

ISSUED SEPTEMBER 17, 1998

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

7238 RESEDA BOULEVARD, INC.	)	AB-6975
dba Colbeh)	
7238 Reseda Blvd.	)	File: 47-326068
Reseda, CA 91335,	)	Reg: 97040277
Appellant/Licensee,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	John P. McCarthy
)	
DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	August 12, 1998
	)	Los Angeles, CA
)	

7238 Reseda Boulevard, Inc., doing business as Colbeh (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its on-sale general public eating place license for 30 days with 15 days stayed during a one-year probationary period for permitting an entertainer to expose and touch her breasts, and solicit a drink, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, and Business and Professions Code §24200, subdivision (a), being a violation of

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

California Code of Regulations, § 143, 143.3, subdivision (1) (b), and subdivision (2).

Appearances on appeal include appellant 7238 Reseda Boulevard, Inc., appearing through its counsel, Karineh Avanesian, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on January 27, 1997. Thereafter, the Department instituted an accusation against appellant charging the referenced violations. An administrative hearing was held on September 2, 1997, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the charged violations. Subsequent to the hearing, the Department issued its decision which determined that the violations noted above were proven and ordered the license suspended. Appellant thereafter filed a timely notice of appeal.

In its appeal, appellant raises the following issues: (1) the entertainer touched only her own clothing next to her breasts; and (2) the testimony of the police officer is not credible, concerning the distance between the performing entertainer and the police officer, and the solicitation of a drink by the entertainer, due to the perjured testimony of the police officer. The issues are interrelated and will be considered together.

DISCUSSION

Appellant contends that the findings are not supported by substantial evidence, arguing that the entertainer touched only her own clothing next to her

breasts; and the testimony of the police officer is not credible, the officer having given perjured testimony.

Much of the argument of appellant centers upon the credibility of officer Damian Guitierrez's testimony. The credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. (Brice v. Department of Alcoholic Beverage Control (1957) 153 Cal.2d 315 [314 P.2d 807, 812] and Lorimore v. State Personnel Board (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640, 644].)

A. Exposure of the Breasts

The entertainer was on a stage in conformity with the Department's rules as to height but not as to distance between the entertainer and the officer.² The officer testified that the entertainer exposed one of her breasts so that the officer could see that her nipple was pierced, and also, that she placed her breast area on the facial area of the officer. The officer also stated he could have touched her breasts due to his close proximity to the entertainer [RT 9-11, 22, 29].

B. Touching of the Breasts

The officer testified that the entertainer, while dancing, rubbed her breast area, and as she was leaning forward, the motion of her hands caused her breasts to be exposed³ [RT 11, 22].

²Rule 143.3, subdivision (2), in pertinent part states: "... entertainers whose breasts ... are exposed to view shall perform on a stage at least 18 inches above the immediate floor level and removed at least six feet from the nearest patron."

³The rule in pertinent part states: "No licensee shall permit any person to perform acts of or acts which simulate: (b) The touching, caressing or fondling on the breast"

Appellant argues that the entertainer did not touch her breasts, but only the clothing next to the breasts. Whether the breasts were touched, hand skin to breast skin, is not dispositive.

In the case of Hollywood Sunset, Inc. (1998) AB-6827, the Board concluded that the entertainer therein caused a touching of her breasts by using the face of an investigator to cause the touching. In the case of 8250 Sunset Boulevard, Inc. (1997) AB-6575, the Board concluded that clothing over the breasts does not negate the violation of touching the breasts. And, in the case of Funtastic, Inc. (1996) AB-6530, the Board determined that the simulated touching of the breasts constituted a violation.

C. Solicitation of a Drink

The officer testified that the entertainer responded to a question by the officer: "... Why don't you buy me a drink" [RT 14]. The charged drink solicitation by the entertainer should be viewed in the context of the relationship established between the officer and the entertainer, after the exposing stage performance, but before the alleged solicitation of a drink.

