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

AB-9107
File: 47-385974 Reg: 09071752

FRANK & DEAN'S RESTAURANT GROUP, INC.,
dba The Show at Papa Joe's
3768 East Colorado Boulevard, Pasadena, CA 91107,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley

Appeals Board Hearing: March 3, 2011
Los Angeles, CA

ISSUED APRIL 22, 2011

Frank & Dean's Restaurant Group, Inc., doing business as The Show at Papa Joe's (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for various periods of time, consisting of: a 20-day suspension with five days thereof stayed for one year, for violating conditions on its license, in violation of Business and Professions Code section 23804; a 30-day suspension for permitting violations of rule 143 and its sub-sections; and a 15-day suspension for having materially altered the interior physical arrangements of the premises without prior written consent, in violation of rule 64.2(b)(1), the suspension to continue indefinitely thereafter until appellant complies with Rule 64.2(b)(1). The

[1]The decision of the Department, dated April 21, 2010, is set forth in the appendix.

suspensions are to run concurrently.

Appearances on appeal include appellant Frank & Dean's Restaurant Group, Inc., appearing through its counsel, Roger Jon Diamond, 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 February 25, 2008. Thereafter, the Department instituted an accusation against appellant charging violations of Business and Professions Code section 23804 (Counts 1, 2, 3, 4, and 20) (condition violations); Department Rules 143.2(3), 143.3(1), and 143.3(2) (Counts 5 through 19 and 21 through 23) (employee and patron conduct); and Rule 164.2(1)(b) (Count 24) (premises alteration).

An administrative hearing was held on March 2, 2010, at which time documentary evidence was received and testimony concerning the violations charged was presented by Department investigators Dolisa Perez and Enrique Alcala. The evidence established the presence of pool tables, in violation of license condition number 7; various forms of simulated sexual activity, in violation of rule 143 and its related sub-sections; the providing of lap dances and female entertainment in violation of condition number 9; and alteration of the physical premises without prior notice to and consent of the Department.

Subsequent to the hearing, the Department issued its decision which sustained the charges of counts 1 through 6, 8 through13, 15 through 18, 20, 22 and 23, and subcounts A, D, and E of count 24. Counts 7, 14, 19 and 21, and subcounts 24B, 24C, and 24F were dismissed.

Appellant filed a timely notice of appeal in which it raises the following issues: (1) The Department's policy of requiring a license applicant to petition for a conditional license constitutes "bureaucratic extortion"; (2) lap dancing not observed by third parties does not constitute entertainment that violates condition number 9; and (3) there was no simulated sexual activity that violated rule 143 and related rules.

DISCUSSION

Our review of the evidence satisfies us that there is ample support in the record for the findings in the decision of the Department, and the issues raised by appellant are asserted in such broad terms and with such little detail that our ability to address them in any great detail is next to impossible. Most of what appellant laments are Department actions and policies that are beyond the jurisdiction of this Board. For example, appellant invites this Board to tell the Department it should not engage in vigorous enforcement of the ABC Act in these troubled times. Or, it invites the Board to tell the Department it is bad policy, and unfair, to extract conditions from license applicants before it will issue a license - appellant calls this "bureaucratic extortion." Appellant's claims that have to some extent been particularized are addressed in the discussion which follows; those that can with legitimacy be described as "rants" are not.

Appellant argues that the various suspensions ordered by the Department are, in this economy, ill-advised, and that the Board should act to "change the punishment system by a published decision." (App. Br. 13.) In its counsel's inimitable fashion, appellant asserts:

> The 30 day suspension should be lifted. The Department should have imposed a substantial fine upon the perpetrator of the violations, not on new management. The whole system needs to be reformulated and the Appeals Board has the power to do this by issuing a formal opinion in this case that the

> Department should henceforth impose substantial fines upon the persons involved and not punish the premises.
>
> It takes forward thinking citizens to figure out new solutions to terrible problems. There is in our society enormous inertia to do nothing but go along with the flow. If that is [*sic*] what good is it to serve as a citizen on the Appeal's [*sic*] Board? Persons should want to make a difference and make changes.
>
> Indeed, President Obama ran on a campaign of change and the mid term elections of 2010 were won by the Republicans because they campaigned for change. Real change would be important.
>
> Although the hearing officer's report adopted by the ABC cannot be challenged on every ground because some of the facts found to be true are true, the Appeals Board can change the punishment system by a published decision.

(*Ibid*.)

Suffice it to say, appellant invites this Board to exercise powers that would override the broad discretion invested in the Department, as well as constitutional and statutory limitations on the Board's powers, and to ignore legislative enactments embodied in the ABC Act since its adoption in 1955. We respectfully decline the invitation.

Appellant's more specific claims, that lap dancing is not entertainment, and that simulated sexual activity must appear to be real, barely deserve discussion. A lap dance involves an actor and an audience. That is enough to constitute entertainment. Webster's offers examples in its definition of the verb "entertain" that would seem to fit: "to cause the time to pass pleasantly for (someone): Amuse, Divert."[2]

Similarly, appellant's argument that an activity is not simulated unless the viewing audience is actually fooled into believing the activity is real, and not simulated, is utterly unconvincing. Such an argument did not sway the Appeals Board in the many

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[2] Webster's New Third International Dictionary, Unabridged (1961), p. 757.

cases it has heard involving the issue of simulated activity, and it does not sway us in this case. "One does not have to be able to perform a specific act to be able to simulate its performance. " (*Cowboy Boogie Compan*y (2006) AB-8405, n.2.)[3]

ORDER

The decision of the Department is affirmed.[4]

FRED ARMENDARIZ, CHAIRMAN
TINA FRANK, MEMBER
MICHAEL PROSIO, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[3] Appellant's assertion that it is improper for the Department to cite prior Appeals Board decisions because it does not provide copies of the decisions and they are not readily accessible to the public is both unpersuasive and untrue. In addition to furnishing copies to various libraries in California, the Appeals Board decisions are readily available to the public via the Board's website "www.abcappealsbd.ca.gov." A simple word search on the Board's website will bring up nearly a dozen prior Board decisions addressing the subject of simulated sexual activity. While none of these decisions is a binding precedent, it cannot be denied that the reasoning they contain is persuasive guidance in any new case involving such an issue.

[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.