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

**AB-9098**
File: 48-27524 Reg: 09071104

CLUBARY, INC., dba Pure Platinum
2431 Pacific Highway, San Diego, CA 92101,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: February 3, 2011
Los Angeles, CA

**ISSUED APRIL 5, 2011**

Clubary, Inc., doing business as Pure Platinum (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked its license for violations of Business and Professions Code section 24200.5; Department Rules 143.3(1)(a), 143.3(2), and 143.3(1)(b), and Health and Safety Code sections 11350, 11351, and 11352; all arising from conduct of dancers performing at appellant's San Diego premises.

Appearances on appeal include appellant Clubary, Inc., appearing through its counsel, Joshua Kaplan, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry Winters.

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[1]The decision of the Department, dated February 26, 2010, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on July 25, 1973. On May 14, 2009, the Department instituted a 34-count accusation against appellant. Counts 1 and 24 alleged that appellant, through its agent or employee, permitted an entertainer whose breasts and/or buttocks were exposed to view, to perform while not on a stage 18 inches above the immediate floor level and removed at least six feet from the nearest patron. Counts 2, 4, 19, 26, 27 and 28 alleged that appellant, through an agent or employee, encouraged or permitted an entertainer to touch, caress or fondle the breasts, buttocks, anus or genitals of another person. Counts 3, 23 and 25 alleged that appellant permitted an entertainer to perform or simulate an act of touching, caressing or fondling of the breast, buttocks, anus or genitals. Count 5 alleged that the appellant permitted an entertainer to perform or simulate an act of sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or other sexual act on the premises. Counts 6, 9, 12,15,18, 22, 29 and 32 alleged that appellant knowingly permitted an employee and/or agent of the Respondent to participate in the illegal sale or negotiations for such sales of narcotics or dangerous drugs upon the licensed premises. Counts 7, 10, 13, 20 and 30 alleged that appellant, by its agent or employee, possessed within said premises a controlled substance consisting of cocaine for purposes of sale. Counts 8, 11, 14, 17, 21 and 31 alleged that appellant, by an employee or agent, sold, furnished, or offered to sell or furnish within the premises a controlled substance consisting of cocaine. Counts 16, 33 and 34 alleged that the appellant by its agent or employee possessed within the premises a controlled substance consisting of cocaine.

An administrative hearing was held on November 17 and 18, 2009, at which time

documentary evidence was received and testimony concerning the violations charged was presented by several Department Investigators. Appellant's president and sole shareholder, Robert Naefke, testified on appellant's behalf, as did Ernesto Encinas, hired as Director of Security in October 2009. Linda Tibbets, a retired San Diego police officer also testified.

Subsequent to the hearing, the Department issued its decision which determined that the charges had been established with respect to all counts of the accusation.

Appellant filed a timely notice of appeal in which it raises the following issues: (1) the accumulation of counts in the accusation violated the principles established in *Walsh v. Kirby* (1974) 13 Cal.3d 95 [118 Cal.Rptr.1]; (2) as a matter of law, appellant cannot be deemed to have permitted violations of Department rules, Business and Professions Code section 24200.5, and Health and Safety Code sections 11350, 11351 and 11352 by independent contractor dance performers; it took all reasonable steps to prevent the alleged misconduct, and there was no employment relationship; (3) there is no basis for derivative or imputed liability; (4) there was a failure of proof with respect to charges in Counts 1 through 6, 9, 12, 15,18, 22 through 29, and 32; and (5) appellant has mitigated the alleged violations to the extent no penalty should be imposed.

DISCUSSION

This is an appeal of an order of the Department revoking appellant's on-sale public premises license. Appellant's business is described as "basically a bar/nightclub with a door charge which serves alcoholic beverages, a daily buffet, offering sports viewing on large screen televisions and sometimes offering dance entertainment on stage." (App. Br., p. 30.) It is primarily the conduct of the persons offering the dance entertainment which gives rise to the Department accusation and this appeal.

We begin with the law that governs this appeal.

When 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].) Appellate review does not "resolve conflicts in the evidence, or between inferences reasonably deducible from the evidence." (*Brookhouser v. State of California* (1992) 10 Cal.App.4th 1665, 1678 [13 Cal.Rptr.2d 658].)

> We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. (*CMPB Friends, Inc. v. Alcoholic Bev. Control Appeals Bd.* (2002( 100 Cal.App.4th [1250,]1254 [122 Cal.Rptr.2d 914]; *Laube v. Stroh* (1992) 2 Cal.App.4th 364, 367 [3 Cal.Rptr.2d 779]; ... We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor an appellate court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. (See *Lacabanne Properties, Inc. v. Dept. Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734] (*Lacabanne*).) The function of an appellate Board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

(*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd*. (*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

I

Citing *Walsh v. Kirby*, *supra*, 13 Cal.3d 95, appellant contends that the Department continued its investigation an unreasonable period of time for the purpose of accumulating charges so that it could increase the penalty should its charges be sustained. It argues that, once the Department had determined there had been a violation, it was obligated to warn appellant that such conduct was occurring or file an

accusation. In either case, appellant argues, it could have acted aggressively to put a stop to the unlawful activity. Appellant elicited testimony from one of the Department Investigators involved in the investigation conducted by the Department that she had "made" a case during her first visit to the premises, yet continued the investigation for three months without informing appellant of the violations found.

