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

AB-8405
File: 47/58-92659 Reg: 04057035

COWBOY BOOGIE COMPANY dba Cowboy Boogie
1721 South Manchester Avenue, Anaheim, CA 92802,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: December 1, 2005
Los Angeles, CA

ISSUED: FEBRUARY 1, 2006

Cowboy Boogie Company, doing business as Cowboy Boogie (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 60 days, 30 of which were conditionally stayed, subject to one year of discipline-free operation, for having permitted violations of Department Rules 143.2 and 143.3 (Title 4 Cal. Code Regs., §§143.2 and 143.3).

Appearances on appeal include appellant Cowboy Boogie Company, appearing through its counsel, Edward A. Weiss, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on January 16, 1981. On April 8, 2004, the Department instituted an accusation against appellant

[1]The decision of the Department, dated February 9, 2005, is set forth in the appendix.

charging 10 violations of Rule 143.2 (counts 3, 4, 5, 6, 7, 8, 11, 12, 15, and 16) and 6 violations of Rule 143.3 (counts 1, 2, 9, 10, 13, and 14) on three separate dates in January 2004. Eleven additional violations of Rule 143.2 (counts 17 through 26) on the same three dates were added to the accusation by amendment on or about October 6, 2004.

Rule 143.2 relates to attire and conduct on the licensed premises. The rule provides, in pertinent part:

> The following acts or conduct on licensed premises are deemed contrary to public welfare and morals, and, therefore no on-sale license shall be held at any premises where such conduct or acts are permitted:
> ...
> (2) To employ or use the services of any hostess or other person to mingle with the patrons while such hostess or other person is unclothed or in such attire, costume or clothing as described in paragraph (1) above [as to expose to view any portion of the female breast below the top of the areola or of any portion of the pubic hair, anus, cleft of buttocks, vulva or genitals].
>
> (3) To encourage or permit any person on the licensed premises to touch, caress or fondle the breasts, buttocks, anus or genitals of any other person.

Rule 143.3 relates to entertainers and conduct on the licensed premises. The rule provides, in pertinent part:

> Acts or conduct on licensed premises in violation of this rule are deemed contrary to public welfare and morals, and therefore no on-sale license shall be held at any premises where such conduct or acts are permitted.
>
> Live entertainment is permitted on any licensed premises, except that:
>
> (1) No licensee shall permit any person to perform any acts of or acts which simulate:
>
> (a) Sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law.
>
> (b) The touching, caressing or fondling on the breast, buttocks, anus or genitals.
>
> ...

> (2) Subject to the provisions of subdivision (1) hereof, entertainers whose breasts or buttocks are exposed to view shall perform only upon a stage at least 18 inches above the immediate floor level and removed at least six feet from the nearest patron.

An administrative hearing was conducted on November 10, 2004. Following the hearing the Department issued a decision sustaining all 26 counts of the amended accusation. The decision included findings that female dancers, with the encouragement of a disk jockey employed by appellant, bared their breasts and buttocks, touched the breasts and buttocks of other dancers, and engaged in simulated sexual intercourse, all this on a three foot high stage, before a crowd of male patrons. The Department found that appellant's employees and security personnel took no action to halt the conduct.

This timely appeal followed. Appellant raises several defenses: (1) Department Rule 143.2 is unconstitutionally vague if applied in any manner other than to describe the relationship between employer and employee; (2) Department Rule 143.2, subdivision (3), is unconstitutionally vague and over broad in that the rule fails to set forth any objective standard; and (3) Department Rule 143.3 is unduly broad if applied to the conduct of patrons, and constitutes an unlawful prior restraint.

DISCUSSION

I

The basic issue in this case is whether Department Rules 143.2 and 143.3 are unconstitutionally vague when applied to conduct by patrons, encouraged and permitted by the licensee and its employees and agents, and as to which no attempt was made to halt or prevent such conduct. Appellant appears to concede that, if engaged in by persons in appellant's employ, such conduct would, without question, contravene such rules.

Appellant argues that Rule 143.2, subdivision (2), must be interpreted to apply to the conduct in question only if those engaged in it were employees, agents, or entertainers under the direction and control of the licensees. It also argues that the words “encourage or permit” are too subjective to give a licensee appropriate notice as to what actions the licensee must affirmatively do to constitute a violation, and, finally, that Rule 143.3 is unconstitutional if applied to the acts of patrons. Appellant concedes that “had the offending parties been entertainers performing for hire, or, performing for tips, there would be no question,” but argues that it is in no position to control the conduct of patrons, claiming that “the licensee is in no position to determine what a customer does before they do it,” and that “[n]o amount of advance preparation could prevent this activity.” Appellant places considerable emphasis on the physical size of the premises and the number of patrons present as factors contributing to its difficulty in anticipating and preventing the conduct in question. The Department points to the appellant’s use of security personnel to separate the largely male audience from the stage on which the female patrons danced as evidence it not only knew of the dancer’s conduct but had the means to control or prevent it.

In *California v. LaRue* (1972) 409 U.S. 109 [93 S.Ct. 390], the United States Supreme Court reviewed the constitutionality of Rule 143.3 and concluded it was a rational measure to regulate conduct in premises licensed to sell alcoholic beverages.

Appellant’s arguments to the effect that it was not warned by the rules that the conduct in question is prohibited, and that it was powerless to prevent it are unpersuasive. A fair reading of the rules in question compels the conclusion that it is sexually-oriented conduct which is the focus of the rule, and where, as in this case, the licensee, through its agents and employees, was exploiting such conduct, the rules shall apply with full force. Rule 143.3, subdivision (1), states that “no licensee shall

permit *any person*" to perform acts or acts which simulate sexual intercourse. It does not say "any person employed by the licensee." [2]

Appellant's security personnel were aware of the "risque" nature of the conduct on stage, one of them warning a Department investigator not to photograph the dancers because the security person did not want "it" to get out.

It is apparent that, by providing a stage for the female patrons ringed by security personnel, a disk jockey who encouraged the dancers to bare their breasts and otherwise entertain a largely male audience, appellant has enlisted female patrons as entertainers and created "live entertainment" well within the scope of Rule 143.

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

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

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[2] Nor does it matter that the persons who engaged in simulated sexual intercourse were both female. It is irrelevant that the two females could not engage in true sexual intercourse. One does not have to be able to perform a specific act to be able to simulate its performance.

relevant evidence at the evidentiary hearing.[3]

Applying these standards, we must reject appellant's arguments.

ORDER

The decision of the Department is affirmed.[4]

SOPHIE C. WONG, MEMBER
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

Chairman Fred Armendariz abstained from participating in the decision in this matter.

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[3]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].

[4] 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.

Appellant contends