ISSUED MARCH 2, 2001

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

CLUB CHA CHA, INC. dba Club Cha Cha 5117 Torrance Boulevard Torrance, CA 90503, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	))))))))))))	AB-7556 File: 48-319326 Reg: 99046907 Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen Date and Place of the Appeals Board Hearing: November 3, 2000 Los Angeles, CA

Club Cha Cha, Inc., doing business as Club Cha Cha (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked its on-sale general public premises license, but stayed revocation upon condition that appellant operate free of discipline for a three-year period and serve an actual suspension of 20 days, for having permitted acts of drink solicitation and for its

[1]The decision of the Department, dated December 9, 1999, is set forth in the appendix.

manager having obstructed a Department investigator in the performance of his duties, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from violations of Business and Professions Code[2] §24200.5, subdivision (b)[3]; 25657, subdivisions (a) and (b)[4]; Department Rule 143[5]; Penal Code §303[6]; and Penal Code §148[7].

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[2] Unless otherwise stated, all statutory references are to the Business and Professions Code.

[3] Business and Professions Code §24200.5 provides, in pertinent part:

"Notwithstanding the provisions of Section 24200, the department shall revoke a license upon any of the following grounds:

"(b) If the licensee has employed or permitted any persons to solicit or encourage others, directly or indirectly, to buy them drinks in the licensed premises under any commission, percentage, salary, or other profit-sharing plan, scheme, or conspiracy."

[4] Business and Professions Code §25657 provides:

"It is unlawful:

"(a) For any person to employ, upon any licensed on-sale premises, any person for the purpose of procuring or encouraging the purchase or sale of alcoholic beverages, or to pay any such person a percentage or commission on the sale of alcoholic beverages for procuring or encouraging the purchase or sale of alcoholic beverages on such premises.
"(b) In any place of business where alcoholic beverages are sold to be consumed upon the premises, to employ or knowingly permit anyone to loiter in or about said premises for the purpose of begging or soliciting any patron or customer of, or visitor in, such premises to purchase any alcoholic beverages for the one begging or soliciting.

"Every person who violates the provisions of this section is guilty of a misdemeanor."

[5] Rule 143 (4 Cal. Code Regs. §143) provides, in pertinent part:

"No on-sale retail licensee shall permit any employee of such licensee to solicit, in or upon the licensed premises, the purchase or sale of any drink, any part of which is for, or intended for, the consumption or use of such employee, or to permit any employee of such licensee to accept, in or upon the licensed premises, any drink which has been purchased or sold there, any

Appearances on appeal include appellant Club Cha Cha, Inc., appearing through its counsel, Rick A. Blake, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on June 7, 1996. Thereafter, the Department instituted an accusation against appellant charging that appellant employed persons to engage in drink solicitation, in violation of various provisions in the Business and Professions and Penal Code, and charging further that appellant's owner/manager resisted, delayed or obstructed a Department investigator in the performance of his duties.[8]

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part of which drink is for, or intended for, the consumpti0on or use of any employee."

[6] Penal Code §303 provides:

"It shall be unlawful for any person engaged in the sale of alcoholic beverages, other than in the original package, to employ upon the premises where the alcoholic beverages are sold any person for the purpose of procuring or encouraging the purchase or sale of such beverages, or to pay any person a percentage or commission on the sale of such beverages for procuring or encouraging such purchase or sale. Violation of this section shall be a misdemeanor."

[7] Penal Code §148 provides:

"Every person who willfully resists, delays, or obstructs any public officer, peace officer, or an emergency medical technician, as defined in Division 2.5 (commencing with Section 1797) of the Health and Safety Code, in the discharge or attempt to discharge any duty of his or her office or employment, when no other punishment is prescribed, is punishable by a fine not exceeding one thousand dollars ($1,000), or by imprisonment in a county jail not exceeding one year, or by both such fine and imprisonment."

[8] The accusation charged drink solicitation pursuant to a commission, percentage, salary, or other profit-sharing plan, scheme, or conspiracy (§24200.5, subdivision (b)) (counts 1 and 7); employment or payment of a commission for the purpose of procuring or encouraging the purchase or sale of alcoholic beverages

An administrative hearing was held on October 20, 1999, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Eric Hirata ("Hirata"), the Department investigator from whom drinks were solicited; by Wendy Wang ("Wang"), appellant's owner/manager; and by Kenneth Nakagawa, a patron of the premises.

