ISSUED JULY 16, 2000

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

JANAL'S ENTERTAINMENT, INC. dba Club Metro 5714 Mission Boulevard Riverside, CA 92509, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)))))))))))	AB-7385 File: 47-305657 Reg: 98043901 Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria Date and Place of the Appeals Board Hearing: May 4, 2000 Los Angeles, CA

Janal's Entertainment, Inc., doing business as Club Metro (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 25 days for appellant's agent or employee having committed battery on a patron of the premises, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, and Business and Professions Code §24200, subdivision (a), arising from a violation of Penal Code §242.

[1]The decision of the Department, dated March 18, 1999, is set forth in the appendix.

Appearances on appeal include appellant Janal's Entertainment, Inc., appearing through its counsel, Mark S. Sabbah, 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 April 4, 1995. Thereafter, the Department instituted an accusation against appellant charging that, on January 18, 1998, appellant's employee or agent, Michael Jared Adams, willfully and unlawfully used force or violence against the person of Richard Donald Flynn (Count 1). Count 2 alleged another instance of battery by one of appellant's employees, and Count 3 alleged that one of appellant's employees attempted to prevent or dissuade a victim or witness of a crime from making a report to a law enforcement agency.

An administrative hearing was held on January 11, 12, and 13, 1999, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that Count 1 was established, Count 2 was dismissed, and Count 3 was not established.

Appellant thereafter filed a timely notice of appeal, raising the following issues: (1) the findings are not supported by the evidence; (2) appellant did not "permit" illegal acts on the premises; (3) the ALJ erred in excluding the testimony of two of appellant's witnesses; (4) the record should be augmented by evidence of dismissal of a criminal complaint for battery; and (5) the penalty is excessive.

DISCUSSION

I

Appellant contends that the ALJ erred in failing to consider the "totality of the circumstances" in finding that Adams, one of the bouncers employed by appellant, committed a battery on Flynn, a patron of the premises.

Witnesses varied in their accounts of the events relating to Count 1, but the basic facts are relatively undisputed. On January 18, 1998, Flynn was a patron of Club Metro. Upon leaving, he went to his Jeep in the premises' parking lot and backed out of the parking place. It appeared to some of the witnesses that in backing up, Flynn struck a parked vehicle. A uniformed security guard for the premises stopped Flynn's car, told him he had struck another car, and an argument ensued during which Flynn was pulled out of his car and fell to the ground. Flynn was then handcuffed with this hands behind his back and a security guard had him sit down on the nearby curb. Adams, a bouncer, stayed near Flynn to watch him.

After about 15 minutes, Flynn, still handcuffed, stood up and started to walk toward his Jeep. Adams, who was right behind him, ordered Flynn to stop, which he did. Almost simultaneously, Adams placed his hand on Flynn's back and knocked Flynn's feet out from under him,[2] causing him to fall to the ground, landing on his back. Flynn then was pulled back to the curb, and a few minutes later the handcuffs were removed and he was allowed to leave.

The Administrative Law Judge (ALJ) found that "Flynn's hands were still handcuffed behind his back when this foot sweep occurred. Additionally, Flynn

[2] An action referred to as a "foot sweep."

was not trying to flee and he was not physically threatening Adams when this foot sweep occurred." (Finding III.)

Appellant's "totality of the circumstances" argument is really an assertion that the findings are not supported by substantial evidence, interwoven with attacks on the ALJ's credibility determinations and invitations to this Board to re-weigh the evidence.

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. The Appeals Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing.[3]

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].)

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[3]The California Constitution, article XX, § 22; Business and Professions Code §§23084 and 23085; and Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

"Substantial evidence" is relevant evidence which reasonable minds would accept as reasonable 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].)

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] (in which 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].)

"Battery" is defined in Penal Code §242 as "any willful and unlawful use of force or violence upon the person of another."

The parties appear to agree that appellant's employees were privileged to use reasonable force in detaining or restraining Flynn, but if Adams used unreasonable force, he committed battery. Whether the force used was reasonable depends upon "whether the force used would have been deemed necessary by a reasonable person in a similar situation." (People v. Blackshear (1960) 182 Cal.App. 2d 71 [5 Cal.Rptr. 618, 619].)

The only legal justification of battery is self defense. (People v. Mayes (1968) 262 Cal.App. 2d 195, 198 [68 Cal.Rptr. 476, 479].) "[N]o provocative act which does not amount to a threat or attempt to inflict injury, and no conduct or words, no matter how offensive or exasperating, are sufficient to justify a battery [citations]." (People v. Mayes, supra, 262 Cal.App. 2d at 197.)

Appellant argues vociferously that Flynn was troublesome, combative, swearing, and challenged appellant's employees to fight, and that Adams, knowing this, was justified in using the foot sweep to control Flynn. However, Adams's knowledge of Flynn's previous behavior, if in fact he had such knowledge, could not justify the use of unreasonable force at a later time when Flynn was clearly incapable of carrying out any threat he may have made.

