ISSUED JULY 28, 1996

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

KUI H. YOUNG and MICHAEL S. YOUNG dba Shanghai Mike's 1960 Santa Fe Avenue Long Beach, CA 90810, Licensees/Appellants, v. THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6565 File: 47-147531 Reg: 95031789 Administrative Law Judge at the Dept. Hearing: Robert Neher Date and Place of the Appeals Board Hearing: May 1, 1996 Los Angeles, CA

Kui H. Young and Michael S. Young, doing business as Shanghai Mike's (appellants), appealed from a decision of the Department of Alcoholic Beverage Control[1] which revoked appellants' on-sale general public eating place license, for permitting employees to solicit alcoholic beverages and other drinks for their own consumption under a profit-sharing plan; for permitting employee-dancers to expose, touch, caress, or fondle their breasts and genitals; for permitting employee-dancers to perform acts of

[1]The decision of the department dated August 10, 1995, is set forth in the appendix.

simulated sexual intercourse; and for allowing patrons to touch the genitals of the employee/dancers; being contrary to the universal and generic public welfare and morals provisions of the California Constitution, Article XX. §22, arising from the violation of Business and Professions Code §§24200, subdivisions (a) and (b); 24200.5, subdivision (b); and 25657, subdivisions (a) and (b); and also in violation of the California Code of Regulations, Title IV, §§143; 143.2, subdivision (3); 143.3, subdivision (1) (a) through (c); and 143.3, subdivision (2) (rules 143, etc.).

Appearances on appeal included appellants Kui H. Young and Michael S. Young, appearing through their counsel, Joseph D. Beason; and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellant's license was issued on November 21, 1983. Thereafter, the department instituted an accusation against the license on December 20, 1994. An administrative hearing was held on May 31, 1995, at which time oral and documentary evidence was received.

Subsequent to the hearing, the department issued its decision which determined that appellants had employed females under a profit-sharing plan to solicit drinks; permitted female employee-dancers to expose and fondle their breasts and genitals; permitted patrons to touch and fondle the breasts and genitals of the female employee-dancers; and permitted the female employee-dancers to perform acts of simulated

sexual intercourse. The department's decision revoked appellants' license. Thereafter, appellants filed a timely notice of appeal.

In their appeal, appellants raised the following issues: (1) the finding that the soliciting females were employed by appellants was supported only by incompetent hearsay evidence; and (2) the findings that appellant permitted lewd acts by dancers was not supported by substantial evidence.

DISCUSSION

I

Appellants contended that the finding that the soliciting females were employed by appellants was supported only by incompetent hearsay evidence.

As conflicts are present in the testimony, it is a rule that appellate review does not "...resolve conflict[s] ...between inferences reasonably deducible from the evidence." (Brookhouser v. State of California (1992) 10 Cal.App.4th 1665, 1678 [13 Cal.Rptr. 658].) The appeals board is bound to resolve conflicts of evidence in favor of the department's decision, and must accept all reasonable inferences which support the department's findings. (Kruse v. Bank of America (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 271]; Kirby v. Alcoholic Beverage Control Appeals Board (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857], a case where there was substantial evidence supporting the license-applicant's position as well as the department's position; Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control (1968) 261 Cal.App.2d

181 [67 Cal.Rptr. 734, 737]; and Gore v. Harris (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

The record establishes that on October 13, 1994, both Yvonne Vu and Maria Robinson performed a "pat-down" search of Investigator Shawn Collins (R.T. 33, 24) with Vu becoming satisfied that Collins was not a "cop" (R.T. 36).

The record, exclusive of any hearsay, establishes that on October 13 and 14, 1994, Vu and Robinson repeatedly solicited and received alcoholic beverages from department investigators Collins and Pete Parszik that were purchased for consumption by the women (R.T. 24, 26, 27, 37-40, 64, 69, 70, 73, 82-83, 86-87, 145-146). Although the investigators were charged $2.75 for their beverages (R.T. 17), the drinks solicited by Vu and Robinson cost $10 (R.T. 27, 40-41, 69, 71-72, 88-89, 145; 147). Contemporaneous with the receipt of the drinks solicited by Vu and Robinson, each of these two women received a token (a nickel marked with red lettering) from the bartender serving the solicited beverages (R.T. 66, 72-73, 75, 84, 86, 88, 146). These tokens were retained by the women soliciting the beverages. In Vu's case, they were retained in a purse that was suspended from her neck (R.T. 66-67, 73, 86). Only Vu and Robinson were given such tokens by the serving bartender when they received their beverages (R.T. 77-78), and these tokens were kept behind the bar (R.T. 93) with appellant Michael Young's knowledge (R.T. 93-94).

Robinson also performed the functions of a waitress in that she accepted money from Collins, and returned to his location on the premises, bringing him a beer and the correct change (R.T. 28, 30).

