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

AB-7921
File: 40-135065 Reg: 00049105

KOPPER KITTY, INC., dba The Classy Lady
8314 Sepulveda Blvd., Sepulveda, CA 91343,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: November 14, 2002
Los Angeles, CA

ISSUED FEBRUARY 4, 2003

Kopper Kitty, Inc., doing business as The Classy Lady (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 30 days with 15 days stayed for one year for violations of Department Rules 143.3(1) (a), (b), and (c), and 143.3(2) (4 Cal. Code Regs. §§143.3, subs. (1) (a), (b), and (c), and (2)), involving what is generally described as lewd conduct by women entertainers.

Appearances on appeal include appellant Kopper Kitty, Inc., appearing through its counsel, John H. Thaler, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer license was issued on March 1, 1989. Thereafter, the

[1]The decision of the Department, dated December 20, 2001, is set forth in the appendix.

Department instituted a 27-count accusation against appellant, for acts allegedly occurring on October 21 and December 28, 1999, and on January 7 and March 17, 2002. The accusation charged that appellant permitted female entertainers to engage in a variety of conduct proscribed by Department rules having the force of law: exposing female breasts while not on a prescribed stage, in violation of Rule 143.3(2) (counts 3, 8, 12, and 27); touching of their own breasts, in violation of Rule 143.3(1)(b) (counts 2, 4, 5, 9, 11, 16, and 19); touching their own genitals, in violation of Rule 143.3(1)(b) (counts 1, 13, and 17); touching their own buttocks, in violation of Rule 143.3(1)(b) (counts 6 and 15); touching the buttocks of another, in violation of Rule 143.3(1)(b) (counts 22, 25, and 26); exposure of the anus, in violation of Rule 143.3(1)(c) (count 18); simulating oral copulation with another, in violation of Rule 143.3(1)(a) (counts 20, 21, 23, and 24); and simulating sexual intercourse, in violation of Rule 143.3(1)(a) (counts 7, 10, and 14).

An administrative hearing was held on October 2, 2001, at which time oral and documentary evidence was received. Five Department investigators testified about the conduct of entertainers on the four separate dates. Subsequent to the hearing, the Department issued its decision which determined that all of the counts were proven true except counts 3 and 9.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) the acts alleged are protected by the First Amendment, (2) the Department's investigators destroyed crucial evidence, (3) officers of the LAPD refused to act on the order of the Administrative Law Judge, and (4) meaningful testimony was prohibited. Issues 3 and 4 will be considered together.

Apparently, appellant does not contest that the acts charged did in fact occur

and in the manner described. This review shall proceed upon that basis.

DISCUSSION

I

Appellant contends the acts alleged are protected by the First Amendment, citing this Board's decision in *Vicary* (2001) AB-7606.

Appellant cites the Appeals Board's Order of August 16, 2001, *Vicary, supra,* which contained an inquiry by the Board as to the state of the law in federal and state courts. The Board concluded:

> "Despite the fact that City of Erie v. Pap's is the most recent pronouncement by the United States Supreme Court, it does not provide a clear answer to the issues in this case. There are three reasons why we think this. First, the Department's rule is not a total ban on nudity. Instead it is an attempt to regulate conduct by a performer who may or may not be nude. Second, by singling out specific elements of conduct, devoid of context, the rule threatens to inhibit expression more than a minimal amount. Indeed, the Department relies on a snapshot record of expressive conduct as the basis for its findings that the rule was violated. The record indicates that, from a total of 48 minutes of dance, the Department has culled touches which lasted seconds. Third, it is inescapable that the content of the expression is what the Department found to be offensive.
>
> "... There was no finding by the Department that the touchings said to violate Rule 143.3 were not part of the expressive element of the dance, nor any attempt to assess the impact the prohibition might have had upon the expression reflected in the dance - nor could it. [Citations] Without such findings, and without evidence to support such findings, we can only conclude that the application of Rule 143.3 to the dancers in appellant's employ, in the circumstances of this case, infringed upon the constitutional rights of expression enjoyed by appellant and the dancers in her establishment by virtue of the First Amendment."

