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

AB-8752
File: 48-294857 Reg: 06063597

SUSANA GARCIA BACCA, dba Azteca Night Club
1900 Long Beach Boulevard, Long Beach, CA 90806,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John W. Lewis

Appeals Board Hearing: June 5, 2008
Los Angeles, CA

ISSUED: OCTOBER 8, 2008

Susana Garcia Bacca, doing business as Azteca Night Club (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked her license for having permitted numerous violations of Department Rules 143.2 and 143.3 (Title 4, Cal. Code Regs., §§143.2 and 143.3) governing conduct and attire, and having permitted acts of drink solicitation in violation of Business and Professions Code section 25657, subdivision (b).

Appearances on appeal include appellant Susana Garcia Bacca, appearing through her counsel, Armando Chavira, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

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[1]The decision of the Department, made pursuant to Business and Professions Code section 11517, subdivision (c), dated September 17, 2007, is set forth in the appendix, together with the proposed decision of Administrative Law Judge John W. Lewis.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on May 31, 1994. On August 2, 2006, the Department instituted a 55-count accusation against appellant charging violations of Department rules 143.2 and 143.3, governing entertainers' conduct and attire, and acts of drink solicitation in violation of Business and Professions Code sections 25657, subdivision (b), and 24200.5, subdivision (b).

An administrative hearing was held on February 7, 2007, at which time documentary evidence was received and testimony concerning the violations charged was presented by Long Beach police officers Victor Feria and Reginald Vega. Appellant presented no witnesses.

Detective Vega testified that he and another Long Beach police officer entered the premises in an undercover capacity on August 12, 2005. Vega testified that during this visit, he was solicited to purchase drinks a total of four times by a woman who identified herself as "Samantha." Samantha told him her beer would cost $11.00, and his beer would be $4.00. He paid the waitress $15.00, received $7.00 change, and was told by Samantha to give it to her. He further testified that he was charged $11.00 each for three additional beers solicited by Amanda. Vega noted a sign on the wall stating that beers were $4.00, mixed drinks $6.00, and that management disclaimed any responsibility for tips.

Vega further testified that, later in that evening, two female entertainers began dancing throughout the bar while wearing bikini tops and bottoms. The two women then began performing lap dances for various male patrons, straddling their legs and simulating sexual and anal intercourse, at times exposing their breast and vaginal areas, and permitting skin to skin contact of breast and buttocks when accepting tips.

Detective Vega visited the premises a second time the evening of September 17, 2005, accompanied by the same officer. On this occasion Vega observed three female entertainers, one of whom, "Chism," he recognized from his first visit in August. The women were dressed in bikini tops and bottoms, were dancing throughout the premises, and engaging in the same kind of lap dance activity he had observed on his initial visit.

Vega and a fellow officer visited the premises a third time on September 24, 2005. On this occasion, there were six female entertainers, one of whom, "Cano," he recognized from his visit a week earlier. He testified that Cano engaged in the same kind of lap dance activity that he had witnessed in his earlier visits. He also testified that he was again approached by Samantha, who asked him to buy her a beer. Vega gave Samantha $20.00. Samantha went to the bar, purchased three Bud Light beers, and gave him $1.00 change.

Vega, and a fellow officer, accompanied by Department investigator John Rubio, went to the premises again on November 19, 2005. Vega observed four female entertainers engaging in the same lap dancing activity as he had described having seen in his three earlier visits to the premises. While there he observed Samantha talking to a group of men. He did not speak to her. After the entertainers had been dancing 10 or 15 minutes, he placed a call and additional officers wearing police identification entered the premises and issued citations to the dancers and the promoter. He also observed the licensee leaving in her car after the additional officers had entered the premises.

Subsequent to the hearing, Administrative Law Judge (ALJ) John W. Lewis issued a proposed decision which sustained 33 counts of the accusation, including the

two counts alleging drink solicitation violations of Business and Professions Code section 25657, subdivision (b), dismissed 22 counts, including the two counts alleging violations of Business and Professions Code section 24200.5, subdivision (b), ordered appellant's license revoked, conditionally stayed the order of revocation for three years, and ordered a 30-day suspension.

The Department did not adopt the proposed decision, and instead decided the case itself. The Department adopted the ALJ's findings of fact in their entirety, all save one of his conclusions of law, added a conclusion of law of its own,[2] and changed the penalty to one of outright revocation.

