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

AB-8985
File: 48-402397 Reg: 08068817

KIM THI BUI, dba Johnny B's
2500 Sycamore Drive, Building A, Antioch, CA 94509,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: July 1, 2010
San Francisco, CA

ISSUED AUGUST 18, 2010

Kim Thi Bui, doing business as Johnny B's (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked her license for failure to maintain workers' compensation insurance, a violation of Labor Code section 3700.5, subdivision (a); possession of gambling paraphernalia, a violation of Penal Code section 337a, subdivision (a); and having contaminated bottles of spirits in violation of Penal Code section 347b.

Appearances on appeal include appellant Kim Thi Bui, appearing in propria persona, and the Department of Alcoholic Beverage Control, appearing through its counsel, Sean Klein.

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[1]The decision of the Department, dated December 12, 2008, is set forth in the appendix.

PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on October 8, 2003. On May 27, 2008, the Department filed an accusation charging that in 2007 it was discovered that appellant failed to maintain workers' compensation insurance (Count 1), that items used for gambling were found on the premises (Counts 2 - 5), that contaminated bottles of spirits were located behind the bar (Counts 6 and 7) and that employees had not been qualified to be managers as required by Department rules (Counts 8 - 10).

At the administrative hearing held on October 22, 2008, documentary evidence was received, and testimony concerning the accusations was presented by Casey Tinloy, an investigator for the Department; Marsha Shaw, a deputy commissioner for the Labor Department; Richard Perry, an employee of appellant; Earl Miller, an independent entertainment promoter; and appellant.

Subsequent to the hearing, the Department issued its decision which determined that the violations charged in Counts 1 - 7 were proved and no defense was established. Counts 8, 9 and 10 were dismissed.

Appellant filed a letter brief in which she asserts she was unaware of the requirement that she carry workers' compensation insurance for her employees, having relied on her bookkeeper to handle all matters relating to obligations to her employees. She also denies any knowledge of gambling at the premises. Appellant's letter brief does not address the issue of contaminated bottles of spirits.

DISCUSSION

I

Appellant maintains that she was uninformed about the requirement of workers' compensation insurance, having relied on a bookkeeper to guide her in matters involving employee-related requirements, but that she acquired workers' compensation insurance once she was made aware of the requirement. She now understands the importance and necessity of this requirement.

The administrative law judge (ALJ) cites Labor Code section 3700.5, subdivision (a), "[t]he failure to secure workers[']] compensation insurance 'by one who knew, or because of his or her knowledge or experience should be reasonably expected to have known, of the obligation.'" (Leg. Basis for Dec. III), as the applicable standard in this matter. He then ignores the language of the statute, treating it as a strict liability or per se rule when he writes: "[a]s the owner of a business and the employer of four employees, Respondent should be reasonably expected to have known of her legal obligation to secure workers[']] compensation insurance for her employees." (Det. of Issues I.)

The record contains no evidence of appellant's knowledge or experience to contradict her sworn testimony that she did not know about the requirement. Instead, the ALJ applied strict liability because appellant has employees. This is not the standard. The testimony of the deputy labor commissioner and Exhibit 3 establish that appellant was assessed a fine in the amount of $5,000, the fine was paid, and appellant obtained workers' compensation insurance to the satisfaction of the Labor Department. There is no evidence that the Labor Department is requesting a further penalty in the form of a license revocation, or that there was previous contact with this department

that would support the conclusion that appellant knew or should have known about this requirement previously. Indeed, if there had been previous contact, the penalty assessed by the Labor Department would have been much greater. (See Lab. Code, §3700.5, subd.(b).)

The ALJ viewed the failure of appellant to carry workers' compensation insurance to be "egregious" (Det. of Issues V) and appears to equate egregiousness with moral turpitude. In doing so he adopted the Department's view that failure to maintain workmen's compensation insurance is a moral turpitude violation: "The Department believes that the acts at this premises – in particular failure to maintain workmen's compensation insurance, *a moral turpitude violation* [emphasis added] – warrants the most severest [*sic*] of penalties." [RT 76.] The Department, however, fails to offer any authority for its position that the failure to obtain workers' compensation insurance rises to the level of moral turpitude, or any evidence that appellant knew or should have known about the requirement.

In *Rice v. Alcoholic Beverage Control Appeals Board* (1979) 89 Cal.App.3d 30, 36-37 [152 Cal.Rptr. 285], the court discussed moral turpitude and the various offenses which may or may not be classified as crimes of moral turpitude:

> The elusive concept of "moral turpitude" has long been the subject of judicial scrutiny; our courts have grappled with the amorphous term in a variety of factual contexts largely involving disciplinary proceedings. [Citations.] [¶] Notwithstanding its frequency of use as a legislatively imposed standard of conduct for purposes of discipline, the concept by nature defies any attempt at a uniform and precise definition. . . . [¶] While not every public offense may involve conduct constituting moral turpitude without a showing of moral unfitness to pursue a licensed activity [citation], conviction of certain types of crimes may establish moral turpitude as a matter of law. [Citation.] Thus, moral turpitude is inherent in crimes involving fraudulent intent, intentional dishonesty for purposes of personal gain or other corrupt purpose [citations] but not in other crimes which neither intrinsically reflect similar inimical factors nor demonstrate a

> level of ethical transgression so as to render the actor unfit or unsuitable to serve the interests of the public in the licensed activity.

