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

AB-7829
File: 41-337214 Reg: 01050181

LUZVIMINDA LIWANAG TUATA dba Minda's Restaurant
2227 Pacific Avenue, Long Beach, CA 90806,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: March 7, 2002
Los Angeles, CA

ISSUED MAY 14, 2002

Luzviminda Liwanag Tuata, doing business as Minda's Restaurant (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended her license for 25 days for violating a condition on her license, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code §23804.

Appearances on appeal include appellant Luzviminda Liwanag Tuata, appearing through her counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine public eating place license was issued on March 4, 1998. Thereafter, the Department instituted an accusation against appellant

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[1]The decision of the Department, dated May 24, 2001, is set forth in the appendix.

charging that, on December 7, 2000, appellant, through her employee, Amber Niemeth, sold, served, and allowed consumption of an alcoholic beverage (beer) after the hour of 11 p.m., in violation of the condition on her license which states: "Sales, service and consumption of alcoholic beverages shall be permitted only between the hours of 11:00 a.m. to 11:00 p.m. each day of the week." In the accusation, appellant's disciplinary history is listed, showing two previous condition violations. The first violation occurred in 1998 and resulted in appellant paying a fine in lieu of a 10-day suspension. The second violation, which occurred on December 17, 1999, was shown as "pending appeal" (Reg. 00048256).

An administrative hearing was held on April 24, 2001, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Department investigator Will Salao concerning the violation.

Investigator Salao testified about what occurred at the premises on December 7, 2000, and about his investigation into appellant's request to modify the condition that was violated. Department counsel began to ask Salao about the violation that occurred on December 17, 1999, the one shown in the Accusation as pending appeal. Appellant's counsel objected and asked for an offer of proof. Department counsel said she was trying to show that appellant was on notice regarding the condition and that the violation in fact occurred on December 17, 1999, allowing it to be used for enhancing the penalty. [RT 20.] The ALJ refused to allow the latter proposed use of testimony regarding the December 17, 1999, occurrence [RT 20-21]:

> "THE COURT: No, I agree with Mr. Saltsman. And if you're going to do that, you'd have to allege something in the Accusation to give the Licensee notice that that's what you're going to do."

After more discussion, the ALJ again refused to allow testimony on the December 17, 1999, occurrence, saying [RT 22-23]:

> "THE COURT: No. I'm dealing with Count I of the Accusation and whatever else is alleged in the Accusation. And in terms of this incident in December of 1999, the only thing that is alleged, is that it really doesn't have relevance, that there was a penalty imposed, but there was an appeal. So there's nothing final from it. We're not going to litigate other cases because otherwise, we would be relitigating the December 1999 incident.
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> "This investigator will testify he was there and that's what happened and Mr. Saltsman would then have to call witnesses to possibly refute what this witness is saying and we're not here for that case."

After hearing more argument from both parties, the ALJ reiterated his refusal to hear testimony regarding the December 1999 incident [RT 23-24]:

> "THE COURT: First of all, I agree with Mr. Saltsman. And, also, I just don't think we're here to litigate what happened in December of 1999 because for one thing, Mr. Saltsman may not be prepared to litigate that incident and it's not alleged in the Accusation.
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> "So the objection is sustained. The Department, I suppose, could have waited until the appeal on the second case was final before going to Hearing on this one. But right now, I'm proceeding with only one prior that has been final."

The ALJ did admit into evidence the Accusation, the Proposed Decision, and the Certificate of Decision for Reg. 00048256, for the limited purpose of showing that, at the time of the violation in the present case, the licensee was on notice as to the condition. Appellant's counsel objected to admission of these documents, arguing that, unless the Accusation in the present matter was "amended to reference [Reg. 00048256] in some other way," appellant would not have had satisfactory notice. [RT 24-26.] The ALJ overruled the objection, saying: "I find this document is no different than if this investigator were to testify that he had previously warned the Licensee about the condition. And that's the only reason these documents are coming in, is to show that she knew." [RT 26.]

