

ISSUED SEPTEMBER 11, 1998

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

	) AB-6958
Guillermo Cervantes)
dba Hermosillo Club	) File: 42-291633
5125 York Boulevard	) Reg: 96038191
Los Angeles, CA 90042,)
Appellant/Licensee,	) Administrative Law Judge
v.	) at the Dept. Hearing:
	) Sonny Lo
)
DEPARTMENT OF ALCOHOLIC	) Date and Place of the
BEVERAGE CONTROL,	) Appeals Board Hearing:
Respondent.	) July 8, 1998
	) Los Angeles, CA
)

Guillermo Cervantes, doing business as Hermosillo Club (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which revoked his license for appellant pleading nolo contendere to a charge of possession of a controlled substance, for appellant's employee serving an alcoholic beverage to an obviously intoxicated individual, and for appellant permitting a dancer to perform acts simulating sexual intercourse, allowing patrons to touch her genitals, and displaying her pubic hair, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from

¹The decision of the Department, dated October 30, 1997, is set forth in the appendix.

violations of Business and Professions Code §§24200, subdivision (d), and 25602, subdivision (a), and Rule 143.3(1) (4 Cal.Code Regs., §143.3, subd. (1)).

Appearances on appeal include appellant Guillermo Cervantes, appearing through his counsel, Armando Chavira, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew Ainley.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale public premises license was issued on January 28, 1994. Thereafter, the Department instituted a five-count accusation against appellant charging that on January 12, 1996, appellant possessed cocaine for sale and was armed during the commission of the offense [count 1(a)]; on the same date appellant purchased, received, or possessed a stolen computer [count 1(b)]; appellant's employee served an alcoholic beverage to an obviously intoxicated person [count 2]; on September 7, 1996, appellant permitted a person to violate provisions of Rule 143.3 [counts 3, 4, and 5].

An administrative hearing was held on March 13, June 25, and September 9, 1997, at which time oral and documentary evidence was received. No evidence was presented showing that the powder seized by the Los Angeles Police Department on January 12, 1996, was cocaine or that appellant was armed while committing a crime, as charged in count 1(a), and the Department did not carry its burden of proving count 1(b), the charge involving a stolen computer. Therefore, count 1(a) and count 1(b) were dismissed. Evidence was presented on the remaining counts of the accusation, and the Department moved to amend the

accusation to include count 6, charging appellant with pleading nolo contendere to a charge of possession of cocaine, an offense involving moral turpitude and therefore a basis for discipline pursuant to Business and Professions Code § 24200, subdivision (d).

Subsequent to the hearing, the Department issued its decision which determined that violations had occurred as charged in counts 2 through 6 and ordered that appellant's license be revoked.

Appellant thereafter filed a timely notice of appeal. In his appeal, appellant raises the following issues: 1) the determination that simple possession of a controlled substance is an offense involving moral turpitude is erroneous as a matter of law, and 2) the violations of § 25602, subdivision (a), and Rule 143.3 do not justify the penalty of revocation.

DISCUSSION

Appellant contends that mere possession of a controlled substance is not an offense involving moral turpitude and the ALJ's determination to the contrary was erroneous as a matter of law.

In Determination V B. and V C. the ALJ stated:

"B. No legal authority was cited to show that mere possession of a controlled substance is a public offense involving moral turpitude. However, in the case of In Re Scott (1991) 52 Cal.3d 968, 978, 277 Cal.Rptr. 201, the California Supreme Court suggested that it is."

"C. The finding contained in Paragraph VII of the Findings of Fact is cause for suspension or revocation of [appellant's] license, in accordance with

Business and Professions Code Section 24200(d) -- Count 6. It also supports a determination that continuation of [appellant's] license would be contrary to public welfare or morals."²

Finding VII recites that appellant pled nolo contendere to possession of a controlled substance.

Appellant argues that In re Scott, (1991) 52 Cal.3d 968 [277 Cal.Rptr. 201, 802 P.2d 985], cited in the Department's decision, is distinguishable and not controlling on the issue of drug possession as involving moral turpitude since Scott involves the disbarment of an attorney/judge rather than an ABC license.