Hirata described his visit to the premises, the acts of drink solicitation, and Wang's conduct which formed the basis for the obstruction charge. The first drink solicitation was by Rie Miller, a woman brought to him by Wang. The second drink solicitation was by Ikue Mitsui, who introduced herself to him shortly after Miller left to join other patrons.

Wang testified that all employees were instructed that drink solicitation was not permitted, that the employees provided companionship, and that they paid for any drinks they ordered for themselves. She stated that customers were charged a fee based upon the time spent with the employees.

Nakagawa testified that he frequented the premises on a weekly or bi-weekly basis, and had never offered to buy a drink for any employee nor had he had been asked to buy anyone a drink.

(§25657, subdivision (a)) (counts 2 and 8); employment or knowing permission to loiter for the purpose of soliciting drinks (§25657, subdivision (b)) (counts 3 and 9); employment for the purpose of procuring or encouraging the purchase or sale of alcoholic beverages (Penal Code §303) (counts 4 and 10); the permitting of solicitation of a drink intended for consumption (Rule 143) (counts 5 and 11); and permitting the acceptance of a drink intended for consumption (Rule 143) (counts 6 and 12). In addition, count 13 charged appellant's manager with having obstructed a Department investigator in the conduct of his investigation.

Subsequent to the hearing, the Department issued its decision which determined that all the charges of the accusation had been established.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) the Department made inconsistent findings, on which it based the penalty decision; (2) the decision is based upon assumed facts and not upon evidence in the record; (3) the decision is not supported by evidence in light of the whole record; (4) the violation of Penal Code §148 was not established; and (5) the penalty is excessive. Since issues 1, 2, and 3 require a review of the evidence in support of the findings, they will be discussed together.

DISCUSSION

I

Acknowledging that, "with some exception" findings 5 through 17 set forth "a fair representation" of the facts, appellant nevertheless contends that the decision is not supported by the evidence, that it is based upon assumed facts, and that the findings are inconsistent, such that it must be overturned.

Findings 5 through 17, which are prefaced by the Administrative Law Judge's statement that, in making them, he had carefully reviewed the evidence, taking into account conflicts in the evidence, the internal consistency of the evidence and credibility and bias of witnesses' testimony, state as follows:

> "5. Department investigators had received information from the City of Torrance Police department of possible violations of Alcoholic Beverage Control laws. On April 3, 1999, at approximately 10:00 in the evening three undercover department investigators went to the premises to investigate.
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> "6. Investigator Hirata entered the premises alone and was greeted and introduced to Wendy Wang, the corporate principal of the Respondent, in the

front lobby. Wang engaged Hirata in conversation asking him among other things, his name and occupation. The investigator using the cover of a pharmaceutical consultant provided Wang at her request, a fictitious business card.

"7. Wang escorted the investigator to a lounge area, tastefully furnished with sofas and appropriate club furniture. Wang then asked the investigator what kind of girl he wanted, to which he replied he wanted a 'party girl.' Wang advised that one was available and then left the investigator to fetch the girl. She introduced the female to the investigator as Rie Miller (COUNTS 7 through 12) and stated that she was a party girl. Wang then left the two alone.

"8. Investigator Hirata discovered in conversation with Miller, that she was regularly employed at the Respondent's premises six nights a week and was paid by the hour plus gratuities. She had been so employed for the past month and a half and her duties consisted of sitting and drinking with patrons and socializing with them.

"9. Miller then asked the investigator to buy her a drink to which he assented. Miller then ordered an Ashaii beer (Japanese brand of beer) from the waiter. At the time Wendy Wang was approximately ten feet distant from Miller, sitting at the fixed bar conversing with patrons, with a presumably clear view of the conduct of Miller. Miller was served her beer and consumed it.

"10. Investigator Hirata asked Miller if she ever had to pay for her drinks, to which she replied 'hell no — I hate it when I ask for customers to pay for drinks and they say no.' Later on, Miller ordered a vodka drink for herself from the waiter which was also charged to Investigator Hirata's tab.

"11. After spending approximately thirty minutes with the investigator, Rie Miller rotated to other patrons at another table, and another female hostess joined the investigator and introduced herself as Ikue Mitsui (COUNTS 1 through 6).

"12. In conversation with Mitsui, Investigator Hirata discovered that Mitsui had been employed at the premises for one year, and was required to work six nights a week and explained her duties as essentially the same as Rie Miller. She also advised the investigator that 'she never pays for her own drinks,' from which it is inferred that the patron is expected to pay for drinks ordered and consumed by Mitsui.

