

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

AB-9292

File: 47-471768 Reg: 11075401

MIDO KHALIL, dba Pyramido
4907 Lankershim Boulevard, North Hollywood, CA 91601-4444,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: June 6, 2013
Los Angeles, CA

ISSUED JULY 30, 2013

Mido Khalil, doing business as Pyramido (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which revoked his license following his plea of nolo contendere to a crime of moral turpitude. Such a plea constitutes grounds for revocation under Business and Professions Code section 24200, subdivision (d).

Appearances on appeal include appellant Mido Khalil, appearing through his counsel, Armando Chavira, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jennifer Casey.

¹The decision of the Department, dated July 17, 2012, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general eating place license was issued on November 24, 2009. On July 19, 2011, the Department instituted a three-count accusation against appellant. The first count charged that appellant Mido Khalil had pled nolo contendere to a charge of petty theft, a crime of moral turpitude. The second and third charges alleged that appellant misrepresented a material fact on his license application, to wit, the existence of two prior convictions for petty theft.

At the administrative hearing held on April 19, 2012, documentary evidence was received and testimony concerning the violations charged was presented by appellant Mido Khalil and by two Department employees: Beatrice Lenes, a Licensing Representative, and Armando Gonzalez, a District Administrator.

Testimony and documentary evidence established that, on January 14, 1997, appellant pled nolo contendere to a charge of petty theft, a violation of Penal Code section 484(a). The name on the charge was Hamid Khalil, which is appellant's former name. On June 19, 2003, appellant pled nolo contendere to a second charge of petty theft, in violation of Penal Code sections 484(a) and 666 (petty theft with a prior). The conviction bears the name Mido Khalil, but explicitly references appellant's 1997 conviction.

In 2009, appellant applied for a license from the Department. Although appellant signed an affidavit under penalty of perjury, he did not disclose his convictions. The Department, however, independently learned of the convictions in the course of a background check. As a result, appellant met with Lenes and explained that he had not understood the question regarding previous convictions on the application. Lenes had appellant complete an affidavit under penalty of perjury addressing these convictions,

and the Department issued appellant's license on November 24, 2009.

On November 12, 2010, appellant pled nolo contendere to a third charge of petty theft, in violation of Penal Code section 484(a), which triggered the accusation in this case. Appellant testified that he is receiving mental health treatment to avoid further criminal behavior. Appellant does not dispute that petty theft is a crime of moral turpitude.

Initially, the accusation did not make reference to section 24200(d). However, at the hearing, counsel for the Department moved to amend the accusation to include a line in count 1 making reference to a violation of section 24200(d). Appellant did not object, and the ALJ granted the Department's request.

Subsequent to the hearing, the Department issued its decision, which dismissed counts 2 and 3. However, the decision held that count 1, pertaining to the 2010 nolo contendere plea, had been proven and no defense had been established. The decision found no cause for mitigation, and revoked appellant's license pursuant to section 24200, subdivision (d).

Appellant filed a timely appeal contending that the penalty of revocation is excessive.

DISCUSSION

Appellant contends that the penalty of revocation is excessive and constitutes an abuse of discretion, particularly in light of the dismissal of counts 2 and 3 of the accusation.

Under section 24200, subdivision (d), "[t]he plea, verdict, or judgement of guilty, or the plea of nolo contendere to any public offense involving moral turpitude" constitutes grounds for revocation. The penalty guidelines contained in rule 144

recommend revocation for "[c]onviction of a crime involving moral turpitude." (4 Cal. Code Regs. §144, appen.) Rule 144 gives an ALJ broad discretion to assign higher or lower penalties based on aggravating or mitigating factors; one factor suggested in the rule is an licensee's "continuing course or pattern of conduct." (*Ibid.*)

The Appeals Board may examine the issue of excessive penalty if it is raised by an appellant, (*Joseph's of California v. Alcoholic Bev. 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 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 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].)

Appellant asserts that revocation is excessive because "it was supported by evidence which had been dismissed in both counts 2 and 3." (App.Br. at p. 2.) Appellant refers this Board to the ALJ's discussion of mitigating evidence in the penalty section of the decision: "No mitigation is warranted. The Department gave the Respondent a huge break when it decided to issue the license despite his two prior convictions. Additional mitigation is not warranted in this case." Appellant asserts that "[i]t was improper to at once dismiss the evidence allegedly supporting counts 2 and 3, then bring it back to bear at the penalty phase." (App.Br. at pp. 2-3.)

The appellant is confused as to what, precisely, was dismissed. The ALJ dismissed counts 2 and 3, which alleged misrepresentation of a material fact on the

license application in violation of section 24200(c). The ALJ held that, because the Department issued the license *after* it had discovered appellant's convictions and elicited an explanation from him, it could not subsequently pursue a charge of misrepresentation based on those convictions. (Conclusions of Law at ¶6.)

This holding, however, did not erase the fact that appellant has accrued three convictions for petty theft.

As mitigation, appellant argued that he has sought mental health treatment for kleptomania. The ALJ, however, considered it relevant that the Department had already given appellant a second chance by issuing a license in spite of his convictions and omissions of fact, and found no mitigation was warranted. This was fully within his discretion.

Alternatively, appellant argues that revocation is excessive because, according to the guidelines, the proper penalty is revocation stayed for three years. (App.Br. at p. 3.) Appellant refers this Board to the penalty guidelines, which state:

Commission of a Crime Involving Moral Turpitude — 24200(a) B&P:
 Committed on premisesRevocation
Committed away from premises (petty theft/shoplifting)
*Revocation stayed 3 yrs*
 Committed away from premises (other than petty theft)
Revocation
 Conviction of a crime involving moral turpitude — 24200(d) B&P
Revocation

(Rule 144, appen., emphasis added.) Appellant goes on to assert that the Department did not allege a violation of section 24200(d) in the accusation, and may therefore only penalize appellant for the *commission* of a crime under section 24200, subdivision (a), and not for a conviction under subdivision (d).

The record is clear, however, that the Department sought to amend the

accusation to explicitly include reference to section 24200(d). [RT at p. 7.] The appellant declined the opportunity to object, and the ALJ granted the request. [*Ibid.*] The amended count 1 of the accusation unquestionably refers to 24200(d), which provides grounds for revocation for appellant's plea of nolo contendere to a crime of moral turpitude. Revocation for a conviction is therefore proper under the penalty guidelines and fully within the ALJ's discretion.

ORDER

The decision of the Department is affirmed.²

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
PETER J. RODDY, 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.