ISSUED FEBRUARY 18, 1997

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

II-S CORPORATION dba Nite Life Uptown 4307-13 Ohio Street San Diego, CA 92104, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6552 File: 48-56991 Reg: 94030015 Administrative Law Judge at the Dept. Hearing: James Ahler Date and Place of the Appeals Board Hearing: July 1, 1996 Irvine, CA

II-S Corporation, doing business as Nite Life Uptown (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended appellant's on-sale general public premises license for 30 days, with 15 days stayed for a probationary period of one year, for appellant's employee having touched her breasts and genitals; exposed her breasts to a patron when she was not on a stage at least 18 inches above the immediate floor level and not at least

[1]The decision of the Department dated July 6, 1995, is set forth in the appendix.

six feet from the nearest patron; and simulated masturbation; being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from violations of §143.3, subdivisions (1)(a), (1)(b), and (2) of Title 4, California Code of Regulations (Department Rule 143.3).

Appearances on appeal include appellant II-S Corporation, appearing through its counsel, Ralph B. Saltsman; and the Department of Alcoholic Beverage Control, appearing through its counsel, John P. McCarthy.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on September 20, 1977. Thereafter, the Department instituted an accusation on May 25, 1994, alleging that appellant's employee performed lewd acts on the dance floor. A First Amended Accusation was filed against appellant on August 10, 1994.

An administrative hearing was held on April 19 and 21, 1995, at which time oral and documentary evidence was received. At that hearing, the Administrative Law Judge (ALJ) found that the lewd acts alleged in the accusation had occurred.

Subsequent to the hearing, the Department issued its decision which determined that appellant's on-sale general public premises license should be suspended for 30 days, with 15 days stayed for a probationary period of one year.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issue: whether an off-duty employee violating Rule 143.3 can cause the licensee to be liable for discipline.

DISCUSSION

Appellant contends that the dancer in question, Jeannie, was clearly shown to be off-duty when the violations of April 10, 1995,[2] took place and, therefore, appellant should not be subject to discipline for any lewd acts she may have committed, especially since the licensee took all conceivable precautions against this conduct occurring. Appellant argues that a violation of Rule 143.3[3] requires that a licensee "permit" an "entertainer" to perform the proscribed acts and that appellant did not "permit" the conduct, nor was Jeannie an "entertainer" within the meaning of Rule 143.3.

Appellant asserts that the testimony is conflicting about whether or not Jeannie was at the premises on April 10, 1995, but that it is clear that if she was there, she was off duty. The ALJ specifically found that Jeannie performed all but one of the acts alleged on April 10, 1995, and so implicitly found that Jeannie was

[2] Appellant does not appear to dispute the violations of May 27, 1994, but asks only that the April 10, 1995, counts be reversed and that the matter be remanded for reconsideration of the penalty.

[3] The complete text of Rule 143.3 is set out in the appendix.

actually there on that night. The ALJ did not make a specific finding with regard to whether Jeannie was off duty when she performed the acts on that night.

Appellant cites the cases of McFaddin San Diego 1130, Inc. v. Stroh (1989) 208 Cal.App.3d 1384 [257 Cal.Rptr. 8] and Laube v. Stroh (1992) 2 Cal.App.4th 364 [3 Cal.Rptr.2d 779] for the proposition that a licensee cannot be held liable for the acts of a non-employee where the licensee has taken all reasonable precautions to prohibit such acts.

The case of McFaddin San Diego 1130, Inc. v. Stroh, supra, 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), supra, was actually two cases--Laube and De Lena, 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 that the licensee should not have been required to take preventive steps to suppress that type of unknown patron activity. The De Lena 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 preventive 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.

Even if Jeannie was off duty on April 10, she did not thereby cease to be an employee. She was clearly permitted to perform as if she were an employee and appellant’s manager did not stop her from doing so. She was clearly not a patron. The McFaddin case and the Laube portion of Laube v. Stroh are not on point, since they involved patron behavior, not that of an employee. The De Lena portion of Laube v. Stroh did involve an off-duty employee, the same situation that appellant alleges existed here. Whether or not Jeannie was off-duty at the time she committed the acts complained of here, the holding in De Lena would still compel us to hold that her acts were imputable to appellant, her employer. Imputing knowledge by the licensee/employer of an employee's on-premises misconduct has long been permitted in Alcoholic Beverage Control Act case law. (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].) Therefore, we find no error in the Department's decision that appellant "permitted" the prohibited acts.

Appellant also argues that there was no violation of Rule 143.3 because Jeannie was not an "entertainer" as contemplated by that rule. Appellant bases this argument on its conclusion that Jeannie "was not an on duty employee authorized by the licensee to engage in any conduct on its behalf" [App. Opening Brief 14], and cites the case of California v. LaRue, (1972) 409 U.S. 109 [93 Sup.Ct. 390] in support of this argument.

As mentioned above, it makes no difference under this statute whether or not the person performing the prohibited acts is an employee or a "volunteer." The point of the violation is not who actually performed the acts, but that appellant permitted the prohibited acts to occur on its licensed premises.

CONCLUSION

The decision of the Department is affirmed.[4]

RAY T. BLAIR, JR.,CHAIRMAN
JOHN B. TSU, MEMBER
BEN DAVIDIAN, MEMBER
ALCOHOLIC BEVERAGE
CONTROL APPEALS BOARD

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[4]This final order is filed as provided by Business and Professions Code §23088, and shall become effective 30 days following the date of this filing of the final order as provided by §23090.7 of said statute for the purposes of any review pursuant to §23090 of said statute.