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

AB-8095
File: 47-382923 Reg: 02053543

RESTAURANT VENTURES S.B., INC., dba Margaritaville
1987 S. Diners Ct., San Bernardino, CA 92408,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Samuel D. Reyes

Appeals Board Hearing: February 19, 2004
Los Angeles, CA
ISSUED MAY 12, 2004

Restaurant Ventures S.B., Inc., doing business as Margaritaville (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 30 days, with 15 of the days stayed conditionally for one year for permitting and encouraging various lewd acts within the premises, violations of California Code of Regulations, title 4, sections 143.2, subdivision (3); 143.3, subdivisions (1)(a), (b), and (c), and (2); and Penal Code 647, subdivision (a).

Appearances on appeal include appellant Restaurant Ventures S.B., Inc., appearing through its counsel, Ralph B. Saltsman, Stephen W. Solomon, and Jessica Brown, and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

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[1]The decision of the Department, dated February 6, 2003, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general eating place license was issued on January 4, 2002. On August 12, 2002, the Department filed a 13-count accusation against appellant charging that various acts of lewd conduct occurred were permitted to occur in the premises on April 9, 2002.

At the administrative hearing held on November 26, 2002, documentary evidence was received, and testimony concerning the violations charged was presented by San Bernardino police officer Jerry Valdivia; Amber Bryk, one of the participants in the violations; and appellant's corporate president and controlling shareholder, Mark Davidson.

The violations charged arose from an event advertised as a "Bead Party" at appellant's premises on April 9, 2002. As patrons entered the premises, males were given bead necklaces, and female patrons were told to collect as many beads as possible from the men. While some women obtained beads by just asking or giving a kiss, some of the women "flashed," that is, exposed their breasts, to obtain beads. The women who had acquired the most beads participated in a "contest" in which they stood on the fixed bar counter and flashed their breasts to earn applause from the other patrons. Amber Bryk, who won the contest, also pulled up her dress and pulled down her underwear. An unknown number of appellant's security personnel, three waiters, and three bartenders, all wearing distinctive clothing identifying them as employees, were present at the event. A disk jockey (DJ), Wayne Deehring, also employed by appellant for the event, was present playing music and conducting the contest. Davidson was also present, but did not observe any of the violations. Valdivia, a San Bernardino police officer in the vice unit, was also present.

Following the hearing, the Department issued its decision which determined that the violations had occurred as charged. Appellant then filed an appeal contending that liability was imposed even though appellant had no knowledge of the conduct and did not permit it, that insufficient evidence exists to find the violations as alleged, and the accusation does not allege violations that are enforceable by the Department.

DISCUSSION

I

Appellant contends that it cannot be held to have permitted the violations because there was no evidence it had knowledge of the violations and it took reasonable steps to prevent the misconduct from occurring.

Appellant relies on the court's holding in *Laube v. Stroh* (1992) 2 Cal.App.4th 364, 377 [3 Cal.Rptr.2d 779], "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."

In this case, the licensee is deemed to have at least constructive knowledge. Deehring, the DJ hired by Davidson, was present, exhorting the women to expose themselves. Rodriguez, the general manager, gave permission to Deehring to run the contest and to have the women expose their breasts. Other employees were present while the women were on the bar counter. The acts and knowledge of employees are imputed to the licensee. (*Morell v. Department of Alcoholic Beverage Control* (1962) 204 Cal.App.2d 504, 514 [22 Cal.Rptr. 405]; *Harris v. Alcoholic Beverage Control Appeals Board* (1961) 197 Cal.App.2d 172, 180 [17 Cal.Rptr. 315]; *Mack v. Department of Alcoholic Beverage Control* (1960) 178 Cal.App.2d 149, 153 [2 Cal.Rptr. 629].)

Appellant quotes the following from *Laube v. Stroh*, *supra*, at page 379:

> 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.

Appellant somehow reads this as saying "that liability might be avoided entirely if a licensee takes all reasonable steps to prevent the misconduct from occurring." (App. Br. at p. 19.) Davidson satisfied the "all reasonable steps" requirement, appellant asserts, by meeting with his management team the night before and telling them that "exposure" would not be tolerated, by meeting with Deehring afterward and telling him not to do it again, and by discontinuing "[a]ll of these type of promotions." We believe this falls far short of "all reasonable steps to prevent the misconduct from occurring."

In any case, it is not simply preventive action that is required by the language quoted from *Laube v. Stroh*, *supra*, but *actual prevention* of the known problem. Davidson knew of the potential for the type of conduct that occurred before the promotion began. After the first incident, his (and his agents' and employees') "duty [became] specific" and should have "focuse[d] on the elimination of the violation." His "[f]ailure to prevent the problem from recurring" after that was "to 'permit' by a failure to take preventive action."

