ISSUED JUNE 12, 1998

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

FUNTASTIC, INC. dba Cactus Jack's/Fritz That's Too 710 East Katella Avenue Anaheim, CA 92805, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6920 File: 47-131835 Reg: 95033296 Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria Date and Place of the Appeals Board Hearing: April 1, 1998 Los Angeles, CA

Funtastic, Inc., doing business as Cactus Jack's/Fritz That's Too (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which ordered its license revoked, with revocation stayed conditioned upon a three-year probationary period and an actual suspension of 30 days, for, among other things, having permitted dancers to expose their breasts, genitals, and anuses to patrons, 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

[1]The decision of the Department, dated July 3, 1997, is set forth in the appendix.

Professions Code §24200, subdivisions (a) and (b), and Rules 143.2 and 143.3 (4 Cal.Code Regs. §§143.2 and 143.3).

Appearances on appeal include appellant Funtastic, Inc., appearing through its counsel, Joshua Kaplan, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on December 31, 1982. Thereafter, the Department instituted an accusation against appellant charging in 14 separate counts that on four different dates in January and February, 1995, appellant permitted violations of Rules 143.2 and 143.3 involving five different entertainers who performed private dances for undercover police officers (counts 1 though 11 and 13 through 15). One additional count (count 12) charged that appellant permitted the premises to be used for the solicitation of prostitution.

An administrative hearing was held on May 5, 1997, at which time oral and documentary evidence was received. At that hearing, Anaheim police officer Steven Walker and vice investigator Randall West described private dances performed for them by female entertainers, in the course of which various displays of nudity and touching occurred in violation of Rules 143.2 and 143.3.

Officer Walker testified that on January 13, 1995, an entertainer with the stage name “Tasha,” while performing a so-called “table dance,” exposed her breasts and buttocks, displayed her anus, and, as she was seated on his lap, moved

her hips back and forth, touching his legs and groin area [RT 15-18, 32]. Investigator West testified that, on that same night, a dancer using the name "Coral" exposed her breasts, touched, fondled and caressed her breasts and body, displayed her anus and pubic hair, and placed her hand in his groin area [RT 46-49].

Walker testified that he returned to the premises on January 27, 1995, at which time a female dancer named "Jules" or "Jewels" performed two table dances for him, exposing her breasts twice during each of the dances [RT 21-27]. Walker's final visit to the premises occurred on February 10, 1995. At that time he encountered an entertainer named Suzanne, who, according to his testimony, grabbed her bra and exposed her breasts, which were bare except for metallic buttons covering her nipple and areola. One of the buttons fell off when she did this, and both fell off while she performed a table dance for him a few minutes later [RT 29-31]. Walker also testified that later in the dance Suzanne turned her back to him and, removing a G-string from her buttocks, bared a smaller G-string beneath it, on either side of which her anus could be seen [RT 31].

West testified that he also returned to the premises on February 10, 1995, and was approached by a woman named "Trisha," who suggested a table dance, telling him she gave the "nastiest" table dances there. He agreed to a $20 table dance, in the course of which Trisha exposed her pubic area and pubic hair to him, touched and caressed her buttocks, breasts and thighs, and sat on his lap, at one

point turning so that her buttocks faced him, pulling her thong to the side and thereby exposing the cleft of her buttocks, her anus and vaginal area [RT 51-54].

Appellant's vice-president and secretary, a 50-percent shareholder in appellant corporation, testified that all of the dancers are "volunteer entertainers", or independent contractors, compensated only by way of tips from patrons, and are required to read and sign a form which summarizes, in lay language, the prohibitions of Rules 143.2 and 143.3.[2] Morrison testified further that the job responsibilities of four managers and over 20 security personnel include supervision of the dancers to ensure the dancers comply with the rules governing their attire and conduct, which are also posted in their dressing rooms and reviewed with the dancers periodically. Dancers who violate the rules are suspended or terminated. Dancers must submit an application which discloses their true names and addresses; the form setting forth the rules requires both their stage names and true names.

Subsequent to the hearing, the Department issued its decision which determined that all of the counts charging violations of Rule 143.2 and 143.3 had been established, but count 12, involving the solicitation of prostitution, had not been established.

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[2] Morrison's testimony, consisting of testimony given in another Department proceeding involving this appellant, was, pursuant to stipulation, submitted as if given in the instant case. Although the precise terms of the stipulation were not made part of the record, it must be assumed, for the stipulation to be meaningful, that the parties intended that it be considered as if Morrison was discussing the factual situation currently under examination.

Appellant thereafter filed a timely notice of appeal, and raises the following issues: (1) the accusation was vague and uncertain; (2) a passive licensee cannot be charged with imputed liability where independent contractors engaged in the misconduct; (3) the failure of the accusation to identify the performers rendered it constitutionally defective; (4) the decision is not supported by the findings and the findings are not supported by substantial evidence; (5) the penalty imposed is cruel and unusual; and (6) Business and Professions Code §24210 is unconstitutional.

