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

AB-8331
File: 48-376658 Reg: 03056122

STEPHEN CHARLES BERKEY dba Diva's
1081 Post Street, San Francisco, CA 94109,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: April 7, 2005
San Francisco, CA

ISSUED JUNE 20, 2005

Stephen Charles Berkey, doing business as Diva's (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked his license for his bartenders on four occasions having permitted the premises to be used as a place for the solicitation of prostitution, each occasion alleged to be a violation of Penal Code section 647, subdivision (b).[2] The revocation order was conditionally stayed, subject to one year of discipline-free operation and service of a 30-day suspension.

Appearances on appeal include appellant Stephen Charles Berkey, appearing through his counsel, Adam G. Slote, and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean Lueders.

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[1]The decision of the Department, dated July 30, 2004, is set forth in the appendix.

[2] Section 647, subdivision (b) provides that a person who solicits or agrees to engage in or who engages in any act of prostitution, commits a misdemeanor.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on December 12, 2001. On October 4, 2003, the Department instituted an accusation against appellant charging that his employees permitted the premises to be used as a place for the solicitation of prostitution. Specific acts of solicitation were alleged to have taken place in the premises on April 12, May 3, June 20, and July 31, 2003.

An administrative hearing was held on April 20 and 21, 2004. Subsequent to the hearing, the Department issued its decision which determined that the charges of the accusation had been established. Appellant thereafter filed a timely notice of appeal. In his appeal, appellant raises the following issues: (1) appellant diligently acted to prevent prostitution, had no knowledge of the incidents alleged, so did not permit the premises to be used for prostitution; (2) constructive knowledge does not constitute good cause for revocation; and (3) neither the evidence nor the findings support the determination that appellant permitted prostitution. These contentions are interrelated, and will be discussed together.

DISCUSSION

The accusation alleged, and the Department found, that appellant permitted the premises to be used as a place for the solicitation of prostitution on four occasions in the year 2003. In earlier investigations of the premises in the year 2002, no violation was found.[3] This appeal involves only the incidents which occurred in 2003.

[3] Appellant characterizes each visit by an investigators to his premises as a separate investigation, while the Department considers all of the visits in the year 2002

Appellant operates a San Francisco nightclub that caters to transgender people. The administrative law judge (ALJ), in a special finding (IV-A), described the premises this way:

> The premises is a bar and nightclub that is located in the "Tenderloin" area of San Francisco. This area has an abundance of homeless people, drug activity, prostitution and petty crime. Since the Respondent's bar is one of the few bars in San Francisco that caters to transgenders, males who dress as females and who want to be perceived as a female, the premises are frequented by transgenders and by men who enjoy meeting other men who dress as women. Some of the men come to converse with the transgenders and some come to pick up a partner. Over the years, the premises have developed a reputation as being transgender friendly and groups who provide outreach services to transgenders are welcomed at the premises. The premises also provide entertainment consisting of shows featuring female impersonators and the premises participate in fund raisers for bisexuals and transgenders.

Appellant does not contest the findings to the extent that acts of prostitution were solicited on the premises, but denies knowledge they occurred, and stresses his vigorous campaign to prevent such conduct. The Department, on the other hand, asserts that, in one of the violations, the bartender actively participated in the negotiations concerning the price to be paid; in another, the person engaging in the solicitation was said to be an employee of the bar; and in the other two, the solicitations took place directly in front of the bartender in circumstances that should reasonably have put him on notice that they were occurring, but which he did nothing to prevent.

The ALJ found that appellant had no actual knowledge of the incidents, but was bound by the imputed knowledge arising from the involvement of his employees in the solicitations.

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part of a single investigation, and the same true for 2003. We do not believe the disagreement to be material. The real issue is whether there is substantial evidence to support the Department's findings and determinations that the acts of solicitation of prostitution occurred, and appellant's employees were sufficiently aware of them to give rise to the constructive knowledge by which appellant is bound.

