ISSUED MARCH 29, 1996

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

BASRA, INC. dba The Pink Lady 67-990 Highway 111 Cathedral City, CA 92234, Appellant/Licensee, v. THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6548 File: 48-189504 Reg: 94031026 Administrative Law Judge at the Dept. Hearing: James Ahler Date and Place of the Appeals Board Hearing: January 11, 1996 Los Angeles, CA

Basra, Inc., doing business as The Pink Lady (appellant), appealed from a decision of the Department of Alcoholic Beverage Control[1] which suspended appellant's on-sale general public premises license for 40 days, with 15 days of the suspension stayed on conditions including a two-year probationary period, for the licensee's permitting its employees to engage in prohibited conduct, i.e., exposing their breasts, in violation of California Code of Regulations §143.3(2) (rule 143). The department also found that an employee of the licensee sold controlled substances (cocaine and methamphetamine) to undercover law enforcement officers in the licensed premises, a

[1]The decision of the department dated June 15, 1995 is set forth in the appendix.

violation of Health and Safety Code §11379; and the licensee possessed three bottles of spirits containing dead "varmints" (adulterated alcoholic beverages), in violation of Health and Safety Code §§26250, 26253, and 26534.

Appearances on appeal included Joshua Kaplan, counsel for appellant; and Jonathon E. Logan, counsel for the department.

FACTS AND PROCEDURAL HISTORY

Appellant's license was issued on June 30, 1987. Thereafter, the department instituted an accusation against appellant on July 8, 1994. An administrative hearing was held on April 6 and 7, 1995, at which time oral and documentary evidence was received.

At that hearing, it was determined that the performers were appellant's employees and their on-premise conduct and knowledge was imputed to appellant. It was further determined that respondent "permitted" the prohibited conduct within the context of its operation of a nightclub in which exotic dancers performed before adults consuming alcoholic beverages.

It was determined also that Tiffeney Moody, an exotic dancer employed by appellant, sold cocaine to undercover law enforcement officers on April 7 and April 14.

It was further determined that appellant's employee, Wendy Sirota, mingled with patrons while she exposed her areolae to public view.

It was determined that three bottles seized from appellant's back bar contained dead "varmints," most of which had wings attached.

Subsequent to the hearing, the department issued its decision which suspended appellant's license for 40 days, with 15 days stayed on conditions including a two-year probationary period. Appellant filed a timely notice of appeal.

In its appeal, appellant raised the following issues: (1) the crucial findings were not supported by substantial evidence; (2) the application of the department's rule 143 violated the due process and equal protection clauses of the California Constitution; and (3) the penalty imposed was excessive.

DISCUSSION

I

Appellant contended that the department's crucial findings were not supported by substantial evidence.

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

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).

Appellate review does not "...resolve conflict[s] 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. 658).

A. Appellant argued that it was not established by substantial evidence that the performers charged with violating the law were employees. Evidence presented by the department and accepted by the ALJ included the following: the performers did not have any particular skill or talent; appellant controlled the performers' dancing through written house rules requiring certain performance conduct, speech, and other actions on the premises; there was a standardized routine for all performers; performers had to sign up for specific shifts to dance; and performers could not delegate another unapproved performer to dance in her place.

Evidence was presented by appellant to establish that the performers were independent contractors, the bulk of which centered around a signed "licensee" agreement between appellant and each performer. This licensee agreement stated that the appellant had "no right to direct or control the nature, content, character, manner or means of [the performers'] performance," and the performer would "determine the method, details and means" of the exotic dancing [exhibits 9, 10, 11, 12].

However, one provision stated: "OWNER [appellant] shall have the right to impose such rules and regulations on the use of the PREMISES by LESSEE [performer] as OWNER [appellant], in its sole and absolute discretion, shall deem necessary and appropriate. LESSEE [performer] agrees to be bound by and to otherwise adhere to each and every rule and regulation imposed by OWNER in connection with the use of the PREMISES."

In addition, appellant argued that there was a provision in the various agreements with the performers which required performers to pay appellant for the use of the stage. However, there were no records kept concerning whether any payments were actually made, and no testimony was given at the hearing to establish payment.

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Appellant failed to consider its conduct in allowing the entertainers to appear as agents for appellant and allowing reimbursement to those performers/agents in the form of tips from appellant's patrons.

We determine that there was an agency created as both the entertainers and appellant were receiving mutual benefits (for the entertainer, tips; for appellant, entertainment for appellant's patrons). Appellant used the entertainers to induce patrons into the premises--a marketing program.

Additionally, appellant created the appearance that the entertainers were its agents in promoting the business of selling alcoholic beverages. In the matter entitled Shin (1994) AB-6320, a daughter of a co-licensee was at the premises, behind the counter; she was specifically told not to sell anything, but sold an alcoholic beverage to a minor, rang the up the sale on the cash register, and gave the minor change. The co-licensee father was nearby talking to another customer. The appeals board found an "ostensible" agency had been created pursuant to Civil Code §§2298 and 2300. An "ostensible" agency is created when a principal allows an appearance of agency to be seen by third parties and the third party relied on the appearance of the agency.

