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

**AB-7606b**
File: 48-275530 Reg: 99047236

RENEE VICARY, dba Angel's Sports Bar
1650 East Sixth Street, Corona, CA 91719,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: none

Appeals Board Hearing: April 8, 2004
Los Angeles, CA

**ISSUED JUNE 9, 2004**

Renee Vicary, doing business as Angel's Sports Bar (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] reimposing a 30-day suspension of her license for violations of California Code of Regulations, title 4, section 143.3 (rule 143.3).

Appearances on appeal include appellant Renee Vicary, appearing through her counsel, Roger Jon Diamond, and the Department of Alcoholic Beverage Control, appearing through its counsel, John Lewis.

FACTS AND PROCEDURAL HISTORY

This is the third appeal in this matter. Following the first appeal, the Appeals Board issued a decision on August 16, 2001, reversing a decision of the Department that conduct of various topless dancers at appellant's establishment (dancers touching

[1]The decision of the Department, dated December 10, 2003, is set forth in the appendix.

their own breasts while performing and a dancer exposing her breasts when not on an elevated stage more than six feet from a patron) violated Department rule 143.3. The Board concluded that the rule, as applied, infringed upon the dancers' First Amendment rights of expression. (*Vicary* (2001) AB-7606.)

The Fourth District Court of Appeal issued a writ of review and ordered the Board's decision annulled, concluding that the Department's enforcement of the rule did not violate the dancers' First Amendment rights. (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd. (Vicary)* (2002) 99 Cal.App.4th 880 [121 Cal.Rptr.2d 753].) The court ordered the matter remanded to the Appeals Board for reconsideration of the penalty imposed by the Department, explaining, on page 895:

> It remains to consider whether Vicary should be given the opportunity to request the Board to reconsider the penalty imposed, an issue which became moot when the Board overturned the decision on the Rule 143.3 violations. We believe that Vicary is entitled to a determination on this point.

Both the California Supreme Court and the United States Supreme Court denied review. The case was remanded to the Appeals Board by the Court of Appeal, and by the Board to the Department, for reconsideration of the penalty.

On April 2, 2003, the Department issued the following Notice:

> On March 24, 2003, the United States Supreme Court denied licensee's Petition for Writ of Certiorari. The Decision of the Court of Appeal annulling the Decision of the ABC Appeals Board is now final. In its opinion dated June 26, 2002, the Court of Appeal remanded the matter to the Appeals Board for reconsideration of penalty, which had previously been rendered moot when the Appeals Board reversed the Department's Decision. On January 24, 2003, the Appeals Board reversed its decision dated August 16, 2001 and ordered that the matter be remanded to the Department for further proceedings in accordance with the Court of Appeal's Decision of June 26, 2002.
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> WHEREFORE, the Department's Decision dated March 23, 2000 is final, effective immediately. Licensee's license is suspended for 30 days.

Appellant again appealed, contending the penalty was imposed pursuant to "underground regulations" not promulgated in accordance with the Administrative Procedure Act (APA), and the Department violated the instruction of the Court of Appeal by not affording appellant a hearing on the penalty.

On November 12, 2003, the Appeals Board issued a decision (AB-7606a) agreeing with appellant that the penalty had been imposed based upon Department guidelines not adopted as regulations in accordance with chapter 3.5 (commencing with section 11340) of the APA, and the penalty was, therefore, unenforceable (Gov. Code, §§ 11340.5, subd. (a)[2]; 11425.50, subd. (e)[3]). The Board remanded the matter to the Department once again, directing it to reconsider the penalty without reference to the underground regulation.

The Department issued a decision on December 10, 2003, that again imposed a 30-day suspension. After noting the Board's order of remand "for reconsideration of the penalty without reference to the penalty guidelines set forth in the Department's 'Instructions, Interpretations and Procedures' manual," the decision continues:

> The Department has reviewed the entire record in this matter, including the findings of fact of the Administrative Law Judge. The record in this matter reveals that the violations found to have occurred were not

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[2] "No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter."

[3] "A penalty may not be based on a guideline, criterion, bulletin, manual, instruction, order, standard of general application or other rule subject to Chapter 3.5 (commencing with Section 11340) unless it has been adopted as a regulation pursuant to Chapter 3.5 (commencing with Section 11340)."

