ISSUED APRIL 28, 1997

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

PINK CADILLAC, INC. dba El Paraiso 420 S. Brookhurst Street Anaheim, California 92804, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6672 File: 47-233859 Reg: 95034170 Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria Date and Place of the Appeals Board Hearing: February 5, 1997 Los Angeles, CA

Pink Cadillac, Inc., doing business as El Paraiso (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which ordered appellant's on-sale general public eating place license suspended for 35 days, with suspension of 15 days thereof stayed for a probationary period of one year, for having permitted two entertainers to expose their breasts to the view of patrons while not on a stage 18 inches above the floor level and not at least six feet from the nearest patron, for having noise of the entertainment heard outside the

[1]The decision of the Department, dated May 16, 1996, is set forth in the appendix.

premises in violation of a condition on its license, and for having sold alcoholic beverages to minors, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from violations of Rule 143.3, subdivision (2), of the California Code of Regulations, Business and Professions Code §25658, subdivision (a), and a condition on the license.

Appearances on appeal include appellant Pink Cadillac, Inc., appearing through its counsel, Ralph B. Saltsman; and the Department of Alcoholic Beverage Control, appearing through its counsel, David B. Wainstein.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on July 14, 1989. Thereafter, on October 20, 1995, the Department instituted an accusation alleging violations of Rule 143.3, subdivision (2), of the California Code of Regulations (topless dancers), Business and Professions Code §25658, subdivision (a) (sale-to-minor), and a condition on the license regulating noise from live entertainment.

Administrative hearings were held on February 2 and March 25, 1996, at which time oral and documentary evidence was received. At the hearing on February 2, 1996, testimony was presented concerning the sale of alcoholic beverages to two minors participating in a minor-decoy program on January 22, 1996. At the hearing on March 25, 1996, testimony was presented concerning

the count of the accusation that appellant had permitted entertainers to dance topless, and the count charging a violation of the noise condition of the license.

Subsequent to the hearing, the Department issued its decision which determined that the charges of sales to minors and the violations of Rule 143.3, subdivision (2), had been proven, but that the charge of a violation of the license condition regarding noise had not been proven. Appellant's license was ordered suspended for a period of 35 days, with 15 days of the suspension stayed for a probationary period of one year. Appellant thereafter filed a timely notice of appeal.

In its appeal, appellant raises the following issues: (1) the women dancing topless were not entertainers within the meaning of the rule; (2) the licensee did not "permit" the activity; and (3) the penalty is excessive. Appellant does not challenge that portion of the decision which found that sales of alcoholic beverages to minors had occurred.

DISCUSSION

I

Appellant contends that Rule 143.3, subdivision (2) ("rule 143.3"), does not apply to the conduct which gave rise to the accusation because the women who disrobed while dancing were not "entertainers" within the meaning of the rule, since they were not employees of appellant. Additionally, appellant contends that it did not "permit" the activity, and that the Administrative Law Judge (ALJ) erred in considering the manager's steps to halt the activity as affecting the penalty

rather than as to whether a violation had occurred.

There is no dispute in the testimony regarding the fact that each of the two women bared her breasts while dancing in a "legs" contest presided over by a disk jockey employed by appellant. There is also no dispute regarding the facts that the women were patrons, were not employees, were competing in a contest the winner or winners of which would be (and apparently were, see II RT 26) awarded a prize of some indeterminant value, and were not paid to enter the competition. There was disagreement over whether the women were encouraged by the disk jockey to shed their top garments, and over the length of time the women's breasts were uncovered.[2]

Appellant contends it is error to consider the patrons as "entertainers" within the meaning of the rule. Appellant contends that the rule, by its use of different references, i.e., "entertainer" vs. "persons," with respect to the kinds of conduct prohibited or regulated, was not intended to apply to what were essentially spontaneous acts by bar patrons. The Department, on the other hand, contends that the women were entertaining the other patrons, and were being rewarded by tips from the patrons. The Department relies on a dictionary definition of entertainment as "something diverting or engaging," as a "public performance." (Dept.Br., p. 2).

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[2] The testimony regarding the time that elapsed ranged from the Department witness's estimate of "five to ten minutes" [II RT 15, 24] to appellant's manager's estimate of "very brief" [II RT 57]. The ALJ found that each woman danced topless "for several minutes."

Appellant also relies on a dictionary definition of an entertainer as "one who receives a guest; one who shows hospitality; a host." (App.Br., p.4), contending that this implies an employment relationship.. Thus, appellant argues that the reference in the rule to "entertainer" was intended to refer to someone who is an employee of the licensee. Appellant cites other portions of the rule which apply to "any person," arguing that the narrower reference to "entertainer" has been used in other statutes in a context suggesting it connotes an employment status.

Neither appellant nor the Department has cited any definitive authority on what label should be placed on the two dancers. Do patrons become entertainers once they step on the dance floor? If not, are they transformed into entertainers once they remove certain articles of clothing? Or, are they simply patrons who have bared certain portions of their anatomy to other patrons?

The Department contends that the term should be defined functionally; that is, if the activity entertains others, the person providing the entertainment is an entertainer within the meaning of the rule. We believe that, at least in the circumstances of this case, the Department's interpretation of the rule is more reasonable.

It is undisputed that the contest in question was for the purpose of entertaining patrons of the bar. While the evidence does not establish that the disk jockey encouraged either of the women to disrobe, there is no evidence that he did anything to discourage it, either before, during or after it occurred. To the contrary,

evidence exists that the disk jockey accompanied the dancers around the dance floor while their breasts were bare [II RT 12-13], and while other patrons were placing money in their remaining garments [II RT 12-13, 66-67], which strongly indicates his endorsement of the activity. His involvement convinces this Board that this activity constituted entertainment offered by the nightclub to its patrons, rather than simply one patron entertaining or amusing another.

The ALJ accepted the testimony of appellant's manager that, while she knew there was to be a "legs" contest, she was not aware anyone was going to take their clothes off [II RT 54, 58], and she reacted immediately once she was aware such conduct was occurring [II RT 56-57]. After this incident, the "legs" contest was discontinued [II RT 59]. The ALJ treated the manager's lack of awareness of what might occur and her cancellation of future contests as factors in mitigation. However, having seen what behavior the contest could engender, the manager was, in our view, less than diligent in allowing the contest to continue and, certainly, in failing to admonish and warn the master of ceremonies not to permit such conduct.

The facts do suggest this as a case where entertainers were permitted to perform in violation of the rule, not simply one where two patrons in a dance contest, or "legs" contest, with other patrons, responded too enthusiastically to the mood of the other patrons. The whole purpose of the contest was to entertain. One, if not the principal, feature of the competition was feminine attractiveness.

The incentive to win the prize apparently induced one of the female contestants to enhance her chances of winning by baring her breasts. Given the competitive nature of the contest, it was foreseeable that, unless discouraged by some admonition from the licensee or its employee, another patron/competitor might try to match or outdo her rival. It is significant that the disrobing occurred in the final phase of the contest, after all but the two patrons who ultimately bared their breasts had been eliminated from the contest. Clearly, then, the progression of the competition would have put anyone on notice that the second dancer would be expected to match and outdo her rival's performance. Since the master of ceremonies could have stopped the contest immediately upon seeing the first dancer bare her breasts, but did not, it is fair to assume that he did not do so because he and the audience were enjoying the performance.[3]

The Department has argued that the dancers were "encouraged to perform" by the MC/disk jockey. The Anaheim police officer who testified to such encouragement acknowledged that he did not know what the master of ceremonies was saying to the women, since the MC spoke in Spanish, a language the officer did not speak. The Department did not call the other police officer who was present, who was described as being fluent in Spanish, who could have related what the master of ceremonies was saying to the dancers. Whether the women

[3] There was testimony, at least with respect to the first dancer, that customers were placing money in her "costume" while her breasts were bared {II RT 66-67].

acted on their own or in response to exhortations from the disk jockey is unclear. Nonetheless, it is clear that the women were invited and encouraged to participate in the contest as part of the entertainment offered to the customers. It is equally clear that nothing was done to discourage what occurred, particularly in the case of the second of the two dancers in the contest.

In sum, we think it fair to say that the licensee recruited a number of its female patrons, in part by offering a prize[4] and the opportunity to garner tips from other patrons, to participate in an hour-long contest presented for the entertainment of other patrons. We have no difficulty concluding that, in the overall circumstances of this case, the participants in the contest were "entertainers" within the meaning of that term as used in rule 143.3.

II

Appellant contends, in the alternative, that it did not "permit" the activity challenged by the Department, since its manager reacted immediately to tell the disk jockey to put a stop to the toplessness. The Department disagrees, arguing that the manager's efforts were half-hearted and fell short of the mark; that the employee who served as appellant's disk jockey was the person who permitted the topless activity; that it was he who picked the contestants for the contest, encouraged them to perform, solicited judging from the audience of patrons,

[4] While the record is silent as to the nature of the prize, it does indicate that the two finalists were given envelopes. We do not know what the envelopes contained.

awarded prizes, and permitted the two women finalists to dance topless. After the first incident, appellant's manager was on notice that things could get out of hand, yet did nothing to stop the contest [II RT 61]. Nor did the disk jockey, who not only allowed the contest to continue, but, according to the testimony, accompanied the dancers around the floor while their breasts were exposed and money was being placed in their remaining clothing [II RT 12-13]. Had the contest been stopped immediately when the first dancer disrobed, the second incident would not have occurred. Thus, it may be said that the activity was "permitted," because the disk jockey allowed it to continue even though he was aware that the other of the patron-entertainers might disrobe. Indeed, it may be inferred that, despite having been put on alert as to what could happen, he encouraged the activity which violated rule 143.3 by allowing the contest to continue. His primary objective was to entertain the patrons of the licensee, by using entertainers he had recruited from among them.

