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

WESLEY G. BLIZZARD dba Cuff's
1941 Hyperion Avenue, Los Angeles, CA 90027,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent
AB-7549
File: 40-103621 Reg: 99046829

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: November 3, 2000
Los Angeles, CA

ISSUED JANUARY 18, 2001

Wesley G. Blizzard, doing business as Cuff's (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked his license, but stayed the revocation for 36 months, conditioned upon discipline-free operation during that period, and a suspension of 20 days for permitting acts of lewd conduct, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from violations of Title 4, California Code of Regulations, §143.3, subdivisions (1)(b) and (1)(c), and Penal Code §647, subdivision (a).

Appearances on appeal include appellant Wesley G. Blizzard, appearing through his counsel, Armando H. Chavira, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

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[1]The decision of the Department, dated December 2, 1999, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer license was issued on May 1, 1981. Thereafter, the Department instituted an accusation against appellant charging that, on April 26, 1999, appellant's bartender permitted a patron to touch, caress, or fondle the genitals of another patron (count 1, Rule 143.3(1)(b)); permitted a patron to display his genitals (Count 2, Rule 143.3(1)(c)); and permitted the performance of a lewd act in the premises (count 3, Penal Code §647, subdivision (a)).

An administrative hearing was held on September 22, 1999, at which the Administrative Law Judge (ALJ) granted the Department's motion to amend the accusation by the addition of count 4, charging appellant with permitting a patron to touch, caress, or fondle the genitals of another patron, in violation of Title 4, California Code of Regulations, §143.2, subdivision (3) (Rule 143.2(3)). Documentary evidence was received, and testimony was presented by Los Angeles Police Department officer Mark Mattingly; the supervisor at the premises, Roger Dennehy; the bartender who was working the night of April 16, 1999, Mark McKenzie; and appellant, Wesley Blizzard.

Subsequent to the hearing, the Department issued its decision which determined that the charge in count 1 had not been established[2] and dismissed that count, but that the charge in each of the other three counts had been established.

Appellant thereafter filed a timely appeal in which he contends that no substantial evidence supports the finding that the lewd conduct was "permitted."

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[2] Count 1 was dismissed because it alleged a violation of Rule 143.3(1)(b), which the ALJ determined does not include acts involving contact between two people. Rule 143.2, violation of which was charged in count 4 of the amended accusation, does prohibit acts involving contact between two people.

DISCUSSION

Appellant contends no substantial evidence exists to support the finding that appellant "permitted" the lewd acts to take place where the evidence showed that the bartender did not witness the acts and that his ability and opportunity to see the acts were merely speculative.

The ALJ found "It was not established that McKenzie actually saw what occurred between [the two patrons]. While it was going on, McKenzie came as near as 10 feet to the location where [the two patrons and the two undercover officers] were. He was passing by and could have seen the behavior." (Finding VIII.) He also found that "McKenzie testified credibly that he did not see any 'inappropriate' activity in the bar that night." (Finding XII.)

The lewd conduct that the bartender did not see, from about 10 feet away, was the two- to three-minute oral copulation of one man by another, in a relatively well-lit corner of the premises, about two feet away from other patrons (who happened to be undercover police officers). [RT 18-20.]

In Determination of Issues IV-B, the ALJ addressed, at some length, the contention advanced here by appellant:

> "[Appellant] contends that he cannot be held to have permitted misconduct inside his licensed [premises] unless he knew it was occurring. Since it was not established that the sole on-duty bartender, McKenzie, [appellant's] acknowledged employee and agent, saw what occurred, [appellant] cannot be held to have permitted it and the accusation must be dismissed. In support of this argument, [appellant] cites to Laube, etc. v. Stroh (1992) 212 Cal.App.4th 364, McFaddin San Diego 1130, Inc. v. Stroh (1989) 208 Cal.App.3d 1384 and Sea Horse Ranch, Inc. v. Superior Court (1994) 24 Cal.App.4th 446. The argument is rejected.
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> "The notion of 'permitting' in cases under the ABC Act has a long history,

stemming from such early cases as Marcucci v. Board of Equalization (1956) 138 Cal.App.2d 605 and Mercurio v. Department of Alcoholic Beverage Control (1956) 144 Cal.App.2d 626 and extending to McFaddin San Diego, supra, and Laube, etc., supra. Early, it was held that '[t]he word "permit" involves no intent. It is mere passivity, abstaining from preventative action.' Harris v. Alcoholic Beverage Control Appeals Board (1963) 212 Cal.App.2d 106, 123. In McFaddin, a license suspension was reversed, the court concluding 'that where a licensee does not reasonably know of the specific drug transaction and has taken all reasonable measures to prevent such transactions, the licensee does not "permit" the transactions.' McFaddin San Diego, supra, 208 Cal.App.3d at 1390. Most recently, the concept of permitting was revisited in Laube, etc., supra. There, borrowing language and a portion of the concept noted years earlier in Marcucci, supra, the court stated,

> 'A licensee has a general affirmative duty to maintain a lawful establishment. Presumably this duty imposes upon the licensee the obligation to be diligent in anticipation of reasonablely possible unlawful activity, and to instruct employees accordingly. Once a licensee knows of a particular violation of the law, that duty becomes specific and focuses on elimination of the violation. Failure to prevent the problem from recurring, once the licensee knows of it, is to "permit" by a failure to take preventative action.' Laube, etc., supra, [212] Cal.App.4th, at 379.

"In this matter, [appellant] 'permitted' prohibited conduct within the context of his operation. Based on three matters of earlier Department discipline for virtually the same offenses, including a stayed revocation, the probation of which had expired just three weeks before the instant incident, respondent was on notice that his clientele was predisposed to such unlawful behavior. The misbehavior was reasonably foreseeable at these premises. [Appellant], therefore, had the specific duty to take added steps to prevent such conduct from ever recurring. His failure to do so establishes that [appellant] 'permitted' the prohibited conduct, even though he did not authorize it and even though neither he nor his on duty employee knew of the specific instance."

We believe the ALJ accurately analyzed the law and cogently applied it to the facts in this matter. Although two of the three prior disciplines involving similar conduct are quite old, the incidents having occurred in 1983 and 1986, the latest one, as noted by the ALJ, resulted in a stayed revocation, the probationary period of which had expired just three weeks before this incident. Appellant was quite clearly on notice that such behavior was "reasonably foreseeable" and he was under a duty to prevent a

recurrence. The failure of the bartender to actually see the violation does not absolve the licensee of responsibility, and the finding of the ALJ, based upon the testimony of the officer, that the bartender had an opportunity to see the behavior, cannot be said to be merely speculative.

Appellant also argues that the ALJ's decision was erroneously based upon his "hindsight review" of appellant's preventive measures. These preventive measures consisted of appellant "advis[ing] his employees of what type of misconduct is prohibited and ask[ing] them to stop it if they see it." (Det. of Issues V.)

It seems obvious that the measures taken by appellant were inadequate and could not reasonably have been expected to prevent a recurrence of the prohibited activity. It is not surprising that the ALJ did not consider these measures to be mitigating circumstances; if anything, he saw their obvious ineffectiveness as constituting aggravation. (See Det. of Issues V.- Penalty Consideration.)

ORDER

The decision of the Department is affirmed.[3]

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[3]This 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 order as provided by §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 §23090 et seq.