> isolated incidents; rather, they involved eight different individual dancers who engaged in multiple violations of Rule 143.3 (title 4, Cal. Code Regs., § 143.3) on two different dates. While each of the violations may have been for a short duration, they were not "incidental" as argued by respondent. On the contrary, most of the dancers involved in the violations repeated the touching more than once during a single dance, some as many as five times.
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> In fashioning the discipline ordered herein, no consideration is given or has been given to the penalty guidelines found by the Board to be an "underground regulation." During the hearing, respondent argued that the 30-day suspension recommended at that time would be "overkill." The Administrative Law Judge specifically considered this claim and found that "[f]ar too much has escaped respondent's attention as she runs this high-risk business for her to benefit from the argument that she has taken every possible step to ensure this type of misconduct will not occur. The only way to ensure that the conduct will not repeat is to impress the importance of such a result on the responsible party." The Department agrees with this assessment of the situation. The discipline ordered is based solely and entirely upon the facts of this case, and is intended to insure continued compliance with the law.

It is from this decision that this appeal is taken. Appellant contends that the Department's reimposition of the 30-day suspension is not valid.[4]

DISCUSSION

Appellant contends the Department's decision to reimpose the 30-day suspension is invalid because the Department disobeyed the Board's decision in AB-7606a, issued November 12, 2003; the Department may not act without a director appointed by the Governor and approved by the Senate and without guidelines; the Department violated appellant's due process right by not providing her a hearing after the Board's decision in AB-7606a and before the Department imposed the penalty; no

[4]Appellant originally contended also that the Department improperly failed to include in the record a series of letters between appellant and the Department following the Appeals Board's decision remanding the matter to the Department. The issue was resolved when the Department provided certified copies of the correspondence.

suspension is warranted because she did not permit the conduct; and the penalty is excessive and the result of vindictive and retaliatory motives.[5]

**A. *THE DEPARTMENT DISOBEYED THE BOARD'S DECISION***

Appellant asserts that the Appeals Board "specifically directed" the Department to comply with the rulemaking provisions of the APA and to adopt regulations in place of its penalty guidelines. She contends that the Department disobeyed the decision of the Appeals Board because it has made no effort to promulgate a regulation in accordance with the APA to replace its penalty guidelines and because it did not reconsider the penalty without reference to the penalty guidelines, as directed in the Board's order.

In the final paragraph of its decision in AB-7606a, the Appeals Board said:

> We are aware that the result we reach in this case will cause the Department and this Board some inconvenience and delay in the appellate process. The ready solution, of course, is for the Department to implement the necessary steps to legitimize its penalty guidelines, either through the normal procedures for the adoption of a regulation, or through use of the emergency adoption procedures spelled out in the APA. Prompt action in this direction will benefit everyone concerned.

While not a specific direction to adopt regulations, it is a strong suggestion from the Board that it believed such actions would provide a "ready solution" to the problem of the Department's underground penalty regulations. The Department has not, as far as this Board is aware, taken any steps to act on the Board's advice.

Business and Professions Code section 23084 provides, in part:

> When the order [of the Appeals Board] reverses the decision of the Department, the Board may direct the reconsideration of the matter in the

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[5]Appellant also asserts that the conduct of the dancers was protected by the First Amendment to the United States Constitution, but only to preserve the point in case the matter reaches the California Supreme Court or the United States Supreme Court.

> light of its order and may direct the Department to take such further action as is specially enjoined upon it by law, but the order shall not limit or control in any way the discretion vested by law in the Department.

Promulgation of penalty regulations is not an action "specially enjoined upon [the Department] by law," unless it wishes to use the penalty guidelines when imposing penalties. Therefore, the Appeals Board cannot "direct" the Department to take such action. It is certainly within the discretion of the Department whether or not to adopt regulations, and the Board's orders "shall not limit or control in any way the discretion vested by law in the Department."

It cannot be said that the Department disobeyed the Board's decision, although it has apparently ignored the Board's suggestion.

Appellant also argues that, although the Department said it did not give consideration to the guidelines in reimposing a 30-day suspension, it referred to the suspension recommended by the administrative law judge which was impermissibly based on the penalty guidelines. She argues that "[i]t defies logic and statistics to believe that the 30 day suspension could continue to be imposed without reference to the initial 30 day suspension." Appellant asserts that, in reimposing the same suspension, "[t]he Department has repudiated the decision of the Appeals Board."

While the Department's repeated reimposition of the same penalty could be viewed as recalcitrance, the Appeals Board has no reason not to accept it as a proper exercise of Department's discretion. In the decision presently under review, the Department has set out the basis for its penalty order and, under the circumstances, we have no reason to believe that the penalty order was anything other than an exercise of the Department's discretion.