Appellant cites McFaddin San Diego 1130, Inc. v. Stroh (1989) 208 Cal.App.3d 1384 [257 Cal.Rptr. 8], and Laube v. Stroh (1992) 2 Cal.App.4th 364 [3 Cal.Rptr.2d 779], as authorities supporting its contention that appellant did not permit activity that was not anticipated, and stopped of its own accord before management could act. We do not think that these authorities are controlling here, since here it was reasonably foreseeable that the activity in question, at least the second occurrence, could and should have been anticipated.

McFaddin San Diego 1130, Inc. v. Stroh concerned several transactions which occurred on the premises involving patrons selling or proposing to sell controlled substances to undercover agents. While the licensee and its employees did not know of the specific occurrences, they knew generally of contraband problems and had taken numerous preventive steps to control such problems. The McFaddin court held that since (1) the licensee had done everything it reasonably could to control contraband problems, and (2) the licensee did not know of the specific transactions charged in the accusation, the licensee could not be held accountable for the incidents charged.

The case of Laube v. Stroh (1992) 2 Cal.App.4th 364 [3 Cal.Rptr.2d 779], was actually two cases - Laube and De Lena, both of which involved restaurants/bars - consolidated for decision by the Court of Appeal.

The Laube portion dealt with surreptitious contraband transactions between patrons and an undercover agent--a type of patron activity concerning which the licensee had no indication and therefore no actual or constructive knowledge--and the court ruled the licensee should not have been required to take preventive steps to suppress that type of unknown patron activity.

The De Lena portion of the Laube case concerned employee misconduct, wherein an off-duty employee on four occasions sold contraband on the licensed premises. The court held that the absence of preventative steps was not dispositive, but the licensee's penalty should be based solely on the imputation to

the employer of the off-duty employee's illegal acts.

The imputation to the licensee/employer of an employee's on-premises knowledge and misconduct is well settled in Alcoholic Beverage Control Act case law. (Morell v. Department of Alcoholic Beverage Control (1962) 204 Cal.App.2d 504 [22 Cal.Rptr. 405, 411]; Harris v. Alcoholic Beverage Control Appeals Board (1962) 197 Cal.App.2d 172 [17 Cal.Rptr. 315, 320]; Mack v. Department of Alcoholic Beverage Control (1960) 178 Cal.App.2d 149 [2 Cal.Rptr. 629, 633]; and Endo v. State Board of Equalization (1956) 143 Cal.App.2d 395 [300 P.2d 366, 370-371].)

The McFaddin and Laube cases both stress the degree of knowledge the licensee may possess, or which may be imputed to the licensee, in determining whether it may be said that the licensee permitted the act constituting the violation which is the subject of the disciplinary proceeding. The testimony regarding the fact that the disk jockey accompanied the dancers while they were on the dance floor and while they were partially disrobed, and the ALJ's finding as to the period of time the two dancers were topless, is sufficient to support the ALJ's determination that appellant "permitted" the activity in violation of rule 143.

The ALJ credited the manager's testimony that she took steps to stop the activity, and to prevent it in the future, on the issue of penalty. However, her failure to act more decisively and in a timely manner once she saw the potential for trouble is inconsistent with her responsibilities as an agent of licensee. Once

disrobing began, the contestants should have been severely admonished or the contest should have been halted. Otherwise, it was reasonably foreseeable that the first contestant's behavior would, as it did, stimulate similar behavior by the remaining finalist. By remaining passive, appellant's management also permitted the activity to occur.

III

Appellant contends that the penalty is excessive since it is based on incorrect findings. Appellant does not otherwise contest the penalty. Since we sustain the Department's findings, we need not address this issue.

CONCLUSION

The decision of the Department is affirmed.[5]

RAY T. BLAIR, JR., CHAIRMAN
JOHN B. TSU, MEMBER
BEN DAVIDIAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[5] This final order is filed as provided in Business and Professions Code §23088, and shall become effective 30 days following the date of this filing of the final order as provided by §23090.7 of said statute for the purposes of any review pursuant to §23090 of said statute.