Appellant filed a timely notice of appeal in which she raises the following issues: (1) The Department failed to comply with the requirements of Government Code section 11517, subdivision © (all counts); (2) the alleged solicitation by a female patron should not have been imputed to appellant (counts 1 and 29); (3) there is not substantial evidence to support Finding of Fact 5 (counts 1 and 29); (4) there is not substantial evidence to sustain count 29; and (5) the licensee's prior disciplinary history was too remote to be an aggravating factor.

Since issues 2, 3, and 4 relate generally to the same subject matter, they will be discussed together.

DISCUSSION

I

The Department's order in this case recites, in part:

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[2] The newly-added Conclusion of Law 14 determined that cause for suspension or revocation was established with respect to counts 5, 10, 15, 20, 25, 32, 37, 42, 47 and 52 of the accusation, all but one alleging violations of Rule 143.3(1)(a), simulated acts of sexual intercourse, etc.

> The above entitled matter having regularly come before the Department on [sic] for decision under Government Code Section 11517© and the Department having considered its entire record including the transcript of the hearing held on February 7, 2007 before Administrative Law Judge John W. Lewis, and the written arguments submitted by the Respondent and Department and good cause appearing therefor, the following Decision is hereby adopted.

Because of its importance to this appeal, we have set out, in a footnote, the pertinent text of section 11517, with the critical language italicized.[3]

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[3] Section 11517. (a) A contested case may be originally heard by the agency itself and subdivision (b) shall apply. Alternatively, at the discretion of the agency, an administrative law judge may originally hear the case alone and subdivision (c) shall apply.

...

(c) (1) If a contested case is originally heard by an administrative law judge alone, he or she shall prepare within 30 days after the case is submitted to him or her a proposed decision in a form that may be adopted by the agency as the final decision in the case. Failure of the administrative law judge to deliver a proposed decision within the time required does not prejudice the rights of the agency in the case. Thirty days after the receipt by the agency of the proposed decision, a copy of the proposed decision shall be filed by the agency as a public record and a copy shall be served by the agency on each party and his or her attorney. The filing and service is not an adoption of a proposed decision by the agency.

(2) Within 100 days of receipt by the agency of the administrative law judge's proposed decision, the agency may act as prescribed in subparagraphs (A) to (E), inclusive. If the agency fails to act as prescribed in subparagraphs (A) to (E), inclusive, within 100 days of receipt of the proposed decision, the proposed decision shall be deemed adopted by the agency. The agency may do any of the following:

(A) Adopt the proposed decision in its entirety.

...

(E) Reject the proposed decision, and decide the case upon the record, including the transcript, or upon an agreed statement of the parties, with or without taking additional evidence. By stipulation of the parties, the agency may decide the case upon the record without including the transcript. If the agency acts pursuant to this subparagraph, all of the following provisions apply:

(i) A copy of the record shall be made available to the parties. The agency may require payment of fees covering direct costs of making the copy.

(ii) The agency itself shall not decide any case provided for in this subdivision without affording the parties the opportunity to present either oral or written argument before the agency itself. If additional oral evidence is introduced before the agency itself, no agency member may vote unless the member heard the additional oral evidence.

(iii) The authority of the agency itself to decide the case under this subdivision includes authority to decide some but not all issues in the case.

(continued...)

Section 11517, subdivision (c)(2)(E) states that the Department may "[r]eject the proposed decision, and decide the case upon the record, including the transcript," or, by stipulation of the parties, upon the record alone. There was no stipulation. Subparagraph (I) provides that "[a] copy of the record shall be made available to the parties." This language is the focus of appellant's argument.

Appellant contends that while the Department decision maker relied on the transcript of the hearing when he made his decision, the Department did not make available to her a copy of the transcript as the statute requires. It is appellant's contention that, had her attorney received a copy of the transcript, he would have been in a better position to formulate arguments for the adoption of the proposed decision.

The Department argues that appellant, by failing to request a copy of the transcript, has waived the issue.

The ALJ's proposed decision is dated February 23, 2007. According to the Department's brief, an Order Concerning Proposed Decision For Comments/Argument was issued by the Department on March 14, 2007, inviting the submission of additional comments or arguments addressing the counts recommended for dismissal by the ALJ and the penalty. The certified record supplied to the Appeals Board does not contain

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[3](...continued)

(iv) If the agency elects to proceed under this subparagraph, the agency shall issue its final decision not later than 100 days after rejection of the proposed decision. If the agency elects to proceed under this subparagraph, and has ordered a transcript of the proceedings before the administrative law judge, the agency shall issue its final decision not later than 100 days after receipt of the transcript. If the agency finds that a further delay is required by special circumstance, it shall issue an order delaying the decision for no more than 30 days and specifying the reasons therefor. The order shall be subject to judicial review pursuant to Section 11523.