Appellant has attempted to support her contention with nothing other than her own suppositions and conclusions, which naturally reflect her bias. These are simply not sufficient to overcome the presumption of official action properly exercised. (See Evid. Code, § 664; *People v. Martinez* (1998) 65 Cal.App.4th 1511, 1517-1518 [77 Cal.Rptr 2d 492].)

**B. *THE DEPARTMENT MAY NOT ACT WITHOUT A DIRECTOR APPOINTED BY THE GOVERNOR AND APPROVED BY THE SENATE AND WITHOUT GUIDELINES***

Appellant asserts that the penalty order is invalid because the Department lacked a director and lacked guidelines. She contends that after the previous director, Jay Stroh, retired about four years ago, the Governor did not appoint a new director. Since the Constitution requires that the Department be run by a director appointed by the Governor and confirmed by the Senate, appellant argues, there is no authority for the Department to continue operating, except as to ministerial functions. Imposing a penalty is not ministerial, but discretionary; therefore, appellant concludes, this penalty could not be imposed.

Appellant did not raise this issue until the present appeal, although former Department director Stroh retired in July of 2000. She contends the Department has been without a director since that time; if so, this should have been raised in her first re-appeal, AB-7606a, filed April 7, 2003. In any case, appellant cites no authority for her contention that the Department cannot perform any discretionary functions without a director appointed by the Governor and confirmed by the Senate.

Continuity of agency functions is ensured by endowing the deputy of a public officer with the authority to exercise the power or perform the duty of the officer as necessary. (Gov. Code, §§ 7, 1194.) Following Stroh's retirement, the chief deputy,

Manuel Espinoza, performed the duties of the director, and Jerry Jolly became chief deputy. In August 2002 Jolly replaced Espinoza as acting director. Governor Schwarzenegger appointed Jolly as director of the Department on February 11, 2004. The Department was never without the ability to impose penalties.

**C. *APPELLANT'S DUE PROCESS RIGHT TO A HEARING WAS VIOLATED***

Appellant objects to the Department not providing her with a new hearing after the Appeals Board issued its decision and before the Department issued its order reimposing a 30-day suspension. She argues that due process requires notice and an opportunity to be heard before a person's liberty or property is taken, that she requested the opportunity to address the Department on the issue of the penalty, and that her original hearing was "contaminated" by the underground regulation.

It is true that due process requires notice and an opportunity to heard before one can be deprived of his or her property.[6] However, appellant had that opportunity at the hearing before the administrative law judge in January 2000. She is not entitled to another hearing.

Justice Tobriner's comments on the right to a hearing, quoted by the court in *Escondido Imports, Inc. v. DMV* (1983) 145 Cal.App.3d 834, 838 [193 Cal.Rptr. 772], are apt:

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[6]Although liquor licensees have been granted procedural due process rights, California courts have considered that a "license to sell intoxicants is not a proprietary right within the meaning of due process." *(Mumford v. Department of Alcoholic Beverage Control* (1968) 258 Cal.App.2d 49, 51 [65 Cal.Rptr. 495]; *Garcia v. Martin* (1961) 192 Cal.App.2d 786, 790-791 [14 Cal.Rptr. 59]; see *Yu v. Alcoholic Bev. etc. Appeals Bd.* (1992) 3 Cal.App.4th 286, 297 [4 Cal.Rptr.2d 280]; see also *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals B*d. (*Vicary*), *supra*, 99 Cal.App.4th 880, 887.)

> The United States Supreme Court "consistently has held that some form of hearing is required before an individual is finally deprived of a property interest." (*Mathews* v. *Eldridge* (1976) 424 U.S. 319, 333 [47 L.Ed.2d 18, 32, 96 S.Ct. 893, 902].) Justice Tobriner, however, once stated: "Due process cannot become a blunderbuss to pepper proceedings with alleged opportunities to be heard at every ancillary and preliminary stage, or the process of administration itself must halt. Due process insists upon the opportunity for a fair trial, not a multiplicity of such opportunities. Due process is not a frozen Draconian code but the concept that in some one of multifarious procedures the accused shall be afforded before judgment the right to a full hearing." (*Dami* v. *Dept. Alcoholic Bev. Control* (1959) 176 Cal.App.2d 144, 151 [1 Cal.Rptr. 213].)