The Department is open in admitting that the case law regarding whether simple possession involves moral turpitude is not entirely clear, and points the Board to two important cases in the area, People v. Castro (1985) 38 Cal.3d 301 [211 Cal.Rptr. 719, 696 P.2d 111] and People v. Dossmann (1985) 171 Cal.App.3d 843 [217 Cal.Rptr. 728]. These two cases present the question of moral turpitude

² Business and Professions Code 24200, subdivision (d), provides:

"The following are the grounds that constitute a basis for the suspension or revocation of licenses:

* * *

"(d) The plea, verdict, or judgment of guilty, or the plea of nolo contendere to any public offense involving moral turpitude or under any federal law prohibiting or regulating the sale, exposing for sale, use, possession, or giving away of alcoholic beverages or intoxicating liquors or prohibiting the refilling or reuse of distilled spirits containers charged against the licensee.

in the context of determining what crimes can be used for impeachment purposes against a witness in a criminal trial.

Neither the Scott case, involving attorney disbarment for judicial misconduct, nor Castro, involving the admissibility of evidence of prior felony convictions for purposes of impeachment in criminal trials, is a particularly relevant model to use for determining if possession involves moral turpitude for purposes of the ABC Act, since the factual situations and the uses to which the determination will be put are so different in each case. We have found no cases directly on point.

Our review of the remainder of this appeal, however, makes it unnecessary to resolve this lack of clear guidance from the courts on this issue.

II

Appellant contends that, assuming the Board decides the moral turpitude issue in favor of appellant, the penalty of revocation for the remaining violations - a first-time violation of Business and Professions Code § 25602 (serving an alcoholic beverage to an obviously intoxicated person), and a first-time violation of Rule 143.3 (permitting a dancer to simulate sexual intercourse, to display her pubic hair, and to allow her genitals to be touched by patrons) - is an abuse of the Department's discretion. Appellant asks that the matter be remanded to the Department for reconsideration of the penalty.

The Appeals Board 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].)

However, where an appellant raises the issue of an excessive penalty, the Appeals Board will examine that issue. (Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183].)

The Department argues that revocation is an appropriate penalty for a "repeat violator" such as appellant, especially when one of the current violations is as egregious as the dancer's conduct here when she allowed patrons to touch her uncovered genitals.

Appellant's discipline history consists of: 1) a 1995 revocation, stayed for two years, for violation of Business and Professions Code §§ 23950 and 23951 (misrepresentation of a material fact on application for license); 2) a January 1996 suspension of 15 days, fine paid in lieu of suspension, for violation of Business and Professions Code §§ 25658, subdivisions (a) and (b), and 25665 (sale to minor and allowing minor to remain on premises); and 3) a September 1996 suspension of 15 days with five days stayed, fine paid in lieu of suspension, for violation of Penal Code §§ 330b; 330b, subdivision (2); 330.1; and 330.4.³

The Department alleges that its recommended penalties for first-time violations of Rule 143.3 range from 30-day suspensions to revocation, depending upon the facts of each case. Revocation is warranted, according to the Department, based solely on the dancer allowing her genitals to be touched by two patrons.

³ The first two of these Penal Code sections are incorrectly cited in the accusation and the Department's decision as §§330(b) and 330(b)(2), section numbers that do not exist in the Penal Code.

While we are not willing to go so far as to say that the dancer's conduct, egregious as it is, would clearly be enough by itself to warrant revocation, we are not presented with only the dancer's conduct. We also have a history of violations going back to the very application for appellant's license, a sale to an obviously intoxicated patron, and, whether or not a crime of moral turpitude, the serious crime of possession of cocaine by the licensee on the licensed premises. We cannot say that the Department has abused its discretion in any way by revoking this license under the totality of these circumstances.

CONCLUSION

The decision of the Department is affirmed.⁴

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

⁴This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate 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.