ISSUED JANUARY 15, 1997

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

MONTELL R. MEACHAM dba 1st King 14401-02 South Western Avenue Gardena, CA 90249, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6111d File: 48-150771 Reg: 90021770 Administrative Law Judge at the Dept. Hearing: Jerry Mitchell Date and Place of the Appeals Board Hearing: October 2, 1996 Los Angeles, CA

Montell R. Meacham, doing business as 1st King (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which denied appellant's petition to make an offer in compromise (POIC). This is the fifth appeal to be filed in this matter.

Appearances on appeal include appellant Montell R. Meacham, appearing through

[1]Copies of the Petition to Make Offer in Compromise, dated September 20, 1995; the Department's Investigation Report of Petition to Make Offer in Compromise, dated October 5, 1995; and the Department's Notice of Action on Petition to Make Offer in Compromise, dated October 18, 1995; are set forth in the appendix.

his counsel, Ralph B. Saltsman; and the Department of Alcoholic Beverage Control, appearing through its counsel, John P. McCarthy.

FACTS AND PROCEDURAL HISTORY

This is an extremely convoluted case, spanning some six years. Appellant has held an on-sale general public premises license since March 23, 1984. The original accusation in this matter was filed against appellant on September 24, 1990, charging violations of condition 3 of appellant's license and Business and Professions Code §23804, alleging that appellant's employees exposed their breasts while they were within six feet of patrons in the premises and caressed their breasts and buttocks.

Appellant requested a hearing, held on March 12, 1991, at which time oral and documentary evidence was received. At that hearing, it was determined that the evidence supported findings 2, 3, and 4, which involved (1) appellant's employees exposing their breasts and buttocks, a violation of condition 3 on the license (finding 2); (2) appellant's employees exposing their breasts to patrons less than six feet removed (finding 3); and (3) four additional counts of exposure of the breasts to patrons less than six feet removed (finding 4).

Subsequent to the hearing, the Department issued its decision which suspended appellant's license for 30 days, no portion of which was stayed. Appellant filed a timely Notice of Appeal.

In its first decision dated June 17, 1992, the Appeals Board reversed finding 2, since condition 3 specifically prohibited the caressing and touching of <u>another person's</u> breasts and buttocks instead of the dancer's own anatomy, and remanded the case to

the Department for reconsideration of the penalty, based upon findings 3 and 4 only.

The Department subsequently issued its first "Decision Following Appeals Board Decision" on June 9, 1993. In that decision, the Department rewrote finding 2 to refer to condition 5, which prohibited acts which simulated touching or caressing of the breasts or buttocks, instead of condition 2. The June 9, 1993, decision imposed the same 30-day suspension, based upon the rewritten finding 2, and the original findings 3 and 4. Once again, appellant filed a timely appeal, which became AB-6111a.

In its decision in AB-6111a, dated November 16, 1993, the Appeals Board reversed due to the rewritten finding 2, and once again remanded the matter to the Department for reconsideration of the penalty, based on findings 3 and 4 only.

In its second "Decision Following Appeals Board Decision," dated August 17, 1994, the Department dismissed finding 2 and imposed a 25-day suspension, with 5 days stayed for a one-year probationary period. Appellant then appealed this decision, which became AB-6111b.

The Appeals Board affirmed the Department's second "Decision Following Appeals Board Decision" on March 8, 1995, which should have settled the matter. Instead, on March 20, 1995, the Department denied appellant's petition to make payment in compromise, citing Business and Professions Code §23095,[2] subdivision (a)

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[2]Prior to January 1, 1995, Business and Professions Code §23095, subdivision (a), provided as follows:

> "Whenever a decision of the department suspending a license for 30 days or less becomes final, whether by failure of the licensee to appeal the decision or by exhaustion of all appeals and judicial review, the licensee may, before the operative date of the suspension, petition the

(as amended effective January 1, 1995), which prohibits an offer in compromise for a suspension of more than 15 days.

On April 4, 1995, appellant appealed the denial of the POIC to the Board because appellant claimed the Department was "...effecting a retroactive application of a penal statute - Business & Professions Code §23095 - to an accusation filed in advance of the effective date of the penal legislation, in violation of the United States Constitution, Article I, section 9(3), and California Constitution, Article I, section 9."

Then in July 1995, after the matter had been calendared for hearing, appellant's counsel notified the Board that the Department had "represented that it would consider a POIC," and asked that the appeal be dismissed without prejudice so that the necessary paperwork could be transmitted to appellant by the Department. The matter was eventually continued to the October 1995 calendar.

Once again, appellant submitted another appeal on October 27, 1995. On November 14, 1995, the Appeals Board notified appellant's counsel that AB-6111c was still pending before the Board, and that another appeal in the matter could not be accepted. The appeal was returned to appellant's counsel, who was also informed that AB-6111c could not be dismissed without a specific request to the Board to do so.

On March 1, 1996, appellant's counsel resubmitted the appeal dated 10-27-95, and asked the Board to (1) dismiss AB-6111c; and (2) accept the 10-27-95 appeal. This was done, and the 10-27-95 appeal became AB-6111d, the matter now pending before the Appeals Board.

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department for permission to make an offer in compromise ..."

In its appeal, appellant asks the Board to reverse the Department's "decision" denying appellant's petition to pay a fine in lieu of serving the suspension in this matter, contending that the decision of the Department is not supported by findings.

The Department contends that this Board lacks jurisdiction to review the Department's determination that it is unable to make the findings required by Business and Professions Code §23095.

