

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

AB-8643

File: 47-306341 Reg: 05060594

CARNIVAL CLUB OF FULLERTON, INC., dba In Cahoots
1401 S. Lemon Street, Fullerton, CA 92832,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: February 7, 2008

ISSUED MAY 30, 2008

Carnival Club of Fullerton, Inc., doing business as In Cahoots (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which revoked its license but which stayed said revocation, subject to a probationary period of three years and service of a 45-day suspension, for various violations of Department Rules 143.2 and 143.3, in conjunction with Business and Professions Code section 24200, subdivisions (a) and (b).

Appearances on appeal include appellant Carnival Club of Fullerton, Inc., appearing through its counsel, Ralph W. Saltsman, Stephen W. Solomon, and Shannon Y. Humphrey, and the Department of Alcoholic Beverage Control, appearing

¹The decision of the Department, dated October 19, 2006, is set forth in the appendix.

through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellant's license was issued on July 5, 1995. On August 31, 2006, the Department filed a 16-count accusation, later amended by the addition of six additional counts, against appellant charging violations of Department Rules 143.2² and 143.3,³

² Department Rule 143.2 (Title 4, Cal. Code Regs., § 143.2) provides, in pertinent part:

The following acts or conduct on licensed premises are deemed contrary to public welfare and morals, and therefore no on-sale license shall be held at any premises where such conduct or acts are permitted:

- (1) To employ or use any person in the sale or service of alcoholic beverages in or upon the licensed premises while such person is unclothed or in such attire, costume or clothing as to expose to view any portion of the female breast below the top of the areola or of any portion of the pubic hair, anus, cleft of the buttocks, vulva or genitals.
- (2) To employ or use the services of any hostess or other person to mingle with the patrons while such hostess or other person is unclothed or in such attire, costume or clothing as described in paragraph (1) above.
- (3) To encourage or permit any person on the licensed premises to touch, caress or fondle the breasts, buttocks, anus or genitals of any other person.
- (4) To permit any employee or person to wear or use any device or covering, exposed to view, which simulates the breast, genitals, anus, pubic hair or any portion thereof.

³ Department Rule 143.3 (Title 4 Cal. Code Regs., §143.3) provides, in pertinent part:

Acts or conduct on licensed premises in violation of this rule are deemed contrary to public welfare and morals, and therefore no on-sale license shall be held at any premises where such conduct or acts are permitted.

Live entertainment is permitted on any licensed premises, except that:

- (1) No licensee shall permit any person to perform acts of or acts which simulate:
 - (a) Sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law.
 - (b) The touching, caressing or fondling on the breast, buttocks, anus or genitals.
 - (c) The displaying of the pubic hair, anus, vulva or genitals.
- (2) Subject to the provisions of subdivision (1) hereof, entertainers whose

(continued...)

and Business and Professions Code section 23038, on November 4 and the early morning of November 5, November 18, and December 2 and the early morning of December 3, 2004. The conduct in question took place during Thursday night promotions called "Club Glam," conducted by an outside promoter named Grant Lee.

An administrative hearing was held January 25, April 27, and July 25, 2006, at which time documentary evidence was received and testimony concerning the violations charged was presented. Subsequent to the hearing, the Department issued its decision which sustained all of the 19 counts concerning Rules 143.2 and 143.3, and dismissed the three counts involving Business and Professions Code section 23038.

Appellant filed a timely notice of appeal in which it raises two issues: (1) The Department communicated with its decision maker on an ex parte basis; and (2) there is no substantial evidence to support Count 7 (permitting sexual acts by a Jane Doe patron).⁴

³(...continued)

breasts and/or buttocks are exposed to view shall perform only upon a stage at least 18 inches above the immediate floor level and removed at least six feet from the nearest patron.

No licensee shall permit any person to use artificial devices or inanimate objects to depict any of the prohibited activities described above.

No licensee shall permit any person to remain in or upon the licensed premises who exposes to public view any portion of his or her genitals or anus.

⁴ Although section C of the Argument section of appellant's brief is captioned "There Is No Substantial Evidence To Support Count Seven for Permitting Sexual Acts By A Jane Doe Patron," it appears from the text of appellant's brief that appellant is challenging all 19 of the lewd conduct counts which were sustained by the Department, referring to the absence of substantial evidence with respect to Count 7 as illustrative of all 19 counts.

