

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

AB-7858

File: 42-307055 Reg: 00049306

ECSTASY CORP., dba Gotham City
21516 Sherman Way, Canoga Park, CA 91303,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen

Appeals Board Hearing: February 13, 2003
Los Angeles, CA

ISSUED APRIL 16, 2003

Ecstasy Corp, doing business as Gotham City (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which revoked its on-sale beer and wine public premises license, for permitting its entertainers to commit acts contrary to the rules of the Department found in the California Code of Regulations, title 4, section 143.3, subdivisions (1) (a), (b), and (c), and (2).

Appearances on appeal include appellant Ecstasy Corp., appearing through its counsel, Joshua Kaplan, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine public premises license was issued on May 4, 1995. Thereafter, the Department instituted an accusation against appellant charging the violations of the rules. The accusation filed listed 17 separate acts of misconduct.

¹The decision of the Department, dated July 5, 2001, is set forth in the appendix.

However, following an administrative hearing on March 9 and May 11, 2001, four of the counts were dismissed or stricken. At that hearing, testimony was presented concerning acts by performers of simulated sexual intercourse, masturbation, and oral copulation (counts 5, 10, 13), touching their own breasts (counts 2, 6, 11, 15), display of pubic hair and anus (counts 4, 17), and exposure of breasts while on a stage not conforming to the rules (counts 1, 3, 12, 16).

Subsequent to the hearing, the Department issued its decision which determined that the acts alleged had occurred. Appellant thereafter filed a timely notice of appeal.

In its appeal, appellant raises the following issues: (1) the decision is not supported by substantial evidence, arguing that a recent Appeals Board decision (*Vicary* (2001) AB-7606), controls as to the conduct alleged; (2) appellant cannot be held responsible for conduct caused by independent contractors; (3) the rules of the Department cannot be sustained as to counts 5, 10, and 13; and (4) the penalty is excessive. Apparently appellant does not contend the acts themselves were not committed or performed.

DISCUSSION

I

Appellant contends the decision is not supported by substantial evidence. In accordance with the following foundational points in mind, we will consider appellant's contentions and arguments and determine whether there is substantial evidence, considering the record as a whole, to support the decision.

"Substantial evidence" is relevant evidence which reasonable minds would accept as a reasonable support for a conclusion. (*Universal Camera Corp.v. Labor*

Bd. (1951) 340 US 474, 477 [95 L.Ed. 456, 71 S.Ct. 456] and *Toyota Motor Sales U.S.A., 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].)

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings.²

The Department, on the other hand, is authorized by the California Constitution to exercise its discretion whether to suspend or revoke an alcoholic beverage license, if the Department shall reasonably determine for "good cause" that the continuance of such license would be contrary to public welfare or morals.

With the guidance of that which is stated above, we now consider what appellant argues concerning a recent case, *Vicary* (2001) AB-7606, as controlling. In that matter,

²The California Constitution, article XX, §22; Business and Professions Code sections 23084 and 23085; and *Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

the Appeals Board reversed the decision of the Department which concerned acts which also are of concern in this matter. The Board concluded that the state of the law was ambiguous and extremely unclear as to First Amendment protection of dancers and their performances as set forth in various cases in this jurisdiction and throughout the nation.

Notwithstanding, the court of appeal reversed the Board in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board / Vicary* (2002) 99 Cal.App.4th 880 [121 Cal.Rptr.2d 753]. The present matter is controlled by the court of appeal's holding in the *Vicary* case, which appellate court decision is contrary to the argument of appellant. Additionally, some of the acts alleged factually come within the acts set forth in *Vicary, supra*, but the more "aggressive" conduct of simulated sexual intercourse and masturbation, display of the anus, and the technical rule as to performers being too close to customers as defined by the rule, go beyond the conduct considered by the Board in *Vicary, supra*.

II

Appellant contends that it cannot be held responsible for conduct caused by independent contractor performers.

The Board has considered this argument in other matters and found that the particular legal or tax status of the performers is of no consequence where the thrust of the rules is to protect the public welfare and morals. (See *Funtastic, Inc.* (1998) AB-6920, and *4623 Monica Corp.* (1998) AB-6919.) Notwithstanding the Board's views as expressed in the cited cases, the rule itself makes it clear where it is stated that "the licensee shall permit no person" to do the prohibited acts. Such language clearly limits appellant's cause.

III

Appellant contends the rules of the Department cannot be sustained concerning counts 5, 10, and 13. Count 5 concerns allegations of simulated sexual intercourse, count 10 concerns simulated oral copulation, and count 13 concerns simulated masturbation.

Rule 143.3, subdivision (1) (a), states: "Live entertainment is permitted on any licensed premises, except that: (a) 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."

Appellant cites cases that have no applicability to the issue before the Board. A major thrust of appellant is that the entertainers were clothed during the acts done, so thus the conduct was merely suggestive. The Appeals Board has rejected this premise time and again, concluding that the acts and motions of the entertainers which come within the prohibited conduct, whether clothed or not, are violations of the rule.

IV

Appellant contends the penalty is 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 raises 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].)

The record shows that a similar offense with decision entered June 4, 1999,

warranted a stayed revocation for a two-year period. The allegations in this matter occurred about eight months following the decision of 1999, actions committed within the stayed revocation period.

We find no abuse of the Department's discretion to revoke the license.

ORDER

The decision of the Department is affirmed.³

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

³This 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.