

ISSUED JANUARY 14, 1998

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

WIDNES INC.	)	AB-6812
dba Mum's)	
144-46 Pine Avenue	)	File: 47-19107
Long Beach, California 90802,	)	Reg: 96035824
Appellant/Licensee,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	John A. Willd
DEPARTMENT OF ALCOHOLIC)	
BEVERAGE CONTROL,	)	Date and Place of the
Respondent.	)	Appeals Board Hearing:
	)	November 5, 1997
	)	Los Angeles, CA
)	

Widnes, Inc., doing business as Mum's (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which ordered its on-sale general public eating place license suspended for 30 days, with 15 days of the suspension stayed for a probationary period of one year, for its having permitted female entertainers to improperly expose themselves while not performing on a stage at least six feet from the nearest patron, to engage in acts of simulated sexual intercourse, to mingle with

¹ The decision of the Department, dated January 30, 1997, is set forth in the appendix.

guests while exposing their bare breasts and clefts of their buttocks, and permit male customers to touch, fondle and caress the entertainers' breasts and buttocks, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from violations of Rule 143.2, subdivisions (2) and (3), and Rule 143.3, subdivision 1(a) (Cal.Code Regs., title 4, §§143.2, subds. (2) and (3), and 143.3, subd. (1) (a).)

Appearances on appeal include appellant Widnes, Inc., appearing through his counsel, Michael C. Cho; and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellant's license was issued on February 13, 1987. Thereafter, the Department instituted an accusation charging in 11 counts that appellant permitted female entertainers to engage in various kinds of conduct, as described above, in violation of rules issued by the Department regulating live adult entertainment.

An administrative hearing was held on November 20, 1996. At that hearing, testimony was presented by three members of the Long Beach Police Department concerning the events which transpired the evening of January 31, 1996. Their testimony is extensively summarized in the decision of the Department, and, in light of the issues raised by appellant in this appeal, need not be set forth at length in this decision.

Subsequent to the hearing, the Department issued its decision which determined that the charges in the accusation had been established. Appellant has filed a timely notice of appeal, and now contends that the Administrative Law Judge (ALJ) improperly denied appellant's request for a continuance necessitated by the fact that appellant's counsel had been stricken ill.

DISCUSSION

At the outset of the hearing, appellant's sole stockholder, John Morris, requested a continuance, stating that he had learned only that morning that his counsel, Douglas W. Otto, was ill, and would not be able to appear at the hearing. Department counsel, Jonathon E. Logan, disputed this, stating he had spoken to Otto's personal secretary only minutes earlier, who had heard nothing about the state of Otto's health, and believed Otto would either be in his office or making court appearances. Logan also represented that he had received copies of letters faxed to the Department's Lakewood office, signed by John Morris, and on Mum's stationery, one of which asked a Department representative for a continuance so that Morris could retain counsel. Although it is not clear, the record suggests [RT 13] that these were shown to the ALJ, although not made exhibits.²

Thereafter, the ALJ stated that he was going to go forward with the hearing, but

² Copies of these documents are attached to the Department's brief, and will be discussed below.

would delay his decision to permit appellant to submit evidence that would justify the granting of a continuance, in which case he would withdraw and the matter be heard before another ALJ. Later in the hearing, Department counsel, Logan, informed the ALJ and Morris of a conversation he had just completed with Otto, in which, according to Logan, Otto informed Logan he no longer considered himself Morris' attorney, since Morris had commenced using the services of his corporate attorney in dealing with the Department [RT 64-65]. The hearing proceeded to its conclusion, with the presentation of testimony by Department witnesses regarding the conduct charged in the accusation.

Appellant now contends it was error for the ALJ to refuse to continue the hearing.

Ordinarily, an appeal to the Board premised on an allegation that a continuance was improperly denied, or, in the rare case, improperly granted, does not present a particularly difficult question. This case is the exception to the rule.

The law is well-settled that the granting or denial of a continuance of a trial or hearing is discretionary, and that one of the paramount considerations in such a request is its timeliness. Based upon the information which he had been given, the ALJ was well within the area of sound discretion in going forward with the hearing, having only the unsupported statement by Morris that his counsel was ill, contrasted with the representation by Department counsel that Otto's personal secretary lacked any such

knowledge, and viewed in light of what Department counsel represented to be contradictory statements made in letters written only a day earlier, as the reason the matter should be continued.

Morris represented that he had on-going discussions with the Department concerning a possible settlement of the matter. Although the comments of Department counsel indicated there was little possibility that a settlement would occur, the ALJ also agreed to withhold any decision for one week, in order to permit appellant time to exhaust those discussions. We can only presume that nothing emerged therefrom.

