

BEFORE THE CALIFORNIA
GAMBLING CONTROL COMMISSION

In the matter of the Statement of Issues
Against:

CHANTHOU SUON,

Respondent.

Agency Case No. DGC # 108056

OAH No. N2007010839

PROPOSED DECISION

Presiding Administrative Law Judge Jaime René Román, State of California, Office of Administrative Hearings, heard this matter in Sacramento, California, on March 26, 2007.

Randall A. Pinal, Deputy Attorney General, represented Complainant, Robert E. Lytle, Jr., Director of the Department of Justice's Division of Gambling Control (Division).

Chanthou Suon (respondent) was present and represented himself.

Complainant filed a First Amended Statement of Issues with the Office of Administrative Hearings, on March 30, 2007. This amended statement of issues included two additional Causes for Denial of Application and was argued by Complainant at the March 26, 2007 hearing. The First Amended Statement of Issues also corrected a simple error describing respondent's work permit application.

Oral and documentary evidence having been received, the Administrative Law Judge submits this matter for decision on March 26, 2007, and finds as follows:

FINDINGS OF FACT

1. On March 26, 2007, Complainant Robert E. Lytle, Jr., in his official capacity as Director of the (Division), through his counsel, Ranall A. Pinal, Deputy Attorney General, submitted a Joint Stipulation To Factual Findings (Stipulation). Respondent received a copy of the Stipulation. Respondent signed the Stipulation and agreed that there is no material dispute about the relevant facts in the proceeding. Therefore, the facts presented in the Stipulation were adopted as the true and complete facts pertaining to this proceeding.

2. In October 2005, the Division received from the Commission an application for a work permit submitted by respondent, dated September 15, 2005, to work at the Empire Sportsmen's Association as a card dealer. The commission requested the Division determine respondent's suitability for the requested work permit.
3. On February 2, 2002, Stockton police arrested respondent following an altercation with Stephanie Pann. Respondent and the victim were co-habitants, had a three year relationship together and were parents of a child from the relationship. When police interviewed respondent about the incident, he admitted he had been arguing with the victim. Respondent told police the victim had cursed his mother, so he pushed the victim with an open hand to the shoulder. When the victim tried to grab respondent, respondent pushed her again and grabbed her neck to stop her from cursing his mother. Respondent released the victim, who then called the police. When police arrived, the victim had no physical injuries, refused medical attention and refused photographs. Police did not observe any marks on her neck.
4. On February 4, 2002, the San Joaquin County District Attorney filed a criminal complaint against respondent in San Joaquin County Superior Court, case number SM223104A, alleging in count one that on or about February 2, 2002, respondent violated Penal Code section 243, subdivision (e), a misdemeanor, by willfully and unlawfully using force and violence upon Stephanie Pann, who was a former spouse, fiancé, or a person with whom respondent was then cohabitating, and a person who is the parent of respondent's child; and in count two, that on or about the same date, respondent made criminal threats against the same victim in violation of Penal Code section 422, a misdemeanor.
5. On February 14, 2002, respondent pled guilty to violating Penal Code section 243, subdivision (e), and the District Attorney dismissed the charge of violating Penal Code section 422. The court granted respondent three years' probation, ordered him to serve 15 days in jail, and pay a probation fee, a \$131 booking fee, \$100 to a Domestic Violence Fund, and \$100 restitution plus a \$10 administration fee.
6. On February 8, 2005, the San Joaquin County Superior Court issued an order revoking probation and order for issuance of a bench warrant for respondent to appear at a probation revocation hearing. The order was based upon a showing by the San Joaquin County Probation Office that respondent had failed to pay the balance of court-ordered fees and fines, and failed to report as directed by his probation officer.
7. Division staff contacted Greg Bjustrom at the San Joaquin County Superior Court, Criminal Division on March 26, 2007, and confirmed the February 8, 2005, court order and bench warrant are still valid.
8. The standard work permit application, titled Application for Initial Regular Work Permit/Temporary Work Permit, includes a box on the first page for the applicant to mark "yes" or "no" in response to the question whether he or she has, within the last ten years, been convicted of a misdemeanor involving, among other things, dishonesty or moral

turpitude. Respondent marked "no". In a latter part of the application, the applicant must again disclose his or her criminal history by marking a "yes" or "no" box in response to the questions, among others, whether the applicant has been convicted of a misdemeanor within the last ten years, or the applicant is currently on probation. Respondent marked "no" to both questions.

