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

AB-7636

MVP SPORTS GRILL, INC. dba MVP Sports Grill
14160 Beach Boulevard, Westminster, CA 92683,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

File: 47-321019 Reg: 99047495

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: May 3, 2001
Los Angeles, CA

ISSUED JUNE 21, 2001

MVP Sports Grill, Inc., doing business as MVP Sports Grill (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 20 days for having violated a condition on its license limiting the level of entertainment noise, and for a dancer in its employ having "slapped" her buttocks while dancing, violations of Business and Professions Code §23804 and Department Rule 143.3 (1)(b).

Appearances on appeal include appellant MVP Sports Grill, Inc., appearing through its counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

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[1]The decision of the Department, dated April 27, 2000, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on February 7, 1997. Thereafter, on October 18, 1999, the Department instituted an accusation against appellant charging that appellant permitted dancers to engage in conduct violative of Rule 143.3(1)(b) (counts 1 and 3); permitted the showing of video transmissions which contained scenes of the conduct of the dancers, in violation of Department Rule 143.4(1) and (2) (counts 2 and 4); and that, on two occasions, appellant provided entertainment which was audible beyond the premises under its control.

An administrative hearing was held on January 25, 2000, at which time oral and documentary evidence was received. Following the conclusion of the hearing, the Administrative Law Judge (ALJ) issued a proposed decision, which the Department adopted, sustaining only one of the counts (count 3) relating to the dancers, and the count relating to the alleged condition violation. The ALJ found that a dancer identified as Jane Doe #2 "technically" violated Department Rule 143.3(1)(b)[2] by slapping her buttocks approximately fourteen to sixteen times in the course of her performance.[3] He also found that on the two occasions alleged in the accusation as condition violations, a Westminster police officer was able to hear music emanating from the premises while

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[2] Rule 143.3(1)(b) prohibits any live entertainment which consists of or simulates the "touching, caressing or fondling on the breast, buttocks, anus or genitals."

[3] The ALJ appeared to base his determination that the violation was technical on the fact the dancer touched her own, clothed, buttocks.

he was in his parked vehicle approximately 100 feet and 250 feet from the premises.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) Did the slapping of her buttocks by the dancer constitute a violation of Rule 143.3(1)(b) when the dancer was fully clothed at all times?; and (2) Was the area where the police officer was parked an area under the control of the licensee?

DISCUSSION

I

Appellant, citing the Board's decision in Jagg, Inc. (1998) AB-6878, suggests that the Board, in its interpretation of Rule 143.3(1)(b), intended to draw a distinction between adult entertainment and traditional non-sexual entertainment and dancing. Thus, says appellant, the question presented in this appeal is whether the fully-clothed dancer's slapping of her clothed buttocks, in rhythm to the music and to the dance movement constituted a violation of the rule. Appellant suggests that the Department's position is such that it would also be required to challenge such other public performances as Gone With the Wind, High Noon, and the Taming of the Shrew, among others, because in those performances there is contact between hand and buttocks.

The Department has requested in its brief to the Board that, as to this count of the accusation, the Board remand the case to the Department so that it may dismiss it, and render the issue moot. Appellant has not objected to the Department's request.

II

Appellant contends that the area where the police officer was located when he heard the music coming from appellant's premises was under its control by virtue of an oral agreement between appellant and a neighboring tenant of the complex. The Department contends the area under appellant's control is the area defined in the licensing diagrams submitted by appellant and adopted by the Department, and that the Department is not bound by a private agreement, if any, between appellant and its neighbor. While we do not accept the Department's narrow construction of the condition in question, we do agree that the condition was violated.

Appellant's corporate president testified to a purported arrangement between appellant and Sam Ash, a neighboring tenant, pursuant to which appellant's patrons could park in the parking area near Ash's premises, in return for which Ash was not charged for meals he consumed at the premises.

Appellant claims that it follows from the existence of this arrangement that the parking area near Ash's premises must be considered an area under appellant's control within the meaning of the condition. Appellant suggests that the Department would hold appellant responsible if nefarious activity were to occur in the parking area in question, so fairness requires it be treated as an area under his control for entertainment noise as well.

The problem with appellant's argument is that there is no evidence that the neighboring tenant had any authority to cede control of the area in question to appellant. Appellant's president testified on cross-examination that the entire

parking area was owned by a single landlord, and appellant shared parking with other businesses. It follows that the arrangement between appellant and Dash was nothing more than one where Ash had no objection to patrons parking near his business after he closed, and did not give appellant any control over that area.

Appellant makes the further argument that, unless the area where the police officer was parked is deemed an area under the appellant's control, the condition itself is rendered vague and unenforceable. Although appellant's logic is somewhat obscure, it appears to be that, unless the noise was a threat to a residential area, its enforcement becomes unreasonable.

We do not agree with appellant. The condition is clear by its terms. The only thing vague or ambiguous is the purported agreement between appellant and Sam Ash. Absent proof Ash had the power to cede control over the area to appellant, the agreement is incapable of immunizing appellant against a condition violation.

ORDER

The decision of the Department is affirmed with respect to the condition violation, and the case is remanded to the Department for the entry of an order dismissing the charge relating to the conduct of the dancer. The Department is directed to reconsider the penalty in light of the dismissal of that charge.[4]

[4] This 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

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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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.