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

AB-7737
File: 48-323653 Reg: 00049128

MARK D. DREIER dba Loading Dock
1525 Mission Street, San Francisco, CA 94103,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Stewart A. Judson

Appeals Board Hearing: March 11, 2004
San Francisco, CA
ISSUED MAY 12, 2004

Mark D. Dreier, doing business as Loading Dock (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which conditionally revoked his license for a probationary period of two years with a suspension of 30 days for permitting public acts of oral copulation, sodomy, and exposure and fondling of buttocks and genitals, all within the premises, in violation of public welfare or morals and rules of the Department, and for failure to notify the Department of changes to the premises, as cited in Business and Professions Code section 24200, subdivisions (a) and (b), California Code of Regulations, title 4, sections 64.2, subdivision (b)(1), 143.2(3), and 143.3.

Appearances on appeal include appellant Mark D. Dreier, appearing through his counsel, Beth Aboulafia, and the Department of Alcoholic Beverage Control, appearing through its counsel, Robert Wieworka.

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[1]The decision of the Department, dated November 16, 2000, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on January 15, 1997. Thereafter, on June 26, 2000, the Department instituted an accusation against appellant charging twelve counts:

(1) five counts for incidents on December 11, 1999, of oral copulation and exposing with touching the genitals by two males;

(2) three counts of incidents on January 8, 2000, of the same conduct;

(3) three counts of insufficient lighting, which counts were later dismissed; and

(4) one count of failure to notify the Department of changes to the premises.

An administrative hearing was held on September 29, 2000, at which time oral and documentary evidence was received. At that hearing, testimony was presented. Subsequent to the hearing, the Department issued its decision which determined that the Penal Code violations did not apply, but sustained those counts of oral copulation with touching and exposure of genitals under a violation of public welfare or morals charge, dismissed the counts as to insufficient lighting, but sustained the count as to failing to notify the Department of premises' changes.

Appellant thereafter filed a timely notice of appeal. In his appeal, appellant raises the following issues: (1) the decision of the Department erroneously found the misconduct which was charged under the Penal Code (the penal provisions were held not valid) violated public welfare or morals; (2) the applicable rules of the Department are not applicable to this proceeding; (3) appellant did not permit the misconduct, and (4) the penalty is excessive. Essentially, appellant is arguing, the findings[2] of the

[2]The demarcation between findings and determination of issues has been blurred over the years, and should be read together which will give the structural basis

decision were not supported by substantial evidence.

Apparently, appellant does not contest the decision findings that appellant failed to notify the Department concerning alterations to the premises. Therefore, that issue will be affirmed without review.

DISCUSSION

Some of the foundation premises upon which this appeal is considered are set forth below.

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 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

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for the decision under consideration. *DeArmond v. Southern Pacific Company* (1967) 253 Cal.App.2d 648 [61 Cal.Rptr. 844], and 7 California Procedure, Witkin, pp. 390-393.

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.[3]

"Substantial evidence" is relevant evidence which reasonable minds would accept as a reasonable support for a conclusion. (*Universal Camera Corp. v. Labor Bd.* (1951) 340 US 474, 477 [95 L.Ed. 456, 71 S.Ct. 456] and *Toyota Motor Sales U.S.A., 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 dispute. (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925].)

I

Appellant contends the decision of the Department erroneously found the misconduct which was improperly charged under the Penal Code, violated public welfare or morals.

The Department's decision's Determination of Issues I, II, and III state the Penal Code provisions cited in the accusation, do not apply under the facts of this matter. However, Determination of Issues IV, V, and VI state the acts themselves occurred

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[3]The 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].

which acts were in violation of an uncharged Penal Code section, which would be contrary to public welfare or morals.

The second paragraph of Determination of Issues IV states:

> The conduct committed by the patrons, in open view, is contrary to public welfare and morals when permitted in a public premises under the circumstances found. (Footnote omitted) Article XX, Section 22 of the California State Constitution grants to the Department "the power in its discretion, to deny, suspend, or revoke any specific alcoholic beverage license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare and (sic) morals."

