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

AB-9204
File: 48-449447 Reg: 11074665

FIDEL VALENZUELA VILLA, dba The Back Door
1255 West Avenue I, Lancaster, CA 93534-2247,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: September 6, 2012
Los Angeles, CA

ISSUED OCTOBER 17, 2012

Fidel Valenzuela Villa, doing business as The Back Door (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended his license for 30 days for violations of Business and Professions Code section 24200.5, subdivisions (a) and (b); and Department Rules 143.2(2), 143.2(3), 143.3(1), and 143.3(2) (Cal. Code Regs., tit. 4, §143.2, subd. (2) and (3); §143.3, subd. (1) and (2)); all arising from conduct of an entertainer at appellant's premises.

Appearances on appeal include appellant Fidel Valenzuela Villa, appearing through his counsel, Armando H. Chavira, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry K. Winters.

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[1]The decision of the Department, dated October 11, 2011, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on April 18, 2007. On March 24, 2011, the Department instituted a 9-count accusation against appellant. Count 1 alleged that appellant permitted, employed or used the services of an individual to mingle with patrons while unclothed or exposing to view a portion of the female breast below the top of the areola, or any portion of the pubic hair, anus, cleft of the buttocks, vulva or genitals. Count 2 alleged that appellant's agent or employee encouraged or permitted a patron to touch, caress or fondle her breasts, buttocks, anus, or genitals. Count 3 alleged that a patron in the premises was encouraged or permitted to touch, caress or fondle the breasts, buttocks, anus, or genitals of appellant's agent or employee. Counts 4, 5 and 6 alleged that appellant permitted an agent or employee to perform or simulate sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or other sexual acts on patrons in the premises. Count 7 alleged that appellant permitted an individual to remain in the licensed premises while her pubic hair, anus, vulva or genitals were exposed to public view. Count 8 alleged that appellant permitted an entertainer, whose breasts and/or buttocks were exposed to view, to perform while not on a stage 18 inches above immediate floor level and removed at least six feet from the nearest patron. Count 9 alleged that appellant permitted an individual to remain in the licensed premises after exposing to view any portion of her genitals or anus.

At the administrative hearing held on August 3, 2011, documentary evidence was received and testimony concerning the violations charged was presented by the appellant and by Department investigators, Victoria Wood and David Duran.

Testimony established that on April 16, 2011, investigators from the Department

of Alcoholic Beverage Control visited the licensed premises and observed a female dancer, known as Ivy, performing for a private birthday party for an individual named Michael. It is the conduct of Ivy which is the subject of this matter.

Subsequent to the hearing, the Department issued its decision which determined that the charges in counts 1 - 4, and 7 - 9 of the accusation were proven, but that the preponderance of the evidence did not establish counts 5 or 6.

Appellant filed a timely appeal raising the following issues: (1) The findings and decision are not supported by substantial evidence, and (2) substantial evidence does not exist to support a finding that appellant permitted the conduct in question. These issues will be discussed together.

DISCUSSION

Appellant contends the decision is not supported by substantial evidence, and he maintains that the record does not support a finding that he observed the alleged violations of rules 143.2 and 143.3 by the entertainer known as "Ivy." Appellant also contends substantial evidence does not support a finding that he "permitted" the violations.

Appellant maintains that he did not observe the conduct in question, because he was busy checking the bathrooms and bringing in a beer barrel, and thus did not see Ivy doing anything illegal until the end when his security guard threw her out. Appellant asserts that he cannot be found to have permitted the activity, because he had no actual or constructive notice that it was occurring.

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 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].)

> We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. (*CMPB Friends,* [*Inc. v. Alcoholic Bev. Control Appeals Bd.* (2002)] 100 Cal.App.4th [1250,]1254 [122 Cal.Rptr.2d 914]; *Laube v. Stroh* (1992) 2 Cal.App.4th 364, 367 [3 Cal.Rptr.2d 779]; ....) We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor an appellate court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. (See *Lacabanne Properties, Inc. v. Dept. Alcoholic Bev. Control* (1968) 261 Cal.App2d 181, 185 [67 Cal.Rptr. 734] (*Lacabanne*).) The function of an appellate Board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

(*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd*. (*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

The first rule alleged to have been violated relates to attire and conduct on the licensed premises. Rule 143.2 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.

The second rule alleged to have been violated relates to entertainers and conduct on the licensed premises. Rule 143.3 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 and/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.

The Board is bound to accept the Department's factual findings, absent an abuse of discretion:

> The burden is upon the appellant to show there is no substantial evidence whatsoever to support the findings. (*Division of Labor Law Enforcement v. Transpacific Transportation Co*. (1979) 88 Cal.App.3d 823 [152 Cal.Rptr. 98].) The trier of fact (the [Department] in this instance) is the sole arbiter of all conflicts in the evidence, conflicting interpretations thereof, and conflicting inferences which reasonably may be drawn therefrom; it is the sole judge of the credibility of the witnesses; may disbelieve them even though they are uncontradicted if there is any rational ground for doing so, one such reason for disbelief being the interest of the witnesses in the case; and, in the exercise of sound legal discretion, may draw or may

> refuse to draw inferences reasonably deducible from the evidence. (*Johnson v. Pacific Indem. Co*. (1966) 242 Cal.App.2d 878, 880 [52 Cal.Rptr. 76].)