9. In December 2002, the Division received from the Commission an application for a work permit submitted by respondent, dated December 17, 2002, to work at the Empire Sportsmen's Association as a floor person. The Commission requested the Division determine respondent's suitability for the requested work permit.

10. During the background investigation, Division staff discovered respondent's criminal history stemming from his guilty plea to violating Penal Code section 243, subdivision (e) in February 2002.

11. Division staff also noted respondent failed to disclose his February 2002 conviction of violating Penal Code section 243, subdivision (e)(1), on his December 2002 application.

12. Despite respondents conviction and failure to disclose the conviction, Division staff recommended the Commission approve respondent's application. The investigating agents noted Respondent was born in Cambodia and was a resident alien of the United States. The agents further stated:

Mr. Suon did not disclose any convictions or criminal history on his application. However, it was revealed that Mr. Suon had a battery conviction in February 2002. Division staff contacted Mr. Suon and it was apparent that due to Mr. Suon's limited English he did not understand that since he had been convicted of a misdemeanor and placed on probation he should have marked the boxes on the questionnaire, "yes." Mr. Suon was under the impression that since it was "all taken care of" then it was dismissed and was not on his record any more. Additionally, he didn't understand the meaning of probation, he again thought that since he had paid the restitution he was finished with the process, he didn't understand that probation lasts for the amount of time specified (3 years) not just until he paid restitution. (Complainant's Exhibit L.)

13. When Division staff questioned respondent about his failure to disclose his February 2002 conviction on his December 2002 application, staff informed him that he should have disclosed his conviction on the application.

14. Ultimately, the reviewing agents reached the following conclusion:

The investigation revealed that on February 14, 2002, Mr. Suon was convicted of PC Section 243(e) battery on spouse, a misdemeanor. However, this conviction, even if disclosed, would not be grounds for denial and the investigation did not reveal any information that would indicate that the issuance of a work permit to Mr. Suon would be inimical to the public health, safety or welfare of the residents of the State of California. (id.)

15. On May, 6, 2003, the Division forwarded to the Commission its report and recommendation that the Commission approve respondent's December 2002 application for a work permit.

16. On June 4, 2003, the Commission approved respondent's December 2002 work permit application.

17. Respondent worked as a floor person at Empire Sportsmen's Association from October 2004 through March 2005. He left for employment elsewhere because business was slow.

18. The Division's May 2003 determination that respondent was suitable to receive a work permit because his February 2002 conviction of violating Penal Code section 243, subdivision (e), was not a crime of moral turpitude, and respondent's failure to disclose his criminal history did not require mandatory denial pursuant to Business and Profession Code section 19859, subdivisions (b) and (d), was made under the leadership of a different agency director and without the advice of legal counsel.

19. On or about July 10, 2006, the Commission mailed to respondent a letter informing respondent that the Division had recommended to the Commission that respondent's application be denied on the grounds that within 10 years of the application, respondent had been convicted of a misdemeanor involving moral turpitude.

20. On July 20, 2006, respondent attended the Commission's regularly scheduled meeting. Respondent stated he agreed with the Division's recommendation but requested a hearing.

LEGAL CONCLUSIONS

Applicable Statutes

1. California Business and Professions Code section 19859, subdivisions (b) and (d), state:

The Commission shall deny a license to any applicant who is disqualified for any of the following reasons:

[§]...[§]

(b) Failure of the applicant to provide information, documentation, and assurances required by this chapter or requested by the director, or failure of the applicant to reveal any fact material to qualification, or the supplying of information that is untrue or misleading as to a material fact pertaining to the qualification criteria.

[§]...[§]

(d) Conviction of the applicant for any misdemeanor involving dishonesty or moral turpitude within the 10-year period immediately preceding the submission of the application...

[¶]...[¶]

2. California Business and Professions Code section 19857, states:

No gambling license shall be issued unless, based on all of the information and documents submitted, the commission is satisfied that the applicant is all of the following:

(a) A person of good character, honesty, and integrity.

(b) A person whose prior activities, criminal record, if any, reputation, habits, and associations do not pose a threat to the public interest of this state, of to the effective regulation and control of controlled gambling, or create or enhance the dangers of unsuitable, unfair, or illegal practices, methods, and activities in the conduct of controlled gambling or in the carrying on of the business and financial arrangements incidental thereto.

3. California Penal Code section 243, subdivision (e)(1), states:

When a battery is committed against a spouse, a person with whom the defendant is cohabitating, a person who is the parent of the defendant's child, former spouse, fiancé, or fiancée, or a person with whom the defendant currently has, or has previously had, a dating or engagement relationship...