DISCUSSION

In a long line of decisions, the Appeals Board has consistently held that it lacks jurisdiction to review a denial of an offer of compromise by the Department of Alcoholic Beverage Control, and the courts have as consistently declined to review the Board's decisions. (In the Matter of the Accusation Against John W. and Suzanne Radtke,(July 6, 1979) AB-4617, and the numerous cases cited therein). The Board's reasoning has consistently been that reiterated in Radtke:

> "The department may entertain a petition to make an offer of compromise only after a decision of the department which suspends a license . . . has become final. From the context of the statute, it is apparent that this means final as to all appellate rights having been terminated; this includes the penalty imposed in the decision. Here, appellants have been afforded a hearing and all appellate rights as to the merits of the case. Section 23095(a) merely permits the department to accept a sum of money in lieu of a suspension . . . This is a discretionary matter vested solely in the department." (Emphasis in original).

Appellant acknowledges the Radtke line of decisions, but contends that the decision of the Court of Appeals in Department of Alcoholic Beverage Control v. Appeals Board (Safeway) (1987) 195 Cal.App.3d 812 [240 Cal.Rptr. 915], requires reconsideration of the Board's position with regard to the scope of its jurisdiction to review the Department's action.

In that case, Safeway contested the Department's determination of the amount of the fee to be assessed by the Department for the transfer of licenses between certain Safeway corporate entities, and appealed to the Board. The Board denied the Department's motion to dismiss the appeal, and the Court of Appeals affirmed. The Court of Appeal put forth two grounds in support of the Board's appellate jurisdiction. First, the decision regarding the proper transfer fee was said to be a question of law, "which falls within the Appeals Board's power to review 'whether the department has proceeded without, or in excess of, its jurisdiction,' and 'whether the department has proceeded in the manner required by law.'" Second, the Court of Appeal upheld review on the basis of the Board's jurisdiction to review a decision of the Department transferring a license, even if such a decision might be characterized as "administrative."

The present case is not really comparable. Safeway (the real party in interest) was adversely impacted by the action of the Department as to which it had not had an opportunity to be heard. In such circumstance, the Board correctly viewed its jurisdiction over the Department to be broad enough to review the Department's interpretation of the statutory fee structure for license transfers. In the present case, appellant has already had the benefit of Board review of the penalty the Department wishes to enforce.

Appellant also contends that the addition of the phrase "that the following conditions are met" to Business & Professions Code §23095 requires the Department to make factual findings, and that it follows that an appeal to the Board lies if the

conditions exist and the findings can be made.[3] The Department, on the other hand, contends that its refusal to accept an offer of compromise is discretionary, and not subject to review. The Department stresses that the language of section 23095 is permissive - "the department may stay the proposed suspension and cause any investigation which it deems desirable and may grant the petition if it is satisfied" that the conditions exist set forth in the statute are met. Significantly, it is to the satisfaction of the Department that such conditions must be met.

Thus, it is no answer for appellant to contend that the Department is required to grant its petition simply because it is willing to pay the maximum monetary penalty that can be required upon acceptance of a compromise. That would merely obviate the need for the licensee's books and records to permit the computation of an appropriate monetary penalty.

It is also essential that the Department be satisfied that "the public welfare and morals would not be impaired by permitting the licensee to operate during the period of suspension and that the payment of money will achieve the desired disciplinary purposes." (Bus. & Prof. Code §23095, subd. (a)(1).) There are no criteria set forth in the statute to guide or control the Department's determination of whether it is satisfied that the alternative sanction of a monetary penalty will achieve the desired disciplinary purposes. It would seem, then, that this is a determination upon which the Department

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[3] Contrary to appellant's suggestion, the added language requiring the Department to find that certain conditions have been satisfied, would seem to be a limit on the Department's exercise of discretion, rather than a command that it engage in the exercise.

must bring to bear its considerable expertise in ascertaining what is necessary in order to effect an appropriate discipline, a determination which inescapably rests upon an exercise of discretion.

It is the accepted rule that 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]). In Martin, the Supreme Court stated:

> "But viewing the propriety of the penalty as a matter vested in the discretion of the Department under our constitutional provision (art. XX, §22), and considering the rule that its determination of the penalty will not be disturbed unless there is a clear abuse of its discretion ... it does not appear that the Department abused its discretion here."

In the present case, the penalty portion of the order had become final. Finality is one of conditions precedent to the Department's ability to even consider a petition for compromise. It was in the imposition of that penalty that the Department made its determination that a suspension of 25 days, with five days suspended, was necessary to achieve effective discipline. Appellant unsuccessfully contested that penalty before the Appeals Board in AB-6111b. At that time the Board stated:

> The ordering of a penalty is subject to no precise criteria or standard, except that the penalty is not to be arbitrary or excessive. The assessing of a particular number of days for a suspension is a discretionary act on the part of the department. . ."

Thus, even if the Appeals Board were so inclined to reduce the penalty, the Supreme Court has confirmed the Board's inability to substitute its discretion for that of the Department. (Martin, supra, 341 P.2d at 300.)

CONCLUSION

The decision of the Department is affirmed.[4]

JOHN B. TSU, MEMBER
BEN DAVIDIAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

DISSENTING:
RAY T. BLAIR, CHAIRMAN

[4]This final order is filed as provided by Business and Professions Code §23088, and shall become effective 30 days following the date of this filing of the final order as provided by §23090.7 of said statute for the purposes of any review pursuant to §23090 of said statute.