DISCUSSION

I

Appellant contends the Department violated the Administrative Procedure Act (APA)⁵ by transmitting a report of hearing, prepared by the Department's advocate at the administrative hearing, to the Department's decision maker after the hearing but before the Department issued its decision. It relies on the California Supreme Court's holding in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2006) 40 Cal.4th 1 [145 P.3d 462, 50 Cal.Rptr.3d 585] (*Quintanar*) and an appellate court decision following *Quintanar*, *Chevron Stations, Inc. v. Alcoholic Beverage Control Appeals Board* (2007) 149 Cal.App.4th 116 [57 Cal.Rptr.3d 6]. It asserts that, at a minimum, this matter must be remanded to the Department for an evidentiary hearing regarding whether an ex parte communication occurred.

The Department disputes appellant's allegations of ex parte communications and asks the Appeals Board to remand this matter so that the factual question of whether such a communication was made can be resolved.

We agree with appellant that transmission of a report of hearing to the Department's decision maker is a violation of the APA. This was the clear holding of the Court in *Quintanar, supra*.

Both parties agree that remand is the appropriate remedy at this juncture. We agree, and as we have done in the numerous other cases involving this issue, we will

⁵Government Code sections 11340-11529.

remand the matter to the Department for an evidentiary hearing.

II

Appellant contends that there is no substantial evidence in support of the charge in Count 7 of the accusation.⁶ It argues that there is no evidence of the necessary element of knowledge and permission, citing portions of testimony of appellant's witnesses that they took corrective action when improper conduct was observed. Appellant does not claim that the lewd conduct did not occur.

Appellant cites the testimony of James Lessley that he asked a woman to leave the premises on November 5, 2004, when she started to remove her clothing, and that he had been trained and instructed to remove anyone who tried to remove their clothing or "flash" while in the premises. According to appellant, Lessley might well have been referring to the woman the subject of Count 7. Lessley also testified there were 10 to 12 security guards inside the premises, some of whom, including himself, moved around the room.

Appellant also refers to the testimony of its General Manager, Paul Dippolito, that security guards were trained to take action against any person who began taking off his or her clothing. Dippolito also testified that appellant's relationship with Grant Lee was terminated prior to the filing of the Department's accusation.

Findings of Facts III-A through III-F of the decision describe in considerable

⁶ Count 7, as amended, alleged that on November 5, 2004, appellant permitted a female Hispanic Jane Doe to perform or simulate an act of sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or other sexual act in violation of Rule 143.3(1)(a).

detail the activities of Heather Marie Bentzen⁷ and her husband, Carlos Eric Bentzen, which gave rise to counts 1 through 6, 9, 10, and 15. These findings demonstrate that the objectionable conduct was frequent and extended in duration, despite the presence of security personnel who, in a position to witness it, took no action to prevent it.

A videotape recording (Exhibit 3) recorded by Fullerton police detective Tom Olivares was played at the administrative hearing, and formed the basis for some of the administrative law judge's (ALJ's) findings regarding Heather Marie Bentzen's conduct.

No useful purpose would be served by discussing the extensive findings of the ALJ beyond acknowledging the number of instances of objectionable behavior referred to in those findings. It is enough to note that any efforts by appellant's security personnel to discourage or prevent such conduct were either non-existent or simply ineffective in light of the apparent theme of the promotion taking place on those Thursday nights.

Appellant's decision to end its relationship with the event promoter can only be described as too little, too late. The Department's action was appropriate and the penalty reasonably within the Department's discretion.

ORDER

The decision of the Department is affirmed as to issues other than that

⁷ Although the decision throughout refers to Heather Marie *Benson* and Carlos Eric *Benson*, we have referred to them by the surname *Bentzen*, as used in the accusation and in appellant's brief on appeal.

involving the alleged ex parte communication, and the matter is remanded to the Department for an evidentiary hearing in accordance with the foregoing discussion.⁸

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁸ This order of remand is filed in accordance with Business and Professions Code section 23085, and does not constitute a final order within the meaning of Business and Professions Code section 23089.