DISCUSSION

I

Appellant contends that the failure of the accusation to identify by other than stage names the dancers who engaged in the prohibited conduct deprived it of the ability to defend itself, because it was unable to investigate or interrogate them because it did not know who they were.

This is a sham argument. Morrison admitted in his testimony that appellant would have been able to search its records and identify the dancers involved [Exhibit C at pp. 132-133]. He testified each "volunteer dancer" is required to complete an application form, which is maintained in a file by appellant's bookkeeper [Exhibit C at p. 128]. He clearly could have reviewed those documents, just as he admitted he had done previously.

A somewhat similar contention was rejected in Raab v. Department of Alcoholic Beverage Control (1960) 177 Cal.App.2d 333, 334 [2 Cal.Rptr. 26, 27],

where an accusation did not identify the particular store clerk who sold the alcoholic beverage to the minor.

II

Appellant asserts it cannot be held liable for the dancers' conduct because (1) the dancers were "volunteer entertainers" or independent contractors; (2) it lacked knowledge of the alleged violations; and (3) the dancers were not personally subject to liability under Rule 143.2 or 143.3. Appellant argues that a scheme which imposes liability where the active participant is not subject to criminal liability, and the misconduct itself is not within the exercise of the activities licensed, is unconstitutional.

Appellant argues that absent per se criminal misconduct during the exercise of the license privilege, there can be no independent contractor misconduct imputed to a licensee. Appellant cites Rob-Mac, Inc. v. Department of Motor Vehicles (1983) 148 Cal.App.3d 793 [196 Cal.Rptr. 398]; Ford Dealer's Association v. Department of Motor Vehicles (1982) 32 Cal.3d 347 [185 Cal.Rptr. 453]; and Yu v. Alcoholic Beverage Control Appeals Board (1992) 3 Cal.App. 4th 286 [4 Cal.Rptr.2d 280].

We have reviewed these cases. None of them provides support for the broad proposition put forth by appellant. Indeed, each can be read to the contrary.

In Rob-Mac Inc. v. Department of Motor Vehicles, the court upheld a license suspension where an auto dealership salesman had sold motor vehicles after resetting the odometer in violation of the Vehicle Code. The court rejected the

independent contractor defense, holding that the owner of a license is obligated to see that the license is not used in violation of the law. The court held further that, by analogy to the tort law non-delegable duty theory, where an employer is under an affirmative duty by reason of his relationship to others, he cannot escape responsibility by delegating that duty to an independent contractor. The auto dealer's duty to protect the public against loss or damage by reason of fraud did not permit him to escape responsibility by delegating the details of his sales operation to an independent contractor.

By the same token, appellant has elected to provide a form of entertainment to its patrons which is the subject of strict rules regarding attire and conduct, the object of which is to protect the public welfare and morals by prohibiting certain forms of lewd and lascivious conduct. Appellant cannot escape liability if the dancers he provides, under whatever form of employment or contractual relationship, engage in conduct violative of those rules.

The court in Rob-Mac v. Department of Motor Vehicles acknowledged that there might be unusual circumstances where a licensee could escape responsibility for acts of an independent contractor, but stated that a licensee who has created a climate where wrongdoing is likely to occur, or has not made every effort to discourage wrongdoing, is not free from fault. Here the evidence clearly demonstrates that the licensee created a climate where wrongdoing is likely to occur, and has not made every effort to discourage it. Licensee "employed" female dancers, denominated "volunteer entertainers" or "independent contractors" to

provide sexually-oriented entertainment to mainly male patrons, and required them to depend solely on tips from satisfied customers. Under these circumstances, the dancers had the obvious incentive to challenge the limits placed upon them by the licensee's dress and conduct code. The record also reveals the existence of a more secluded second floor in the premises, where the dancers went to escape the scrutiny of security personnel, which facilitated the dancers in engaging in the prohibited conduct.[3] As the Department argued at the administrative hearing, it was as if management was responding to the activity with a wink and a nod.

Similarly, the California Supreme Court, in Ford Dealers' Association v. Department of Motor Vehicles (1982) 3 Cal.3d 347 [185 Cal.Rptr. 453], upheld a regulation which extended to oral representations made by salespersons to customers, rejecting the contention that the regulation was either not authorized by statute or unconstitutional. In the course of so doing, the court pointed out that, under the statute in question, the fact that the employees might have been held liable as individuals "was not necessary to the conclusion that liability should be imputed to their employers." (Ford Dealers' Association v. Department of Motor Vehicles, supra, at 361.)