The terrible mischief such view has on the proper use of law is an undermining of the rule of law, as Government Code section 11503 states in pertinent part:

> A hearing to determine whether a right, authority, license or privilege should be revoked, suspended, limited or conditioned shall be initiated by filing an accusation. The accusation shall be a written statement of charges which shall set forth in ordinary and concise language the acts or omissions with which the respondent is charged, to the end that the respondent will be able to prepare his defense. It shall specify the statutes and rules which the respondent is alleged to have violated, but shall not consist merely of charges phrased in the language of such statutes and rules....

Counts I, III, and VIII of the accusation charge violations of Penal Code sections 286 and 288. Having found these Penal Code section not applicable to the matter, the counts should have been dismissed.

The decision's statement: "Under the circumstances, it is not an arbitrary exercise of discretion to conclude that the conduct found herein above is contrary to the public welfare and (sic) morals," is in the absence of a proper charging, an arbitrary and despotic view of the rule of law. Under the facts of this matter, such charges must be dismissed.

II

Appellant contends the cited rules of the Department are not applicable in this

proceeding, arguing that the rules cited cover only entertainer or employee conduct.

The rules charged as violated are rule 143.2(3) and 143.3. The 143 series of rules showing their titles, are:

(1) rule 143 is entitled "Employees of On-Sale Licensees Soliciting or Accepting Drinks;"
(2) rule 143.1 is entitled "Employment of Minors in Public Premises;"
(3) rule 143.2 is entitled "Attire and Conduct;"
(4) rule 143.3 is entitled "Entertainers and Conduct;"
(5) rule 143.4 is entitled "Visual Displays;" (films or displays of sexual acts)
(6) rule 143.5 is entitled "Ordinances." (Attire of entertainers or persons)

From the titles above set forth and the case of *City of Berkeley v. Cukierman* (1993) 14 Cal.App. 4th 1331, 1340 [18 Cal.Rptr. 2d 478], which stated that "First, the law is clear that the title of legislation may not be used to control or enlarge the positive provisions of the statute (citations omitted) [and] [I]t has been likewise held that chapter and section headings cannot be resorted to for the purpose of creating ambiguity when none exits," we conclude that the headings are not controllable, but the language of the rules are the controlling factor.

The two rules under consideration, state in pertinent part, as follows:

143.2 Attire and Conduct (the specific rule under review is set forth in italics)

The following acts or conduct on licensed premises are deemed contrary to public welfare and morals, and therefore no on-sale license shall be held at any premises where such conduct or acts are permitted:
(1) speaks to employment or use of any person where breasts, pubic hair, anus, cleft of the buttocks, vulva or genitals are exposed;
(2) speaks to employment or use of any person who is unclothed or attired as stated in (1) above;
(3) *to encourage or permit any person on the licensed premises to touch, caress or fondle the breasts, buttocks, anus or genitals of any other person;*
(4) speaks to permitting employees or person to wear devices that simulate breasts, etc.

Rule 143.3 Entertainers and Conduct (The specific rule is set forth in italics)

Acts or conduct on licensed premises in violation of this rule are deemed contrary to public welfare and morals, and therefore no on-sale license shall be held at any premises where such conduct or acts are permitted.
Live entertainment is permitted on any licensed premises, except that:
(1) speaks to acts of or simulated acts of sexual intercourse, masturbation, etc.;
(2) speaks to entertainers who expose themselves to be on a prescribed stage;
No licensee shall permit any person to use artificial devices or inanimate objects to depict any of prohibited activities described above.
No licensee shall permit any person to remain in or upon the licensed premises who exposes to public view any portion of his or her genitals or anus.

The rules, even though written with some ambiguity, still are rules that talk of conduct of employees, entertainers, and **any person or persons.** It is evident from reading the two rules, each considered as a whole, that the intent is to control conduct by all persons, whether employees, entertainers, or anyone else.

III

Appellant contends that he did not know of, or permit, the conduct as alleged.

The following cases touch on the concept of permitting, and while these cases concern sales of controlled substances, the cases are in point.

