

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

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|-------------------------|---|--------------------------|
| KDM ENTERTAINMENT, INC. |) | AB-7029a |
| dba Kokomo's |) | |
| 17927 MacArthur Blvd. |) | File: 47-185953 |
| Irvine, CA 92614, |) | Reg: 97038827 |
| Appellant/Licensee, |) | |
| |) | Administrative Law Judge |
| v. |) | at the Dept. Hearing: |
| |) | Sonny Lo |
| |) | |
| DEPARTMENT OF ALCOHOLIC |) | Date and Place of the |
| BEVERAGE CONTROL, |) | Appeals Board Hearing: |
| Respondent. |) | June 6, 2000 |
| |) | Los Angeles, CA |

KDM Entertainment, Inc., doing business as Kokomo's (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which revoked its license for violations of Business and Professions Code §24200, subdivisions (a) and (b), and Penal Code §242. This is appellant's second appeal from a Department order of revocation in this matter.

Appearances on appeal include appellant KDM Entertainment, Inc., appearing through its counsel, Joshua Kaplan, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

¹*The decision of the Department, dated December 23, 1999, is set forth in the appendix.*

FACTS AND PROCEDURAL HISTORY

The Department's original order was based upon appellant's prior disciplinary record and a determination that appellant's assistant head of security, Jeremy Cripe, through the use of excessive force, committed a battery on the person of Shane Lawson, a violation of Penal Code §242.²

The Appeals Board affirmed the Department's order, but the Court of Appeal for the Fourth Judicial District annulled the order of revocation. The court held that the Department erred in finding that Cripe had no right to intervene in the altercation, but agreed with the Department that Cripe had used excessive force. For this reason, it found it necessary to remand the matter to the Department for reconsideration of the penalty:

"While the use of excessive force is a battery justifying revocation, given all the facts and circumstances here, the Department mistakenly thought Cripe had no right to intervene in defense of Hill at the outset of the altercation. In this it was wrong. And we have no way of answering this question: Would the Department have revoked the license had it properly found the use of force was initially lawful and only became unlawful when it was excessive? Thus, we must require the Department to reconsider the penalty imposed in that light."³

Following the appellate court's decision and its remittitur, the Department entered a new decision and order. In its decision, the Department acknowledged the court's purpose in remanding the matter, and after stating that it had reviewed the entire record, including the court's decision, and having specifically considered

² Cripe intervened in an altercation between another security guard and a companion of Lawson, and administered a choke hold on Lawson, rendering him unconscious. When Cripe released Lawson, Lawson fell and injured his head. *The Department rejected Cripe's claim of self defense.*

³ *KCM Entertainment, Inc. v. Alcoholic Beverage Control Appeals Board, et al., G024265 (unpublished opinion of Court of Appeal of Fourth Appellate District dated September 29, 1999.)*

Cripe's initial right to intervene, once again ordered appellant's license revoked. Appellant has filed a timely appeal, and now contends: (1) the count of the accusation deemed sustained fails to state a legally cognizable basis for disciplinary action; (2) the decision was not supported by the findings, and the findings are not supported by substantial evidence; (3) appellant's conduct was privileged; and (4) the penalty is excessive.

DISCUSSION

Given the prior history of this case, appellant's contentions invite little consideration.

We find it useful to consider what the appellate court had to say about the initial order of revocation. To that end, we have set forth in the text which follows that part of the court's unpublished opinion dealing with penalty.

"Kokomo's next argues the penalty of license revocation constitutes cruel or unusual punishment because it is 'out of all proportion to the offense and is extraordinarily disproportionate[.] Kokomo's makes the point that it is being punished for 'misconduct it did not authorize, took every reasonable precaution to prevent and never ratified.' There is, concededly, some truth to Kokomo's characterization of the misconduct at issue.

"The Department specifically found Cripe's act of choking Lawson was against Kokomo's policy regarding the use of force by its bouncers. The Department also found that Cripe had been told 'not to strike or use excessive force on patrons.' Other than that instruction, however, Cripe had been given no training as a bouncer. In light of the use of untrained bouncers in an establishment of the sort shown here, the Department had every reason to reject Kokomo's claim that it 'took every reasonable precaution to prevent' Cripe's battery of Lawson.

