

	Link to Final Agency Decision
	OAH Docket No. 8-1201-17662-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF
EMPLOYMENT AND ECONOMIC DEVELOPMENT
STATE SERVICES FOR THE BLIND

In the Matter of the Appeal of Judy Bush	FINDINGS OF FACT, CONCLUSIONS AND RECOMMENDATION
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This matter came on for hearing before Administrative Law Judge Eric L. Lipman commencing at 9:30 a.m. on January 17, 2007, at the offices of the State Services for the Blind, 2200 University Avenue West, Suite 240, St. Paul, Minnesota. The hearing record closed on January 31, 2007, following the receipt of Post-Hearing submissions from the parties.

Tricia Matzek, Assistant Attorney General, 445 Minnesota Street, Suite 900, St. Paul, Minnesota 55101, appeared on behalf of the State Services for the Blind (the Agency or SSB). Judy Bush, 217 Nebraska Avenue West, No. 105, Saint Paul, Minnesota 55117, appeared on her own behalf and without counsel (Appellant).

STATEMENT OF THE ISSUES

1. Did SSB show good cause for termination of Appellant's license for failure to operate according to Minn. R. 3321.0300 and the Operator Agreement dated February 14, 2005?

Based upon the evidence in the hearing record, and the submission of the parties, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Appellant is legally blind and qualifies for the opportunity to operate a vending stand under the Business Enterprises Program (BEP). The BEP is operated and managed by SSB.

2. As part of the BEP, the agency enters into agreements with other government entities for opportunities to manage and operate vending machines in the offices that are leased or owned by these other government agencies.

When the opportunity to provide vending machine services is secured, SSB makes these business opportunities available to blind vendors under the BEP.¹

3. In 2005, SSB and Appellant entered into an agreement for Appellant to operate Stand # 77, which included vending machine operations at a number of locations in the Federal Courts Building in Minneapolis, Minnesota. The Operation Agreement sets forth a number of contractual obligations that the BEP Vending Stand Operator must fulfill. In relevant part, the Operating Agreement obliges the Vending Stand Operator:

1(a) To devote his best energies and full time to the conduct of this business and to notify the State Licensing Agency in case of sickness or inability to continue and not to abandon the business without first giving sixty (60) days written notice to the State Licensing Agency;

....

1(d) To conduct the business at all times in accordance with Rules To Govern All Vending Stands and Business Enterprises of the State Licensing Agency, Minnesota Rules Chapter 3321, which are incorporated by reference, and made part of this contract;

1(e) To conduct the business in accordance with the permit or contract granting the State Licensing Agency the authority to establish this vending stand, see attachment(s) B. Dress Code; C. Location Permit, which are incorporated by reference, and made part of this contract....²

4. Following the execution of the Operator Agreement for the Federal Courts Building, and by later Addendum to the Operator Agreement, Appellant was granted the opportunity to manage and operate the vending machines at the State Services of the Blind headquarters in St. Paul.³

5. During the course of the next several months, problems arose with Appellant's performance under the contract; particularly as to her reporting, record-keeping and machine stocking responsibilities. By way of an electronic mail message on January 2, 2006 she acknowledged to BEP officials her lapses in attending to the needs of the vending machine business, stating that "sometimes it's just too hard."⁴

¹ See, Exhibit 3.

² *Id* (emphasis omitted).

³ Testimony of P. Benson; see also Ex. 3A.

⁴ Ex. 4.

6. As part of its own review of Ms. Bush's performance, and the mounting number of oral and written complaints received from SSB's partner agencies, it was clear to SSB that Ms. Bush was not meeting the performance objectives of the Operator Agreement. Among the noted deficiencies were that the vending machines were not cleaned properly or regularly; that there were shortages of product in the machines; that proof of the payment of sales tax had not been rendered and that perishable food products were not dated in accordance with state law. SSB informed Appellant of the nature of these complaints.⁵

7. When SSB officials raised performance issues with Ms. Bush, she often pointed to health-related difficulties as a barrier to better performance.⁶