The officer testified that, following the stage exposure and touching by the entertainer of her breasts, she performed a lap dance for the officer:

"She was facing me. Numerous times she leaned towards me. While she was facing me, her hands are rubbing my shoulder area, then she would face away from me and she sat on my lap, at which time I moved my hands, and she was grinding her buttocks on my lap. She stood up; she continued to dance in front of me facing away from me bending over forward with her buttocks facing me. Then she turned around, faced me. She continued to dance; put her hands over my shoulders and leaned toward me with her hands up against the wall rubbing her chest on my face. Turning away, continuing to grind her buttocks on my lap; standing up, reached between

her legs, rubbed my leg up to my crouch area for a period of four songs.”

[RT 24]. [Also, see RT 13-14.]

The record also shows the officer was in the premises for two and one-half hours, had one beer and three-quarters of a second beer during that time, and allowed the entertainer to perform not one lap dance, but four, apparently in succession, on the officer [RT 19, 24].

After the “lap dance,” the officer testified that “she told me that my fee [for the lap dances] was up to \$80 and if I wanted anything else” [RT 14]. The officer “replied [with] words to the effect, yes, can we go somewhere else” [RT 14]. “She laughed and said, ‘why don’t you buy me a drink?’” [RT 14]. The officer and the entertainer went to the bar counter and the officer ordered a beer and the entertainer ordered a “screwdriver.” [RT 14-15].

Apparently, directly following the service of the drinks ordered by the officer and the entertainer, uniformed officers arrived and officer Guitierrez seized the entertainer’s drink [RT 15-16]. The following colloquy concerning these events occurred during the direct examination of the officer by the Department’s counsel:

“Q. What happened to the drink in [sic] both drinks?

“A The beer [the officer’s drink] was left at the scene. The mixed drink [the entertainer’s drink], I took it into custody and booked it at West Valley Station as evidence.

“Q. What happened to the drink after you booked it into evidence?

“A. I requested an analyzed [sic] report through SID, at which time it was

analyzed by SID." [RT 16].⁴

The officer, still on direct examination, verified the analysis report, marked as

Exhibit 2:

"Q. (By the Department's counsel): Officer Guterrez, would you take a look at Exhibit 2 and tell me if you recognize it?

"A. Yes, sir.

"Q. What is it?

"A. This is a faxed copy from SID indicating an alcohol analysis was conducted of the evidence which I booked." [RT 16-17].⁵

On cross-examination by appellant's representative, the officer testified as to the arrival of uniformed officers. The following colloquy occurred:

"A. Everyone was detained inside of the business, I identified myself to the bartender, to the defendant [the entertainer]. I removed the drink [the entertainer's], placed it on the table at the south center of the bar and called the manager over, obtained his I.D., explained to him the situation and the investigation. I also obtained the I.D. from the bartender. I completed a citation and [the entertainer] was taken outside the business where she was transported to West Valley Station.

"Q. Did you take the drink?

"A. At that time it was on the table where I was issuing the citations.

⁴This answer and the preceding answer, is the offending testimony. The cross-examination which follows the direct examination shows the police officer falsely testified under oath.

Penal Code §118 states in pertinent part: "Every person who, having taken an oath that he will testify ... truly before any competent tribunal ... willfully and contrary to such oath, states as true any material matter which he knows is false ... is guilty of perjury."

⁵See footnote 4, supra.

"Q. Did you leave the drink there when you left the premises?

"A. Yes, sir.

"Q. You left it at the premises; is that correct?

"A. Yes, sir.

"Q. Approximately when did you come back for it?

"A. As soon as we walked out -- they still had [the entertainer] outside. Roughly ten minutes later I re-entered the business.

"Q. So you went back into the business after ten minutes; is that correct?

"A. Yes. Roughly ten, fifteen minutes. I didn't time it.

"Q. Was the drink still there?

"A. No, sir.

"Q. So you didn't confiscate the drink that was served to her?

"A. I originally did and then it was destroyed.

"Q. So what's this analyzation report on?