[¶]...[¶]

4. California Penal Code section 242, states:

A battery is any willful and unlawful use of force or violence upon the person of another.

Legal Discussion

5. Complainant argues Business and Professions Code section 19859, subdivisions (b) and (d), provide two mandatory grounds for denial of respondent's application. Because at least one of these subdivisions clearly provides grounds for denial of respondent's application, judgment is reserved on the causes for discretionary denial under Business and Professions Code section 19857.

Moral Turpitude

6. California Business and Professions Code section 19859, subdivision (d), states in relevant part that the Commission shall deny a license to any applicant who is convicted of any misdemeanor involving moral turpitude within the 10-year period immediately preceding the submission of the application.

7. A criminal act involves moral turpitude if it involves a serious breach of a duty owed to another or to society. (*In re Stuart K. Lesansky* (2001) 25 Cal.4th 11, 16; [citing *In re Johnson* (1992) 1 Cal.4th 689, 699; *In re Calaway* (1977) 20 Cal.3d 165, 169-170; *In re Higbie* (1972) 6 Cal.3d 562, 569-570].) Acts of moral turpitude are acts which involve “bad character” and “readiness to do evil.” (*People v. Zataray* (1985) 173 Cal.App.3d 390, 400.) “Moral turpitude has also been described as any crime or misconduct committed without excuse, or any ‘dishonest or immoral’ act not necessarily a crime. (*In re Higbie* (1972) 6 Cal.3d 562, 569.)” (*Clerici v. Department of Motor Vehicles* (1990) 224 Cal.App.3d 1016, 1027.) A crime of moral turpitude is “an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellowmen, or to society in general, contrary to the accepted and customary rule of right and duty between man and man.” (*In re Craig* (1938) 12 Cal.2d 93, 97.) Although moral turpitude does not depend on dishonesty being an element of the offense, “there is widespread agreement that convictions of crimes involving fraudulent intent and intentional dishonesty for personal gain establish moral turpitude as a matter of law. (See *In re Hallinan* (1957) 48 Cal.2d 52; *Yakov v. Board of Medical Examiners*, *supra*, 68 Cal.2d 67, 73; *Morrison v. State Board of Education* (1969) 1 Cal.3d 214; *Golde v. Fox* (1979) 98 Cal.App.3d 167, 185; *Brewer v. Department of Motor Vehicles* (1979) 93 Cal.App.3d 358, 365-366.)” (*Harrington v. Department of Real Estate* (1989) 214 Cal.App.3d 394, 400-401. In deciding whether a conviction necessarily involved moral turpitude, a court must look to the statutory definition of the particular crime, and only if the least adjudicated elements of the crime necessarily involved moral turpitude does the conviction involve moral turpitude. (*People v. Forster* (1994) 29 Cal.App.4th 1746, 1756-7.)

8. No California Appellate Court decision has indicated whether Penal Code section 243, subdivision (e) (a simple battery upon a spouse or cohabitant) constitutes a crime of moral turpitude. The crime of felony battery under section 243, subdivision (d) is not necessarily a crime of moral turpitude. (*People v. Mansfield* (1998) 200 Cal.App.3d 82, 87.) To qualify as a battery under section 242 (simple battery), “force against the person is enough; it need not be violent or severe, it need not cause bodily harm or even pain, and it need not leave any mark. (*id.*, at p. 88, quoting 1 Witkin, California Crimes: Crimes Against the Person § 258 (1963). A battery under section 242 is any willful and unlawful use of force or violence upon the person of another. “The word violence has no real significance. It has long been established, both and in tort and criminal law, that ‘the least touching’ may constitute a battery. (*id.*). Therefore, a simple battery under Penal Code section 242 does not necessarily show readiness to do evil or necessarily involve moral turpitude.” (See *People v. Cavazos* (1985) 172 Cal.App.3d 589, 574.)