8. In January of 2006, SSB officials detailed the process for Ms. Bush to apply for a temporary medical leave from the Business Enterprises Program.⁷

9. In March of 2006, Ms. Bush submitted a written request for a medical leave from the program. During the leave period, she proposed that she would maintain administrative duties relating to the stands, but that Appellant's niece and two of Appellant's friends would fill and service the various vending machines.⁸

10. While Appellant was on medical leave, SSB continued to receive complaints as to the performance of Appellant's employees in servicing the vending machines.⁹

11. Following Ms. Bush's return from medical leave, in late March of 2006, her performance under the contract remained sub-standard.¹⁰ In the period following her return from medical leave, Appellant was sent notices that she was in default of her reporting obligations under the contract on eight different occasions.¹¹

12. On the morning of August 7, 2006, SSB officials reached Ms. Bush by telephone and demanded both her attention to the vending machines in her stand and that she personally appear at SSB offices with business records that were past due for submission. A few hours after this call, Ms. Bush telephoned SSB officials to inform them that she was *en route* to the hospital; that she would

⁵ See, Exs. 4, 5 and 29.

⁶ Exs 2, 4, 9, 11 and 14.

⁷ Ex 5.

⁸ Ex 10.

⁹ Exs. 10A, 15, 16, 17 and 18.

¹⁰ Ex. 19.

¹¹ Exs. 21 through 28.

like to apply for a general leave from the program; and that her niece would be dropping off the keys to the vending machines at SSB offices.¹²

13. On August 8, 2006, Ms. Bush's niece arrived at the SSB offices and returned the keys to the vending machines that were associated with Ms. Bush's Operator Agreement.¹³

14. On August 11, 2006, SSB issued notice to Ms. Bush that as a result of her continued non-compliance with her contractual obligations, her operator's license was revoked.¹⁴

15. By successive letters, each timely filed, Appellant sought both an administrative review of her revocation and then later a contested case appeal before an Administrative Law Judge.¹⁵

Based upon these Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. Appellant received due, proper and timely notice of the time and place of the hearing. The SSB has complied with all relevant procedural notice requirements.

2. SSB and the Administrative Law Judge are authorized to hear this matter pursuant to Minn. Stat. §§ 14.50 and 248.07 and Minn. R. 3321.0400 and 3321.1200.

3. Appellant has the burden to prove, by a preponderance of the evidence, that she has complied with the terms of the various agreements and applicable rules and that the SSB has failed to show good cause for her license to be revoked.

4. Among the duties that Appellant, Ms. Bush, assumed when she executed the Operator Agreement was to:

- a. Maintain stocks of products in vending machines and to ensure that those products are dated and fresh;
- b. Maintain the cleanliness of vending machines and the areas adjacent to the vending machines;

¹² Ex. 11.

¹³ Testimony of P. Benson.

¹⁴ Ex. 1.

¹⁵ Exs. 30, 35 and 36.

- c. Maintain accurate records relating to vending machine operations;
- d. Timely provide records relating to vending machine operations;
- e. Timely provide payments due under the Operator Agreement; and
- f. Provide 60 days notice to SSB in advance of “abandoning the business.”¹⁶

5. Under the terms of the Operator Agreement and applicable law, if a Vending Stand Operator does not comply with the terms of the agreement, SSB may take corrective action, up to and including, revocation of the operator’s license to operate a vending stand through the program.¹⁷

6. Appellant has not shown, by a preponderance of the evidence that she has complied with provisions of the Operator Agreement.

7. Further, Appellant is in violation of Minn. R. 3321.1000, subps. (2) (A), (2) (B), (2) (C), (2) (D) and (2) (F).

8. Each of Appellant’s failures to provide account information within 40 days of the close of the month being documented constitutes a separate default under the Operator Agreement.¹⁸

9. Because Appellant’s actions and omissions have the potential to damage the operation, integrity, and reputation of the BEP, there is good cause for the revocation of the agreement between Appellant and SSB under Minn. R. 3321.0300 and 3321.0500.

Based upon these Conclusions, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

¹⁶ Ex 3; *accord*, Minn. R. Part 3321 (2005).

