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

AB-7766
File: 47-203381 Reg: 00049120

4805 CONVOY, INC. dba Dream Girls
4805 Convoy Street, San Diego, CA 92111,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: September 6, 2001
Los Angeles, CA

ISSUED DECEMBER 28, 2001

4805 Convoy, Inc., doing business as Dream Girls (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 30 days for one of appellant's dancers displaying her pubic hair, anus, vulva, or genitals, and for exposing her breasts and buttocks while not on a stage at least 18 inches above the floor and removed at least six feet from the nearest patron, 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 violations of California Code of Regulations, title 4, chapter 1, §143.3 (Rule 143.3).

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[1]The decision of the Department, dated February 1, 2001, is set forth in the appendix.

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, John W. Lewis.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on October 16, 1987. Thereafter, the Department instituted a three-count accusation against appellant charging that, on March 2, 2000, appellant permitted Mary Diann Gast to perform acts in violation of Rule 143.3, subdivisions (1)(b), (1)(c), and (2).

An administrative hearing was held on November 4, 2000, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the activities of the evening in question, appellant's practices with respect to preventing violations such as occurred here, and the usual practice of the Department in notifying licensees of violations of this type.

The ALJ described the pertinent events of the night, as testified to by the undercover officer involved, in Finding III:

> "A. Detective Kenneth Nelson of the San Diego Police Department's vice unit and his partner that night visited the premises in an undercover capacity on the night of March 2, 2000 at around midnight. Detective Nelson sat at a table near the main stage of the premises. While seated there, Nelson observed a female dancer who was later identified as Mary Diann Gast dance on the main stage and he observed no violations during her dancing. Nelson subsequently went to the bar counter and contacted Gast who was seated at a bar stool. After asking Gast how much she charged for a couch dance, Nelson requested a couch dance and Gast agreed to perform a couch dance for Nelson for ten dollars. Nelson and Gast proceeded to some couches which were located near the main stage of the premises and Nelson sat on one of the couches. Gast then performed a couch dance for Nelson while wearing a maroon dress with spaghetti straps and which was split in four separate areas from her waist. Nelson did not observe any violations during this couch dance. After the couch dance, Nelson and Gast spoke about a second couch dance and Nelson testified

> that he believes that Gast asked him if he wanted another couch dance. Nelson recalls that he then asked 'Is there going to be more skin?' However, Nelson could not recall any response by Gast to this question.
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> "B. Gast did perform a second couch dance for Nelson. During the second couch dance, Gast stood directly in front of Nelson about six to twelve inches from his feet and she proceeded to make direct contact with Nelson's body while "straddling" him. Gast also pulled her dress down in the front exposing both breasts and she rubbed her breasts on Nelson's crotch, stomach, chest and face. At one point, Gast exposed the entire rear portion of her anus as well as her perineum and her front crotch area revealing her vaginal area. When Gast exposed her genitals, her genitals were six to twelve inches from Nelson."

Subsequent to the hearing, the Department issued its decision which determined that two of the counts, those involving subdivisions (1)(c) and (2) of Rule 143.3, were sustained, while the third, involving subdivision (1)(b) of Rule 143.3, was reversed. The Department had recommended a penalty of revocation stayed for a two-year probationary period and a 30-day suspension, but the ALJ proposed, and the Department adopted as its order, a penalty of 30 days' suspension.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) the conduct of the officer constitutes entrapment; (2) appellant was not afforded due process; and (3) the Department's penalty is an abuse of discretion.

DISCUSSION

I

Appellant contends the dancer, Mary Diann Gast, was entrapped by San Diego police officer Kenneth Nelson through his request for her to show him "more skin" when she did a second couch dance for him, after Nelson had already observed her perform two dances on stage and one couch dance for him, all of which he noted were "lawful and proper" [RT 23, 27].

Appellant raised this issue at the hearing. The ALJ did not separately address the issue, but included it in Finding VI, regarding the penalty determination (the references to this issue are highlighted):

> "The Department recommended a penalty in this matter consisting of a revocation stayed for two years and a thirty day suspension based upon 'a long history of these types of violations.' The evidence established that since [appellant] was licensed in 1987, it has been found to have violated Title 4, California Code of Regulations Section 143.3 and/or Section 143.2(3) under three separate accusations in 1990, in 1993-1994, and 1995.[1] In determining an appropriate penalty in this matter, one must consider not only the number of similar past violations, but also the dates of the prior violations and the fact that [appellant] has had no similar violations since March of 1995. ***Other factors which must be considered in arriving at an appropriate sanction in this matter include*** the fact that one of the three alleged violations was not established, the fact that no other violations were observed on March 2, 2000 other than those committed by Gast during the second couch dance and ***the fact that the violations occurred only after the under cover detective asked Gast if there was going to be any more skin. Although this question by the detective does not rise to the level of entrapment, the circumstances under which the violations occurred must also be considered in the imposition of a penalty herein.*** Even though a significant penalty is indicated herein based upon the nature of the violations which were established and the prior disciplinary history, a stayed revocation is not warranted based upon the prior disciplinary history involving similar violations and the circumstances of the violation as described above."

