ISSUED JULY 6, 2000

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

NATURAL NINE, INC. dba Sam's Hof Brau 1751 E. Olympic Blvd. Los Angeles, CA 90021, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7389 File: 47-307710 Reg: 98044682 Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen Date and Place of the Appeals Board Hearing: May 4, 2000 Los Angeles, CA

Natural Nine, Inc., doing business as Sam's Hof Brau (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked its on-sale general public eating place license, with revocation stayed, conditioned upon three years of discipline-free operation, and ordered a suspension of 30 days, for having permitted female entertainers in its employ to engage in simulated sexual intercourse and simulated oral copulation, contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from violations of Department Rule 143.3, subdivisions (1)(a) and (1)(b) (4 Cal. Code Regs. §143.3, subds. (1)(a) and (b).)

[1]The decision of the Department, dated March 25, 1999, is set forth in the appendix.

Appearances on appeal include appellant Natural Nine, Inc., appearing through its counsel, Andreas Birgel, Jr., and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on August 8, 1995. Thereafter, on September 29, 1998, the Department instituted an accusation against appellant charging that appellant permitted dancers in its employ to engage in conduct which violated Department Rule 143.3, subdivisions (1)(a) and (1)(b), and that a woman solicited a police officer for an act of prostitution.

An administrative hearing was held on January 13, 1999, at which time oral and documentary evidence was received. At that hearing, Los Angeles police officer Andre Dawson testified about the conduct of dancers he observed in the course of investigations conducted with fellow officers on January 14, 1998, and February 4, 1998. Alan Minato, an officer of the corporation, testified about its policies regarding the conduct of dancers, to the effect that they are not permitted to engage in the kind of conduct officer Dawson said he had seen. Juan Flores, appellant's manager, said he spoke to officer Dawson on February 4, 1998, after Dawson disclosed his identity as a police officer, and was told by Dawson that he had observed "lewd conduct," but that it was unnecessary to fire the dancers involved.

Subsequent to the hearing, the Department issued its decision which determined that the charges of the accusation relating to the conduct of the

dancers had been established. No evidence was presented regarding the count which charged the solicitation of an act of prostitution, and it was dismissed.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant contends that (1) there was insufficient evidence to support the findings that appellant permitted the entertainers to perform the acts alleged in the accusation; (2) the ALJ improperly excluded from evidence the report prepared by officer Dawson; and (3) the penalty is excessive.

DISCUSSION

I

Appellant contends there was not substantial evidence to support the findings that appellant permitted the acts of simulated oral copulation, simulated sexual intercourse, and the touching, fondling, and caressing of breasts.

"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 [71 S.Ct. 456]; Toyota Motor Sales USA, Inc. v. Superior Court (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].)

Appellant argues that it did not permit the dancers to engage in the kind of conduct described by officer Dawson, and that officer Dawson's testimony is neither credible nor of such value as to constitute substantial evidence. Appellant claims that Dawson's written report omits a great many of the details to which he testified, and that Dawson relied for his testimony on a more detailed report prepared by Department

investigator Jerry Garcia prepared five months later after conversations between the two.

Appellant's contentions address two issues. The first, whether this Board may reject the findings of the ALJ simply because it might believe appellant's witnesses to be more credible, must be resolved against appellant. 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].) The foundation for this well-settled rule is that the trier of fact heard the witnesses testify, observed their demeanor while testifying, and during their cross-examination, so is in a much better position to evaluate credibility than a reviewing body, which has only the cold transcript and arguments of counsel.

We do not find it particularly remarkable that the police officer was able to testify to more detail than was set forth in his initial report. That he relied on a memorandum written by an investigator conducting a "back-track" investigation, which contained his oral response to that investigator is neither unreasonable nor in any way suggestive that his credibility is questionable.

The second issue raised by appellant's contentions concerns the concept of "permitting." It is appellant's position that, through the creation of rules proscribing the kind of conduct engaged in by the dancers, and enforcement of

those rules through termination from employment, it cannot be said to have permitted the activities which were found to have taken place.[2]

In Laube v. Stroh (1992) 3 Cal.4th 364 [3 Cal.Rptr.2d 779], the court, after an extensive review of case authorities on the issue, said this:

> "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 testimony of officer Dawson that appellant's manager, on at least one occasion, observed the conduct in question, and that the disk jockey, to the enthusiasm of the audience, encouraged it [RT 31], is strong evidence of permitting, under the rule established in Laube v. Stroh, supra.

The mere posting of rules patterned after Rule 143, and the termination of dancers who break those rules is not, without more, sufficient preventive action to avoid discipline. Appellant is expected to be alert to the possibility of violations, and to act diligently to prevent any from occurring. Where, as here, management did nothing to stop the improper activities, despite an awareness they were occurring, speaks volumes. Moreover, given that the dancers hope to generate tips by pleasing their audience, the possibility that they will go beyond what is permitted by Rule 143 is increased.

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[2] We have not set forth in detail the specific conduct of the dancers. It is enough to say that officer Dawson's graphic description of their conduct, if believed, leaves no question that Rule 143.3 was violated.

For these reasons, appellant's contention that it cannot be said to have permitted the rule violations lacks merit.

II

Appellant complains of the ALJ's refusal to admit into evidence the report prepared by officer Dawson. It argues that the report affects the officer's credibility, an issue that has already been addressed.

Appellant's argument is that the report lacks much, if not most, of the detail contained in officer Dawson's testimony. While this may be true, it does not establish that there was error in its exclusion.

Appellant's counsel was able to cross-examine officer Dawson at length on the differences between his report and his direct testimony. The ALJ himself reviewed the report, and found nothing inconsistent between what was in the report, albeit in much abbreviated content, and the officer's testimony. [RT 36-37.]

It is difficult to find any prejudice to appellant flowing from the exclusion of the report.

III

Appellant contends the penalty is excessive. Its attack on the penalty is premised on a renewal of its argument that there was not substantial evidence of the violations, and prejudice allegedly flowing from the exclusion of the police report.

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].)

Here, appellant's contention that the penalty is excessive rests upon arguments we have already rejected.

ORDER

The decision of the Department is affirmed.[3]

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
E. LYNN BROWN, 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 final 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.