ISSUED SEPTEMBER 11, 1997

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

KENNETH MACKENZIE dba Hollywood Tropicana 1250 North Western Avenue Los Angeles, CA 90029, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6734 File: 48-255003 Reg: 96035394 Administrative Law Judge at the Dept. Hearing: Sonny Lo Date and Place of the Appeals Board Hearing: July 2, 1997 Los Angeles, CA

Kenneth Mackenzie, doing business as Hollywood Tropicana (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which ordered his on-sale general public premises license revoked for his having permitted female entertainers to touch, caress and fondle their own breasts and the breasts of other persons, to perform acts simulating sexual intercourse, and to use an artificial device to simulate sexual intercourse or oral copulation, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX,

[1] The decision of the Department dated September 12, 1996, is set forth in the appendix.

§22, arising from violations of 4 California Code of Regulations §§143.3, subdivisions (1) (a) and (1) (b), and 143.2, subdivision (4) ("rule 143" or "the rule"), and of Business and Professions Code §23804 as a result of violations of conditions on appellant's license.

Appearances on appeal include appellant Kenneth Mackenzie, appearing through his 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 premises license was issued on February 5, 1991. Thereafter, the Department instituted an accusation alleging that on September 14, 1995, Cheryl Landau and Valerie Cook, female entertainers employed by appellant engaged in certain conduct violative of rule 143 and conditions on appellant's license. Counts 1 through 7 of the accusation were based on alleged violations of rule 143 and its subparts, and count 8, aggregating the conduct alleged in counts 1-7, charged violations of conditions on appellant's license.

An administrative hearing was held on August 27, 1996, at which time oral and documentary evidence was received. At that hearing, Department investigator Shawn Collins testified that he and two other Department investigators visited appellant's premises on the night in question. Landau, in the course of a private dance for Collins, cupped her breasts in her hands and fondled them [RT 17-18]. Later that same

evening, that same Landau and Cook engaged in an oil wrestling match, in the course of which each rubbed oil on the other's breasts and buttocks. After a recess between "rounds," Landau squirted oil on the crotch area of Cook, and then bent down and sucked the oil as it ran down Cook's crotch, spitting it back onto Cook's breasts and stomach. In a third "round," Cook placed whipped cream on the end of a banana, and Landau placed the banana in her groin area. Cook licked the whipped cream from the end of the banana, and then began sucking on the banana, continuing until it broke. This activity took place on a lowered stage, and was viewed by an estimated 75 patrons.

Subsequent to the hearing, the Department issued its decision which determined that the rule and the conditions had been violated. In accordance with the recommendations of Department counsel at the administrative hearing, appellant's license was ordered revoked. Appellant thereafter filed a timely notice of appeal.

Appellant contends that the penalty is excessive.

DISCUSSION

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 stresses his efforts to insure that the female entertainers comply with the beverage control laws and the conditions on his license, and urges this as mitigation. In addition, the entertainers are required to sign forms which set out rules with which the dancers must comply, on pain of fine, suspension or termination. Some of the forms even set forth the conditions on appellant's license, as well as the strictures of rule 143. Appellant also employed an attorney to address the entertainers and explain the laws and conditions applicable to their performances. The manager at the time the conduct occurred was demoted, and the disk jockey supervising the wrestling was fired. All this, appellant contends, is evidence that appellant did all he could to prevent the activity which led to the accusation from occurring.

Appellant cites and quotes from Harris v. Alcoholic Beverage Control Appeals Board (1965) 62 Cal.2d 589 [43 Cal.Rptr. 633], suggesting that it weakens the Court's earlier decision in Martin, supra. Harris, however, is clearly distinguishable both from Martin and from this case. Harris involved a licensee with a spotless record for five years suddenly met, in an eight-day period, with a series of violations which, under the Department's internal schedule of penalties would ordinarily have resulted in a maximum suspension of 75 days, instead of revocation, and which the Court thought were of such a nature as to not warrant revocation. In that setting, the Court sustained the Appeals Board's reversal of the Department's order of revocation.

. The Department points out that appellant was under a stayed revocation and probation order (accompanied by a 30-day suspension) which was entered only five months before the events involved in the current accusation. The ALJ found that the conduct was blatant, took place before a large number of patrons, while management was present and took no action to stop it (Determination of Issues VI.) For these reasons, the Department argues, no mitigation was warranted.

Appellant's business is centered around female entertainment. (See Exhibit 5, which, probably not by coincidence, bears a publication date the same as the date of the charged violations.) The Department's position is that appellant has demonstrated that his management is unable to control the activities of the entertainers.

This violation occurred only five months after the entry of an order of stayed revocation stemming from conduct in 1993 in violation of Rule 143. There would appear to be little question that whether appellant's license should continue is a matter for the sound discretion of the Department. We do not see any indication that the Department has abused that discretion.

CONCLUSION

The decision of the Department is affirmed.[2]

BEN DAVIDIAN, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
JOHN B. TSU, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

---

[2] 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 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.