

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

AB-7589

File: 47-310685 Reg: 99047244

CHAMPPS ENTERTAINMENT, INC. dba Champps Americana
51 Fortune Drive, Suite 500, Irvine, CA 92718,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: November 14, 2002
Los Angeles, CA

ISSUED FEBRUARY 6, 2003

Champps Entertainment, Inc., doing business as Champps Americana (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its on-sale general public eating place license for 25 days with 10 of those days stayed for a probationary period of one year for permitting entertainment to be audible beyond the area under appellant's control, and for an additional five days for permitting persons to fondle the breasts of a woman, and permitting a woman to simulate oral copulation, arising from a violation of Business and Professions Code section 23804, and California Code of Regulations, title 4, section 143.2, subdivision (3).

Appearances on appeal include appellant Champps Entertainment, Inc., appearing through its counsel, Ralph Barat Saltsman, Stephen Warren Solomon, and

¹The decision of the Department, dated February 3, 2000, is set forth in the appendix.

James S. Eicher, Jr., and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on November 20, 1995. Thereafter, the Department instituted an accusation against appellant charging the violations set forth above. An administrative hearing was held on December 16, 1999, at which time oral and documentary evidence was received.

Subsequent to the hearing, the Department issued its decision which determined that counts 1, 4, and 5 of the accusation were proven true.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issue: the findings and decision are not supported by substantial evidence, arguing (1) the Department imposed sanctions without fault on the part of appellant, (2) appellant did not knowingly permit the violations, and (3) appellant took reasonable precautions to guard against the violations of law.

DISCUSSION

The Department is authorized by the California Constitution to exercise its discretion whether to suspend or revoke an alcoholic beverage license, if the Department shall reasonably determine for "good cause" that the continuance of such license would be contrary to public welfare or morals. The Department's exercise of discretion "is not absolute but must be exercised in accordance with the law, and the provision that it may revoke [or suspend] a license 'for good cause' necessarily implies that its decisions should be based on sufficient evidence and that it should not act arbitrarily in determining what is contrary to public welfare

and morals.” (Martin v. Alcoholic Beverage Control Appeals Board (1961) 55 Cal.2d 867, 876 [13 Cal.Rptr. 513] quoting from Weiss v. State Board of Equalization (1953) 40 Cal.2d 772, 775.)

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. The Appeals Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing.²

"Substantial evidence" is relevant evidence which reasonable minds would accept as a reasonable support for a conclusion. (Universal Camera Corporation v. National Labor Relations Board (1951) 340 US 474, 477 [95 L.Ed. 456, 71 S.Ct. 456] and Toyota Motor Sales USA, Inc. v. Superior Court (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].) When, as in the instant matter, the findings are attacked on the ground that there is a lack of substantial evidence, the Appeals Board, after considering the entire record, must determine whether there is substantial evidence, even if contradicted, to reasonably support the findings in

²The California Constitution, article XX, section 22; Business and Professions Code sections 23084 and 23085; and Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

dispute. (Bowers v. Bernards (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925].)

Appellate review does not "resolve conflicts in the evidence, or between inferences reasonably deducible from the evidence." (Brookhouser v. State of California (1992) 10 Cal.App.4th 1665, 1678 [13 Cal.Rptr.2d 658].)

Apparently, there is no contention that the acts and conduct complained of did not occur.

Prior to the date of the violations, appellant's representative, John Lutz (Lutz) and an investigator of the Department discussed the dangers of allowing a radio show to be broadcast from the premises. The show was considered to be "adult entertainment", and had, in shows past, instigated a practice of the broadcast host autographing the bare breasts of women in attendance, called "rack signing."

Lutz then attempted to cancel the broadcast but after receiving assurances by the show's sponsors that that type of conduct would not be offered, he agreed to the show, knowing that any such illegal conduct could cause sanctions to be placed against the license.

Lutz appreciably increased his security guards from the usual two or three, to ten. Patron attendance that evening was approximately 350 persons, and the broadcast had a potential exposure of about one-half million listeners.

Department investigators testified a woman named Anita Schnabell exposed her breasts and men would place their faces on her breasts. Later, Schnabell was seen standing in a bent position with her mouth over the head of a beer bottle, the bottle held in a man's groin area, with the woman moving the head of the bottle in and out of her

mouth.

Later, while not charged by the Department, but adding to the question of whether appellant's employees and guards were properly monitoring the conduct of this group of patrons and the show's host's conduct, the same woman during the radio program, went onto the stage, past security placed at the bottom of the stairs, exposed her breasts while on the stage with the broadcast host autographing her breasts.

Another woman named Joann Richards pulled down her blouse while among the patrons, exposing her breasts. A male signed the top of her breasts, and the signature of the broadcast host was evident on her breasts.

Exhibit 5 shows the process of autographing the breasts of a woman by the apparent show host. Exhibit 6A shows the baring of Richard's breasts among the male patrons, with exhibits 6B and 6C showing her bare breasts with the autographs thereon.

Lutz testified that while he knew of the exposures and "rack signing," he felt to interrupt the show would be a disaster and could cause a riot. He also made the decision not to physically remove the violators during the show, but to have them ejected after leaving the stage.

We cannot guess at the motivation of Lutz to allow the conduct without some meaningful action to stop it. But we determine that, due to his prior knowledge of the potential for misconduct, and then simultaneous inaction during the improper conduct of patrons and the broadcast host, fault was shown by the sufficient knowledge and inaction. Lutz did not take reasonable action once the misconduct was evident, but showed a mere facade of trying to avoid the obviously improper conduct.

Concerning the audibility of the sounds of the entertainment, the radio station was allowed to place speakers in the premises and also outside the premises in the

patio area. A Department investigator testified he could hear the entertainment from the premises at 80 feet away from the premises, and outside the area under appellant's control, a violation of a condition which states: "Entertainment provided shall not be audible beyond the area under the control of the licensee."

Appellant also suggests the penalties for the separate violations are indefensible in their disparity. We think each penalty fairly fits the offense. The more significant penalty was for a violation of the noise condition. Appellant seeks to trivialize the noise violation, stating that the same material went throughout the nation on syndicated radio. One difference we see, however, is that any radio listener offended by what he or she heard could simply change stations or turn the radio off. Appellant's neighbors, who were exposed to the broadcast through appellant's outdoor speakers, did not have the luxury of that choice.

The lesser penalty was for conduct much more the result of a breach of faith by third parties.

ORDER

The decision of the Department is affirmed.³

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

³This 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.