Appellant argues that the evidence and the findings do not support the determination that appellant permitted the solicitation of prostitution. Appellant asks the Board to conduct its own independent review and reject the findings of imputed knowledge. Appellant argues that the purposes behind the doctrine of imputed knowledge are not served by its application in this case, because of appellant's personal lack of knowledge and his efforts to prevent the solicitation of prostitution.

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. The Appeals Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing.[4]

"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 U.S. 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 findings are attacked on the ground that there is a lack of substantial evidence, the Appeals Board, after considering the entire record, must determine

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[4] The California Constitution, article XX, section 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].

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].) Where there are conflicts in the evidence, the Appeals Board is bound to resolve them in favor of the Department's decision, and must accept all reasonable inferences which support the Department's findings. (*Kirby v. Alcoholic Bev. Control App. Bd.* (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857] (in which the positions of both the Department and the license-applicant were supported by substantial evidence); *Kruse v. Bank of America* (1988) 202 Cal.App.3d 38, 51 [248 Cal.Rptr. 271]; *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734]; *Gore v. Harris* (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].) The credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. (*Lorimore v. State Personnel Board* (1965) 232 Cal.App.2d 183, 189 [42 Cal.Rptr. 640]*; Brice v. Dept. of Alcoholic Bev. Contro*l (1957) 153 Cal.App.2d 315, 323 [314 P.2d 807].)

It is well settled that a licensee is vicariously responsible for the acts of his employees. (See, e.g., *Morell v. Dept. of Alcoholic Bev. Control* (1962) 204 Cal.App.2d 504 [22 Cal.Rptr. 405]; *Harris v. Alcoholic Bev. Control Appeals* Bd. (1962) 197 Cal. App.2d 172 [17 Cal.Rptr. 315].)

The record amply supports the findings of the ALJ that acts of prostitution were solicited on the premises. The question is whether there was sufficient evidence of

knowledge, actual or constructive, on the part of appellant or his employees that such conduct was occurring. We have reviewed the evidence with respect to each of the four incidents in question, and find it sufficient to support the findings with respect to the incidents which occurred on April 27, 2003,[5] May 3, 2003, and June 20, 2003, but not as to the incident of July 31, 2003. In each case, the incident has to be considered in light of the general awareness of all those concerned, as evidenced by the testimony of several witnesses, that transgender prostitution was a matter of concern, not only in this bar, but in the neighboring area of San Francisco itself.

April 27, 2003

Department investigator Eric Hirata had two conversations on the subject of oral copulation with Carla Clynes, a bartender employed by appellant. Clynes informed him what he might expect to pay. After Hirata had told Clynes he thought a certain person attractive, she asked him if he wanted her. She then introduced him to "Melli." Hirata and Melli, whose true name was Maria Castillo, discussed what Hirata wanted, and reached an agreement on the price she would charge, an amount Clynes had suggested to Hirata earlier, to orally copulate him. Hirata and Melli left the bar together, and Melli was arrested when she entered Hirata's state-owned vehicle.

Appellant does not dispute Hirata's account of what occurred, but asserts that, consistent with appellant's enforcement efforts, Clynes was terminated for her involvement in a solicitation of prostitution that occurred after the incident involving Hirata, but before appellant knew of the Hirata incident. Clynes did not testify.

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[5] Both the accusation and the decision place the date of this incident as April 12, 2003. However, Hirata testified that it took place on April 27, 2003.

May 3, 2003

While Department investigator Edgar Valdez was seated at the fixed bar, he was approached by a female later identified as Jenny Nguyen. Nguyen asked Valdez if he wanted to go on a date. The two negotiated a price for oral copulation while Nicole Crawford, the bartender, was standing in front of them, three feet away. Valdez asked Crawford if Nguyen was "clean." Crawford joked that she was not a nurse, but then folded a napkin in the shape of a nurse's cap, and said Nguyen was clean. Valdez asked if condoms were available, and Nicole brought a jar filled with condoms to him. Valdez took two from the jar. Crawford then told him to take another one, he would need it. The two left the bar, and Nguyen was later arrested.