In the law field of negligence, the case of Spadlin v. Cox (1988) 201 Cal.App.3d 799, 809, 247 Cal.Rptr. 347, held that an employee's misconduct could be reasonably foreseen as an outgrowth of his duties. In the negligence case of Meyer v. Blackman (1962) 59 Cal.2d 668, 678, 31 Cal.Rptr. 36, the court held that in situations where it is known that truck drivers carry unauthorized passengers, the employer is liable to those passengers (for injuries) even if the employer expressly gave orders not to carry such passengers. In the case of Rogers v. Kemper Construction Company (1975) 50 Cal.App.3d 608, 124 Cal.Rptr. 143, the court held that one way to determine whether the risk is inherent in, or created by, an enterprise is to ask whether the actual occurrence was a generally foreseeable consequence of the activity. In the case of Perez v. Van Groningen & Sons, Inc. (1986) 41 Cal.3d 962, 970, 227 Cal.Rptr. 106 106, it was held that a "Master cannot escape liability merely by ordering his servant to act carefully. If he could, no doubt few employers would ever be held liable."

B. Appellant argued that the chain of the custody of the controlled substances was defective.

Exhibit 8 is a chemical testing of the substances showing the substances to be methamphetamine. The substance sold on each occasion was logged and placed into the evidence locker [R.T. 26, 34]. Other than raising the issue, appellant has not advised the appeals board as to reasons why it feels the department failed in its burden.

The appeals board is not required to make an independent search of the record

for error not pointed out by appellant. It was the duty of appellant to show to the appeals board that the claimed error existed. Without such assistance by appellant, the appeals board may deem the general contentions waived or abandoned. See Horowitz v. Noble (1978) 79 Cal.App.3d 120, 129, 144 Cal.Rptr. 710; and Sutter v. Gamel (1962) 210 Cal.App.2d 529, 531, 26 Cal.Rptr. 880, 881.

C. Appellant argues that there was no substantial evidence to support finding V that "Wendy" violated rule 143. The rule states in pertinent part that it is contrary to the public welfare "to employ any person ... 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...." "Areola" is defined as "the colored ring around the nipple....."[2]

Officer James Edward Eggert testified that a performer left the stage and mingled with the patrons while the tops of her breasts were exposed so that the officer could see the areolas [R.T. 4/6, 167-168].

We determine that finding V was supported by substantial evidence.

D. Appellant argued that the testimony of Officer Rose was not to be believed, as there was confusion between his testimony and the report which his partner, Officer Douglas, prepared. Substantial evidence does not have to be uncontroverted--just substantial.

Where there are conflicts in the evidence, the appeals board is bound to resolve conflicts of evidence in favor of the department's decision, and must accept all

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[2]Webster's New International Dictionary, 1986, p. 116.

reasonable inferences which support the department's findings (Gore v. Harris (1964) 29 Cal.App.2d 821, 40 Cal.Rptr. 666). See Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control (1968) 261 Cal.App.2d 181, 67 Cal.Rptr. 734, 737; Kirby v. Alcoholic Beverage Control Appeals Board (1972) 7 Cal.3d 433, 439, 102 Cal.Rptr. 857--a case where there was substantial evidence supporting the department's as well as the license-applicant's position; and Kruse v. Bank of America (1988) 202 Cal.App.3d 38, 248 Cal.Rptr. 271. The ALJ took note of the discrepancies, called them minor, and determined that the officer who testified was credible.

Appellant also argued that due to Officer Eggert's conduct with regard to count number 4 (dismissed after he was found to have acted improperly by touching a performer's breasts while she was on stage performing--finding VII, VIII and determination of issues VI), his testimony regarding the violations should also be seen as tainted. However, this is an issue of credibility, and the credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. See Brice v. Department of Alcoholic Beverage Control (1957) 153 Cal.2d 315, 314 P.2d 807, 812, and Lorimore v. State Personnel Board (1965) 232 Cal.App.2d 183, 42 Cal.Rptr. 640, 644. Apparently, the ALJ, who presided at the administrative hearing, saw the witnesses' demeanor, and heard the witnesses' testimony, accepted the testimony as presented by the department's witnesses.

We are bound to resolve all such credibility and conflict questions in favor of the department's decision.

E. Appellant contended that there was no substantial evidence to support the conclusion that the bottles seized were "poisonous, deleterious, injurious to health, diseased, contaminated, filthy, putrid, decomposed, or otherwise unfit."[3] Adulterated food is defined by the Health and Safety Code §26523 as: "Any food is adulterated if it consists in whole or in part of any diseased, contaminated, filthy, putrid, or decomposed substances, or if it is otherwise unfit for food."