"But the question remains whether that battery justifies the penalty of revocation. The Attorney General argues the battery must not be considered in isolation, but rather viewed in the context of Kokomo's prior violations. The Attorney General contends that Kokomo's 'incredible disciplinary history warrants the penalty of revocation.'

"The Board also specifically pointed to that history in affirming the

revocation order. It cited three instances of prior discipline between 1992 and 1994 for violations, such as lewd conduct, offering free goods, and serving minors. The Board found particularly significant, however, the 1995 incident in which a bouncer conspired with two patrons to batter a third patron. It noted there were ‘two matters involving battery or a conspiracy to commit battery upon patrons within a span of a little over two years.’ The Board concluded Kokomo’s ‘has displayed a history of employing aggressive, untrained or inadequately trained, security personnel who have engaged in unlawful acts involving physical assaults on members of the public.’ That is a damning assessment.

“Like the Board, though we find the Department’s revocation decision harsh, we cannot label it an abuse of discretion in light of Kokomo’s disciplinary history.⁴ A liquor license is not a vested property right but a privilege that can be revoked to protect the public welfare or morals, ‘quite independently of any showing of fault of the licensee.’ *Yu v. Alcoholic Bev. etc. Appeals Bd.* (1992) 3 Cal.App.4th 286, 297.)

“Kokomo’s directly bears some of the fault for Cripe’s use of excessive force. It failed to adequately train him as a bouncer. As the court stated in *Laube v. Stroh* (1992 2 Cal.App.4th 364), ‘A licensee has a general affirmative duty to maintain a lawful establishment. Presumably, this duty imposes upon a 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 the 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.

“Kokomo’s has already been disciplined once for a bouncer’s participation in a plan to batter a patron. The nightclub was certainly aware of the need to instruct employees in the appropriate means of controlling unruly customers so that a battery did not occur in the future. After all, in addition to previous unfortunate incidents, it continued to mix alcohol with youthful patrons, some of them minors, in large numbers with all the attendant risks in that.

“Obviously, the general instructions given to Cripe, ‘No striking, don’t use excessive force,’ were simply not enough. He inflicted unjustifiable physical force with the potential to cause great bodily injury in apparent ignorance of the risks and with indefensible disregard for the health and safety of a patron.

“Kokomo’s argument that the penalty of revocation was disproportionate

⁴ [Court’s footnote 6] “We also note certain additional violations not considered by the Department or the Board. In our unpublished decision in *KDM Entertainment, Inc. v. Alcoholic Beverage Control Appeals Board* (Feb. 26, 1998, G021549), we set aside a finding by the Department that Kokomo’s kept a disorderly house, but we upheld findings that Kokomo’s permitted the premises to become a law enforcement problem and failed to take adequate remedial steps. In that writ proceeding we annulled the order of revocation and remanded for certain findings and reconsideration of the penalty.”

to the conduct and disciplinary history, is not irrational, but neither is the converse. Reasonable persons of good will could honestly disagree on that point. A tipsy patron was put at considerable bodily risk by Kokomo's ineptly schooled employee who believed he was acting on his employer's behalf as he understood his mission.

"In such situations, particularly in matters involving the safety of the public, we do not substitute our judgment for that of an administrative agency; we defer to its presumed expertise. (See, e.g., *Bryce v. Board of Medical Quality Assurance* (1986) 184 Cal.App.3d1471, 1476.)

"Consequently, while it might not have been the call we would have made, we cannot find the Department committed 'a manifest abuse of [its] discretion' in revoking Kokomo's license. (*Ibid.*)"

Concluding with its direction to the Department to reconsider its penalty order on the premise that Cripe's actions were initially lawful, the court has unmistakably left the final call to the Department, and the Department has made it.

Appellant's arguments amount to no more than a collateral attack on matters already decided by the Appeals Board and the District Court of Appeal. Appellant has provided no reason why those determinations should be disregarded or set aside.

ORDER

The decision of the Department is affirmed.⁵

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

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

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD