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

AB-9155
File: 48-134058 Reg: 10072354

DIRTY DAN'S, INC., dba Pure Platinum
4000 Kearny Mesa Road, San Diego, CA 92111,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: February 2, 2012
Los Angeles, CA

ISSUED FEBRUARY 28, 2012

Dirty Dan's, Inc., doing business as Pure Platinum (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 30 days for violations of Business and Professions Code section 24200.5, subdivision (a); Department Rules 143.2(2), 143.2(3), 143.3(1)(a), 143.3(1)(b), and 143.3(1)(c), and Health and Safety Code sections 11351, 11352, 11377, and 11379; all arising from conduct of agents, employees, entertainers or dancers at appellant's premises.

Appearances on appeal include appellant Dirty Dan's, Inc., appearing through its counsel, Joshua Kaplan, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

---

[1]The decision of the Department, dated January 26, 2011, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on April 5, 1983. On January 6, 2010, the Department instituted a 14-count accusation against appellant. Count 1 alleged that appellant permitted an agent or employee to remain in the licensed premises while his/her pubic hair, anus, vulva or genitals were exposed to public view. Count 2 alleged that appellant permitted an agent or employee to perform or simulate an act of sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or other sexual act on the premises. Counts 3 and 10 alleged that appellant knowingly permitted the illegal sale, or negotiation for such sales, of narcotics or dangerous drugs on the premises. Counts 4 and 8 alleged that appellant's agent, employee, entertainer or dancer possessed a controlled substance on the premises. Counts 5 and 9 alleged that appellant's agent, employee, entertainer or dancer sold, furnished or offered to sell or furnish a controlled substance on the premises. Counts 6 and 14 alleged that appellant's agent or employee was permitted to touch, caress or fondle the breasts, buttocks, anus, or genitals of another person on the premises. Counts 7 and 12 alleged that appellant permitted an entertainer to perform or simulate an act of touching, caressing or fondling of the breast, buttocks, anus or genitals. Counts 11 and 13 alleged that appellant permitted an agent or employee 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.

At the administrative hearings held on August 24, 2010, and October 27, 2010, documentary evidence was received and testimony concerning the violations charged was presented by Department of Alcoholic Beverage Control Investigators, Tristina

Olson and Spencer Jones. At the administrative hearing held on October 27, 2010, testimony concerning the violation charged was also presented by Robert Naefke, the president and sole shareholder of Dirty Dan's, Inc., and Ernesto Encinas, the director of security at appellant's premises.

Subsequent to the hearing, the Department issued its decision which determined that the charges in counts 1 - 2, 4 - 9, and 11 - 14 of the accusation were proven, but that the preponderance of the evidence did not establish counts 3 and 10.

Appellant filed a timely appeal raising the following issues: (1) the accumulation of counts in the accusation violated the principles established in *Walsh v. Kirby* (1974) 13 Cal.3d 95 [118 Cal.Rptr.1]; (2) appellant cannot be deemed to have permitted the alleged violations by independent contractor dance performers, because appellant took all reasonable steps to prevent the alleged misconduct and there was no employment relationship; (3) there is no basis for derivative or imputed liability; (4) counts 1, 2, 7, 11 and 14 failed to identify the suspects in question and should be dismissed; (5) there was a failure of proof with respect to the charges in counts 1, 2, 6, 7, 11, 12, 13, and 14; and (6) appellant has mitigated the alleged violations to the extent no penalty should be imposed.

DISCUSSION

This is an appeal of an order of the Department suspending appellant’s on-sale public premises license for 30 days. Appellant’s business is described as "a sports lounge showing numerous events on numerous television screens located throughout the premises. It is a limited food service restaurant. It is a bar serving alcoholic beverages. Lastly, it is an entertainment venue where women perform dances for an audience." (App. Br. at p. 15.) It is primarily the conduct of the persons offering the

dance entertainment which gives rise to the Department accusation and this appeal.

We begin with the law that governs this appeal.

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].)

I

Appellant contends first that the accumulation of counts in the accusation violated the principles established in *Walsh v. Kirby, supra,* 13 Cal.3d 95. Appellant maintains that the Department continued its investigation for an unreasonable period of

time, for the purpose of accumulating charges so that it could increase the penalty should its charges be sustained. It argues that, once the Department had determined there had been a violation, it was obligated to warn appellant that such conduct was occurring or file an accusation. In either case, appellant argues, it could have acted aggressively to put a stop to the unlawful activity.

In *Walsh v. Kirby*, *supra*, the licensee, who had a previously unblemished record, was charged with selling below an established "fair trade" price on a total of 10 occasions. The statute involved did not provide for suspension or revocation, but each offense after the first was punishable by a $1000 fine. The California Supreme Court concluded that the Department had acted improperly by accumulating enough violations for the purpose of driving the licensee into bankruptcy.

The Department argues that *Walsh v. Kirby* has no application to this case. Citing previous Board decisions distinguishing that case,[2] the Department justifies the length of its investigation on the basis that each visit to the premises unearthed new and different violations.

The administrative law judge (ALJ) made the following assessment (Findings of Fact X):

---

[2] *Ann Minshaw* (2001) AB-7741 and *Chavez* (1998) AB-6788.

In *Chavez*, the Board stated:

> The extent to which Department investigators should have contacted appellants concerning the investigation is a matter of discretion within the police powers granted the Department. In the absence of clearly unreasonable delay, it is not for the Appeals Board to mandate at what point in an investigation the Department must inform a licensee that the licensed premises are under scrutiny. A continuing investigation may very well be needed to determine the existence of violations or the degree to which a law is being, or has been violated.

A. The Respondent's attorney contends that the case of *Walsh v. Kirby* is applicable in the instant case and that the subject Accusation should be dismissed based upon the ruling in that case. However, this contention is hereby rejected since the *Walsh* case differs from the instant case in several respects.

B. In the instant case, the Department's investigators only made five visits to the premises and the preponderance of the evidence did not establish that the Department's decision to make additional visits to the premises after the first or second visit was unreasonable, arbitrary or capricious. Furthermore, the Respondent did not have a record of no prior violations as in the *Walsh* case.

The Board is wary of substituting its judgment for that of the Department with respect to when an investigation has reached the point where an accusation should be filed. In the absence of any evidence that the Department intentionally prolonged the investigation for the purpose of obtaining a more severe penalty, it would seem inappropriate for the Board to infringe upon the Department's discretion in its conduct of an investigation.

II & III

Appellant contends it took all reasonable steps to prevent the alleged misconduct, that there was no employment relationship between the licensee and entertainers and no basis for derivative or imputed liability

Appellant's president and sole shareholder, Robert Naefke, testified on behalf of appellant. Naefke described in considerable detail the relationship between appellant and the dancers who perform in appellant's premises, including those whose conduct is cited in the accusation. In brief, Naefke asserts that the dancers are independent contractors who lease from appellant the stages on which they perform [RT 208], and the only requirements appellant imposes on them are that they have both a City of San Diego entertainer's license and business license [RT 218], a ban on drugs [RT 248],

and compliance with the ABC Act as it pertains to their conduct [RT 221]. He asserts they are not employees, and that appellant is not responsible for their conduct [RT 222]. Dancers who violate these requirements are banned from the premises. Given this business structure, appellant argues, there is no legal basis for the charges of the accusation.

Dancers set their own schedule, purchase their own costumes, and select their own music in cooperation with the DJ. Dancers choreograph their own performances, and are not required to perform any specific hours or number of shifts per day. Dancers are not required to arrive or leave at any specific time, and are free to leave the premises and return later to resume performing. They are also free to perform at other clubs [RT 246].

Dancers retain any tips from patrons, but may share their tips with the DJ, or with security personnel [RT 242]. They receive no payment from appellant [RT 243]. Dancers who perform private dances determine the fee they will charge. According to Naefke, appellant does not share in the money a dancer receives for a private dance.

The Board does not agree that the arrangement between Pure Platinum and the dancers insulates it from any discipline warranted by the acts which violate Department rules governing entertainer conduct. Appellant's argument exalts form over substance; the substance here is that appellant and the performers are engaged in a mutual business endeavor, in the nature of a loose and informal partnership or joint venture.

Appellant's disclaimer of any employment relationship between it and the dancers is irrelevant. The arrangement between appellant and its dancers is designed to give the illusion of separateness, but the reality is a common pursuit of revenue by appellant and dancers, each having something to offer the other. The ALJ described

the relationship as follows (Findings of Fact III):

> A. The evidence established that Robert Naefke is the president of Dirty Dan's Inc., a California corporation, which operates a gentlemen's club featuring topless entertainers at the licensed premises. Mr. Naefke who is the sole director and the sole shareholder of Dirty Dan's, Inc., obtained an alcoholic beverage license from the Department through his California corporation, Dirty Dan's, Inc. Mr. Naefke also formed a second corporation, FMI, Inc[.], which he incorporated in the state of Nevada and Mr. Naefke is the sole owner of FMI, Inc. Through his Nevada corporation, FMI, Inc., Mr. Naefke hired all the employees who were to work at the licensed premises including the managers, the security staff members, the bartenders, the doormen and the cocktail waitresses. Therefore, by Mr. Naefke's design, none of the employees working at the licensed premises as of January 2009 were technically employed by Dirty Dan's, Inc. Through FMI, Inc. Mr. Naefke also made arraignments to provide adult dancers/entertainers to the licensed premises and entered into "lease" agreements with certain entertainers who were to perform at the licensed premises.
>
> B. Although all the employees who were working at the premises as of January of 2009 were not technically employed by Dirty Dan's, Inc., all those employees are in fact the employees and agents of Mr. Naefke who is the sole owner of both Dirty Dan's, Inc. and FMI, Inc. and Mr. Naefke is in fact the actual holder of the alcoholic beverage license at the licensed premises. Therefore, the on-premises knowledge and/or misconduct by the managers, security staff, bartenders and cocktail waitresses working at the licensed premises are imputed to Mr. Naefke and his California corporation, Dirty Dan's, Inc., which is solely owned by Mr. Naefke.

It comes as no surprise that much of the conduct found to violate the law involved conduct that could be described as lewd.[3] Appellant should not have been surprised. Indeed, as appellant notes in its administrative hearing brief, at page 35, it was virtually foreseeable:

> The dancer's revenue depends upon the dancer's ability as an actress, creating the illusion of erotic availability and erotic allure to the patrons; their dance proficiency, their friendly personality, etc. Dancers' profits are dependent upon their own managerial skills as "sales people" and, in that regard, dancers are in a business completely distinct from the licensee.

[3] See Findings of Fact IV, V, VI, VIII.

> Dancers' theatrical dance profession requires them to possess a high level of skill in order to achieve income at licensee's venue consisting of dance ability, acrobatic balance (training for such being necessary), alluring and erotic appeal, acting ability in order to project a fantasy of availability and interest, sales skills in order to market themselves to sell private dances.

Appellant argues that it took all reasonable steps to prevent unlawful conduct, citing its zero tolerance policy with respect to drugs, surveillance personnel, the presence of video cameras (except that no camera was focused on the stage) [RT 255], its employment of managers and the requirement that they keep a log, and the presence of security personnel.

The Department argues that the claim is meritless. It argues that Naefke was an "absentee licensee" who visited the club only two or three times a month, and the visits were brief. Indeed the ALJ found that Naefke had effectively relinquished control of the premises (Findings of Fact IX-C):

> Mr. Naefke chose to live in Las Vegas, not to be present at the premises on a daily basis and to rely on his managers and security people to operate, manage and monitor the activities at the premises. Therefore, Mr. Naefke in effect relinquished his control of the licensed premises to his managers and security people and relied on them to discover and correct any unlawful activities that were occurring in the premises. And it is quite obvious from the evidence presented at the hearing that Mr. Naefke's managers and security people did a very poor and inadequate job of managing and monitoring the premises. . . .

Appellant's argument reduces to this: simply by hiring managerial and security personnel, it did everything it could to prevent the activities for which it has been found liable. Notably, the record is silent as to the training and competency of such personnel, and Naefke's infrequent and brief appearances at the premises do little to fill that void.

IV

Appellant contends counts 1, 2, 7, 11 and 14 failed to identify the dancers in

question and should be dismissed. Appellant maintains that it was denied due process, because the accusation listed some dancers by their stage names instead of their true names, thereby depriving if of the ability to defend itself since it did not know who they were, and thus was unable to investigate or interrogate these individuals.

Naefke testified that the dancers had to sign a lease agreement and fill out an information sheet which included their identifying information [RT 213]. In addition, the dancers were required by the City of San Diego to have an adult entertainer permit which contained their picture and true name. Naefke had photocopies of these documents, but testified that he was unable to locate lease agreements when he went through his records.

Poor record keeping does not create a defense.

V

Appellant contends there was a failure of proof with respect to the charges in counts 1, 2, 6, 7, 11, 12, 13, and 14 that it "permitted" the behavior in question.

Appellant maintains that the counts in question were not proved because there was no evidence presented that the licensee gave permission to engage in this behavior, no evidence that the licensee encouraged such behavior, and no evidence of the identities of specific agents or employees of appellant who permitted this behavior.

It is well settled in Alcoholic Beverage Control Act 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* (1992) 2 Cal.App.4th 364, 377 [3 Cal.Rptr.2d 779]; *Kirby v. Alcoholic Bev. Etc. Appeals Bd*. (1973) 33 Cal.App.3d 732, 737 [109 Cal.Rptr. 291].)

It is irrelevant whether appellant encouraged or gave permission for the dancers

to engage in this misconduct, and the specific identities of appellant's agents or employees who permitted the behavior are equally irrelevant.

VI

Appellant contends it has mitigated the alleged violations to the extent no penalty should be imposed.

Appellant cites as mitigating factors: 12 years of operation since its last disciplinary action; the termination of all lease agreements with the offending dancers; training of licensee and employees; and cooperation by the licensee in the investigation. It argues that there should be no discipline, or a lesser penalty than the 30-day suspension recommended by the ALJ.

The Appeals Board may examine the issue of an excessive penalty raised by an appellant (*Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board* (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183]), but will not disturb the Department's penalty orders in the absence of an abuse of the Department's discretion. (*Martin v. Alcoholic Beverage Control Appeals Board & Haley* (1959) 52 Cal.2d 287 [341 P.2d 296].)

If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within the area of its discretion. (*Harris v. Alcoholic Beverage Control Appeals Board* (1965) 62 Cal.2d 589, 594 [43 Cal.Rptr. 633].)

We do not believe a 30-day suspension constitutes an abuse of discretion in this matter.

ORDER

The decision of the Department is affirmed.[4]

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

---

[4]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.