"A. When we re-entered the business, I walked over to the table where I had left the drink. I had noticed that the drink had been removed from the table. I walked back to the bartender, and I asked the bartender to mix the same drink that she had served the [entertainer].

"Q. Did the bartender mix the drink?

"A. Actually -- yes, sir. I actually talked to the manager, the manager told the bartender to mix the drink.

"Q. Did [the entertainer] ever take a drink of that drink?

"A. Not of this one, sir.

"Q. Did she have a drink of the other drink?

"A. I believe she had a sip.

"Q. When do you believe she had a sip?

"A. Right when they served them to us.

"Q. Is there any place in the report that [the entertainer] had a sip of that drink?

"A. I don't believe so.

"Q. You remember that today though?

"A. Just as you asked, yes.

"Q. You didn't put it in your report; is that correct?

"A. That's correct" [RT 26-28].

Exhibit 2, the laboratory analysis of the replacement drink, was moved into evidence by the Department's counsel. However, the ALJ refused to admit the analysis as evidence upon it not being relevant to the case⁶ [RT 33].

The officer's false testimony is very disturbing. "As respects perjury, testimony that merely affects the credibility of a witness is material, and may be so though given on a collateral matter, since such evidence usually tends to strengthen the case of one party or weaken that of the party's adversary." [19 Cal.Jur. 3d, §1798 -- citations omitted].

Additionally, California Jury Instructions give some guidance:

BAJI 2.22: "A witness false in one part of his testimony is to be distrusted in others. You may reject the entire testimony of a witness who wilfully has

⁶4 California Code of Regulations §143, states in pertinent part: "No on-sale retail licensee shall permit any employee ... to solicit ... the purchase or sale of any drink" The falsification of the evidence by the officer was not necessary, as the proof needed under the rule was to a "drink," not necessarily an alcoholic beverage.

testified falsely on a material point, unless, from all the evidence, you believe that the probability of truth favors his testimony in other particulars.”

BAJI 12.36 (last paragraph): “A duty to disclose known facts arises [in the absence of a fiduciary or a confidential relation] where one party knows of material facts and also knows that such facts are neither known nor readily accessible to the other party.”

BAJI 12.37 (Fraud and Deceit): “Intentional concealment exists where a party: (1) Knows of defects in a property and intentionally conceals them. [or] (2) while under no duty to speak, nevertheless does so, but does not speak honestly or makes misleading statements or suppresses facts which materially qualify those stated.”

We conclude the decision of the Department must be reversed. The credibility of the officer has no standing before this tribunal, as it is fraught with perjury and highly questionable conduct. While the cases of Brice and Lorimore, supra, are followed by the Appeals Board in almost all cases, the credibility given to the officer by the Administrative Law Judge (ALJ) is unreasonable in this case, and the Appeals Board will not sanction it. (See Findings IV and V, as examples of partial credibility of the officer). The officer’s testimony was not credible -- his testimony was false.

CONCLUSION

Our review of the record leads us to view the officer’s conduct of obtaining a “replacement” drink and causing an analysis thereof, as probably an “innocent” attempt to protect his investigation, though highly improper. Notwithstanding, with four months elapsing between the investigation and the administrative hearing, and ample opportunity to reflect upon his conduct, the officer is left with no excuse for giving testimony, under oath, that any peace officer should deem contrary to his or

her oath of office. If the Department determines that a rehearing is in order to sustain any or all of the counts, it must do so with testimony other than from officer Guterrez. The record as it now stands is so tainted, that if such further proceedings are deemed inadvisable, then dismissal of the accusation is in order.

We also conclude that due to the insensitivity of the ALJ to the testimony and conduct of the officer, another ALJ should preside if further hearings are held.

The decision of the Department of Alcoholic Beverage Control is reversed, and the matter is remanded to the Department for further proceedings on any or all counts of the accusation, deemed appropriate by the Department, in accordance with the views expressed in this decision.⁷

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

⁷This 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, before this final decision becomes effective, may 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.