"13. During this time, Wendy Wang had remained at the fixed bar in conversation with patrons, and presumably had a clear view of the conduct

of Mitsui.

"14. Mitsui asked the investigator to buy her a beer to which he assented. Mitsui had the bartender provide her a beer and she consumed it. After some more conversation, Investigator Hirata requested his bill from Mitsui. The latter called over the premises' manager who handed the investigator the bill for the evening.

"15. The investigator then asked to speak to the 'owner' for an explanation of the bill, which totaled $166.00. (COUNTS 1 through 12). Wendy Wang advised the investigator that the drink portion of the bill reflected a charge of $38.00, representing drinks ordered for Miller, Mitsui and for himself. There was also a cover charge of $20.00 as duly spelled out on the bill, and the balance of the bill was in effect for the companionship and attendant service provided by Miller and Mitsui.
"16. There was nothing in the evidence in this case to suggest the element of price-gouging often associated with bar-girl drink solicitations of male patrons. The standard price for a beer was $6.00 per bottle and $8.00 for a vodka drink, and these standard prices were reflected in the investigator's bill of $38.00 for five beers and one vodka.

"17. At the hearing in this matter, Wendy Wang admitted that she had employed Miller and Mitsui as companions for male patrons; to keep them company and socialize with them at the premises. They were not required to solicit drinks as part of their job. This was an Asian club, and the evidence did establish that these type of services were a widespread and acceptable custom in many countries in Asia, and Respondent's premises was simply an offshoot of this custom."

While appellant has not included Finding 18 among those with which it has little or no quarrel, we have reviewed the record and are satisfied it is supported by the evidence. It adds the following to the decision:

"18. However, Ms. Wang's denial that she prohibited her employees from soliciting drinks from patrons and they were required to pay for their own drinks is contradicted by direct and credible evidence. That evidence first being, employees Miller & Mitsui statements to Investigator Hirata to the effect that they never pay for their own drinks. Secondly, Ms. Wang's statement to Investigator Hirata explaining the bill to him (and again her testimony at the hearing) that the alcoholic beverage charges appearing on the bill represented drinks consumed by her employees Mitsui and Miller.

"Finally, Wang admitted that Investigator Hirata's bill was prepared by her

> manager and that tally included the major part of five beers and a vodka for her employees, Miller and Mitsui. If Wang's employees were prohibited from soliciting alcoholic drinks from patrons, how does that square with their solicitation of drinks from the investigator and the tally for those drinks showing up on the investigator's bill prepared by the premises' manager. It does not.
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> " Was the manager in error in making those charges or is Ms. Wang being untruthful. Her testimony lacks credibility and the evidence establishes a classic case of bar-girl solicitation proscribed by law."

Appellant does not challenge the findings to the extent they find that Miller and Mitsui solicited drinks, but cites Wang's testimony that she fired them for doing so in violation of the conditions of their employment.

Although conceding that the alleged B-girls, Miller and Mitsui, were employed at the premises, were paid hourly, and received tips, appellant contends that there is no evidence they received a commission, percentage or other compensation on drinks sold. Therefore, appellant contends, counts 2 and 8 cannot survive.

Appellant further contends that Miller and Mitsui, and the other female employees, were employed to sit with customers, socialize, and drink with them, take orders for Karaoke, and sing with customers, who were charged a fee based upon the time spent with them. Thus, appellant contends, it is not possible to make a finding they were employed to loiter, and counts 3 and 9 must also fail.

Appellant also challenges the finding that Wang had a "presumably" clear view of Miller, from ten feet away, when Miller asked Hirata to buy her a drink. Appellant argues that there is no testimony as to what Wang could see, what obstructions there may have been between her and Miller, or the direction she may have been facing. To this, we might add, there is no evidence Wang could hear

any conversation between Miller and Hirata.

The Department, while defending the decision as a whole, asserts that appellant has not challenged counts 1 and 7, which charged violations of §24200.5, subdivision (b), a violation of which can be penalized by revocation. Thus, the Department contends, those counts alone are enough to sustain the penalty which was imposed.

The Department is mistaken. Appellant has argued that there is no evidence of any payment of a commission, salary, or percentage, and our review of the record finds none. Appellant's admission that the women were employed and paid an hourly wage does not fill the void. The term "salary" denotes fixed compensation paid regularly, as distinguished from an hourly wage. See Webster's Third New International Dictionary (Unabridged), at page 2003. The mere fact that appellant's challenge to the sufficiency of the evidence did not specifically identify counts 1 and 7 as deficient is not a bar to our determination that the evidence in support of those counts is insufficient.