These circumstances are sufficient, we think, to support an inference that Crawford was aware that a solicitation of prostitution had taken place - a man seated at the bar is approached by a female, a discussion occurs, and the two prepare to leave together, their need for condoms having been expressed to the bartender who had been in a position to observe the conversation between the two. Even if Crawford did not hear the spoken words, she should have been alert to the incident and its potential.

June 20, 2003

Department investigator Jesus Gutierrez was seated at a table when he was approached by a female transgender, later identified as Jessie Gomez, who asked if he wanted company. She invited him to play a video game at the fixed bar, and while there, he bought her a non-alcoholic drink. While within five feet of Scott Cortwright (also known as "Suzie"), a bartender, the two negotiated the price Gomez would charge Gutierrez for oral copulation and anal intercourse. Gutierrez asked Gomez if she was "clean." Gomez said she was, and Cortwright said that he knew Gomez and she was

clean. Gutierrez asked Cortwright for condoms, and Cortwright handed him some.

Cortwright denied any knowledge that Gomez had solicited prostitution, and claimed that when he was asked if Gomez was clean, he was in the process of serving another patron, and giggled, thinking it a weird question to ask. The ALJ chose to place greater weight on Gutierrez's testimony that Cortwright told him he knew Gomez and she was clean.

Again, the combination of circumstances were such that a reasonable person, alert to the potential of solicitation for prostitution, should reasonably have been on notice that such was on-going, and made an effort to discourage or prevent it.

July 31, 2003

Department investigator Valdez visited the bar a second time on July 31, 2003. He took a seat at the bar next to a transgender person who identified herself as "Mercedes." She was later identified as Joseph Bullard. Mercedes offered to take Valdez back to her apartment, and they agreed upon a price of $50.

The only evidence of knowledge on the part of Cortwright that prostitution was being solicited was that he was standing in front of the two while they were discussing what they were going to do. There was no evidence that he vouched for Mercedes' cleanliness, participated in the conversation, or offered condoms to them when they left the bar, and no finding that he heard their conversation. Mercedes was already seated at the bar when Valdez sat down, unlike the other incidents where the prostitutes approached the investigators. Thus, we do not think there was substantial evidence of knowledge on the part of Cortwright that could be imputed to his employer. Nor do we think that testimony that Bullard sometimes picked up glasses is, by itself, enough evidence to deem him an employee, as the Department claims. The ALJ made no

finding that Bullard was an employee, appellant denied that Bullard was an employee, and the only evidence that Bullard was an employee was a hearsay statement to a Department investigator.

Appellant described prostitution as part of a transgender life style, citing statistics that 48 percent of the transgender population was involved in "sex work" in the past six months. He conceded that this presented a "huge challenge" to Divas, which he met with training, strict employment rules, and vigilant and diligent activity on the part of bartenders, managers, and security. These efforts were acknowledged by the ALJ, and were the reason the ALJ rejected the Department's recommendation of outright revocation. As the record reflects, however, even these efforts were open to failure.

Following the incidents which gave rise to the accusation, appellant retained the services of Patrol Special, a quasi-governmental entity which possesses certain police powers and provides its services on a fee basis to merchants and businesses. He testified that since the services of Patrol Special have been utilized, the prostitution problem at Divas has been eliminated.

Contrary to appellant's assertion that no purpose is served by the application of the doctrine of imputed knowledge in this case, appellant has added another enforcement tool to his efforts to prevent prostitution, action brought about by the filing of the accusation that resulted in the hearing from which this appeal was taken. Had appellant utilized the services of Patrol Special earlier, there might have been even fewer incidents of prostitution.

ORDER

The decision of the Department is affirmed except as to count 4 of the accusation, and affirmed as to penalty, there being no reason to believe the

Department would modify the penalty because this Board felt one of the four incidents of solicitation unproven.[6] (See *Miller v. Eisenhower Medical Center* (1980) 27 Cal.3d 614, 635 [166 Cal.Rptr. 626].

TED HUNT, CHAIRMAN
SOPHIE C. WONG, MEMBER
FRED ARMENDARIZ, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[6] This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate district court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.