ISSUED FEBRUARY 19, 1997

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

8250 SUNSET BOULEVARD, INC.- dba The Body Shop 8250 Sunset Boulevard West Hollywood, CA 90046, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)))))))))))))	AB-6575 File: 47-79274 Reg: 95032394 Administrative Law Judge at the Department Hearing: Rodolfo Echeverria Date and Place of the Appeals Board Hearing: July 1, 1996 Irvine, CA

8250 Sunset Boulevard, Inc., doing business as The Body Shop (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which conditionally revoked appellants' on-sale general eating place license for permitting the touching, fondling, or caressing of a dancer's breasts and for not complying with the requirements of a bona fide public eating place, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from violations of Business and Professions

[1]The decision of the Department dated September 21, 1995, is set forth in the appendix.

Code §§23038 and 23396, and §143.3, subdivision (1)(b), of Title 4 of the California Code of Regulations.

Appearances on appeal include appellant 8250 Sunset Boulevard, Inc., appearing through its counsel, Joshua Kaplan; and the Department of Alcoholic Beverage Control, appearing through its counsel, David Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general eating place license was issued on September 14, 1979. Thereafter, the Department instituted an accusation against appellant's license on March 16, 1995. Appellant requested a hearing.

An administrative hearing was held on August 23, 1995, at which time oral and documentary evidence was received. At that hearing, it was established that appellant permitted an entertainer to lean down from the stage and place a patron's face between her breasts [RT 23, 25]. It was also established that appellant was not operating as a bona fide public eating place in accordance with the license requirements, since meals were not served or available.

Subsequent to the hearing, the Department issued its decision which determined that appellant's license should be conditionally revoked, revocation being stayed for a probationary period of two years, with an actual suspension for ten days and indefinitely thereafter until appellant proved that it was in compliance with the requirements for a bona fide public eating place. Appellant thereafter filed a timely notice of appeal.

In its appeal, appellant raises the following issues: (1) The findings are not supported by substantial evidence; (2) the Department accumulated counts improperly; (3) appellant was not liable for the acts of the dancer involved since she was an independent contractor; (4) Business and Professions Code §24210, providing for the Department's own Administrative Law Judges, is unconstitutional; and (5) the penalty imposed constitutes cruel and unusual punishment.

DISCUSSION

I

(a) Appellant contends that its entertainer, Ms. Bracken, did not permit the touching of her breasts, or, alternatively, that her breasts were covered and therefore were not actually touched within the meaning of California Code of Regulations, Title 4, Chapter 1, §143.3, subdivision (1)(b) [Rule 143.3(1)(b)]. The rule prohibits "acts of or acts which simulate ... the touching ... on the breast ...."

As to whether or not a patron touched Ms. Bracken's breast, Ms. Bracken and the investigator gave diametrically opposed testimony. The ALJ clearly believed the investigator, not Ms. Bracken. The credibility of a witness's testimony is properly determined by the trier of fact, and an appellate tribunal will defer to such determinations unless they are clearly unreasonable and are in excess of the reasonable discretion accorded the trier of fact. (Brice v. Department of Alcoholic Beverage Control (1957) 153 Cal.2d 315 [314 P.2d 807, 812]; Lorimore v. State Personnel Board (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640, 644].)

Appellant's alternative argument is that the rule does not prohibit anyone from touching the dancer's bra, and that is all that happened. Rule 143.3 does not say that the prohibition against touching applies only to an unclothed body part, and we find no justification for reading such a requirement into the rule. Whether clothed or not, the dancer's breasts were touched and the rule was violated.

(b) Appellant contends that it was operating as a bona fide public eating place, but that during the various Department inspections, none of the investigators asked to see the freezer in an adjoining room that was allegedly fully stocked with food [RT 124-125]. In essence, appellant argues that the operation at the premises did conform to the law.

The relevant portion of Business and Professions Code §23038[2] requires that the licensee maintain "a place which is regularly and in a bona fide manner used and kept open for the serving of meals" and which has facilities to prepare actual meals.[3]

The question of what constitutes a "bona fide restaurant" under earlier Alcoholic Beverage Control provisions was discussed in the case of Covert v. State Board of Equalization (1946) 29 Cal.2d 125 [173 P.2d 545]. The Covert court stated that a determination of whether a premises was operating in a bona fide

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[2] The full text of this section is set out in the appendix.

[3] Bona fide is defined as "sincere...made with earnest or wholehearted intent...genuine...not specious or counterfeit..." (Webster's Third New International Dictionary, 1986, page 250.)

manner was made by viewing "physical characteristics and the actual mode of operation of the business" (173 P.2d at 549), and in addition to equipment, there must be "personnel appropriate to a restaurant, together with a real offer or holding out to sell food whenever the premises are open for business, [and] there must also be actual and substantial sales of food . . . ." (173 P.2d at 550.) Quoting another decision, the Covert court stated: "'Substantial [food service], as distinguished from incidental, sporadic, or infrequent, service is required.'" (173 P.2d at 550.)

In the course of several inspections during 1994 and January 1995, investigators were told that the kitchen had not been open in months [RT 25, 27] and that no food had been served for four to five years [RT 55]. The kitchen facilities inspected by the investigators appeared to be functional but unused, and there was no food appropriate for meal preparation [RT 30-32, 38-40, 59-61, 67-69].