II

Appellant contends that insufficient evidence exists to find violations as alleged in the accusation. By this, we are assuming that appellant means that *substantial evidence* is lacking to support the findings.

"Substantial evidence" is relevant evidence which reasonable minds would accept as reasonable support for a conclusion. (*Universal Camera Corp. v. Labor Board* (1951) 340 U.S. 474, 477 [95 L.Ed. 456, 71 S.Ct. 456]; *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].) When an appellant charges that a Department decision is not supported by substantial evidence, the Appeals Board's review of the decision is limited to determining, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. (Cal. Const., art. XX, § 22; Bus. & Prof. Code, §§ 23084, 23085; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].) In making this determination, the Board may not exercise its independent judgment on the effect or weight of the evidence, but must resolve any evidentiary conflicts in favor of the Department's decision and accept all reasonable inferences that support the Department's findings. (*Kirby v. Alcoholic Bev. Control App. Board.* (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857] (positions of both the Department and the applicant supported by substantial evidence); *Kruse v. Bank of America* (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 271]; *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925]; *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734]; *Gore v. Harris* (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

It is the ALJ, as trier of fact, who makes determinations of witness credibility. (*Lorimore v. State Personnel Bd.* (1965) 232 Cal.App.2d 183, 189 [42 Cal.Rptr. 640]*; Brice v. Dept. of Alcoholic Bev. Contro*l (1957) 153 Cal.App.2d 315, 323 [314 P.2d 807].)

The Appeals Board will not interfere with those determinations in the absence of a clear showing of abuse of discretion.

The Department rules that were found to be violated provide:

Rule 143.2, subdivision (3) –

> 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: [¶] . . . [¶] (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.

Rule 143.3, subdivisions (1) and (2) –

> 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) No licensee shall permit any person to perform acts of or acts which simulate: [¶] (a) Sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law. [¶] (b) The touching, caressing or fondling on the breast, buttocks, anus or genitals. [¶] (c) The displaying of the pubic hair, anus, vulva or genitals.
> (2) Subject to the provisions of subdivision (1) hereof, entertainers whose breasts and/or buttocks are exposed to view shall perform only upon a stage at least 18 inches above the immediate floor level and removed at least six feet from the nearest patron.

Factual findings 3 through 28 are quoted here, as they will be referred to in the following discussions:

> 3. Respondent operates an establishment known as Margaritaville located at 1987 S. Diners Ct., San Bernardino, California ("licensed premises"). The establishment operates as a restaurant and fixed bar with entertainment. It is operated as [a] nightclub during the evenings.
> 4. The licensed premises advertised a "Fat Tuesday's Mardi Gras Style Bead Party" for Tuesday, April 9, 2002.
> 5. On April 9, 2002, respondent employed 3 bartenders, 3 waitresses, and several security personnel. All employees wore distinctive attire clearly identifying them as employees. The men wore black pants and black shirts and the women wore shorts and a top. The Margaritaville logo was embossed on the employees' clothing.
> 6. Respondent employed a disc jockey, Wayne Deehring ("Deehring") to provide the entertainment. Deehring had provided his services to respondent's

president, Mark Davidson ("Davidson"), over the past 6 years at various businesses owned by Davidson. Deehring played music during the evening for patrons to dance.

7. City of San Bernardino police officers conducted an undercover operation at the licensed premises on April 9, 2002. Jerry Valdivia ("Valdivia") and his partner entered the licensed premises at about 10:45 p.m. The doorman was handing out bead necklaces to male patrons and gave one each to the officers.

8. The doormen were informing female patrons that they could go around the club to try to obtain bead necklaces and that the one with the most necklaces at the end of the night would win the contest.

9. Once inside, the officers sat in the north side of the business close to the entry door. From their position, the officers observed female patrons receiving beads from male patrons. Some of the women lifted their tops briefly exposing their breasts in exchange for the beads.

10. One of the women Officer Valdivia observed expose her breasts was Michelle Torres ("Torres"). On several instances, usually closer to the dance floor in the center of the premises, Torres exposed her breasts for a few seconds and received beads in exchange. Clapping and cheering by nearby customers often accompanied Torres' exposure. On two separate instances, male customers actually reached and touched Torres' breasts. On another occasion, both Torres and another female patron were exposing their breasts next to each other; as they faced each other their breasts touched.

11. Valdivia also observed Tiffany Montanez ("Montanez") receive a bead necklace and place it over her head before lifting her blouse and bra, exposing her breasts for a couple of seconds.