Webster's New Third International Dictionary, 1986, defines "contaminate" as: "to soil, stain, corrupt, or infect by contact or association...to render unfit for use by the introduction of unwholesome or undesirable elements...SYN Taint, Attaint, Pollute, Defile: these mean to make impure or unclean. Contaminated implies an action by something external to an object which by entering into or coming in contact with the object destroys its purity...." (ibid., page 491). The following words are also defined: "filthy" as "dirty" (ibid., pp. 850-851; "putrid" as "rotten" (ibid., p. 1850); and "decomposed" as "rot, decayed, to separate essentially into constituent parts" (ibid., p. 587).[4]

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[3]The department found that the contaminants in the three bottles of alcoholic beverages violated Health and Safety Code §26534, which states: "It is unlawful for any person to manufacture, sell, deliver, hold, or offer for sale any food that is adulterated."

[4]Appellant also argues that the bottles seized were not proven to contain alcohol. The bottles, Blackberry flavored Brandy (exhibit 5), Old Forester (exhibit 6), and Le Roux Cream de Casis (exhibit 7), were seized by the department, apparently from appellant's bar well [R.T. 4/6, 104]. Alcoholic beverage bottles duly labeled and used in the due course of service of patrons are presumed to contain that which the label purports to be contained in the bottle; otherwise, a license would be subject to sanctions under Business and Professions Code §§24024 and 25170.

We determine that finding XI was supported by substantial evidence.

F. Appellant argued that it took reasonable precautions and expended great effort in providing a lawfully-run premises, stating that "There is also uncontradicted evidence in this record that appellant did everything humanly possible and reasonable to discourage and prevent such transaction." The record showed that the performers received income for their time and dancing in the form of tips from appellant's patrons [R.T. 120]. There were approximately 100 entertainers working at the premises from time to time [R.T. 118].

Appellant cites the cases of McFaddin San Diego 1130, Inc. v. Stroh (1989) 208 Cal.App.3d 1384, 257 Cal.Rptr. 8 and Laube v. Stroh (1994) 2 Cal.App.4th 364, 3 Cal.Rptr. 2d 779, for the proposition that the misconduct of the performers, who appellant argues were independent contractors, would not be imputed to appellant.

Appellant misreads McFaddin and Laube. The case of McFaddin, supra, concerned several transactions occurring on the premises involving patrons selling or proposing to sell contraband to undercover agents. While the licensee and its employees did not know of the specific occurrences, they knew generally of contraband problems and had taken numerous preventive steps to control such problems. The McFaddin court held that since (1) the licensee had done everything it reasonably could to control contraband problems, and (2) the licensee did not know of the specific transactions charged in the accusation, the licensee could not be held accountable for the incidents charged.

The case of Laube v. Stroh (1992) 2 Cal.App.4th 364, 3 Cal.Rptr.2d 779, was

actually two cases--Laube and De Lena, both of which involved "up-scale" restaurants/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 De Lena 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 preventative 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 crucial question is therefore the status of the performers.

We have already determined the dancers were the agents of appellant and we conclude the De Lena portion of the Laube case applies.

II

Appellant contended that the application of rule 143 violated the due process and equal protection clauses of the California Constitution.

The appeals board, a constitutionally-created agency of the state, is prohibited by the State Constitution, Article 3, Section 3.5, from declaring this or any statute unconstitutional or unenforceable. See Regents of University of California v. Public Employment Relations Board (1983) 139 Cal.App.3d 1037, 1042, 189 Cal.Rptr. 298.

We therefore decline to review this contention.

III

Appellant contended that the penalty imposed by the department was excessive. 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 raised 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 it was excessive to penalize appellant where there had been no record of previous wrongful conduct since June 1990, and the violations in the present matter were of such short duration as to render them de minimis. The issue, however, is whether the violations occurred, and if so, what would be a

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reasonable penalty. The fact that the violations were of short duration is not the issue, but whether they happened.

The department had the following factors to consider concerning the penalty: (1) a performer at the premises sold controlled substances during the time she was working at the premises, and between acts; (2) the wrongful conduct of the performer in selling the controlled substances was imputed to appellant; (3) another performer was involved in the same drug transaction; (4) another performer mingled with appellant's patrons and exposed a portion of her breast to public view; (5) and

appellant in 1990 was disciplined for the same type of violation as charged in the present matter concerning the exposure of a performer's body parts.

We determine that the penalties imposed are reasonably within the department's discretion.

CONCLUSION

The decision of the department is affirmed.[5]

RAY T. BLAIR, JR.,CHAIRMAN
JOHN B. TSU, MEMBER
BEN DAVIDIAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL

APPEALS BOARD

[5]This final order is filed as provided by Business and Professions Code §23088, and shall become effective 30 days following the date of this filing of the final order as provided by §23090.7 of said statute for the purposes of any review pursuant to §23090 of said statute.