ISSUED JUNE 30, 1997

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

ZDRAVKA FISHER and ZORAN KACAR dba Z-Island 8756 Parthenia Place Sepulveda, CA 91343, Appellants/Licensees, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6641 File 48-296553 Reg. 95033067 Administrative Law Judge at the Dept. Hearing: Sonny Lo Date and Place of the Appeals Board Hearing: May 7, 1997 Los Angeles, CA

Zdravka Fisher and Zoran Kacar, doing business as Z-Island (appellants), appeal from a decision[1] of the Department of Alcoholic Beverage Control which revoked appellants' on-sale general license, staying revocation, except for a 30-day actual suspension, for a probationary period of two years, for having permitted female entertainers to expose, caress and fondle their breasts and to expose their anus and vulva to customers, being contrary to the universal and generic public

[1] The decision of the Department, dated February 22, 1996, is set forth in the appendix.

welfare and morals provisions of the California Constitution, article XX, §22, arising from violations of rule 143.3, subdivisions (1) and (2), of the California Code of Regulations (Cal.Code Regs. §143.3, subds. (1) and (2) ("rule 143.3").)

Appearances on appeal include appellants Zdravka Fisher and Zoran Kacar, appearing through their counsel, Frank DiSabatino; and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale general license was issued May 5, 1986. Thereafter, the Department instituted an accusation alleging that appellants had committed nine separate violations of rule 143.3 by having permitted four female entertainers to expose their breasts (counts 1, 2, 3 and 4) and for permitting two female entertainers to touch, fondle or caress their breasts (counts 6 and 7) while not on a stage located at least six feet from the nearest patron; for permitting one female entertainer to engage in acts of masturbation (count 5); and for permitting two female entertainers to display their anus and vulva to male customers (counts 8 and 9). The accusation also charged appellants with a violation of Business and Professions Code §25663, subdivision (a), for employing an 18-year-old minor in an area where alcoholic beverages are sold (count 10).[2]

[2] Counts 3, 6, 9 and 10 of the accusation were dismissed by the Administrative Law Judge for lack of evidence.

An administrative hearing was held on January 10, 1996, at which time oral and documentary evidence was presented. Subsequent to the hearing, the Administrative Law Judge (ALJ) entered an order revoking appellants' license, but staying revocation and imposing an actual suspension of 30 days, finding that the evidence was sufficient to establish violations of rule 143.3 with respect to three of the female entertainers. Appellants filed a timely notice of appeal.

In their appeal, appellants raise the following issues: (1) the findings are not supported by substantial evidence; (2) appellants were unaware of the violations, and had taken steps to prevent such violations; and (3) a suspension is unwarranted.

DISCUSSION

I

Appellants contend that the evidence is insufficient to support the decision. Their attack on the sufficiency of the evidence seems to be premised on a claim that the ALJ erred in assessing the credibility of the witnesses and misunderstood the testimony of appellant Fisher. (See App.Br., pp. 4-5.)

The ALJ made a number of findings of fact regarding the conduct of the three dancers which constituted the gravamen of the Department's charges, the posting, but apparent non-enforcement, of rules prohibiting such conduct, and the ability of appellant Fisher to monitor the dancers' activities.

Appellants have not specified which of the findings are not supported by the evidence, other than to challenge the ALJ's assessment of the testimony of appellant Fisher. Appellants' failure to be any more specific as to which of the counts are deficient effectively prevents this Board from considering their contentions. The Appeals Board is not required to make an independent search of the record for error not pointed out by appellants. It is the duty of appellants to show to the Appeals Board that the claimed error existed. Without such assistance by appellants, the Appeals Board may deem the general contentions waived or abandoned. (Horowitz v. Noble (1978) 79 Cal.App.3d 120, 139 [144 Cal.Rptr. 710] and Sutter v. Gamel (1962) 210 Cal.App.2d 529, 531 [26 Cal.Rptr. 880, 881].)

Nonetheless, we have independently reviewed the transcript of the administrative hearing, and have concluded that the evidence is more than ample to sustain the ALJ's findings.

Officer Thompson's testimony [RT 6-48] is clearly sufficient to support the charges in counts 2, 4 and 7. His description of the booth dances, one during which he shared the booth with the dancer [see RT 15-20] (count 2), and the other where he sat two feet from the booth and watched the two participants [see RT 21-24, 34] (counts 4 and 7), leaves no doubt that the prohibitions of rule 143 were violated. Although he was extensively cross-examined by counsel for appellants,

his testimony was not weakened in any way.

Similarly, Officer Leon's testimony [RT 51-77] is sufficient to support the charges in counts 1, 5 and 8. Officer Leon's graphic description of the conduct involved in these counts leaves nothing to the imagination as to what occurred.

Co-appellant Fisher and a bar patron denied seeing any of the activities described by the police officers, and questioned whether the conduct in the booths could have been seen by anyone outside the booth. The ALJ chose the testimony of the police officers over that of the co-appellant and the patron.

The credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. (Brice v. Department of Alcoholic Beverage Control (1957) 153 Cal.2d 315 [314 P.2d 807, 812] and Lorimore v. State Personnel Board (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640, 644].) Thus, the Board is precluded from substituting its view of credibility for that of the Department.

II

Appellants contend that they cannot be held responsible for what occurred between the police officers and the dancers, because they were unaware of it, and because the dancers had been warned that they could not engage in such activities. To this end, appellants had posted signs (Exhibits F, G, H) in various places in the bar and in the dancers' dressing room, spelling out in detail the kinds of sexually-

related conduct which was prohibited.

The ALJ concluded that the rules, which prohibited the dancers from removing their tops while in a booth, touching customers, or permitting customers to touch them, were "apparently not strictly enforced."

Based on the testimony of co-appellant Fisher that she could monitor the activities in the booths from her position at the bar [RT 100], the ALJ's conclusion would appear to be a reasonable inference to be drawn, given the events described by the police officers and the absence of any action by Fisher to prevent or halt such conduct.

In any event, the mere posting of signs does not free the licensee from liability for acts of its employees in violation of the law, especially where the licensee knows or could reasonably anticipate the possibility that such conduct may occur. In this case, co-appellant Fisher, by her own admission, knew that controls needed to be in place to regulate the dancers' conduct, but rather than maintain vigilance, she relegated the responsibility to the dancers themselves [RT 101]:

> "Q.: Now, the rules that you mentioned that were on the big poster, when did you write those up?
>
> "A.: Well, I couldn't point out exactly date, but one day that I decided, I say, I'm not going to go after every girl and push all these rules. I'm going to tape there when they're changing and read, and say, make sure you read those rules and follow."

III

Appellants argue that instead of any suspension, only a reprimand would be an appropriate penalty.

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].)

Appellants assert that appellants' previously unblemished record, the fact that signs had been posted warning the dancers that certain conduct was prohibited, and the questionable credibility of the police officers all combine to justify some lesser penalty than that imposed.

The penalty, revocation, stayed, with an actual suspension of 30 days, is in line with the Department's penalty guidelines.

Accepting the testimony of the police officers, which the Board must, the conduct was quite brazen, and certainly warranting more than a slap on the wrist, which is essentially what appellants' brief seeks.

CONCLUSION

The decision of the Department is affirmed.[3]

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

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[3] This final decision is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this decision as provided by §23090.7 of said Code.

Any party may, before this final decision becomes effective, apply to the appropriate district court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.