ISSUED DECEMBER 28, 1999

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

4805 CONVOY, INC. dba Dream Girls 4805 Convoy Street San Diego, CA 92111, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7357 File: 47-203381 Reg: 98043263 Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria Date and Place of the Appeals Board Hearing: December 2, 1999 Los Angeles, CA

4805 Convoy, Inc., doing business as Dream Girls (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked appellant's on-sale general public eating place license, with revocation stayed for a probationary period of one year on condition that a 35-day suspension be served, for permitting acts of simulated oral copulation, exposure of vaginal lips, and exposure of the buttocks while not on a stage as prescribed by the rules of the Department, being contrary to the universal and generic public welfare and morals

[1]The decision of the Department, dated February 11, 1999, is set forth in the appendix.

provisions of the California Constitution, article XX, §22, and Business and Professions Code §§24200, subdivisions (a) and (b), arising from a violation of 4 California Code of Regulations, §§143.3(1)(a), 143.3(1)(c), and 143.3(2).

Appearances on appeal include appellant 4805 Convoy, Inc., appearing through its counsel, William R. Winship, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellant's license was issued on October 16, 1987. Thereafter, the Department instituted an accusation against appellant charging the above referenced violations. An administrative hearing was held on November 30, 1998, at which time oral and documentary evidence was received.

Subsequent to the hearing, the Department issued its decision which determined that of the four counts alleged in the accusation, three were true, and the allegations of prior violations were true.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) the Department's decision is not based on credible evidence, and (2) the penalty is excessive.

DISCUSSION

I

Appellant contends the Department's decision is not based on credible evidence.

Detective Kerry Mensior and a fellow detective from the San Diego Police Department, entered the premises on November 5, 1997. Detective Mensior testified that an entertainer named Tara Niederhouse, during a "couch dance" with

a patron, simulated oral copulation (Finding IV-A).[2] The dancer, standing in front of the patron, dropped to her knees, ran her hands down from his chest to hips, looked directly into the eyes of the patron, then with her head in his groin area apparently near his genitals, bobbed her head up and down. This occurred, the dancing and bobbing, at least four or five times during a 15 minute period [RT 49-50].

Officer Mensoir also testified that he purchased a "couch dance" (often called a "lap dance") from Jennifer Handy. During the dance, the officer was able to observe through her clothing, the lips of the dancer's vulva, and her buttocks [RT 57-59]. There are conflicts in the evidence as to the type of apparel worn by Handy.

The conflicts in the evidence mainly concern the type of clothing worn. Where there are conflicts in the evidence, the Appeals Board is bound to resolve them in favor of the Department's decision, and must accept all reasonable inferences which support the Department's findings. (Kirby v. Alcoholic Beverage Control Appeals Board (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857] (a case where the positions of both the Department and the license-applicant were supported by substantial evidence); Kruse v. Bank of America (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 271]; 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].) However, the

---

[2]Count 2 of the accusation (allegations of exposure of the buttocks by an entertainer) was found not established (Finding IV-C), based upon the dim lighting; the officer was 20 feet from the dancer, and the dancer was wearing opaque panties.

panties worn were opaque, and in the dim lighting, would cause great difficulty of seeing in the detail the alleged exposed body of Handy.

Appellant attempts to show that the officer's testimony is not credible, by showing it is inherently faulty and manufactured, over time:

a). Three days after the investigation, the officer prepared a written report of the incident, thereafter discarding his notes. The investigative report, admittedly, would not support the conclusion of simulated oral copulation.

b). 61 days thereafter, at a Department meeting, appellant's representative pointed out the weaknesses in the police report. That day, the Department contacted the officer who prepared a supplemental report. Appellant's brief makes some telling observations of the two reports:

> "Inexplicably, Officer Mensoir's first report did not contain any reference whatsoever to Ms. Neiderhouse having bobbed her head up and down, raising her head up and away from the customer's lap six to eight inches, lowering her head back into the customer's lap, or repeating this rhythmic movement at least five (5) complete times. (H.T. 24-25) In short, nearly three (3) months after and at the request of [Department] investigator Surls, Officer Mensoir substantially altered his original report to include observations in significant detail not contained in his original report. Under oath, Officer Mensoir used the second report to refresh his recollection, and unbelievably testified to these many additional details 'from memory' (H.T. 13-15)."
> (Appl. Brf. P. 5.)

Appellant also argues:

> "Finally, and perhaps more aggravating, Officer Mensoir testified at the department hearing to specific observations which did not appear in any of his three (3) written reports. (H.T. 87) Officer Mensoir never recorded that Ms. Neiderhouse touched a male patron in the chest area or slid her hands down to his hip area in any of his three (3) reports. (H.T. 87). Likewise, Officer Mensoir testified at the hearing that Ms. Neiderhouse touched parts of her body against a male customer, but never made any reference whatsoever to any such conduct in any of his three (3) written reports.

(H.T. 88) Given that Officer Mensoir's testimony took place more than 13 months after the subject event, and given the fact the Officer Mensoir testified to visiting as many as 15 licensed premises per shift, appellant respectfully asserts Officer Mensoir's testimony is simply not credible or capable of belief in the circumstances." (Appl. Brf. pp. 6-7.)

c). 43 days following the preparation of the second report (or a total of 107 days following the observations by the officer), and at the request of the Department, the officer prepared another (third) report.

The Department in Finding IV, alludes to the testimony of seeing something which the Department concluded could not have been seen. Given the dim lighting conditions, the time lapse between the gradually expanding factual recollections, against the backdrop of the entire record, the Department's carefully crafted findings of a less than credible record demands that we too not place much confidence in the accuracy of the record.

ORDER

The decision of the Department is reversed.[3]

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

---

[3]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 order as provided by §23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code §23090 et seq.