There is absolutely no evidence that, at the time he did the foot sweep, Adams feared for his safety and felt he needed to protect himself. In any case, the use of force in self-defense is not tested by what Adams subjectively felt to be necessary, but by what a reasonable person in a similar situation would deem necessary. In addition, even if force were necessary, only reasonable force would be allowed.

It is difficult to see how any trier of fact could reach a conclusion other than that Adams used unreasonable force. Flynn was unarmed, he was handcuffed with his hands behind his back, he was walking away from Adams, and he stopped when Adams ordered him to, yet Adams knocked him to the ground from behind.

The ALJ's finding clearly was supported by substantial evidence and will be upheld by this Board.

II

Appellant contends the Department used an erroneous standard of strict liability in finding that appellant permitted the premises to be used in a manner contrary to public welfare and morals.

Appellant equates the present case with that in the recent case of Santa Ana Food Market, Inc. v. Alcoholic Beverage Control Appeals Board. (1999) 76 Cal.App. 4th 570, 576 [90 Cal.Rptr. 2d 523], where the court said that "where a licensee commits a single criminal act unrelated to the sale of alcohol, the licensee has taken strong steps to prevent and deter such crime and is unaware of it before the fact, suspension of the license simply has no rational effect on public welfare and morals." In Santa Ana Food Market, an employee, at great pains to hide the transaction from the licensee, surreptitiously and for her own personal gain committed food stamp fraud. The licensee had taken substantial measures to prevent such criminal activity by its employees.

Appellant contends that, as in Santa Ana Food Market, the acts of its employees neither directly involved, nor were adjuncts of, alcohol sales, and "the licensee, obviously was unaware of [Adams's] act before the fact." (App. Opening Br. at 16.) It also contends that, as in Laube, "there is no evidence that the licensee permitted, knew, or failed to take preventative action. In addition, it is inconceivable that the appellant would be able to foresee the act by Mr. Adams toward an unruly and clearly violent patron." (App. Opening Br. at 19.) We disagree.

Unlike Santa Ana Food Market, the illegal act of appellant's employee was not surreptitious and was not unrelated to the sale of alcohol: Adams used the foot sweep in the open, with a number people (as well as a video camera) observing, including at least appellant's chief of security and one of appellant's managers. This battery took place in the premises parking lot, an area clearly under appellant's control, and was perpetrated on a patron of the premises by one of appellant's own bouncers. This violent act easily fits in the category described by the Santa Ana court as "adjuncts of alcohol sales, such as gambling, prostitution, and drug use." (Santa Ana Food Market, Inc. v. Alcoholic Beverage Control Appeals Board., supra, 76 Cal.App. 4th at 575.)

Additionally, it appears that appellant was not unaware of the occurrence of fights and other disturbances on the premises, having been disciplined in 1996 for maintaining a disorderly house. In fact, appellant needed to employ a large security staff, made up of both armed, uniformed security guards and unarmed bouncers, "to keep the customers from fighting one another" [RT 373]. Even though appellant did not know that this particular incident would occur, it knew, or should have known, of the great potential for overreactions by employees when confronted by belligerent patrons. These types of incidents are all-too-common occurrences at premises that serve alcoholic beverages, and appellant's premises had the additional risk factor of large numbers of patrons.

Appellant also cites Laube v. Stroh (1992) 2 Cal.App. 4th 364 [3 Cal.Rptr. 2d 779] for the proposition that appellant cannot be held to have permitted Adams

to use unreasonable force unless it had some prior knowledge and failed to take preventive action.

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 with 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 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 on four occasions sold contraband on the licensed premises. The court held that the absence of preventive steps was not dispositive, but the licensee's penalty should be based solely on the imputation to the employer of the off-duty employee's illegal acts. The imputation to the licensee/employer of an employee's on-premises knowledge and misconduct is well settled in Alcoholic Beverage Control Act case law. (See Harris v. Alcoholic Beverage Control Appeals Board (1962) 197 Cal.App.2d 172 [17 Cal.Rptr. 315, 320]; Morell v. Department of Alcoholic Beverage Control (1962) 204 Cal.App.2d 504 [22 Cal.Rptr. 405, 411]; Mack v. Department of Alcoholic Beverage Control (1960) 178 Cal.App.2d 149 [2 Cal.Rptr. 629, 633]; and Endo v. State Board of Equalization (1956) 143 Cal.App.2d 395

The court in Laube v. Stroh, supra, said in regard to a licensee "permitting" unlawful activity:

> "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 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."

Laube v. Stroh, supra, is not helpful to appellant. The Laube portion of that decision is not applicable in this case, since Adams was an employee. Under the DeLena portion of Laube v. Stroh, the usual rule of the licensee's knowledge of, and imputed liability for, the on-premises acts of employees applies.

III

Appellant argues the ALJ erred by not allowing Cois Byrd, a non-percipient witness, to testify regarding appellant's security and by failing to grant a continuance to allow appellant to compel the attendance of another witness, Andrea Barnett, who had been subpoenaed but failed to appear.

Evidence Code §352 provides:

> "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

In addition, the Administrative Procedure Act, which governs the Department's hearings, provides that the Administrative Law Judge "has discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time." (Gov. Code §11513,

subd. (f).) Cases too numerous to require citation hold that a court has broad discretion in assessing whether the probative value of testimony will be outweighed by the delay it engenders and that the exercise of this discretion by the trial court is deferred to by a reviewing court unless there is a clear abuse of discretion.