In surveying the various cases discussed by the court, offenses such as fraud, bribery, grand theft, extortion, and willful tax evasion are examples of crimes involving moral turpitude, because they involve intentional dishonesty for personal gain and/or fraudulent intent. On the other hand, failure to file income tax returns is *not* a crime of moral turpitude because the requisite intent is lacking.

Even if the Department had argued (which they did not) that revocation was within its discretion in regards to protecting public welfare and morals, the court qualified this discretion in *Martin v. Alcoholic Beverage Control Appeals Board* (1961) 55 Cal.2d 867, 876, 880 [13 Cal.Rptr. 513, 518]:

> [T]he discretion to be exercised by the department under section 22 of Article XX of the Constitution "is not absolute but must be exercised in accordance with the law, and the provision that it may revoke [or deny] a license 'for good cause' necessarily implies that its decisions should be based on sufficient evidence and that it should not act arbitrarily in determining what is contrary to public welfare or morals." (*Weiss v. State Board of Equalization* (1953), 40 Cal.2d 772, 775 [256 P.2d 1], quoting from *Stoumen v. Reilly* (1951), 37 Cal.2d 713, 717 [234 P.2d 969].)
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> [¶] . . . [¶]
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> [T]he determining factor in upholding original decisions by the department (or by its predecessor Board of Equalization) was whether there was substantial evidence on which reasonable minds might differ as to whether the denying or granting of the license would or would not be contrary to public welfare and morals. It is, however, the declared rule that neither in the case of revocation of an existing license nor in denying an application for a license can the department act arbitrarily or without a showing of good cause.

The ALJ states: "[Appellant's] failure to secure such insurance was contrary to public welfare or morals and constitutes cause for suspension or revocation . . . ." (Det. of Issues I). However, he reaches this conclusion without any evidence that appellant

knew or should have known of the requirement to have workers' compensation insurance, or that such failure was a willful attempt to circumvent the law. Instead, the ALJ has obviated the need for evidence by arbitrarily applying a strict liability standard.

"Under the cited constitutional and statutory provisions the propriety of the penalty is a matter vested in the discretion of the Department, and its determination may not be disturbed unless there is a clear abuse of discretion." (*Harris v. Alcoholic Beverage Control Appeals Board* (1965) 62 Cal.2d 589, 594 [43 Cal.Rptr.633, 637].)

In the instant case, appellant relied upon a bookkeeper to advise her regarding matters such as taxes, unemployment insurance and other employment-related requirements; however, she was unaware of the requirement to maintain workers' compensation insurance. Once appellant was contacted by the Labor Department and informed of the requirement to carry workers' compensation insurance, she immediately complied - in addition to paying a hefty fine. Ordinarily a licensee's cooperation and positive actions to correct the problem would have been considered as mitigating factors in determining the penalty, as outlined in the Appendix to rule 144 (Cal.Code Regs., tit. 4, §144), but in this case they were not.

The Department argues that appellant should have known about the requirement to have workers' compensation insurance just because she has employees; even if that were true, the failure to maintain workers' compensation insurance is simply not a crime of moral turpitude when there is no willful intent to break the law. In this case, the Department arbitrarily treated the offense as one of moral turpitude per se, citing no legal authority in support of this treatment, and ignoring the evidence of mitigation. We conclude that the Department abused its discretion and did not show good cause for revoking this license.

II

Appellant contends that the gambling paraphernalia found on the premises were simply items found in a large envelope - perhaps picked up by the janitor or left behind by a patron - and that she had no knowledge of the items or of any instances in which gambling took place in her establishment.

Appellant's denials of involvement in gambling at the premises do not refute the evidence of gambling paraphernalia found during a search of a cabinet behind the bar. If the gambling activities were carried on by an employee, appellant would be vicariously responsible. However, there is no direct evidence of appellant's personal involvement with, knowledge of, or connection to the gambling paraphernalia, or indeed any evidence that the paraphernalia belonged to an employee.

CONCLUSION

Department rule 144 does not prescribe any specific penalty for failure to carry workers' compensation insurance. Since this offense is not a crime of moral turpitude, and good cause has not been shown that continuance of the license is contrary to public welfare and morals, we think an order of revocation is excessive, and an abuse of discretion. Further, rule 144 calls only for suspension if gambling is proved, and in this case aggravation is not appropriate because there is no direct evidence of appellant's personal involvement with the activity. Viewing the various violations separately or together, it is our view that an order of revocation is excessive and constitutes an abuse of discretion.

ORDER

The decision of the Department is reversed as to penalty and remanded for reconsideration of the penalty in accordance with the foregoing discussion.[2]

SOPHIE WONG, MEMBER
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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