In *Walsh v. Kirby*, *supra*, the licensee, who had a previously unblemished record, was charged with selling below an established "fair trade" price on a total of 10 occasions. The statute involved did not provide for suspension or revocation, but each offense after the first was punishable by a $1000 fine. The Supreme Court concluded that the Department had acted improperly by accumulating enough violations for the purpose of driving the licensee into bankruptcy.

The Board is wary of substituting its judgment for that of the Department with respect to when an investigation has reached the point where an accusation should be filed. In the absence of any evidence that the Department intentionally prolonged the investigation for the purpose of obtaining a more severe penalty, it would seem inappropriate for the Board to infringe upon the Department's discretion in its conduct of an investigation.

The Department argues that *Walsh v. Kirby* has no application to this case. Citing previous Board decisions distinguishing that case,[2] the Department justifies the

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[2] *Ann Minshaw* (2001) AB-7741 and *Chavez* (1998) AB-6788.

In *Chavez*, the Board stated:

> The extent to which Department investigators should have contacted appellants concerning the investigation is a matter of discretion within the police powers granted the Department. In the absence of clearly unreasonable delay, it

(continued...)

length of its investigation on the basis that each visit to the premises unearthed new and different violations.

In a way, the administrative law judge (ALJ) held this view, stating (in Finding of Fact XVII-C):

> The violations observed during the first four visits alone would justify the imposition of a substantial penalty in this matter and making four visits to the premises after observing more than one violation on the first visit is found not to have been arbitrary or capricious. Although, the Department could have chosen to file an Accusation against the Respondent after its investigators had already observed eighteen violations during the first four visits to the premises, it was not unreasonable to make additional visits to the premises after the fourth visit since more than one type of violation had been observed during the first four visits, since different performers had been involved in the observed violations and since at least two employees of the Respondent had been involved. Under those circumstances, the preponderance of the evidence did not establish that the Department's decision to make additional visits to the premises was unreasonable, arbitrary or capricious. Furthermore, the Respondent did not have a record of no prior violations as in the *Walsh* case.

It is apparent from the type and number of violations alleged, and proved, by the Department, that the problems were directly related to appellant's mode of operation, i.e., an attempt to structure the relationship between it and its dance performers in such a way as to insulate it against any licensee liability.

There is a common thread running through all of the matters charged. The dancers are motivated by self interest to push the envelope with respect to what conduct is permitted and what conduct will generate more tips and more private dance revenue. The freedom with which these dancers may move from club to club [RT 285-

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[2](...continued)
is not for the Appeals Board to mandate at what point in an investigation the Department must inform a licensee that the licensed premises are under scrutiny. A continuing investigation may very well be needed to determine the existence of violations or the degree to which a law is being, or has been violated.

286] invites them to engage in improper and illegal conduct while dancing on stage or providing private dances, knowing there will be another club, perhaps even in another city, where they can continue to perform, if barred from appellant's premises.

Appellant, willingly or not, must accept the risks to its alcoholic beverage license flowing from dancer misconduct of the type observed in this case, because it is a direct and foreseeable consequence of the modus operandi it has chosen for its business. It is apparent from the relatively undisputed facts of this case that appellant materially underestimated the risks it had assumed, and failed to act appropriately in light of those risks.

II

Appellant's president and sole shareholder, Robert Naefke, testified on behalf of appellant. Naefke described in considerable detail the relationship between appellant and the dancers who perform in appellant's premises, including those whose conduct is cited in the accusation. In brief, Naefke asserts that the dancers are independent contractors who lease from appellant the stages on which they perform, and the only requirements appellant imposes on them is that they have a City of San Diego entertainer's license, a ban on drugs, and compliance with the ABC Act as it pertains to their conduct.[3] He asserts they are not employees, and that appellant is not

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[3] Q. Are there any rules or regulations in place at Pure Platinum to regulate the conduct of the dance entertainers?

A. [Naefke]: There's basically two major rules. One is the rule of absolutely no drugs, and the other is the six elements of the nude entertainment law which basically describe what the girl can wear on the stage and when she's off the stage in the area, what parts of the body have to be covered, et cetera.

[RT 278.]

responsible for their conduct. Dancers who violate these requirements are banned from the premises. Given this business structure, appellant argues, there is no legal basis for the charges of the accusation.