Subsequent to the hearing, the Department issued its decision which determined that the violation occurred as charged in the accusation and no defense was established.

Appellant thereafter filed a timely notice of appeal in which she contends that the Department improperly amended the accusation at the hearing without following the statutory procedure for doing so.

DISCUSSION

On appeal, appellant states (App. Br. at 5):

> "The circumvention of the amendment statute provided in the Administrative Procedure Act resulted in the December 1999 'prior violation' being at issue and under discussion on the record with evidence and testimony produced effectively amending the accusation without following the statutory procedure. All of this occurred to the manifest detriment of Appellant and did result in affirmative findings being made on that issue by the Administrative Law Judge."

Appellant's statement just quoted misrepresents the record:

– The December 1999 violation was ***not*** "at issue" – The ALJ made it perfectly clear, as shown above in the excerpts from the record, that the December 1999 violation was ***not*** at issue, but the accusation and decision in that matter were admitted only as evidence that the appellant was on notice about the condition when the present violation occurred.

– The December 1999 violation was ***not*** "under discussion on the record with evidence and testimony produced" – The only discussion on the record about the December 1999 incident was that described above, when both counsel and the ALJ discussed the appropriate use of that incident in the present case. There was no testimony produced, since appellant's counsel objected to Department counsel asking

the investigator about that incident before the investigator could answer. The ALJ allowed no further questioning about the incident. The only other evidence produced was Exhibit 5, the certified copies of the Accusation and decision in Reg. 00048256, which were admitted only to show notice.

– The Accusation was ***not*** "effectively amend[ed]" – If the December 17, 1999, incident had been put into issue and evidence had been adduced to show that the condition had been violated on that date, the Accusation might be considered to have been "effectively amended" to conform to the evidence. However, as discussed above, it was not put into issue and neither testimony nor documentary evidence was introduced to prove that a violation had actually occurred on December 17, 1999.

Contrary to appellant's allegation, the Accusation was not amended, effectively or otherwise; therefore, no statute was circumvented and appellant was not prejudiced in any way.

Further proof of the total lack of foundation for appellant's appeal is found in the Department's decision:

– Finding I.A. shows appellant's record of discipline to consist of the 1998 violation. It then states:

> "Another disciplinary action is not considered here as it is on appeal. That disciplinary action involved [appellant's] alleged violation of Condition #2 of her license on December 17, 1999, in violation of Business and Professions Code Section 23804."

– Determinations of Issues II, III, and IV specifically addressed this issue:

> "[II] The Department recommended that [appellant's] license be revoked, with the revocation stayed for two years, except for a 45-day suspension which shall be served. In making the recommended penalty, the Department apparently considers the present violation to be [appellant's] third violation of Business and

> Professions Code Section 23804. In other words, the Department is assuming that [appellant] did violate Section 23804 on December 17, 1999, notwithstanding that the case for that alleged violation is on appeal. ¶ [III] Whether or not [appellant] violated Business and Professions Code Section 23804 on December 17, 1999 is not an issue in this case, as it was not pled in the Accusation as a count, and it has been litigated at a previous disciplinary hearing. The Administrative Law Judge in that case found that [appellant] did commit the violation. The Department adopted the Administrative Law Judge's proposed decision as its decision. [Appellant] then appealed that decision to the Alcoholic Beverage Control Appeals Board. The appeal is not yet final. Therefore, the only relevance from that case is the fact that it gave [appellant] notice regarding Condition #2 of her license. ¶ [IV] Because [appellant] has only one prior disciplinary action which may be considered here, the recommended penalty is too harsh."

Instead of the Department's recommendation of a revocation stayed for two years with a 45-day suspension, the penalty imposed was only 25 days. Given the clear exposition of reasons for rejecting the recommended penalty, and the very substantial reduction of the penalty actually imposed, we find appellant's claim of prejudice totally groundless.

ORDER

The decision of the Department is affirmed.[2]

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[2]This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this order as provided by §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 §23090 et seq.