While the Court of Appeal[2] did not precisely allude to the Board's concerns, or issue a pronouncement clarifying the difficulty, the court did reverse the Board's decision and upheld the Department's rule as a proper regulatory control even under

---

[2]*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board/ Vicary* (2002) 99 Cal.App.4th 880 [121 Cal.Rptr 2d 753.

"minimal constitutional protections" of the dancers.

The present matter's conduct as proven goes well beyond the factual conduct in *Vicary, supra.* The present matter's violations include some conduct similar to *Vicary, supra,* but include other conduct that it would seem impossible to describe as "expressive" or "art form." These acts herein, appear more to be sexually-driven exhibitions which include lap dances where the entertainers' body parts, used in sexual expressions, were used to touch and rub the sexual and private parts of the investigators. Such conduct also included simulated oral copulation and simulated sexual intercourse.

The sexual arousal conduct of appellant's entertainers clearly does not come within the concerns of the Board in *Vicary, supra*.

II

Appellant contends the Department's investigators destroyed crucial evidence. Apparently, two of the five Department investigators made some type of recording in the form of notes, shortly after the incidents they witnessed. These notes were, according to testimony, destroyed following the preparation of a formal report for each incident [RT 70-72].

Appellant contends that since the notes were destroyed after the formal reports was completed, the investigators' testimony given with reference at times to the reports, should be stricken.

It is common, although not necessarily universal, that investigators or police, and anyone else who records an event does so first with raw notes, then finishes the investigation with a memorandum or report, and discards the earlier notes once the final draft is prepared.

We are unwilling to ascribe an illicit motive to such behavior, since it strikes us as a normal and reasonable human trait to discard the raw material once a final draft is completed, there no longer being any use or need for the notes. Raw notes would not contain reflection of all events, but the report made with thought, notes, and reflection, would be the most comprehensive of what happened.

This is not to say that proof that the destruction of the raw notes was motivated by a desire to suppress relevant and material evidence should go unpunished. But when the evidence indicates only that the raw notes served as the foundation for a more complete report, and were discarded shortly after the report was finalized, the notion that the person doing so has engaged in misconduct is, in our opinion, unwarranted.

III

Appellant contends officers of the LAPD refused to act on the order of the Administrative Law Judge (ALJ), and meaningful testimony was prohibited.

This in effect is a non-issue before the Appeals Board. The questions and contentions raised should have been raised and resolved at the hearing level. The ALJ aptly stated:

> "13. At the conclusion of the hearing on the merits, counsel for the [appellant] in effect claimed that the hearing was unfair in that the discovery turned over to him by the Police Department pre-hearing, contained redactions which foreclosed the possible follow-up of leads to potential witnesses and evidence.
>
> "The [ALJ] was involved in a number of the licensee's discovery requests pre-hearing and after an in-camera discovery proceeding, ordered police department investigation reports turned over to the licensee's counsel. This was done. From at least May, 2001, until the hearing on the merits in this matter on October 2, 2001, counsel 'sat on his rights' concerning redacted matter in the discovery material and never brought his problem to the attention of the [ALJ] for a remedy until the conclusion of the herein hearing.

> "Further no evidence was presented that the redactions were done for any improper purpose or the redacted material was anything other than extraneous material. The [Appellant's] claim was made in a decidedly untimely manner and on this state of the record the [Appellant] cannot be heard to complain."

Apparently, the presence of the LAPD in the process of the investigation was for backup of the Department's investigators, a usual practice.

Appellant's other concerns, that there was a conspiracy between the Department and the LAPD shows no foundation in the record, and appellant has shown none, except by innuendo.

The time delay by appellant as cited in the ALJ's decision above noted, is attested to by appellant's counsel, in his brief.

ORDER

The decision of the Department is affirmed.[3]

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

---

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