The test for entrapment has been stated in the California Supreme Court case of People v. Barraza (1979) 23 Cal.3d 675 [153 Cal.Rptr. 459], as follows:

> "We hold that the proper test of entrapment in California is the following: was the conduct of the law enforcement agent likely to induce a normally law-abiding person to commit the offense? For the purposes of this test, we presume that such a person would normally resist the temptation to commit a crime presented by the simple opportunity to act unlawfully. Official conduct that does no more than offer that opportunity to the suspect - for example, a decoy program - is therefore permissible; but it is impermissible for the police or their agents to pressure the suspect by overbearing conduct such as badgering, cajoling, importuning, or other affirmative acts likely to induce a normally law-abiding person to commit the crime." (23 Cal.3d at 689-690.) (fn. omitted.)

The Department argues that Nelson's question does not rise to the level of entrapment as defined in People v. Barraza, supra. Rather, the Department contends, Nelson merely offered Gast the opportunity to commit the violations.

The officer's question does not appear to be "overbearing conduct" prohibited by Barraza, supra. However, it appears by this conduct that Nelson was determined to get a violation in this case, and obviously believed he would need to provide some "encouragement" to get one. Before this violation, Nelson had observed Gast perform two dances on stage and one couch dance for him, all of which, Nelson testified, were perfectly "lawful and proper" [RT 23]. It was only after Nelson asked for "more skin" that Gast committed the violation.

While we think that Nelson's conduct was not "badgering," we believe that it was clearly an "affirmative act" that he knew was likely to induce Gast to commit a violation. This went beyond the "simple opportunity" to commit a violation; Gast certainly had that opportunity at least as early as the first couch dance she did for Nelson, yet she did not take advantage of that opportunity until he let her know that he was not interested in a second couch dance unless she went beyond anything she had done yet in his presence during three dances. To ask for "more skin" when she was wearing a dress with spaghetti straps and four long slits in the skirt from the waist to the hem, clearly means exposing some body part that has not already been exposed, and that didn't leave much.

In the context of a premises offering nude entertainment, where the opportunity for more money arises for the dancers when they dance for individuals (and Gast here was offering to dance again for Nelson) and tips are bigger the more that is revealed,

Nelson's question was a "loaded" one, the equivalent, in context, of cajoling or importuning. This was a violation that was "obtained" rather than "committed." The imposition of discipline based on the conduct of law enforcement officers that steps over the line between fairness and unfairness is an abuse of the Department's discretion, and we will not affirm it.

II

Appellant contends it was not accorded due process in that it was not notified of the violations shortly after they occurred as was customary, but more than 30 days later, when it was too late for appellant to identify witnesses or preserve the relevant videotapes of the alleged violations to prepare a defense.

The ALJ found that a due process violation was not established (Finding V):

> "The preponderance of the evidence did not establish that [appellant] was denied due process because it was not notified of the alleged violation immediately after the violations had occurred. Although [appellant's general manager] testified that he believes that the premises was not notified of the March 2, 2000 violations within thirty days of the incident, he was not sure whether assistant manager Armstrong was notified of the Gast violations within thirty days of the incident. Charles Benton, [appellant's] president, also testified that he did not know the date of the first time any of [appellant's] employees were notified of the March 2, 2000 violations."

Kirk Zea, general manager of the premises, testified that the usual practice in prior violations had been that the undercover officer would leave after spotting a violation and shortly thereafter a uniformed officer would come and notify the management of the violation [RT 46]. Nelson testified, however, that this was not the custom and practice as long as he had been in the vice unit, because of the risk of violating an officer's undercover capacity [RT 30].

Department counsel points out in his brief that, had this been a misdemeanor

violation rather than a rule violation, the police would be required to take enforcement action and notify the individuals concerned right away.

Although it appears that appellant was not notified immediately, there was nothing to substantiate its charge that the notification took place so long afterward that it was a violation of due process.

III

Appellant contends the Department abused its discretion in ordering a 30-day suspension. In light of our disposition of this appeal, this issue has become moot.

ORDER

The decision of the Department is reversed.[2]

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

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[2]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.