(d) The decision of the agency shall be filed immediately by the agency as a public record and a copy shall be served by the agency on each party and his or her attorney.

this document. According to the Department's brief, this order was *not* issued pursuant to Government Code section 11517, subdivision (c), and, in fact, specifically stated that the proposed decision would be submitted to the Director for action on April 18, 2007. We are told by Department counsel during argument that this was nothing more than a request for post-hearing briefs. We find this curious, since we are unaware of any authority that permits the Department to ask for post-hearing briefs after the ALJ has declared the hearings closed. Ordinarily, post-hearing briefs are only filed after the parties have requested leave to file or the ALJ has requested them. Post-hearing briefs of a sort are also filed after the Department has rejected the proposed decision and before it issues its own decision

We are told in the parties' briefs that the Department filed a response to the order on or about March 20, 2007, recommending that the findings of fact be adopted but that the Department impose a penalty of revocation. Appellant filed a response on or about April 6, 2007, arguing that the proposed decision be adopted. Unfortunately, neither of these documents is included in the certified record supplied to this Board.

Subsequently, in a Notice Concerning Proposed Decision, dated May 17, 2007, the Department advised appellant that the Department considered, but did not adopt, the proposed decision, and that the Department would itself decide the case "pursuant to the provisions of subdivision (c) of Section 11517 of the Government Code." Appellant was advised that she could submit written argument to the Department on any matters she felt should be argued, without limitation, and that the Department considered the "findings of fact, the determination of issues, and the penalty or recommendation" in not adopting the proposed decision. The notice also advised appellant that any written argument should be received by the Department on or before

June 18, 2007. The notice makes no reference to the record or transcript, nor to the documents filed in response to the March 14, 2007, order.

It does not appear that any additional comments or arguments were filed by either party. Nonetheless, the Department's decision under Government Code section 11517, subdivision (c), recited that it had considered its entire record, including the transcript of the hearing and the written arguments submitted by the parties, apparently referring to the earlier responses to the March 14, 2007, order.

There is no dispute that appellant did not request a copy of the record, including the transcript, during the interim between the Department's notice on May 17, 2007, that it intended to decide the case itself, and the issuance of its decision on September 17, 2007. Was appellant's silence a waiver of her right to have the record, and the transcript of the hearing, made available to her, as the Department argues? Or was the Department's failure to provide appellant a copy of the record, including the transcript, a failure to comply with the statute, as appellant argues?

Sub-paragraph (c)(2)(E)(I) provides, in full: "A copy of the record shall be made available to the parties. The agency may require payment of fees covering the direct cost of making the copy." As of the time of the May 17, 2007, section 11517 order, the transcript had not been prepared. The file-stamped certified original of the hearing transcript indicates it was not received by the Department until June 14, 2007. The court reporter's certification is dated June 12, 2007. Thus, the Department was not in a position to advise appellant what she would have to pay for a copy of the record, including the transcript, at least until some time after May 17, 2007.

The statute does not by its terms require an appellant to request a copy of the record, including the transcript. Instead, it imposes upon the agency (the Department,

in this case), what could be considered an affirmative duty -- "A copy of the record shall be made available. The agency may require payment of fees covering direct costs of making the copy."

Thus, the question for this Board is which is the more reasonable interpretation of the statutory language- must a licensee affirmatively request a copy of the record, including the transcript, with a failure to do so a waiver of the issue, or, is it a more reasonable interpretation of the statute to require a regulatory agency to affirmatively advise a licensee that the record and transcript are available, and specify the cost. We are inclined to think that the latter is the more reasonable interpretation, and to disagree with the Department's suggestion that the statute's requirement, in different subdivisions, that a copy of the decision must be served on a licensee, while a copy of the record need only be made available, demonstrates that the burden was on the licensee to request a copy of the record and transcript.

While the language in section 11517 does put the licensee on notice that she was entitled to the record and transcript, it does not by its terms require her to make a request for them. On the other hand, the language "shall make available" can be understood to place the burden on the agency to notify the licensee that copies of the record and transcript will be made available, subject to payment of the cost of copying. The Department is more aware of the state of the record and the time when the transcript will be available than is a licensee, so it is not unreasonable to place a burden of giving notice of availability on the Department.[4]

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[4] As pointed out, *supra*, the transcript was not prepared until June 12, 2007, and the certified original received by the Department on June 14, 2007. Only much later, after appellant filed a notice of appeal from the Department's decision, was she (continued...)