¹⁷ See, Minn. Stat. § 248.07 (8) and (10) (2006); Minn. R. 3321.0300 (2005); Ex 3, Operator Agreement at 1 (a).

¹⁸ See, Minn. R. 3321.1000 (3) (A) (2005); *see also*, Minn. R. 3321.1000 subparts (2) (C) and (3) (E) (2005); Ex 3, Operator Agreement at 1 (b) and 1 (c).

RECOMMENDATION

Based upon these Conclusions, the Administrative Law Judge recommends that: The determination by the SSB that Appellant's license is subject to immediate revocation should be AFFIRMED.

Dated: March 2, 2007

s/Eric L. Lipman

ERIC L. LIPMAN
Administrative Law Judge

Reported: Taped, Six Cassettes
No transcript prepared

NOTICE

This report is a recommendation, not a final decision. The Director of the State Services for the Blind will make the final decision after a review of the record. The Director may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the final decision of the Director shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Director. Parties should contact Cathy Carlson, Director, Administrative Services, State Services for the Blind 2200 University Ave. West, St. Paul, Minnesota, to learn the procedure for filing exceptions or presenting argument.

If the Director fails to issue a final decision within 90 days of the close of the record, this Report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Director must notify the parties and the Administrative Law Judge of the date on which the record closes.

Under Minn. Stat. § 14.63, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first-class mail or as otherwise provided by law.

MEMORANDUM

While acknowledging a wide-ranging, and lengthy set of defaults in her performance under the Operator Agreement, Ms. Bush makes two key claims in her appeal.

Appellant's main argument is that the return of the vending machine keys to SSB in August of 2006 did not constitute "abandonment" of her obligations under the Operator Agreement – principally because she hoped to return to active management of the business at some date in the future.

While Ms. Bush invites a very narrow parsing of the word "abandon," her arguments fail. First, Appellant's cramped use of the word "abandon" is at odds with the remainder of the contract. Reading the Operator Agreement as a whole, it is clear that the risk of any short-term unavailability – whether it is due to disability, illness or other calamity – is a risk that the Vending Stand Operator assumes under the Agreement. As Ms. Bush reads the Agreement, however, the SSB, its staff, or perhaps the SSB's partner agencies, bears this risk. Such a reading of the Operator Agreement is unreasonable.

Moreover, the word "abandon," as it is commonly and ordinarily used, includes those surrenders which are less than permanent transfers to another person.¹⁹ Accordingly, even if Ms. Bush hoped to return to management under the Operator Agreement in a week, or a month, or at her next convenience, the unambiguous import of the return of her keys to SSB was that neither Ms. Bush, nor her employees, was going to perform duties under the Operator Agreement for some period of time. Such conduct constitutes "abandonment" of her vending business as that word is commonly used and understood.

Appellant's second argument is essentially a plea for further opportunities to perform – at least as long as she could earn her way out the arrearages that have accrued in favor of various creditors. Without minimizing the severity of the setbacks Ms. Bush has suffered – whether financial or otherwise – given the number and duration of her defaults over an 18-month period, it is not unreasonable for the agency to consider the broader needs of Business Enterprise Program and its relationships with partner agencies.²⁰ In this case, SSB had no genuine alternatives. Without the ability to undertake oversight of Appellant's contract performance, and then left to continue the operations on its own after a firm demand for the missing records was made, neither the law nor equity begrudges SSB's termination of this License.

Appellant has failed to demonstrate that the termination of her License is not based upon good cause.

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¹⁹ See, e.g., *The American Heritage Dictionary*, 67 (2d Ed. 1982) (among the usages of the word "abandon" include "to withdraw one's support or help from, especially in spite of a duty, allegiance or responsibility" and "to give up by leaving or ceasing to operate").

²⁰ Compare, e.g., Minn. R. 3321.0500 (2) (2005) ("The operator's agreement to operate a vending stand may be revoked ... in those instances where the operation, integrity, or reputation of the program may be damaged") with Exs. 4 through 9 and 10A through 18.