Appellant's president, Mr. Rofeh, apparently told the investigators on three occasions in October 1994 and January 1995 that the kitchen was not open because it was being remodeled [RT 30, 60, 67]. The investigators, however, saw no evidence of any kitchen remodeling at any of those times [RT 31, 43, 62-63, 67]. At the administrative hearing, Mr. Rofeh testified that the remodeling had started before May 1994, but was not finished until January 1995 [RT 123, 136], and that during that time meals were not prepared for customers "to the extent that it used to be before" [RT 137].

Appellant makes much of the testimony of Mr. Rofeh that "food was available" and that the kitchen was fully functional. What is missing, however, is the regular and bona fide use of the premises for serving meals. The mere ability to serve food is not enough.

II

Appellant argues that the Department failed to notify appellant in a timely manner that it was in violation of the terms of its license as a general eating place, but extended the investigation so that it could accumulate more counts for the accusation. The dates referred to in the accusation were May 3, 1994; October 14 and 15, 1994; and January 12, 1994. On all of these dates, except October 14, 1994, the investigators spoke to Mr. Rofeh about the lack of food service and on each occasion they were told that the kitchen was being remodeled.

Appellant contends that the Department "accumulated counts" in order to impose "a substantial suspension of the license rather than disciplinary action less draconian. This is exactly the process condemned by Walsh [v. Kirby (1974) 13 Cal.3d 95 [188 Cal.Rptr.1].]" (App. Opening Br. 24.) Even if we were to consider this suspension "draconian," which we do not, the Department clearly put appellant on notice that appellant was not conducting its business as a bona fide eating place in accordance with its license requirements when the investigators spoke with appellant's president. We can easily infer that the Department actually "bent over backwards" to give appellant the benefit of the doubt with regard to the question

of remodeling by not issuing an accusation right away, allowing appellant time to finish the alleged remodeling and to resume serving meals. The Department's patience with appellant cannot now be used against it.

In any case, a violation of the terms of a bona fide eating place license seems to require more than one occasion to justify discipline. Where, as in this case, the kitchen exists, the Department might be reasonably questioned if it attempted to discipline on a single incident of no food service, since there could be legitimate reasons why an otherwise bona fide eating place would not or could not serve food on a particular day. Appellant's contention regarding improper accumulation of violations is rejected.

III

Appellant argues that the contract the dancer had with appellant specified that she was an independent contractor. The violation for which discipline is being imposed against this licensee, however, is one that may be committed by "any person," not just by an employee.

Appellant also argues that, with regard to a non-employee, it cannot be held to have "permitted" the actions if there was no "knowledge of the conduct and of its prohibited nature" (App. Opening Br. 36). Appellant cites the case of Laube v. Stroh (1992) 2 Cal.App.4th 364 [3 Cal.Rptr.2d 779] in support of its position. That case was actually two cases--Laube and De Lena, both of which involved restaurants/bars--consolidated for decision by the Court of Appeal.

The Laube portion dealt with surreptitious contraband transactions between patrons and an undercover agent--a type of patron activity concerning which the licensee had no indication and therefore no actual or constructive knowledge--and the court ruled that the licensee should not have been required to take preventive steps to suppress that type of unknown patron activity.

The DeLena portion of the Laube case concerned employee misconduct, wherein an off-duty employee sold contraband on the licensed premises on four separate occasions. The court held that the absence of preventive steps was not dispositive, and that the licensee's penalty should be based solely on the imputation to the employer of the off-duty employee's illegal acts.

Appellant's extensive discussion of the case is really irrelevant. The decision in that case did not set out a general "rule" that is applicable to any situation wherein a licensee permits an illegal activity. Rather, the decision in Laube is based upon the facts in that particular case. Obviously, neither of the situations in Laube are at similar to the present one. The DeLena portion of the case, however, could easily be read to speak against appellant's position on this issue. Accordingly, we reject appellant's contention.

IV

Appellant argues that Business and Professions Code §24210, which allows the Department to use an administrative law judge (ALJ) appointed by the Department, instead of one from the Office of Administrative Hearings, read in

conjunction with Government Code §§ 112512 and 11517, allows "the Department to act as the investigator of alleged misconduct, the prosecutor of alleged misconduct, the preliminary trier-of-fact and law as to the very misconduct it alleges and the ultimate decision maker as to the validity of its own aforesaid accusations" (App. Opening Brief 38). Appellant contends that this is unconstitutional in that it violates due process and equal protection.

Article III, section 3.5 of the California Constitution prohibits any administrative agency from declaring a statute unconstitutional or unenforceable unless an appellant court has previously made such a determination. Therefore, we decline to address this contention.

V

Appellant argues that it was an unconstitutional violation of due process for the Department to impose the same penalty as originally proposed in a stipulation and waiver form (that appellant apparently rejected), when the decision ultimately adopted by the Department found that one of the three counts in the accusation was not established. Appellant argues that if the originally imposed penalty is not reduced by one-third, it "is extraordinarily disproportionate thus constituting cruel or unusual punishment." (App. Opening Br. 50.)

The propriety of the penalty imposed rests within the discretion of the Department unless there is an abuse of the Department's discretion. (Rice v. Alcoholic Beverage Control Appeals Board (1979) 89 Cal.App.3d 30 [153 Cal.Rptr.

285, 291].) However, where an appellant raises the issue of an excessive penalty, the Appeals Board will examine that issue. (Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183].)

Appellant has given us no reason other than hyperbolic assertions to support his claim of an excessive penalty in this case. The rejection by the ALJ of one of the counts does not mean that the other counts, by themselves, cannot support the discipline imposed and this is, in fact, what the ALJ determined. (See Determination of Issues IV.) The Department has obviously exercised its discretion reasonably.

CONCLUSION

The decision of the Department is affirmed.[4]

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

[4]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.