Our research has not found any controlling or even helpful case law. Nor has either of the parties cited any controlling precedent.

A ruling in favor of the Department would be the end of the case, since we have not seen anything in the remaining issues raised by appellant that deserve relief. On the other hand, a ruling in favor of the appellant would seem to require a remand to the Department; however, whether this would provide the licensee with any meaningly remedy is doubtful. The Department's decision maker has already considered and rejected appellant's arguments for adopting the proposed decision with its stayed revocation penalty, albeit arguments formulated without the assistance of the hearing transcript. Hence, it is a very real possibility that the Department will simply give appellant an opportunity to make further arguments in support of her position, and then again order revocation. Since the Board can not control the Department in the exercise of its discretion (see Business and Professions Code section 23085), there is nothing to prevent the Department from again ordering revocation, in light of the Rule 143 violations that appellant apparently concedes (App. Br., pages 10, 23), and the drink solicitation violations we conclude herein were supported by substantial evidence. Nonetheless, we think appellant should be given the opportunity, now that the transcript is available, to argue to the Department why the proposed decision should have been adopted. Due process requires no less.

II

The Department found that instances of drink solicitation took place on separate

[4](...continued)
informed of the cost "to prepare" the transcript.

nights, each time involving the same person who was soliciting. Appellant does not dispute that the incidents occurred, but contends there is no substantial evidence that appellant knowingly permitted them to occur.

Appellant contends, with respect to the events of August 12, 2005, that the Department erred in finding that, despite the fact the payment of $7.00 to Samantha in connection with each of the four acts of solicitation was made in the presence of the waitress, neither the waitress or any other employee took any corrective action to prevent the solicitations. She argues that Finding of Fact 5 erred in finding that the waitress was present both when Samantha said her beer was a "fichada," a slang word implying that the price of the beer would be higher to pay for her companionship, and when Samantha told Vega to give her the $7.00 change.

Vega testified that the waitress had already gone when he gave $7.00 to Samantha, and that he could not recall whether the waitress was present when he gave Samantha $7.00 in connection with each of the next three beers she solicited that evening. Thus, appellant contends, there is no evidence that appellant could have known Samantha was receiving money from Vega, so there was no corrective action to take.

Appellant overlooks Vega's testimony [RT 119, 120, 123] that after Samantha had told him her beer would cost $11.00, he heard her tell the waitress the price of her beer. The ALJ was entitled to believe this testimony, the necessary implication being that an employee of appellant was aware that drinks were being solicited and took no corrective action.

Appellant argues that it was improper for the Department to consider a prior discipline for a drink solicitation violation as an aggravating factor because it was too

remote. Appellant misses the point.

The ALJ explained why he thought it appropriate to consider appellant's disciplinary history (Conclusion of Law 18):

> In determining an appropriate penalty in this case, Respondent's prior disciplinary history must be considered. This license was suspended and placed on a three year stayed revocation for drink solicitation violations. Although the stayed revocation expired in 2003, here we have similar violations occurring in 2005. The Respondent has an affirmative duty to maintain a lawful establishment. That duty became specific due to the prior discipline and she was required to focus on the elimination of such violations. Simply hanging a sign on the wall is not sufficient.

This language is in keeping with the holding of the court in *Laube v. Stroh* (1992) 2 Cal.App.4th 364, 379 [3 Cal.Rptr.2d 779], where the court said:

> A licensee has a general duty to maintain a lawful establishment. Presumably this duty imposes upon the licensee the obligation to be diligent in anticipation of reasonably possible unlawful activity and to instruct employees accordingly. Once a licensee knows of a particular violation of law, that duty becomes specific and focuses on the elimination of the violation. Failure to prevent the problem from recurring, once the licensee knows of it, is to "permit " by failure to take preventive action.

The argument that the prior violation was remote is unavailing. The relatively short passage of time between the end of the stayed period and the violations in the present case, coupled with evidence that a waitress was aware it was occurring suggests a serious lack of oversight on appellant's part, and a breach of her duty to prevent drink solicitation from occurring.

It does not appear that the ALJ used the prior discipline as an aggravating factor. Rather, it is clear that he intended to apply the principle stated *in Laube v. Stroh, supra*. In our view, he did so correctly.

ORDER

This matter is remanded to the Department for such further proceedings as may

be necessary and appropriate in light of our comments herein.[5]

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[5] 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.