dated December 23, 2009, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer license was issued on November 12, 1997. On May 6, 2009, the Department instituted an accusation against appellant charging that on September 26, 2008, the licensee pled nolo contendere to, and was convicted of, a public offense involving moral turpitude.

At the administrative hearing held on October 28, 2009, documentary evidence was received and testimony concerning the violation charged was presented by appellant Rosa Lombera Delgado, the licensee and owner. Testimony was also received from Gonzales Reyes Duran, a tenant residing upstairs from the licensed premises.

Subsequent to the hearing, the Department issued its decision which determined that the charge concerning the entry of the plea of nolo contendere was proven and no defense was established.²

Appellant filed a timely appeal raising the following issue: The Department's policy of uniformly instituting outright revocation in cases based upon convictions of a public offense involving moral turpitude amounts to an abuse of discretion.

DISCUSSION

Appellant was convicted in a criminal court proceeding, on her plea of nolo contendere to the offense of possession of cocaine for sale, a felony violation of Health and Safety Code section 11351. That section provides in pertinent part: "every person who possesses for sale . . . any controlled substance . . . shall be punished by imprisonment in the state prison for two, three, or four years." As part of the nolo

²Two additional charges were dismissed by the Department.

contendere plea bargain in this matter, appellant paid a fine of \$200, served no jail time, was put on probation, and was not deported.

An accusation by the Department filed May 6, 2009, charged appellant with a violation of Business and Professions Code section 24200, subdivision (d), based upon appellant's plea in the criminal proceeding.³

Appellant objects to the order of revocation, and maintains that the Department has a strict policy of ordering revocation in all cases where the licensee has pled nolo contendere to a crime involving moral turpitude. Appellant argues that the Department's failure to exercise legal discretion in such matters, by failing to consider a penalty short of revocation, is tantamount to an abuse of discretion.

Appellant offers no authority for the proposition that the Department has a strict policy of revocation in such matters, but merely asserts that this is the case. In her Opening Brief at page 8, appellant states:

The Department appears to have ignored the evidence and substituted it's [*sic*] own policy of outright revoking licenses for Section 11351 violations. The statutes which govern the Department are clear. There is no mandatory outright revocation for moral turpitude violations whether Section 24200(d) or Section 11351; the Department can choose to suspend or revoke depending on the evidence surrounding the violation, including prior and subsequent criminal history of the licensee; however, it must always exercise discretion.

In other words, even though the Department has discretion to impose suspension or revocation, appellant believes it is an abuse of discretion, and should be

³Section 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."

construed as a strict policy of revocation, simply because the Department chose revocation rather than suspension in this case.

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].)

Although the Department's discretion with respect to the penalty is broad, it does not have absolute and unlimited power. It is bound to exercise legal discretion, which is, in the circumstances, judicial discretion. (*Martin v. Alcoholic Beverage etc. Appeals Board*, 55 Cal.2d 867, 875 [13 Cal.Rptr. 513, 362 P.2d 337].) In *Martin* this court stated, "The term "judicial discretion" was defined in *Bailey v. Taaffe* (1866) 29 Cal. 422, 424, as follows: "The discretion intended, however, is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised ex gratia, but a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice.""

(*Harris v. Alcoholic Beverage Control Appeals Board* (1965) 62 Cal.2d 589, 594-595 [43 Cal.Rptr. 633].)

The administrative law judge (ALJ) considered and rejected the same arguments that appellant now presents to the Board to show why the penalty should be mitigated: that appellant served no jail time, had no prior arrests, and has complied with her probation. Also, that (allegedly) the drugs actually belonged to a person residing upstairs - although this unsupported allegation by appellant's counsel was rejected by the ALJ as a collateral attack. [RT 22-26.] As to the factors offered in mitigation, these

were not ignored or accorded insufficient weight as alleged by appellant; they were considered and rejected by the ALJ, who found "no significant evidence of rehabilitation." (See Penalty section, Proposed Decision at p. 3.)

Appellant is correct in her 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 when it is supported by the findings.

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.

It is within the 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 offense involving moral turpitude.

Revocation is the "standard" penalty listed in the Department's Penalty Guidelines (4 Cal. Code Regs., §144) for "Conviction of a crime involving moral turpitude – 24200(d) B&P." While outright revocation may seem a harsh penalty, we

cannot say that imposition of the standard penalty in this case is an abuse of discretion.

ORDER

The decision of the Department is affirmed.⁴

FRED ARMENDARIZ, CHAIRMAN
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁴This 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.