

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

AB-7606a

File: 48-275530 Reg: 99047236

RENEE VICARY dba Angels Sports Bar
1650 East Sixth Street, Corona, CA 91719,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: None

Appeals Board Hearing: August 14, 2003
Los Angeles, CA

ISSUED NOVEMBER 12, 2003

Renee Vicary, doing business as Angels Sports Bar (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended her license for 30 days for having permitted violations of Department Rule 143.3(1)(b) and 143.3(2) (Title 4, Cal. Code Regs., §143.3, subds. (1)(b) and (2)) (hereafter "Rule 143.3") by entertainers in her employ.

Appearances on appeal include appellant Renee Vicary, appearing through her counsel, Roger Jon Diamond, and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

FACTS AND PROCEDURAL HISTORY

This matter is now before the Appeals Board for its consideration of the 30-day suspension ordered by the Department following appellant's unsuccessful journey through the Fourth District Court of Appeal, the California Supreme Court and the

¹The decision of the Department, dated March 23, 2000, is set forth in the appendix.

United States Supreme Court.

This matter was first heard by the Appeals Board on April 5, 2001. In a decision issued August 16, 2001, the Board reversed the decision of the Department, issued March 23, 2000, which had held that conduct of various topless dancers at appellant's establishment had violated Department Rule 143.3. The Board concluded that the Department Rule, as applied, infringed upon the dancers' First Amendment rights of expression.

The Fourth District Court of Appeal issued a writ of review, and after oral argument, ordered the Board's decision annulled, concluding that the Department was entitled to pursue the conduct in question (the touching of her own breasts by each of seven dancers in the course of her performance, and the exposure of her breasts by a dancer who was not on an elevated stage farther than six feet from a patron) without violating their First Amendment rights. The court remanded the matter to the Appeals Board for reconsideration of the penalty imposed by the Department, explaining:

It remains to consider whether Vicary should be given the opportunity to request the Board to reconsider the penalty imposed, an issue which became moot when the Board overturned the decision on the Rule 143.3 violations. We believe that Vicary is entitled to a determination on this point.

Appellant's petition for review to the California Supreme Court was denied, as was its petition for certiorari to the United States Supreme Court. Thereafter, the case was returned to the Appeals Board by the Court of Appeal, and by the Board to the Department, for reconsideration of the penalty.

On April 2, 2003, the Department issued the following order, entitled "Notice:"

On March 24, 2003, the United States Supreme Court denied licensee's Petition for Certiorari. The decision of the Court of appeal annulling the Decision of the ABC Appeals Board is now final. In its opinion dated June 26, 2002, the Court of appeal remanded the matter to the Appeals Board for reconsideration of the penalty, which had previously been rendered moot when the Appeals Board

reversed the Department's Decision. On January 24, 2003, the Appeals Board reversed its decision dated August 26, 2001 and ordered that the matter be remanded to the Department for further proceedings in accordance with the Court of Appeal's Decision of June 26, 2002.

WHEREFORE, the Department's decision dated March 23, 2001 is final, effective immediately. Licensee's license is suspended for 30 days.

Appellant has again appealed, and contends that the penalty was imposed pursuant to guidelines which were not promulgated in compliance with the Administrative Procedure Act (APA). Appellant also contends that the Department violated the instruction of the District Court of Appeal by not affording appellant a hearing on the penalty.

DISCUSSION

Appellant has premised her appeal on the contention that there was no hearing in which she could demonstrate the alleged hardship the suspension would inflict on her business, and that the penalty was imposed pursuant to guidelines which should have been, but were not, promulgated in compliance with the Administrative Procedure Act, thus, in violation of Government Code section 11425.50, subdivision (e).²

In *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 571 [59 Cal.Rptr.2d 186], the California Supreme Court referred to "two principal identifying

² Section 11425.50, subdivision (e) provides: "A penalty may not be based on a guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule subject to Chapter 3.5 (commencing with Section 11340) unless it has been adopted as a regulation pursuant to Chapter 3.5 (commencing with Section 11340)."

Government Code section 11342.600 defines "regulation" to mean "every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure."

characteristics” of a regulation subject to the APA:

First, the agency must intend its rule to apply generally, rather than in a specific case. The rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided. (*Roth v. Department of Veterans Affairs* (1980) 110 Cal.App.3d 622, 630 [167 Cal.Rptr. 552].) Second, the rule must “implement, interpret, or make specific the law enforced or administered by [the agency], or ... govern [the agency’s] procedure. (Gov. Code, §11342, subd. (g).)

At issue is a section of the Department’s “Instructions, Interpretations and Procedures” manual entitled “Penalties - General Guidelines,” which states:

The penalties indicated in this section of the Guide Book are intended as general guides and are those penalties which the Department usually imposes for the offenses indicated. Higher or lower penalties may be warranted depending on the aggravating or mitigating factors present in the particular case.