In addition to the foregoing evidence, hearsay testimony was received that Vu told investigators that she had been working on appellants' premises for three weeks (R.T. 23), and further, that appellant Michael Young was her boss and that she received $5 of each $10 beverage she successfully solicited (R.T. 159, 162). Additional hearsay testimony was received that appellants' bartender told the investigators that appellant Michael Young allowed Vu and Robinson to solicit drinks and that the red-lettered nickels were tokens used to tabulate the number of drinks each woman successfully solicited (R.T. 153). Hearsay was also received as a statement by another bartender that the employees (Vu and Robinson) and the premises split the proceeds of the $10 drinks the women solicited, with $5 going to the women and $5 to the bar (R.T. 105-106).

Testimony was received that appellant Michael Young admitted to the investigators that he was aware of the B-girl activity and, further, he accepted responsibility for Vu and Robinson's solicitation of drinks[2] (R.T. 153).

Section 11513(c) of the Government Code provides, in pertinent part, as follows: "Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions."

While the "red-lettered nickel evidence" here may not be as persuasive as the tabulation of the B-girls' drinks in the case of Cornell v. Reilly (1954) 127 Cal.App.2d 178 [273 P.2d 572], where a bartender made notations on a pad located beside the

[2]Such a declaration by appellant is a "declaration against interest" and not hearsay; it is admissible to prove the truth of the matter asserted.

cash register whenever one of the women successfully solicited a drink, it certainly is as compelling as the use of the stirring rods in the case of Cooper v. State Board of Equalization (1955) 137 Cal.App.2d 672 [290 P.2d 914], where a non-reusable stirring rod was placed in each women's drink whether it was a whiskey, a mixed drink, or wine. The stirring rods collected by the women were seen to be "cashed in."

The totality of the circumstances, exclusive of hearsay, supports a finding that the women's payments were linked to the solicited drinks on some systematic basis.

In determining whether the evidence sustains the charges, a determination should be made first as to whether the evidence supported a finding that appellant had established a system of solicitation with payment to the women for each drink solicited.

The evidence sustains the fact that a system of solicitation existed at appellants' bar. Indeed, appellant Michael Young admitted it. The combination of the circumstances of Vu and Robinson receiving tokens, their retention of those tokens, the exorbitant price of the beverages, and Robinson's performance of the duties of a waitress, leads to but one conclusion--both Vu and Robinson were employed by appellants to solicit drinks.

II

Appellants contended that the findings that appellant permitted lewd acts by dancers was not supported by substantial evidence.

When, as in the instant matter, the findings are attacked on the ground that there is a lack of substantial evidence, the appeals board, after considering the entire

record, must determine whether there is substantial evidence, even if contradicted, to reasonably support the findings in dispute. (Bowers v. Bernards (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925].) "Substantial evidence" is defined as relevant evidence which reasonable minds would accept as a rational support for a conclusion. (Universal Camera Corporation v. National Labor Relations Board (1950) 340 US 474, 477, 95 L.Ed. 456, 71 S.Ct. 456; and Toyota Motor Sales USA, Inc. v. Superior Court (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].)

The record substantiates that the patrons "hooted and hollered" and "were going wild" in response to the conduct of Bryant and Vu in exposing their breasts and genitals and performing other lewd acts on stage in the premises (R.T. 47, 142, 143, 149). Despite the uproarious response to Bryant's and Vu's lewd misconduct, the record does not contain evidence that appellant did anything to either determine the cause of the patrons' reaction or to stop the misconduct.

Vu's misconduct off-stage at the bar was that Vu exposed her breasts and vagina to Collins (R.T. 49, 51, 52, 55), and placed Collins' hand to her vagina when he tendered a monetary "tip" (R.T. 54). Immediately thereafter, Vu solicited a "tip" from Parszik (R.T. 57) and exposed her crotch to that investigator (R.T. 57, 58).

Appellant Michael Young was on the premises when the lewd conduct by Bryant and Vu occurred (R.T. 32, 33, 40, 139, 149). Appellant was seated at the bar and in close proximity to the two investigators during Vu's misconduct (R.T. 55, 56). Appellants may not avail themselves of the defense found in the case of McFaddin San Diego 1130, Inc. v. Stroh (1989) 208 Cal.App.3d 1384 [257 Cal.Rptr. 8], inasmuch

that appellants had not done the efforts as shown by the licensees in the McFaddin case.

We determine that the findings were supported by substantial evidence.

CONCLUSION

The decision of the department is affirmed.[3]

RAY T. BLAIR, JR., CHAIRMAN
JOHN B. TSU, MEMBER
BEN DAVIDIAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[3]This final order is filed as provided by Business and Professions Code §23088, and shall become effective 30 days following the date of this filing of the final order as provided by §23090.7 of said statute for the purposes of any review pursuant to §23090 of said statute.