12. Jaymee Buckley ("Buckley") received a bead necklace before lifting her blouse and bra to briefly expose her breasts.

13. Amber Bryk ("Bryk") saw that some of the women were obtaining the bead necklaces by exposing their breasts, or "flashing." One of these women, whom she referred to as "the Mexican girl," had many necklaces. Other women were obtaining their beads by asking for them, by giving a hug, or by kissing the men on the cheek.

14. Bryk had a conversation with Deehring by the DJ Stand. Deehring had many bead necklaces and told Bryk that if she wanted a lot of beads she could flash him. She proceeded to expose her bare breasts to him and received about 50 bead necklaces. Deehring told Bryk to go get more beads and to have fun.

15. On at least two other occasions, Bryk approached male patrons and asked for the bead necklaces they were holding. In each instance she lowered the strap of her dress and exposed her breasts for a couple of seconds.

16. Respondent's employees, including bouncers and waitresses, were close enough to observe Bryk, Buckley, Montanez and Torres expose their breasts, but took no action to stop their activity or to remove them from the licensed premises.

17. At some point late in the evening, Deehring, with the permission of respondent's general manager, Mike Rodriguez ("Rodriguez"), presided over the final stage of the bead necklace contest. Deehring made an announcement

over the microphone asking those with the most bead necklaces to approach the fixed bar. The fixed bar area was cleared and 5 female patrons, including Buckley, Bryk, Montanez and Torres, were helped by respondent's employees to the top of the fixed bar.

18. The fixed bar area where the contest took place was not a stage nor was it at least 18 inches above the immediate floor level. Patrons were not moved at least 6 feet from the fixed bar; on the contrary, they were crowded against the fixed bar. Valdivia stood approximately 3 to 4 feet from the women and Deehring.

19. The women, apparently those that had collected the most beads throughout the evening, displayed the bead necklaces around their necks. Deehring proceeded to orchestrate audience reaction to each of the women.

20. Deehring spoke off the microphone to the contestants and encouraged them to expose their breasts and genitalia so they could win. He did so for at least two rounds of audience reaction.

21. Bryk was the first contestant Deehring called. He told her "show your tits." Bryk proceeded to lower the straps of her dress fully exposing her breasts. Those in the crowd clapped and cheered. Bryk responded by using her hands to squeeze and manipulate her breasts. She also danced seductively and rubbed her genital area. At some point while she was on top of the fixed bar Bryk pulled up her dress and pulled down her underwear to expose her vulva.

22. Buckley was the next contestant. To the cheers of those in attendance, she pulled her blouse and bra, exposed her breasts, and squeezed and manipulated her breasts.

23. Montanez followed and exposed her breasts and squeezed and manipulated her breasts.

24. Respondent's employees stood around, the bartenders behind the fixed bar and the some [sic] bouncers in front of the fixed bar, and watched the bead necklace contest.

25. Later in the evening, after police officers decided to take action, Rodriguez admitted to Officer Valdivia that he had seen the breast "flashing" during the evening.

26. Davidson has extensive experience as a Department licensee. He has been in the night club business for 27 years and a licensee for 19 years. In addition to the licensed premises, he presently owns 3 other businesses that sell alcoholic beverages.

27. Davidson exercises direct oversight over the day to day operations of the licensed premises. He regularly visits the establishment and reviews the various areas. He arrived between 10 and 10:30 p.m. on April 9, 2002, and left at approximately 12:45 a.m. He performed his usual routine, checking paperwork and supplies and inspecting the various areas of the business. Davidson testified he did not witness, and was not informed about, any exposure of breasts or any other inappropriate conduct. He further testified that had he been aware of the conduct observed by the undercover officer he would have stopped it.

28. On April 9, 2002, Davidson was aware that at bead contests held along the Colorado River some females expose their breasts in exchange for bead

> necklaces. He instructed his management team to be aware of that possibility and not to allow any sexual exposure. After the April 9th incidents Davidson has stopped the bead night promotion to avoid the possibility of further inappropriate conduct. He also admonished Deehring not to participate or allow similar sexual exposure in the future.

A. Rule 143.2(3) (Counts 2 and 4)

The ALJ determined that this rule was violated based on factual findings 10 and 16, quoted above. Appellant argues there is no evidence that Davidson or the other employees encouraged or permitted anyone to touch anyone else.

However, given the combination of women doing what they thought would get them more beads and the disinhibiting effect of alcohol on both the women exposing themselves and the men observing them, this conduct falls within the category of "reasonably possible unlawful activity" that appellant's agents had the duty of preventing. Appellant permitted this activity as much as it permitted the women to expose themselves. (See I., *ante*.)