Yu v. Alcoholic Beverage Control Appeals Board involved the contention that because the licensees were unaware of the activities which led to disorderly house

[3] The testimony also indicates that, with respect to several of the incidents, the conduct occurred within a relatively short distance from security guards ostensibly on the alert to spot such conduct. [See RT 17, 54-55].

charges, they should not have their licenses revoked or suspended. The court disposed of this argument by pointing out that cases have held knowledge is not an element of proving the existence of a condition warranting revocation, and where there is evidence that the licensee's agents or employees knew about the illegal conduct, their knowledge is imputed to the licensee.

Rule 143.3 makes no mention of employees, but instead governs whenever a licensee permits "any person" to perform the proscribed acts. (Compare Oxman v. Department of Alcoholic Beverage Control (1957) 153 Cal.App.2d 740 [315 P.2d 484, 490], where the court rejected the contention that, since the persons soliciting drinks were independent contractors, there could be no violation of Business and Professions Code §24200.5.)

Appellant argues that it cannot be deemed to have permitted misconduct in the licensed premises without knowledge of the occurrence and its prohibited nature. Appellant boldly asserts that "liability without knowledge of the conduct and of its prohibitive nature is now conceptually and legally impossible," relying on Laube v. Stroh (1992) 2 Cal.App.4th 364 [3 Cal.Rptr.2d 779], and the analysis in that case of the decision in McFaddin San Diego 1130, Inc. v. Stroh (1989) 208 Cal.App.3d 1384 [257 Cal.Rptr. 8]. Neither of those cases stands for such a broad proposition.

McFaddin San Diego 1130, Inc. v. Stroh (1989) 208 Cal.App.3d 1384 [257 Cal.Rptr. 8], concerned several transactions which occurred on the premises involving patrons selling or proposing to sell controlled substances to undercover

agents. While the licensee and its employees did not know of the specific occurrences, they knew generally of contraband problems and had taken numerous preventive steps to control such problems. The McFaddin court held that since (1) the licensee had done everything it reasonably could to control contraband problems, and (2) the licensee did not know of the specific transactions charged in the accusation, the licensee could not be held accountable for the incidents charged.

The case of Laube v. Stroh (1992) 2 Cal.App.4th 364 [3 Cal.Rptr.2d 779], was actually two cases--Laube and Delena, both of which involved restaurants/bars--consolidated for decision by the Court of Appeal.

The Laube portion of the decision dealt with surreptitious contraband transactions between patrons and an undercover agent--a type of patron activity concerning which the licensee had no actual or constructive knowledge. Although holding that a licensee was not strictly liable for every event which occurred on the licensed premises, the court also declared (2 Cal.App.4th 379):

> "A licensee has a general, affirmative 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 a failure to take preventive action."

Appellant should have been keenly aware of the possible existence of unlawful activity, since it had been disciplined previously by the Department for

very similar activities in 1993, in a proceeding finalized by the California Supreme Court's denial of review in January, 1996. Having been placed on notice by earlier violations of a similar nature, appellant had an affirmative duty to prevent further violations.

Although appellant posted written rules of dress and conduct, there is no evidence any strict monitoring procedures were implemented. For example, there was no evidence of any written rules requiring employees to monitor the dancers, or use of other means, such as electronic surveillance or undercover personnel. Given the climate created by the kind of entertainment offered, and the manner in which it was offered, that dancers could be expected to exceed proper bounds was clearly foreseeable.

Nonetheless, appellant submits that notions of fundamental fairness encompassed in the 14th Amendment are violated by subjecting it to sanctions where the dancers are not personally liable for their conduct. Appellant forgets that the 21st Amendment gives the states wide authority to regulate the sale of alcohol. (See California v. LaRue (1972) 409 U.S. 109 [93 S.Ct. 390].) Although the amendment does not supersede all other provisions of the United States Constitution in the area of liquor regulations, its broad sweep has been recognized as conferring more than the normal state authority over public health, welfare and morals. (California v. LaRue, supra, 409 U.S. at 114-115 [93 S.Ct. at 394-395].) In that case the Court upheld Rule 143.3 as a permissible means of curtailing social problems associated with nude dance bars. In so doing, the court cautioned

against second-guessing the efficacy of regulatory measures, stating "wide latitude as to choice of means to accomplish a permissible end must be accorded to the state agency that is itself the repository of the State's power under the 21st Amendment." (409 U.S. at 116 [93 S.Ct. at 396].) (See also Ford Dealers' Association v. Department of Motor Vehicles (1982) 3 Cal.3d 347 [185 Cal.Rptr. 453], and text, supra, p.8.)

III

Appellant contends there is not substantial evidence in the record to support the findings, and the findings do not support the decision.

"Substantial evidence" is relevant evidence which reasonable minds would accept as a reasonable support for a conclusion. (Universal Camera Corporation v. National Labor Relations Board (1950) 340 US 474, 477 [71 S.Ct. 456] and Toyota Motor Sales USA, Inc. v. Superior Court (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].)

