ISSUED OCTOBER 19, 2000

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

DIRTY DAN'S, INC. dba Pure Platinum 4000 Kearney Mesa Road San Diego, CA 92111, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7494 File: 48-134058 Reg: 99045597 Administrative Law Judge at the Dept. Hearing: John P. McCarthy Date and Place of the Appeals Board Hearing: July 6, 2000 Los Angeles, CA

Dirty Dan's, Inc., doing business as Pure Platinum (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended appellant's on-sale general public premises license for 15 days, with 10 of those days stayed for a probationary period of one year, for permitting a performer to simulate sexual intercourse with a patron, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, and Business and Professions Code §24200, subdivisions (a) and (b),

[1]The decision of the Department, dated September 2, 1999, is set forth in the appendix.

arising from a violation of 4 California Code of Regulations, §143.3(1)(a).

Appearances on appeal include appellant Dirty Dan's, Inc., appearing through its counsel, Joshua Kaplan, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellant's license was issued on April 5, 1983. Thereafter, the Department instituted an accusation against appellant charging the violation of allowing lewd conduct. An administrative hearing was held on July 9, 1999, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred. Appellant thereafter filed a timely notice of appeal.

In its appeal, appellant raises the following issues: (1) the decision is not supported by the findings or substantial evidence; (2) the Department's rule cannot be applied as a matter of law; (3) appellant is not responsible for the alleged violation; and (4) the penalty is excessive. Issues 1 and 2 will be considered together, and 3 and 4 will be considered together.

DISCUSSION

I

Appellant contends the decision is not supported by the findings or substantial evidence, arguing the Department's rule cannot be applied as a matter of law.

California Code of Regulations, title 4, §143.3(1)(a), states in pertinent part:

> "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 ...." [2]

The Department's decision (Finding VII and Determination of Issues III) found that simulated intercourse had occurred. The Determination stated:

> "The pelvic movements of Dobson [the entertainer concerned], with the placement of her genital area immediately adjacent to and often touching the genital area of Macfarlane, repeatedly moving up to six inches up and down, takes on the appearance, imitates and/or pretends the prohibited sexual intercourse. It simulates it and is intended to do so. It is not saved simply because both the entertainer and her customer are clothed ...."

The descriptive actions of the entertainer were detailed by police officer Brett Macfarlane of the San Diego Police Department [RT 12-13, 15-16, 22-26, 28, 31].

The Appeals Board's decision in Two For The Money, Inc. (1997) AB-6774, concerned the conduct of two dancers, one claimed to have simulated oral copulation, the other sexual intercourse. One dancer knelt, holding her hand in front of her mouth as if holding a cylindrical object, and moved her head, with her mouth open, toward and away from a stationary vertical pole on the stage. The other dancer, while clothed, sat on an investigator's lap and made grinding

---

[2]The word "simulate" is defined as follows: "to give the appearance or effect of, to have the characteristics of but without the reality of, to make a pretense of, to give a false indication or appearance of, to take on an external appearance of, or act like ...." (Webster's Third International Dictionary (1986), page 2122; Funk & Wagnalls Standard College Dictionary (1973), page 1252; and Webster's New World Dictionary, Third College Edition (1988), page 1251.)

movements with her hips against his crotch. The Appeals Board found simulation in that case.

We stated In the case of Two For the Money, Inc., supra.,:

> "Clearly, the element of deception that appellant emphasizes is not present in every definition of 'simulate;' the primary emphasis in the definitions appears to be on the resemblance, not on the intent to deceive by the resemblance. We therefore reject appellant's contention that to simulate oral copulation or sexual intercourse the act must be such that onlookers would think that oral copulation or sexual intercourse were actually taking place. (¶) While the activities ... would not deceive anyone into thinking that actual oral copulation or sexual intercourse were occurring, they clearly were intended to and did resemble or give the appearance of those acts. It might be said that the activity in count 2 was 'suggestive' of oral copulation rather than simulating it, and the activity in count 6 might be described as 'stimulating' rather than 'simulating.' However, these activities were suggestive and stimulating precisely because the dancers 'feigned' or 'pretended' or 'imitated' sexual acts; in other words, they simulated oral copulation and sexual intercourse. We cannot say that the Department exceeded its discretion in finding these acts to be violative of Rule 143.3. (¶) Appellant also argues that it is constitutionally impermissible to interpret 'simulated' sexual activity as prohibiting 'merely suggestive or erotic dancing without anatomical exposure for such exotic dancing is constitutionally protected and cannot be prohibited as alleged simulated sexual activity.' ... We disagree. This is not a case in which constitutionally protected expression is at issue. Appellant has certainly not specified a protected activity that is involved here. In any case, the restriction in Rule 143.3 does not prohibit dancing, lewd or otherwise; it simply prohibits lewd acts in an establishment licensed to sell alcoholic beverages. There simply is no constitutional issue here. (See Kirby v. Alcoholic Beverage Control Appeals Board (1975) 47 Cal.App.3d 360 [120 Cal.Rptr. 847.]"

We conclude the Determinations are supported by the Findings, and the Findings are supported by substantial evidence of simulated sexual intercourse [RT 12-13, 15-16, 22-26, 28, 31].

II

Appellant contends it is not responsible for the alleged violation, and argues the penalty is excessive.

Appellant contends that imposition of any sanction due to the conduct of the entertainer would amount to strict liability, that is, since appellant adheres to an aggressive and extensive review of the conduct of its entertainers, it did not permit the violations, citing the case of Laube v. Stroh (1992) 2 Cal.App.4th 364 [3 Cal.Rptr.2d 779], for the proposition that there must be knowledge before liability attaches. The Laube case 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.

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 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. The imputation to the licensee/employer of an employee's or agent's on-premises knowledge and misconduct is well settled in Alcoholic Beverage Control Act case law. (See 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].)

The argument that strict liability is being imposed is incorrect. It was the employee or agent of appellant that violated the rules of the Department. Notwithstanding the alleged extensive controls and monitoring of the entertainers, the violation occurred. Such regulations and supposed safeguards appear more of a veneer to proper control, when an enterprise such as appellant's by its very nature would inspire the entertainers to cross over the line of legal into the illegal arena.

Passing to the question of 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].) Appellant's argument of a "de minimus factual context of the matter" is not well founded. There was a violation of the rules of the Department.

The penalty of five days (15 days with 10 days stayed) appears a reasonable exercise of the Department's discretion.

ORDER

The decision of the Department is affirmed.[3]

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

---

[3]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.