ISSUED OCTOBER 24, 2000

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

SHARON MATA GALVAN dba Los Vacitos 223 West Chapman Ave. Orange, CA 92666, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7528 File: 47-336717 Reg: 99046548 Administrative Law Judge at the Dept. Hearing: Sonny Lo Date and Place of the Appeals Board Hearing: August 3, 2000 Los Angeles, CA

Sharon Mata Galvan, doing business as Los Vacitos (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended appellant's on-sale public eating place license for 45 days with 25 of those days stayed during a two-year probationary period, for permitting dancers to simulate sexual intercourse, and for permitting the violation of a condition on the license, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, and Business and Professions Code

[1]The decision of the Department, dated October 28, 1999, is set forth in the appendix.

§24200, subdivisions (a) and (b), arising from violations of Business and Professions Code §23804, and 4 California Code of Regulations, §143.3(1)(a).

Appearances on appeal include appellant Sharon Mata Galvan, appearing through her counsel, Rick Blake, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon Logan.

FACTS AND PROCEDURAL HISTORY

Appellant's license was issued on June 30, 1998.[2] Thereafter, the Department instituted an accusation against appellant charging the violations referred to above. An administrative hearing was held on September 8, 1999, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that five of 17 counts were proven, the proven counts being concerned with the allegations of simulated sexual intercourse and a violation of a condition on the license prohibiting noise from being audible outside the premises.

Appellant thereafter filed a timely notice of appeal. In the appeal, appellant raises the issue that the findings are not supported by substantial evidence.

DISCUSSION

"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.

[2]The license was originally issued on February 26, 1974, in the name of Jesus Galvan.

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 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 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.[3]

It is the Department that is authorized by the California Constitution to

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[3]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].

exercise its discretion whether to suspend or revoke an alcoholic beverage license, if the Department shall reasonably determine for "good cause" that the granting or the continuance of such license would be contrary to public welfare or morals.

Appellant argues that 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: (¶) No licensee shall permit any person to perform acts or acts which simulate: (a) Sexual intercourse ...."[4]

Appellant further argues: "The movements described are no more than simple modern day dance moves ... It is more likely those movements were intended to be an alluring or even perhaps stimulating act rather than a simulation of 'sexual intercourse' ... (¶) A reasonable person cannot conclude that a dancer moving her buttocks for fifteen seconds against a patron, while music was playing and both partners were clothed, constitutes the appearance of sexual intercourse. This would appear to stretch the rule too far."

The Department's decision (Findings III-A and IV-D) found that simulated intercourse had occurred. The descriptive actions of the dancers of rubbing their buttocks' against the genitals of patrons, were testified to by James Rose, at the

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[4]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.)

time of the incidents, an investigator for the Department [RT 15-18, 19-21, 29-30].

The Appeals Board's decision in Two For The Money (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 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:
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> "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.3rd 360 [120 Cal.Rptr. 847].)"

The rule does not mandate any length of time the prohibited act should continue to constitute a violation of the rule. The longevity of time for the acts (herein about 15 seconds each time) to constitute a violation is irrelevant.

A review of the record shows that the acts could be construed as some type of position (both standing positions and sitting positions) for sexual intercourse. The acts could be classed as stimulating, but are clearly acts which could easily suggest some type of position for sexual intercourse. The arguments of appellant are rejected.

ORDER

The decision of the Department is affirmed.[5]

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

[5]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.