

**BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD
OF THE STATE OF CALIFORNIA**

AB-7797

File: 48-268018 Reg: 00048726

4600 SUNSET BOULEVARD, INC. dba Cheetah's
4600 Hollywood Blvd., Los Angeles, CA 90027,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen

Appeals Board Hearing: February 13, 2003
Los Angeles, CA

ISSUED APRIL 4, 2003

4600 Sunset Boulevard, Inc., doing business as Cheetah's (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 30 days with five days stayed for a probationary period of one year, for permitting its entertainers to commit acts contrary to the rules of the Department found in the California Code of Regulations, title 4, sections 143.3, subdivision (1) (a) and (b), and 143.3, subdivision (2).

Appearances on appeal include appellant 4600 Sunset Boulevard, Inc., appearing through its counsel, Joshua Kaplan, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on May 20, 1992. Thereafter, the Department instituted an accusation against appellant charging the

¹The decision of the Department, dated March 29, 2001, is set forth in the appendix.

violations of the rules.

An administrative hearing was held on October 19, 2000, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning acts by performers of simulated sexual intercourse, touching their own breasts, and exposure of breasts while on a stage not conforming to the rules.

Subsequent to the hearing, the Department issued its decision which determined that the acts had occurred as charged. Appellant thereafter filed a timely notice of appeal.

In its appeal, appellant raises the issue that the decision is not supported by substantial evidence and the penalty is excessive. Apparently appellant does not contest the acts themselves were committed and performed.

DISCUSSION

I

Appellant contends the decision is not supported by substantial evidence. Additionally, appellant makes various arguments.

a) Appellant argues that a recent case of *Vicary* (2001) AB-7606, is controlling. In that matter, the Appeals Board reversed the decision of the Department which concerned acts which also are of concern in this matter. The Board concluded that the state of the law was ambiguous and extremely unclear as to First Amendment protection of dancers and their performances as set forth in various cases in this jurisdiction and throughout the nation.

Notwithstanding, the court of appeal reversed the Board in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board / Vicary* (2002) 99 Cal.App.4th 880 [121 Cal.Rptr.2d 753]. The present matter is controlled by the court of appeal's holding in the *Vicary* case, which appellate court decision is

contrary to the argument of appellant. We must agree with the state of the law at this time.

b) Appellant also argues that the rule of the Department cannot be sustained concerning count 3. Count 3 concerned allegations of simulated sexual intercourse.

Rule 143.3, subdivision (1)(a), states: "Live entertainment is permitted on any licensed premises, except that: (a) No licensee shall permit any person to perform acts of or acts which simulate: (a) Sexual intercourse"

Appellant cites cases that have no applicability to the issue before the Board. A major thrust of appellant is that the entertainers were clothed during the acts presented, so thus the conduct was merely suggestive. The Appeals Board has rejected this premise time and again, concluding that the acts and motions of the entertainers which come within the prohibited conduct, whether clothed or not, are violations of the rule.

c) Appellant argues that the performers were independent contractors, and were not personally responsible by way of penalty, under the rules, for their conduct. The Board has considered this argument in other matters and found that the particular contract or tax status of the performers is of no consequence where the thrust of the rules is to protect the public welfare and morals. (See *Funtastic, Inc.* (1998) AB-6920, and *4623 Monica Corp.* (1998) AB-6919.) Notwithstanding the Board's views as expressed in the cited cases, the rule itself makes it clear where it is stated that "... the licensee shall permit no person" to do the prohibited acts. Such language clearly limits appellant's cause.

II

Appellant contends the penalty is excessive.

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].)

The Department had the following factors to consider: (1) appellant has two prior Rule 143.3 violations to which it stipulated as true, in 1994 and 1995, (2) the present accusation alleges the acts in 1999, which are essentially the same as those shown in 1994 and 1995, and (3) the 1994 and 1995 penalties were for a 15 day suspension each, with a fine being allowed to be paid in lieu of the actual suspension. Apparently, appellant has not "taken to heart" the learning from the prior cases to curb the natural inclination to "step over the line." Considering such factors, the appropriateness of the penalty must be left to the discretion of the Department. The Department having exercised its discretion reasonably, the Appeals Board will not disturb the penalty.

ORDER

The decision of the Department is affirmed.²

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

²This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 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 section 23090 et seq.