**D. *NO SUSPENSION IS WARRANTED BECAUSE APPELLANT DID NOT PERMIT THE CONDUCT***

Appellant contends that the Department improperly used a strict liability standard in finding these violations. She asserts that she was aware of past violations and did all she reasonably could to prevent the violations. She argues that the Department did not consider the case of *Laube v. Stroh* (1992) 2 Cal.App.4th 364 [3 Cal.Rptr.2d 779], which held that the Department could not use a strict liability standard in determining whether a licensee "permitted" a violation. Appellant mistakenly asserts that this case was not decided until after the Department imposed the penalty in her case, and therefore, the matter should be remanded to the Department again "for reevaluation." She also argues that the decision does not make a specific finding that she permitted the violations.

It is not surprising that the decision does not address whether appellant permitted the violations; it appears that appellant did not raise this argument at the administrative hearing. The Board may, therefore, consider the issue waived. (See 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 394, p. 444.)

In any case, *Laube v. Stroh*, *supra*, does not aid appellant. The court held that:

> a licensee must have knowledge, either actual or constructive, before he or she can be found to have "permitted" unacceptable conduct on a licensed premises. It defies logic to charge someone with permitting conduct of which they are not aware. It also leads to impermissible strict liability of liquor licensees when they enjoy a constitutional standard of good cause before their license – and quite likely their livelihood – may be infringed by the state.

(2 Cal.App.4th at p. 377.)

The court went on to say, with regard to a licensee "permitting" unlawful activity:

> 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 reasonably 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 the 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 preventive action.

(2 Cal.App.4th at p. 379.)

Appellant was well aware of this type of violation occurring, since she testified that she had disciplined dancers in the past for such violations. Knowing this, her duty was to prevent the violations from recurring. Her actions to prevent recurrences were clearly insufficient. Under *Laube v. Stroh*, *supra*, she must be deemed to have permitted the violations.

**E. *THE PENALTY IS EXCESSIVE AND THE RESULT OF VINDICTIVE AND RETALIATORY MOTIVES***

Appellant argues that the 30-day suspension is excessive because the violations were de minimus, appellant did not instruct the dancers to violate the rule, and there have been no additional violations. She also asserts that the only explanation for the Department's reimposition of the same suspension is vindictiveness.

The Appeals Board may examine the issue of excessive penalty if it is raised by an appellant (*Joseph's of California. v. Alcoholic Beverage Control Appeals Bd.* (1971) 19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183]), but will not disturb the Department's penalty order in the absence of an abuse of discretion. *(Martin v. Alcoholic Beverage Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) If the penalty imposed is reasonable, the Board must uphold it, even if another penalty would be equally, or even more, reasonable. "If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within the area of its discretion." (*Harris v. Alcoholic Beverage Control Appeals Bd.* (1965) 62 Cal. 2d 589, 594 [43 Cal.Rptr. 633].)

The Department's decision addressed, and rejected, appellant's "de minimus" argument, noting that the rule places no limit on the duration of the touching, most of the dancers touched themselves more than once during a single dance, eight different dancers were involved, and the violations occurred on two different occasions. In *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd. (Vicary)*, *supra*, 99 Cal.App.4th 880, 894, the court disagreed with appellant's argument that brief touchings should be found not to violate rule 143.3:

> The prohibition of Rule 143.3 is clear and the touchings here were not inadvertent. We decline to hold that the minimal constitutional protection to which the dancers are entitled requires that they be permitted one or more "freebies."

Appellant has presented absolutely no proof that the same penalty was reimposed because of the Department's alleged "vindictiveness."[7] Appellant makes a

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[7]At oral argument before the Board, appellant asserted that the Department has become overzealous in its policing of the premises, apparently attributing this also to (continued...)

weak argument that "The odds of the same number, 30, being selected twice, are extremely remote." This assumes that penalties are imposed in a totally random manner. On the contrary, the Department has explained in its decision the considerations that went into determining the appropriate penalty. We do not find it at all surprising, given the nature and circumstances of these violations, that the Department should have determined that a 30-day suspension is appropriate.

Appellant has not shown that the penalty imposed by the Department was an abuse of discretion.

ORDER

The decision of the Department is affirmed.[8]

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

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[7](...continued)
the Department's alleged vindictiveness. Were these assertions proven, we would, of course, condemn such actions. Oral argument, however, is not evidence, and the record does not contain evidence of "overzealousness."

[8]This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 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 section 23090 et seq.