We do not agree that the arrangement between Pure Platinum and the dancers insulates it from discipline warranted by the acts of the dancers described in the accusation which violate Department rules governing entertainer conduct. Appellant's argument exalts form over substance; the substance here is that appellant and the performers are engaged in a mutual business endeavor, in the nature of a loose and informal partnership or joint venture.[4] Appellant's disclaimer of any employment relationship between it and the dancers is irrelevant. The arrangement between appellant and its dancers is designed to give the illusion of separateness, but the reality is a common pursuit of revenue by appellant and dancers, each having something to offer the other. The ALJ found as much (Finding of Fact XVI-B):

> Furthermore, the Respondent cannot escape responsibility for the multiple unlawful acts committed in the premises by the performers simply because of the fact that the Respondent set up a system whereby the performers were designated to be independent contractors and not employees. The very agreement designed by the Respondent allowed the performers to dance at the premises and the agreement states that the Respondent was desirous of leasing to the lessees so that they could provide adult entertainment at the premises. It is clear from the evidence that these performers were at least lessees of the Respondent, that the same performers were dancing regularly at the premises and that the Respondent's business benefitted from having topless dancers performing at its club. Mr. Naefke testified that it was profitable to have the topless dancers because they bring in people from the convention center who spend money at the premises and that a dancer needed to be a "salesman" who could sell herself and get the gentlemen to spend money at the premises.

[4] Asked why appellant has topless dancers, Naefke stated: "They're profitable. ... They bring people from the convention center to the club to spend money." [RT 303.]

Dancers set their own schedule, purchase their own costumes, and select their own music in cooperation with the DJ. Dancers are charged different lease rates, ranging between $20 and $30 per day, depending on whether they are performing on a day or night shift or a particular day. Dancers choreograph their own performances, and are not required to perform any specific hours or number of shifts per day. Dancers are not required to arrive or leave at any specific time, and are free to leave the premises and return later to resume performing. They are also free to perform at other clubs.[5] The average time dancers perform at Pure Platinum is 90 days. They receive no payment from appellant.

Dancers retain any tips from patrons, but may share their tips with the DJ, or with security personnel. Dancers who perform private dances[6] determine the fee they will charge, subject to a "minimum house fee" of $20. According to Naefke, the purpose of this minimum house fee is "it makes a playing field fair for all the girls." [RT 280.] According to Naefke, appellant does not share in the money a dancer receives for a private dance.[7]

It comes as no surprise that much of the conduct found to violate the law

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[5] If a dancer were to leave Platinum Pure to perform at another club, and return the same evening, she would have to pay another fee. [RT 286.]

[6] It would not be a stretch to assume that most of these "private dances" are what are also referred to more graphically as "lap dances," the term used by the Department investigators to describe their own experiences during their investigation.

[7] Q. Where did the money go?

A. Into the dancer's purse, G-string, whatever.

[RT 282.]

involved conduct that could be described as lewd.[8] Appellant should not have been surprised. Indeed, as appellant notes in its administrative hearing brief, at page 12, it was virtually foreseeable:

> The dancer's revenue depends upon the dancer's ability as an actress, creating the illusion of erotic availability and erotic allure to the patrons; their dance proficiency , their friendly personality, etc. Dancers' profits are dependent upon their own managerial skills as "sales people" and, in that regard, dancers are in a business completely distinct from the licensee.
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> Dancers' theatrical dance profession requires them to possess a high level of skill in order to achieve income at licensee's venue consisting of dance ability, acrobatic balance (training for such being necessary), alluring and erotic appeal, acting ability in order to project a fantasy of availability and interest, sales skills in order to market themselves to sell private dances.

III

Appellant argues that it took all reasonable steps to prevent unlawful conduct, citing its zero tolerance policy with respect to drugs, surveillance personnel, the presence of video cameras (except that no camera was focused on the stage) [RT 296], its employment of managers and the requirement that they keep a log, and the presence of security personnel.

The Department argues that the claim is meritless. It argues that Naefke was an "absentee licensee" who visited the club only two or three times a month, and the visits were brief.

The ALJ found that Naefke had effectively relinquished control of the premises (Findings of Fact XVI-A):

> Mr. Naefke cannot escape responsibility for the multiple illegal activities that occurred in the licensed premises during his absence. The Respondent chose not to be present at the premises and to rely on his managers and security people to operate, manage and monitor the activities at the premises.

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[8] See Findings of Fact II, III, IV, VIII, X, XI, XII.

> Therefore, the Respondent in effect relinquished his control of the licensed premises to his managers and security people and relied on them to discover and correct any illegal activities that were occurring in the premises. And it is quite obvious from the evidence presented at the hearing that the Respondent's managers and security people did a very poor and inadequate job of managing and monitoring the premises. ...

Appellant's argument reduces to this: simply by hiring managerial and security personnel, it did everything it could to prevent the activities for which it has been found liable. Notably, the record is silent as to the training and competency of such personnel, and Naefke's infrequent and brief appearances at the premises during the three-month period in question do little to fill that void.

IV

We have reviewed the remaining issues raised by appellant, and we are not persuaded that they have merit.

ORDER

The decision of the Department is affirmed.[9]

FRED ARMENDARIZ, CHAIRMAN
MICHAEL A. PROSIO, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[9]This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 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 section 23090 et seq.