ISSUED JANUARY 17, 2001

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

B BAR J, INC. dba Fort Knox 9015 Long Beach Blvd. South Gate, CA 90280, Appellant/Licensee v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7488 File: 42-077478 Reg: 98044970 Administrative Law Judge at the Dept. Hearing: Sonny Lo Date and Place of the Appeals Board Hearing: September 7, 2000 Los Angeles, CA

B Bar J, Inc., doing business as Fort Knox (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its on-sale beer and wine public premises license for 30 days with 10 days stayed during a probationary period of one year, for permitting a dancer to expose her breasts, and permitting another dancer to touch and fondle her breasts and perform an act of simulated masturbation, in violation of the Department rules, being contrary to the universal and generic public welfare and morals provisions of the California

[1]The decision of the Department, dated August 19, 1999, is set forth in the appendix.

Constitution, article XX, §22, and Business and Professions Code §24200, subdivisions (a) and (b), arising from violations of 4 California Code of Regulations, §§143.3(1)(a) and (b), and 143.3(2).

Appearances on appeal include appellant B Bar J, Inc., appearing through its counsel, Meir J. Westreich, and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

FACTS AND PROCEDURAL HISTORY

Appellant's present license was issued on July 30, 1979. Thereafter, the Department instituted an accusation against appellant charging the violation of the Department's rules.

An administrative hearing was held on July 13, 1999, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that four of the five counts in the accusation were proven to be true.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) the findings of the decision are not supported by substantial evidence, and (2) the penalty is excessive.

DISCUSSION

I

Appellant contends the findings are not supported by substantial evidence, arguing that appellant did not permit the violations and relevant evidence was excluded concerning the discriminatory acts of, and an agreement with, the South

Gate Police Department.

It may be well to consider the underlying premises in this appellate review. 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 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 (1950) 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

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

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].)

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].)

The decision finds that one of appellant's dancers with her breasts exposed, came within six feet of customers, being a violation of a rule of the Department [Finding IV].

Another dancer while performing, touched, fondled, and caressed her breasts, buttocks, and genitals. She also performed acts of simulated masturbation [Finding V]. Appellant does not argue against these findings.

Nowhere in appellant's argument does it contend that the dancers were not employees or at least agents working for the good of appellant's business enterprise, nor does the law allow the escape of responsibility by an employer for the misdeeds of its employees, as corporations, like appellant, must work through employees. Appellant's misconception is in its main premises that "management level employees" must observe the violations to constitute a "permitting." Such is not the law. A licensee is vicariously responsible for the unlawful on-premises acts of its employees. Such vicarious responsibility is well settled by case law. (Morell

v. Department of Alcoholic Beverage Control (1962) 204 Cal.App.2d 504 [22 Cal.Rptr. 405, 411]; Harris v. Alcoholic Beverage Control Appeals Board (1962) 197 Cal.App.2d 172 [17 Cal.Rptr. 315, 320]; and Mack v. Department of Alcoholic Beverage Control (1960) 178 Cal.App.2d 149 [2 Cal.Rptr. 629, 633].)

Appellant cites many authorities, which in the main are not applicable to the facts of this case. Appellant cites the case of McFaddin San Diego 1130, Inc. v. Stroh (1989) 208 Cal.App.3d 1384 [257 Cal.Rptr. 8], which 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. However, the violations in this review occurred by the acts of employees or agents of appellant, persons placed within the premises for the furtherance of the business of appellant.

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. This portion is inapplicable.

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. This portion of the case is applicable in the present case.

Appellant raises the question of strict liability. It is certainly true that Laube v. Stroh, supra, rejected the concept of strict liability - liability without fault - as well as the notion that a licensee can be held to have permitted something of which he had no knowledge.[3]

However, the rule set forth in an appellate decision is based upon the facts in that particular case. The rules from the cases cited by appellant are important in cases where they are applicable. In any event, such cases must be cautiously used within a reasonable context of the factual similarities between that cited case and

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[3]Laube v. Stroh is most frequently cited for the following proposition: "The Marcucci case perhaps states it best. 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."

the matter under present review. A decision of a court should not be based on quotations from a factually dissimilar case where such case's facts are not pertinent. (Harris v. Capital Growth Investors XIV (1991) 52 Cal.3d 1142, 1157 [278 Cal.Rptr. 614].)

The argument by appellant that its management did not see these "brief" violations, has no basis in law or fact. Appellant, as shown by its strict rules, well knew the problems of keeping the dancers "in line" and the probability that due to the desire of the dancers to enhance their "tip ratio," they may bend the rules. Appellant's stringent rules did not work in this particular instance.

Passing to the argument raised as to the conduct of the South Gate Police Department, the Administrative Law Judge (ALJ) was correct in not allowing testimony and documentation of agreements between appellant and the police. They are irrelevant, as the violations were done, admitted to by appellant, and that is the issue before the ALJ and this Board. The ruling of the ALJ was within his discretion to control the admission of evidence to rule an orderly hearing with a reasonable time frame, and to eliminate side issues and irrelevant matters. This it appears the ALJ properly did.

II

Appellant contends 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 penalty is a 30-day suspension with 10 of those days stayed, or a net suspension of 20 days. We find it extremely difficult to accept the argument that the penalty is unreasonable and excessive under the facts of this matter.

ORDER

The decision of the Department is affirmed.[4]

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[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.