Barnett was expected to testify regarding Count 1, as a percipient witness. However, five other percipient witnesses had already testified regarding that count. In addition, counsel for appellant could not say with any certainty what her testimony would be, since he had not yet interviewed her.

Appellant proposed to have Byrd, a former sheriff of Riverside County, testify as an expert witness regarding the manner in which appellant's security force handled the incident involving Flynn. He was not a percipient witness to the events of Count 1 and was not connected with appellant's security operation; his testimony would be based on his general knowledge of appellant's security operation and his viewing of the videotape. An expert witness had already testified for appellant regarding the use of force. It was unclear whether Byrd would also testify as to use of force [RT 401, 403].

The ALJ felt that the proffered testimony would have been cumulative and would not aid him in his determination. Given that seven witnesses (five percipient, one non-percipient, and one expert) had already testified for appellant with regard to Count 1, we cannot say the ALJ abused his discretion in his rulings regarding these witnesses.

IV

Appellant asks that the record be augmented by a certified copy of the dismissal of a criminal complaint against Michael Adams for battery. The dismissal is dated August 12, 1999, after the date of the administrative hearing and issuance of the Department decision in this matter.

Business & Professions Code §23084, subdivision (e), states that one of the questions the Appeals Board may consider on review is "[w]hether there is relevant evidence, which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before the department."

While it is true that this dismissal could not have been produced at the hearing, it is properly excluded from the record because it is not "relevant evidence." The dismissal of a criminal case can have no effect on a disciplinary proceeding against a licensee because the standard of proof in a criminal matter – beyond a reasonable doubt – is higher than the preponderance-of-the-evidence standard that is applicable in an license disciplinary matter.

In Cornell v. Reilly (1954) 127 Cal.App.2d 178 [273 P.2d 572], the court held that a not guilty verdict in a criminal case is not dispositive of the outcome in an administrative licensing hearing:

> "The somewhat related argument that Andrews' [the licensee's manager and bartender] acquittal in the criminal action constitutes a conclusive determination, binding in this proceeding, that such offenses had not been committed is equally without merit. Even if appellant had been charged criminally and acquitted, such acquittal would be no bar in a disciplinary action based on the same facts looking towards the revocation of a license. Traxler v. Board of Medical Examiners, 135 Cal.App. 37, 26 P.2d 710; Bold v. Board of Medical Examiners, 135 Cal.App. 29, 26 P.2d 707; Saxton v. State Board of Education 137 Cal.App. 167, 29 P.2d 873. Quite clearly, if

> the principle of *res judicata* is rejected where the defending party is identical in the two actions it necessarily follows that it is not *res judicata* when the prior acquittal is of a different party."

More recently, in Gikas v. Zolin (1993) 6 Cal.4th 841, 851, ft. 3 [25 Cal.Rptr. 2d 500], the California Supreme Court said:

> "Appellant argues that imposing administrative sanctions despite the dismissal of criminal charges would violate the constitutional prohibition against double jeopardy. The claim lacks merit. It has long been generally held that even an acquittal of criminal charges does not prohibit civil proceedings based upon the same underlying conduct. [Citations.]"

The dismissal in the criminal case has been properly excluded from the record.

V

Appellant argues that the penalty of 25 days' suspension is "grossly excessive" in light of the circumstances of the incident and the impact on appellant's 100 to 110 employees.

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 argues that the penalty should be less because there is no evidence that it permitted illegal acts or failed to take preventive action and that the conduct of Adams was "at most a reaction to a confrontational situation." Appellant's

argument relies on contentions that have been examined and rejected herein in the previous sections.

As far as the impact on appellant's employees, the Appeals Board is aware of the financial hardships that can ensue for both licensees and their employees when a substantial suspension is ordered. While a demonstrated hardship may be a consideration in the Board's review, the Board may not disturb a penalty order unless it is so clearly excessive that any reasonable person would find it to be an abuse of discretion in light of all the circumstances.

The penalty here, while heavy, is well within the bounds of the Department's discretion. The ALJ sustained only one count and so imposed a penalty that is considerably less than the revocation the Department originally wanted to impose. Although it is only one count, battery is a serious matter and warrants a serious penalty.

"If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within the area of its discretion." (Harris v. Alcoholic Beverage Control Appeals Board (1965) 62 Cal.App. 2d 589, 594 [43 Cal.Rptr. 633, 636].)

Appellant also has expressed concern that this decision will prompt the Department to reinstate the stayed penalty of revocation it imposed as part of appellant's prior discipline. The Board cannot address that issue at this time because the Department has not issued such an order. If the Department orders the reimposition of the stayed revocation, appellant may appeal to this Board from that order. At that time the Board would be able to review the Department's action

reimposing the stayed revocation to ensure that the Department did not act arbitrarily, but properly considered such factors as the similarity of the violations.

ORDER

The decision of the Department is affirmed.[4]

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

[4]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.