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].)

Appellate review does not "resolve conflicts in the evidence, or between inferences reasonably deducible from the evidence." (Brookhouser v. State of California (1992) 10 Cal.App.4th 1665, 1678 [13 Cal.Rptr.2d 658].)

Appellant's attack on the evidence is premised in large part on a contention which has already been discussed, i.e., that the licensee did not encourage or permit such conduct.

Appellant suggests that because the nudity displays and the touching of breasts, buttocks and genitals were only fleeting, they do not warrant discipline. The issue is not how long each violation occurred, but whether it occurred, and, for the most part, appellant does not question the evidence that the conduct occurred.

Appellant suggests that because the police remained clothed, as did the entertainers accused of touching their breasts and buttocks, there can be no violation. However, the fact that there was fabric covering the dancer's body, or that the police officers were clothed while their genitals were touched and fondled, is no defense. If the dancers' conduct did not constitute the precise touching, fondling and caressing contemplated by the rule, it can hardly be said not to have simulated it, which the rule also forbids.

IV

Appellant contends that the penalty - a stayed revocation and a 30-day suspension - constitutes cruel and unusual punishment.

The Appeals Board will not disturb the Department's penalty orders in the absence of an abuse of the Department's discretion. (Martin v. Alcoholic Beverage Control Appeals Board & Haley (1959) 52 Cal.2d 287 [341 P.2d 296].) 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 offers four reasons in support of its contention: (1) it argues it is unfair to impose the same penalty as originally sought by the Department prior to the hearing, even though what appellant contends is the "most serious" charge - solicitation of prostitution by one of the dancers - was not established; (2) the violations occurred, if at all, for only a few seconds; (3) the violations were committed by independent contractors; and (4) the dancers did everything possible to hide their conduct from appellant's oversight.

The only argument that has not been addressed in the previous discussions is that involving the fact that one of the 15 counts of the accusation was not sustained.

It is well-settled that the Department is not bound by the terms upon which it was willing to settle prior to hearing. When there is a settlement:

> "[t]he department, acting on the basis of written reports, secures a prompt determination, at little administrative cost; the licensee avoids the risks that testimony at a formal hearing may paint him in a worse light than the reports, and, also, avoids the cost and delay of a hearing. The licensee who rejects a proffered settlement hopes that the hearing will clear - or at least partially excuse - him and he hopes that, even if he is not found innocent, he will be dealt with less harshly than the department proposes. But if the department can never, no matter what a hearing may develop, assess a penalty greater than that proposed in its offer, a licensee has little to lose by rejection. Only the cost of the hearing would be risked; otherwise he would not be harmed. In that situation, licensees would be induced to gamble on the chance of prevailing at the trial, while the department would lose much of its inducement to attempt settlement. The law should not permit that kind of tactic by an accused." (Court's emphasis.)

(Kirby v. Alcoholic Beverage Control Appeals Board (1971) 17 Cal.App.3d 255, 261 [94 Cal.Rptr. 514].)

The law is also well settled that administrative proceedings are not criminal in nature, and not governed by the law applicable to criminal cases.

> "The object of an administrative proceding aimed at revoking a license is to protect the public, that is, to determine whether a licensee has exercised his privilege in derogation of the public interest, and to keep the regulated business clean and wholesome. Such proceedings are not conducted for the primary purpose of punishing an individual. (Citation omitted.) Hence, such proceedings are not criminal in nature."

(Cornell v. Reilly (1954) 127 Cal.App.2d 178, 187 [273 P.2d 572, 576-577]; see also Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control (1968) 261 Cal.App.2d 181, 190 [67 Cal.Rptr. 734, 740].)

Given its remedial purpose, appellant's stayed revocation and suspension does not violate the rule against cruel and unusual punishment. (People v. Valenzuela (1991) 3 Cal.App.4th Supp. 6, 8 [5 Cal.Rptr.2d 492].)

While it is true that one count of the accusation fell by the wayside, it is also true that the Department proved fourteen instances of rule violations, occurring on four different days. In addition, appellant had been disciplined previously for the same type of rule violations. Under such circumstances, it does not seem that a 30-day suspension is so arbitrary and capricious as to constitute an abuse of discretion.

V

Appellant contends that Business and Professions Code §24210, the section which authorizes the Department to delegate the power to hear and decide to an administrative law judge appointed by the director, is unconstitutional.[4]

The Appeals Board, like other state agencies, lacks the power, by virtue of article 3, §3.5, of the California Constitution, to declare a statute unconstitutional. We therefore decline to consider this issue.

CONCLUSION

The decision of the Department is affirmed.[5]

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

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[4] Appellant's brief on this issue complains of hearsay allegedly admitted over objection, and evidence of custom and practice on the part of an identified dancer having been excluded. We are unable to find these subjects in the record.

[5]This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate 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.