As to counts 2 and 8, the Department argues that the prohibition in §25657, subdivision (a), against employment for the purpose of procuring or encouraging the purchase or sale of alcoholic beverages does not require proof of payment of a commission or percentage. We agree with the Department that proof of employment for such purpose is enough.

With respect to counts 3 and 9, the Department argues that §25657, subdivision (b), must be construed to cover the direct actions of both employees and non-employees. If appellant's position is accepted, the Department argues, a

loophole would be created in the statute, and appellant would be shielded from prosecution from the fact the persons "begging or soliciting" were employees, so could not have been loitering.

Addressing this last point, we do not share the Department's concern. It seems to us a reasonable interpretation of §25657, subdivision (b), is that it is a violation to employ anyone for the purpose of begging or soliciting (which the evidence supports in this case) or to employ or knowingly permit anyone to loiter for the purposes of soliciting, which would reach the loiterer whether employed or not.

In addition, the findings support the determination that the counts under Rule 143 were established (by the solicitation and acceptance of drinks for consumption), as well as the Penal Code counts.

It is not essential that the Department prevail as to every count of the accusation to sustain a penalty such as that imposed here, where, as here, the evidence clearly establishes the existence of classic bar-girl activity and drink solicitation, albeit in the context of an Asian cultural tradition. The broad array of statutes directed against drink solicitation in licensed premises speaks volumes regarding the degree of concern about such conduct, and the need to eradicate the practice to the extent possible.

II

Based upon Hirata's testimony (at RT 32-36), the record establishes that after Hirata had displayed his credentials and identified himself as a peace officer, and had obtained the return of the bill he had paid, and the marked currency with

which he paid it, Wang produced the fictitious business card he had given her when arriving at the premises. and asked him if the card was real. He told her it was fictitious, and that he needed it returned to him. She declined to give it to him, returning it to her jacket pocket. At that point, another investigator placed her hands behind her back, retrieved the fictitious business card, and gave it to Hirata. The second investigator then released Wang, who lunged at Hirata and grasped his wrist with one of her hands in an attempt to retrieve the business card. Once again Wang was restrained by the second investigator. At that point, Wang was warned that she risked a charge of assault upon a peace officer.

Appellant contends this conduct does not rise to the level of a violation of Penal Code §148. It concedes it might constitute an assault on a peace officer, but argues that more, such as actual flight, or interruption of a peace officer in the performance of his duties is required under §148. Appellant also argues that the demand for the return of the card had nothing to do with Hirata's investigation, which, appellant contends, had been completed when he demanded the return of the business card.

It cannot be assumed that Hirata's investigation concluded at the point he had recovered the bill for the evening's activities, and the marked currency. Once Wang displayed the fictitious business card, and Hirata asked that it be given to him, its production became an integral part of the investigation. While her initial refusal to give it to him might fall short of contravening the statute, her physical attempt tp take it away from Hirata, however brief, clearly did. That her conduct might also constitute an assault on a peace officer is irrelevant.

In In re Gregory (1980) 112 Cal.App.3d 764, 776, 778 [169 Cal.Rptr. 540], a violation of §148 was upheld where a 15-year-old had attempted to walk away after an officer had taken hold of his arm.

Here, Wang struggled to regain possession of the business card, and as a consequence, interfered with and obstructed Hirata from pursuing his investigation in a normal, uninterrupted manner. The violation of §148 was clear.

III

Appellant argues that the penalty would have been less if the decision had found, as it contends, that certain of the solicitation counts had not been established, and that the Penal Code §148 charge had also been rejected.

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].)

It is apparent from what we have written that we disagree in large part with appellant's analysis of the record.

We think only the charges that required proof of a salary, percentage or commission scheme lacked supporting proof. The remainder of the counts of the accusation, asserting drink solicitation violations under various theories were supported by substantial evidence. Similarly, the evidence supports the finding of a violation of Penal Code §148. Hence, there is no real basis for concluding that the

penalty is excessive.

The order stays revocation for a probationary period of three years. Its object is to put appellant on notice that it must alter its method of operation if it is to retain its license. Such a requirement is reasonable, given the evidence. The accompanying suspension, 20 days, does not strike us as abusive.

As we pointed out earlier herein, the Legislature has made it clear that drink solicitation and bar-girl activity is not acceptable in any form. The decision in this case simply honors that legislative mandate.

ORDER

The decision of the Department is affirmed.[9]

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

[9] This 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 may, before this final decision becomes effective, 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.