B. Rule 143.3(1)(a) (Count 10)

Appellant argues this count must be dismissed because Bryk testified that she did not have "any physical contact with her vaginal area (that would simulate sexual acts)." (App. Br. at p.12.) Her testimony, however, when asked if she had any physical contact with her vaginal area while on the bar, was "Not that I remember." [RT 70.]

The ALJ found, based on officer Valdivia's testimony [RT 31-32], that Bryk, while standing on the bar counter, "danced seductively and rubbed her genital area." (Factual Finding 21.) This is sufficient to support the conclusion that the rule was violated. It does not matter if her genital area was covered at the time. (See *7589 Reseda Blvd*. (1998) AB-6975, and cases cited therein.)

In spite of appellant's protestations that Bryk's testimony was "[t]he most credible and accurate evidence of the events that pertain to [her]," the ALJ obviously found the officer more credible and made his findings accordingly.

C. Rule 143.3(1)(b) (Counts 3, 8, 11, and 12.)

Appellant contends that this rule "prohibits live entertainment that involves the 'touching, caressing or fondling on the breast, buttocks, anus or genitals." The conduct alleged in these counts, appellant argues, does not constitute entertainment and was engaged in by patrons, not paid entertainers. Therefore, appellant concludes, the rule does not apply to the conduct at issue.

Appellant errs in its reading of the rule and in its categorization of the performers of the conduct. The rule provides, in subdivision (1), that a licensee shall not permit "any person" to perform the acts described. The patrons involved here fit within this category. Likewise, the activity involved was clearly intended as "live entertainment." (See e.g., *Pink Cadillac, Inc.* (1997) AB-6672; *II-S Corporation* (1997) AB-6552.)

D. Rule 143.3(1)(c) (Count 9)

As it did with regard to count 10, appellant argues that Bryk is the most credible witness as to what she did and, since she was sure none of her genital area was exposed when she pulled up her dress and pulled down her panties, the count should have been dismissed.

The ALJ relied on the officer's testimony in finding that Bryk exposed her "pubic hair, anus, vulva, or genitals," as prohibited by this rule. The officer was standing on the floor in front of the bar where Bryk was standing, and he was in a position to observe what Bryk exposed. Substantial evidence supports the finding.

E. Rule 143.3(2) (Counts 1, 5, 6, and 7)

Appellant argues these counts should have been dismissed because the rule prohibits conduct of "entertainers," not patrons. However, as noted in section C., *ante*, the conduct of these patrons was within the definition of "live entertainment" and they were clearly "entertainers" for purposes of the rule.

III

Appellant contends the Department cannot enforce violations of the regulations involved in this matter because they are regulations, not statutes, and because rule 143.2 is only guidance to the Department when it is issuing a license. Appellant asserts that rule 143.2 "is not a mandate that licensees must follow. Licensees must abide by relevant California Business and Professions Code [sic], but cannot be held to know and follow regulations that are not law, which the legislature did not intend to bind licensees." (App. Br. at pp. 15-16.)

We are somewhat bewildered by appellant's position that regulations are not enforceable laws. A properly adopted regulation "has the force and effect of a statute." (*Associated Beverage Co. v. Board of Equalization* (1990) 224 Cal. App. 3d 192, 201 [273 Cal. Rptr. 639].) The Department derives its authority to promulgate rules from article XX, section 22, of the California Constitution and section 25750 of the Business and Professions Code. (*Harris v. Alcoholic Beverage Control Appeals Board* (1962) 204 Cal. App. 2d 729, 731 [22 Cal. Rptr. 634].) In addition, section 24200, subdivision (b), specifically provides that grounds for suspension or revocation include "the violation or the causing or permitting of a violation by a licensee of . . . any rules of the department."

Appellant contends that section 24200, subdivision (a), referred to in the decision's Legal Conclusions as a basis for imposing discipline, is not included in the accusation. Appellant is in error; this section is cited on the third page of the accusation, following the license history and preceding the signature of the district administrator.

Appellant contends that rule 143.2 applies only to license applications, apparently based on the language in the introductory paragraph of that section that says "no on-sale license shall be held at any premises where such conduct or acts are permitted." The use of the word the word "held" rather than "granted" or "issued" makes clear the application of this section to licenses already issued.

Appellant also alleges that it did not have the notice required by due process of the charges against it because the ALJ found violations that were not in the accusation. Appellant has not pointed out the violations to which it refers, and we see no findings of violations not charged in the accusation.

ORDER

The decision of the Department is affirmed.[2]

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

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[2]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.