

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

BASRA, INC.	)	AB-6579
dba The Pink Lady)	
67-990 Highway 111	)	File: 48-189504
Cathedral City, CA 92234,	)	Reg: 94030389
Appellant/Licensee,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	James Ahler
DEPARTMENT OF ALCOHOLIC)	
BEVERAGE CONTROL,	)	Date and Place of the
Respondent.	)	Appeals Board Hearing:
	)	February 5, 1997
	)	Los Angeles, CA
)	

Basra, Inc., doing business as The Pink Lady (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended appellant's on-sale general public premises license for 20 days, with ten days stayed for a one-year probationary period, for appellant having permitted its dancers to bare their buttocks to public view, and for allowing a patron to touch another dancer's breast, being contrary to the universal and generic public welfare and morals provisions of the California

¹The decision of the Department entitled "Decision Under Government Code Section 11517(c)" dated September 25, 1995, and the Proposed Decision of the Administrative Law Judge (ALJ) dated April 14, 1995, are set forth in the appendix.

Constitution, article XX, §22, arising out of a violation of Business and Professions Code §24200, subdivision (a), and the California Code of Regulations, Title IV, §143.2, subdivisions (2) and (3).

Appearances on appeal include appellant Basra, Inc., appearing through its counsel, Joshua Kaplan; and the Department of Alcoholic Beverage Control, appearing through its counsel, David B. Wainstein.

FACTS AND PROCEDURAL HISTORY

Appellant's license was issued on June 30, 1987. Thereafter, the Department instituted an accusation on July 14, 1994, alleging violations by dancers at appellant's premises.

An administrative hearing was held on February 9, 1995, at which time oral and documentary evidence was received. At that hearing, testimony was established that the licensed premises is a bar which provides entertainment in the form of "exotic dancing." Two uniformed police officers conducted a routine bar check on March 24, 1994. During the bar check, they observed two dancers who were performing "table dances." The dancers were wearing bikini tops and T-back swimsuit bottoms, which exposed their buttocks to public view. During the dance routine, the officers also saw a patron touch one of the dancer's breast.

Subsequent to the hearing, the ALJ issued his proposed decision which was rejected by the Department. The major difference between the proposed decision and the Department's decision was that the Department doubled the penalty. Appellant filed a timely notice of appeal.

In its appeal, appellant raised the following issues: (1) the decision is not supported by its findings, and the findings are not supported by substantial evidence; (2) appellant cannot be deemed to have permitted independent contractors to violate Department rules; and (3) California Government Code §§11512 and 11517, are unconstitutional and void under the Due Process clauses of the United States and California Constitutions.

DISCUSSION

I

Appellant contends that the police officers failed to obtain the identity of either dancer in question and did not cite or arrest either one of them for their actions. Appellant argues that the dancers were not wearing T-back swimsuit bottoms and argues appellant's witnesses should be afforded more credibility. Appellant also argues that the patron merely touched the fabric covering the performer's breast, and then for only one second or so.

"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 U.S. 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].)

The two uniformed police officers observed two dancers performing, each wearing a T-back swimsuit bottom, which exposed their buttocks. One of the officers was standing next to appellant's manager, Mr. Shawkat and pointed to an Asian dancer and said, in essence, "Look what she is doing." Mr. Shawkat replied, "They can table dance" [RT 27-31].

The credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier-of-fact. (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].)

Here the trier-of-fact found the testimony of appellant's witness, Taves, that the dancers never exposed their buttocks when table dancing not to be credible. Since the trier-of-fact did find the two police officers to be credible witnesses, their testimony is direct substantial evidence.

The two officers also witnessed a patron touching the fabric covering a dancer's left breast, with the patron's hand running down the dancer's left side. The patron received a kiss from the dancer [RT 12-16, 67-69]. Appellant argues that the rule does not prohibit touching of the costume covering the dancer's breast, and in any event,

the contact lasted only about one second.

Department Rule 143.2, subdivision (3), prohibits the touching, caressing, or fondling of a dancer's breasts. The distinction between touching the fabric covering the dancer's breast versus touching the skin of the breast itself is without merit. Such interpretation would allow dancers to wear the sheerest of costumes and permit patrons to touch any part of the dancer's body, as long as there was fabric separating the patron's hand and the dancer's body.

We determine that there was substantial evidence supporting the findings which support the decision.

II

Appellant contends that, because the dancers/performers were independent contractors, there cannot be an imputation of liability.

Rule 143.3, subdivision (2), identifies "entertainers" and no distinction is made concerning their employment status. As appellant had experienced similar problems, as evidenced by a prior 1990 decision of a similar type violation, it had already been placed on notice of these potential problems and had an affirmative duty to prevent further violations.

As the ALJ noted in his proposed decision, California Civil Code section 1668 provides, in pertinent part: "All contracts which have for their object, directly or indirectly to exempt anyone from responsibility for his. . .violation of law, whether willful or negligent, are against the policy of the law."

We do not believe appellant may by a creation of an employment status or other

business practices, avoid liability for misconduct on the premises which appellant through its employees either knew or should have known and anticipated.

III

Article 3, §3.5 of the California Constitution provides that state administrative agencies may not declare a statute unconstitutional. Therefore, we decline to review this contention.

CONCLUSION

The decision of the Department is affirmed.²

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

²This 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.