It is the District Administrator or District Supervisor’s responsibility to objectively assess each alleged violation on its own factual merits, considering the Department’s standard penalty and the presence of any factors of aggravation or mitigation. Penalty recommendations in different cases should be consistent when the same factors are present. Deviation from the standard penalties requires the presence of either aggravation or mitigation and must be so indicated on the ABC-309. It is also imperative that the concept of progressive discipline be kept in mind when recommending penalties. Failure to do so may result in reduced penalties at hearings.

It is the Assistant Director’s (field) and Deputy Division Chief’s responsibility to ensure that penalties recommended by District are in line with the standard penalties and that deviations from the standard are fully justified and explained on the ABC-309. In addition, Division review should also ensure that the Districts are consistent in their approach to penalties.

(Instructions, Interpretations, and Procedures, December 4, 1996, page L225.)³

This portion of the manual discusses a number of considerations which are to be taken into account in developing a penalty recommendation: factors of aggravation and mitigation; the staying of penalties; operative and effective dates of penalties; fines vs. suspensions; and imposition of conditions. The manual then sets forth a penalty

³ A copy of these guidelines is annexed hereto.

schedule which lists types of offenses and a penalty associated with each. The Department appears to have utilized these guidelines in one form or another for many years, (See *Harris v. Alcoholic Beverage Control Appeals Board* (1965) 62 Cal.2d 589, 595 [43 Cal.Rptr. 633]). Department counsel often refer to the Department's "standard penalty" when making their penalty recommendations to the administrative law judge presiding at the hearing..

Despite their longevity, this is the first case in which the question whether the Department's penalty guidelines fall within the ambit of Government Code sections 11340.5, subdivision (a), and 11425.50, subdivision (e), has been squarely presented to this Board. Their description and content appear clearly to fall within the literal language of the pertinent Government Code provisions, and we have been given no persuasive reason why they should be excluded therefrom.

The Department has argued that the Board should not consider this issue because the appellant did not meaningfully raise and argue the issue at the Department level. In the ordinary case, this argument would be persuasive, since fairness requires that the Department be entitled to consider the issue before an appeal from its ruling. But this case is not the ordinary case.

In this case, the court of appeal expressly held that appellant was entitled to have the issue of penalty reconsidered. It was for that reason that the case was remanded to the Board, and from the Board to the Department.

Following the remand, the Department, without notice to appellant, entered an order reimposing the same 30-day penalty it had originally ordered. Appellant was effectively precluded from raising the issue at the Department level at a time when she could have done so.

The Department argues that its power to deny, suspend, or revoke an alcoholic beverage license derives directly from article XX, section 22, of the California Constitution, and any requirement that its penalty guidelines be formally adopted as a regulation interferes with its ability to exercise that discretion. We disagree.

We do not see how the exposure of those guidelines to public scrutiny and comment - which is the purpose behind the Government Code provisions requiring their promulgation as regulations - will frustrate that objective. On the contrary, the result of such public scrutiny and comment will be that all licensees, and not those few fortunate enough to be represented by the most experienced counsel, will know what they may face in the penalty phase of a proceeding. The Department's discretion remains limited only by the traditional principles regulating its exercise. (See *Martin v. Alcoholic Beverage Control Appeals Board* (1959) 52 Cal.2d 287, 293 [341P.2d 296]: "viewing the propriety of the penalty as a matter vested in the discretion of the department under our constitutional provision (art. XX, §22), and considering the rule that its determination of the penalty will not be disturbed unless there is a clear abuse of discretion")

We find the Law Revision Commission's comments made at the time subdivision (e) was enacted instructive on the ultimate disposition of this appeal:

If a penalty is based on an "underground rule" - one not adopted as a regulation as required by the rulemaking provisions of the Administrative Procedure Act - a reviewing court should exercise discretion in deciding the appropriate penalty. Generally the court should remand to the agency to set a new penalty without reliance on the underground rule but without setting aside the balance of the decision.

(Cal. Law Revision Com. com., Deering's Ann. Gov. Code (2003 ed.) foll. §11425.50.

We are aware that the result we reach in this case will cause the Department and this Board some inconvenience and delay in the appellate process. The ready

solution, of course, is for the Department to implement the necessary steps to legitimize its penalty guidelines, either through the normal procedures for the adoption of a regulation, or through use of the emergency adoption procedures spelled out in the APA. Prompt action in this direction will benefit everyone concerned. See *Tidewater Marine Western Inc.*, *supra*, 14 Cal.4th at 568-569.

ORDER

The decision of the Department is reversed as to penalty, and the matter is remanded to the Department for reconsideration of the penalty without reference to the penalty guidelines set forth in the Department's "Instructions, Interpretations and Procedures" manual.⁴

TED HUNT, CHAIRMAN
KAREN GETMAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁴ This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

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