(*Pescosolido v. Smith* (1983) 142 Cal.App.3d 964, 970-971 [191 Cal.Rptr. 415].)

The administrative law judge (ALJ) made extensive findings based on the testimony of investigators Wood and Duran, outlining the activities of Ivy which constituted violations of rules 143.2 and 143.3. (See Findings of Fact (FF) 6 - 14.) Appellant has offered no proof that these activities did not occur, but rather, alleges that "[t]here was no solid evidence from any source that Appellant had witnessed the violative aspects of Ivy's conduct." (App.Br. at pp. 5-6.) He argues that a licensee who does not know specifically that a prohibited activity is taking place cannot be held to have permitted it.

FF 15 and 16 of the ALJ's decision, and the testimony of the Department investigators [RT 17, 48-49, and 55-56], contradict appellant's position that he was unaware of the actions of Ivy:

> FF 15. Approximately 30 minutes elapsed between the time the investigators first saw Ivy and her final dance for Michael. During this time the Respondent, both bartenders, and the bouncer were in a position to see Ivy. None of them, however, contacted Ivy or made any effort to stop her.
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> FF 16. Toward the end of this 30-minute period one of the investigators spoke to the Respondent about Ivy's activities. The Respondent acknowledged that he had seen her, but stated that she was performing for a private party.

The conflict between the licensee's testimony and that of the investigators is resolved in Conclusions of Law 8:

> CL 8. The Respondent testified that he was working both inside and outside the Licensed Premises that night, including the cooler, the restroom, the parking lot, and the smoking area. He indicated that, although he saw Ivy start dancing, he did not see her while she was nude

> until virtually the end of the 30-minute period. He further indicated that he asked the bouncer to remove her from the Licensed Premises, but that she finished and left before the bouncer could do so. [Fn. omitted.] Both investigators, on the other hand, testified that the Respondent was present while Ivy was dancing nude and that the bouncer never made any effort to contact her. (Finding of Fact ¶¶ 15-16.) Using the factors set forth in [Evidence Code] section 780, the investigators are found to be the more credible witnesses.

The conflict in testimony was resolved by the ALJ, and the Board is not inclined to question it. 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].)

Appellant cites *Laube v. Stroh*, *supra*, 2 Cal.App.4th 364, for the proposition that the licensee cannot be found to have "permitted" an activity unless he has actual or constructive notice that the illegal activity is occurring. (App.Br. at p.5.) Appellant maintains that he did not have such notice because he was engaged in various other activities in and around the premises while Ivy was performing. However, *actual* knowledge is not necessary to establish appellant's vicarious liability for the acts (or in this case, failure to act) of his employees; *imputed* knowledge, based on the employees' knowledge of the unlawful conduct, is sufficient to render appellant liable. Two bartenders and a bouncer had an opportunity to observe Ivy's conduct and an obligation to stop it.

At page 367, the *Laube* court explained:

> The factual discussion involves the element of the licensee's knowledge of illegal or improper activity on his or her premises; this knowledge may be either actual knowledge or *constructive knowledge imputed to the licensee from the knowledge of his or her employees.* (See *Fromberg v. Dept. Alcoholic Bev. Control* (1959) 169 Cal.App.2d

230, 233-234 [337 P.2d 123]; *Endo v. State Board of Equalization* (1956) 143 Cal.App.2d 395, 401-402 [300 P.2d 366].) [Italics added.]

It is well settled in ABC case law that an employee's on-premises knowledge and misconduct is imputed to the licensee/employer. (See *Yu v. Alcoholic Bev. etc. Appeals Bd*. (1992) 3 Cal.App.4th 286, 295 [4 Cal.Rptr.2d 280]; *Laube v. Stroh*, *supra*; *Kirby v. Alcoholic Bev. Etc. Appeals Bd*. (1973) 33 Cal.App.3d 732, 737 [109 Cal.Rptr. 291].) "The owner of a liquor license has the responsibility to see to it that the license is not used in violation of law and as a matter of general law the knowledge and acts of the employee or agent are imputable to the licensee." (*Munro v. Alcoholic Bev. Control Appeals Bd.* (1960) 181 Cal.App.2d 162, 164 [5 Cal.Rptr. 527].)

Even if the Board were to accept the premise that appellant had no *actual* knowledge of Ivy's unlawful conduct, he is deemed to have *constructive* knowledge of the activity because the conduct and knowledge of the three employees who watched Ivy perform is imputed to him.

ORDER

The decision of the Department is affirmed.[2]

FRED ARMENDARIZ, CHAIRMAN
BAXTER RICE, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[2]This 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.