The case of *McFaddin San Diego 1130, Inc. v. Stroh* (1989) 208 Cal.App.3d 1384 [257 Cal.Rptr. 8], concerned several transactions which occurred on the premises involving patrons selling or proposing to sell controlled substances to undercover agents. While the licensee and its employees did not know of the specific occurrences, they knew generally of contraband problems and had taken numerous preventive steps to control such problems. The *McFaddin* court held that since (1) the licensee had done everything it reasonably could to control contraband problems, and (2) the licensee did not know of the specific transactions charged in the accusation, the licensee could not be held accountable for the incidents charged.

The case of *Laube v. Stroh* (1992) 2 Cal.App.4th 364 [3 Cal.Rptr.2d 779], was

actually two cases–*Laube* and *Delena*, both of which involved restaurants/bars--consolidated for decision by the Court of Appeal.

The *Laube* portion dealt with surreptitious contraband transactions between patrons and an undercover agent--a type of patron activity concerning which the licensee had no indication and therefore no actual or constructive knowledge--and the court ruled the licensee should not have been required to take preventive steps to suppress that type of unknown patron activity.

The *Delena* portion of the *Laube* case concerned employee misconduct, wherein an off-duty employee on four occasions sold contraband on the licensed premises. The court held that the absence of preventative steps was not dispositive, but the licensee's penalty should be based solely on the imputation to the employer of the off-duty employee's illegal acts.

The imputation to the licensee/employer of an employee's on-premises knowledge and misconduct is well settled in Alcoholic Beverage Control Act case law. (See *Harris v. Alcoholic Beverage Control Appeals Board* (1962) 197 Cal.App.2d 172 [17 Cal.Rptr. 315, 320]; *Morell v. Department of Alcoholic Beverage Control* (1962) 204 Cal.App.2d 504 [22 Cal.Rptr. 405, 411]; *Mack v. Department of Alcoholic Beverage Control* (1960) 178 Cal.App.2d 149 [2 Cal.Rptr. 629, 633]; and *Endo v. State Board of Equalization* (1956) 143 Cal.App.2d 395 [300 P.2d 366, 370-371].)

There is nothing in the record that shows appellant or his employees gave any permission to the participants who were engaging in the sexual activity. However, over the years, the Board has taken the position that even though a party did not specifically condone the acts done, if in fact, an appellant or his or her employees knew or should

have known of the improper acts, there was then a permitting.

Appellant's bartender was on duty during the times of each of the two times (acts) by the parties involved. The bartender was on the first floor but could have seen the improper activity on the balcony area if he had looked [RT 64-65, 77].

The premises' TV was playing male pornographic videos each time the Department investigators came to the premises and observed the improper conduct [RT 15, 35].

According to appellant, male conduct in the bathroom stalls (two males within one stall) was a problem [RT 79 - 80].

Exhibit 3 is an flyer which was available for public taking which suggests an open policy of male togetherness.

We reject appellant's minimizing of the concept of "permitting" and appellant's culpability in ignoring grossly improper conduct within the premises, most likely stimulated by legal TV presentations and flyers which show the permissive attitude of appellant and most likely, his employees. With this background of permissive stimuli, it is clear from a reading of the entire record appellant "permitted" the improper conduct.

IV

Appellant contends that the penalty is excessive.

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].)

The Department had the following factors to consider: (1) the acts done were committed in a public place and in a manner to allow for a full public viewing of the conduct, (2) the staff at the premises apparently were oblivious, being able to see but apparently not seeing, the conduct which occurred on two occasions as witnessed by the Department investigators, (3) the use of male pornographic videos for viewing by all who occasioned the premises, during the two times the Department investigators visited the premises, and (4) distributing flyers which tended to suggest privacy in conduct which was being condoned while open and public. While such factors each may be somewhat innocent, together shows that such conduct was being condoned with no realistic control over the acts and desires of the customers. Considering such factors, the appropriateness of the penalty must be left to the discretion of the Department. The Department having exercised its discretion reasonably, the Appeals Board will not disturb the penalty.

ORDER

The decision of the Department is reversed as to Determination of Issues IV, V, and VI, but affirmed as to all other Determinations, including the penalty.[4]

TED HUNT, CHAIRMAN
KAREN GETMAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[4]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.