Casting considerable doubt on appellant's claim that his counsel did not appear because of illness was the representation by Department counsel that, during a break in the proceeding, he spoke to attorney Otto and was told by Otto that he had no intention of appearing at the hearing [RT 64-66].

However, accompanying appellant's brief on this appeal to the Board are two declarations, one from Morris and one from attorney Otto, which present a decidedly different version of the facts.

Attorney Otto states in his declaration that he contracted a severe case of stomach flu during the night prior to the hearing, and, but for his illness, would have represented Morris at the hearing. He states that his illness was such that he was unable to prepare an affidavit or declaration to inform the ALJ or the Department of his illness, or to prepare a written request for a continuance. Instead, he asserts, he

instructed Morris to advise the ALJ of his illness and request a continuance.

Otto further asserts that he spoke with Department counsel Logan late in the morning during the day of the hearing, and informed him of his illness, of his need for a continuance, and of his directions to his client to request a continuance. He specifically denies telling Department counsel that he did not represent appellant. Finally, he states that, but for his illness, he was prepared to represent appellant at the hearing. These statements stand in direct contradiction to Department counsel's report to the ALJ of his telephone conversation with Otto which occurred late in the course of the administrative hearing.

The Department's brief does not address the statements in attorney Otto's declaration. Instead, the Department denies appellant has a right protected by due process to be represented by counsel at an administrative hearing, emphasizes the breadth of discretion an administrative law judge has when it comes to the grant or denial of a continuance, stresses the delay already having occurred as a result of earlier continuances, and blames appellant for creating his own problems by bypassing his counsel in his dealings with the Department. While each of these reasons separately or together might in other circumstances be sufficient to justify the denial of a continuance, they do not provide a satisfactory answer in this case.

The Department argues that Morris had discharged his attorney, and the continuance was sought on the pretext that Morris needed to retain a new attorney.

The Department bases this argument on a letter, one of two written by Morris to the District Administrator the day before the hearing. Copies of both letters are attached to the Department's brief. One is formal in appearance, addressed to the District Administrator in his official capacity, and it is this letter that is referred to by the Department.

We do not read Morris's letter the same way the Department reads it. There are two key statements in the letter. In the first paragraph, Morris states: "I left word for my attorney that the matter had been settled and the administrative law hearing had been taken off calendar. I was alarmed to learn today that the Department expects to go forward tomorrow." In the third paragraph, he states: "I ask you to reconfirm that agreement or to agree to a continuance of the hearing so I can again retain counsel to represent me." The Department construes these statements to mean Morris was seeking new counsel. However, they can just as easily be read to say he now had to rehire his former attorney, the one he had told the hearing was off calendar.

The question left unanswered by the Department's brief is why there is such a discrepancy between what Department counsel represented to the ALJ about the reason Morris was without counsel at the hearing, and the reasons set forth in Attorney Otto's declaration. The Board is afforded no assistance in answering this question by the Department's brief, which totally ignores the Otto declaration. In light of the fact that the Otto declaration flatly denies making the statements Department counsel

attributed to him, some kind of response would have been expected. Absent a response, it would be inappropriate to completely disregard the content of the Otto declaration. At the same time, it would be equally inappropriate to accept its statements as fact, even though the failure of the Department to refute it gives rise to the temptation. Fairness suggests that the issue be resolved by a finder of fact, and not by this Board.

In the context of this case, the Otto declaration is in the nature of evidence which in the exercise of reasonable diligence could not have been produced at the time of the administrative hearing, so that a remand for its consideration would be appropriate under Business and Professions Code §23085.

If the matters stated in the Otto declaration concerning his illness are true, then it was unfair for the hearing to go forward without his presence. Whether and to what extent his presence may have made a difference is difficult to determine. Admittedly, the graphic testimony of the three Long Beach police officers leaves little to the imagination. Nonetheless, the officers did not face cross-examination by a skilled attorney, and it is conceivable that some testimony could have been developed that might have ameliorated to some extent any damage done during their direct testimony. Thus, for reasons of essential fairness, this Board believes this matter must be remanded to the Department for consideration of the question whether appellant's request for a continuance should have been granted.

CONCLUSION

This case presents an issue of procedural fairness. The Board wishes to be clear that it is not prejudging Department counsel. That said, it should be equally clear that the Board intends to ensure that licensees are afforded fair treatment at the hands of the Department. For these reasons, this matter is remanded to the Department for reconsideration in light of this decision, and for such further action thereafter as the Department may deem appropriate in a lawful exercise of its discretion.³

BEN DAVIDIAN, CHAIRMAN
JOHN B. TSU, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD⁴

³This 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 decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate 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.

⁴ Ray T. Blair, Jr., Member, did not participate in the oral argument or decision in this matter.