9. Penal Code section 243, subdivision (e), involves a special relationship between the perpetrator and the victim of a domestic nature. This special relationship, Complainant argues, lifts this crime to one involving moral turpitude. Complainant cites *People v. Rodriguez* (1992) 5 Cal. App. 4th 1398. In this case the trial court allowed the prosecution to impeach defendant with a prior felony conviction for inflicting corporal injury on a spouse or cohabitant under Penal Code section 273.5. The court stated, "To violate Penal Code section 273.5 the assailant must, at the very least, have set out, successfully, to injure a person of the opposite sex in a special relationship for which society rationally demands, and the victim may reasonably expect, stability and safety, and in which the victim, for these reasons among others, may be especially vulnerable." The court emphasized a willful violation of the special relationship and the "intent to injure" as indicia of the general readiness to do evil that defines moral turpitude. (*id.*, at p. 1402)

The least adjudicated elements of Penal Code section 273.5 are that the defendant, "willfully inflict corporal injury resulting in a traumatic condition." Respondent and Ms. Pann did have the kind of special relationship discussed above. Nevertheless, the facts and circumstances of the incident leading to Respondent's conviction under section 243(e) are distinguishable from *Rodriguez* in that there was no showing that Respondent "set out...to injure" or had an "intent to injure" the victim. Furthermore, a violation of 273.5 demands a resulting injury. Respondent's victim suffered no injury. Because a conviction under section 273.5 requires not only special relationship between defendant and victim but also intent to inflict corporal injury, *Rodriguez* does not demand that a conviction of section 243(e) be classified as a crime of moral turpitude.

The 9th Circuit Federal Court of Appeals in *Galeana-Mendez v. Gonzales*, (2006) 465 F.3d 1054, discussed whether a violation of California Penal Code section 243, subdivision (e), was a crime of moral turpitude. In finding that a section 243, subdivision (e), misdemeanor conviction is not a crime of moral turpitude, the court stated: "Given that force that is neither violent nor severe and that causes neither pain nor bodily harm may constitute battery, the relationship element of section 243(e)(1) is not sufficient to, by itself, transform every battery under section 243(e) into a crime categorically grave, base, or depraved." (*Id.*, at p. 1064.)

10. Respondent's conviction of Penal Code section 243(e), does not constitute a crime of moral turpitude under Business and Professions Code section 19859, subdivision (d). The crime of simple battery cannot be characterized as a general readiness to do evil or involving grave acts of baseness or depravity. Furthermore, in the absence of a showing that respondent intended to injure the victim or that a serious injury resulted, the special relationship between respondent and victim alone does not elevate the crime to one of moral turpitude.

Failure To Disclose Conviction

11. California Business and Professions Code section 19859, subdivision (b) states in relevant part that the Commission shall deny a license to any applicant who fails to reveal any fact material to qualification, or supplies information that is untrue or misleading as to a material fact pertaining to the qualification criteria.

12. Respondent failed to disclose the February, 2002 section 243, subdivision (e), conviction in his 2002 application to the Commission. Despite this failure, the Commission granted respondent's application. The agents cited respondent's limited English as a source of confusion. Division staff questioned respondent about his failure to disclose and explicitly informed him that he should have disclosed his conviction.

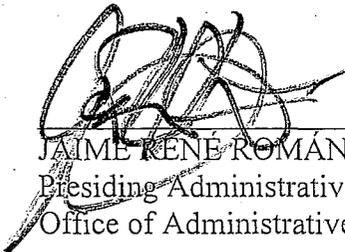
13. Respondent failed to disclose his conviction again on his 2005 application to the Commission. Respondent marked 'no' in response to the question whether the applicant has been convicted of a misdemeanor within the last ten years. This response was clearly false and misleading in direct violation of Business and Professions Code section 19859, subdivision (b). Respondent, despite a prior admonition, lied on his more recent application to the Commission. Moreover, the application was executed under penalty of perjury. Perjury is a crime of moral turpitude. Any confusion respondent had pertaining to the questionnaire was cleared up by the Division in 2002.

ORDER

The application of Chanthou Suon for a card dealer license is denied by reason of Legal Conclusions 11, 12, and 13.

Dated: _____

2/23/07



JAIME RENÉ ROMÁN

Presiding Administrative Law Judge
Office of Administrative Hearings

BEFORE THE
STATE OF CALIFORNIA
CALIFORNIA GAMBLING CONTROL COMMISSION

In the Matter of:

CHANTHOU SUON

Respondent.

File No. DC # 108056

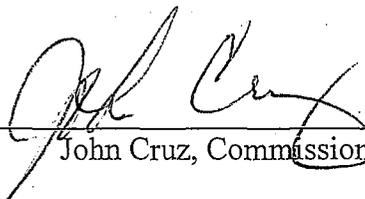
OAH No. N-2007010839

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the CALIFORNIA GAMBLING CONTROL COMMISSION as its Decision in the above-entitled matter.

This Decision shall become effective on AUG 10 2007.

IT IS SO ORDERED JUL 10 2007.



John Cruz, Commissioner