ISSUED SEPTEMBER 9, 1999

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

ROBERT D. and SANDRA DEASE dba Sandraella's 815 South Brookhurst Street Anaheim, CA 92804, Appellants/Licensees, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6749 File: 48-260959 Reg: 96035881 Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen Date and Place of the Appeals Board Hearing: July 2, 1997 Los Angeles, CA

Robert D. and Sandra Dease, doing business as Sandraella's (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which ordered their on-sale general public premises license suspended for 50 days, with suspension of 10 days thereof stayed for a probationary period of two years for having permitted a female entertainer to expose her breasts while not at least six feet from the nearest patron, and permitting female entertainers to touch, fondle, and caress their breasts, being contrary to the universal and generic public welfare and morals provisions of the

[1] The decision of the Department dated November 14, 1996, is set forth in the appendix.

California Constitution, article XX, §22, arising from violations of Rule 143.3, subdivision (1) (b) and Rule 143.3, subdivision (2), Title 4, California Code of Regulations ("rule 143" or "the rule").

Appearances on appeal include appellants Robert D. and Sandra Dease, appearing through their counsel, Joseph R. Donahue; and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellants' license was issued on June 24, 1991. Thereafter, on April 16, 1996, the Department instituted an accusation alleging that, on November 9 and December 1, 1995, female entertainers employed by appellants engaged in conduct violative of rule 143. An administrative hearing was held on September 3, 1996, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the conduct of two female dancers employed by appellants. Subsequent to the hearing, the Department issued its decision which determined that the dancers had violated the rule, and ordered appellants' license suspended. Appellants thereafter filed a timely notice of appeal.

In their appeal, appellants raise the following issues: (1) the evidence is insufficient to support the decision; and (2) the penalty is excessive.

DISCUSSION

I

Appellant contends that the evidence is insufficient to support the decision.

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing a Department 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.[2]

"Substantial evidence" is relevant evidence which reasonable minds would accept as reasonable support for a conclusion. (Universal Camera Corporation v. National Labor Relations Board (1950) 340 U.S. 474, 477 [71 S.Ct. 456]; Toyota Motor Sales USA, Inc. v. Superior Court (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 747].)

When, as in the instant matter, the findings are attacked on the ground that

[2]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].

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 conflict[s] 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. 658].

Two Department investigators, William Johnson and Lowrey Spencer, testified that, accompanied by an Anaheim police detective, they visited appellants' premises on November 9, 1995, and again on December 1, 1995. On each of their visits, they testified, they observed the dancer introduced as "Taylor" (Corine Allison) caress her breasts in the course of her dance performance, by cupping her breasts with the back of her hand and then pushing her hands up and over the center of her breasts, caressing the nipples. In addition, they testified, during their December visit a dancer introduced as "Natasha" cupped her breasts in her hands and ran her hands over her breasts and nipples in the course of her performance. They also testified that Natasha, after having removed her dress and her upper clothing, dropped to her hands and knees and, with her breasts exposed, crawled forward on the stage toward the areas where the investigators were seated, approaching to within three feet. The investigators further testified that the DJ employed by appellants was located in a position where he could observe the dancers while they performed, and that the bartender could see some

parts of the stage.

Sandra Dease testified that, following a suspension for an earlier violation of Rule 143, she adopted a business policy of being extremely strict with all entertainers, requiring them to police each other, to be familiar with Department and City of Anaheim rules, and to review dressing room signs explaining the rules. She testified she pursued a policy of strict compliance with Department rules, had fired several dancers for having committed what she perceived were violations of rule 143, and even had trouble hiring entertainers because her policies were so strict. Neither she nor her husband were present when the November incident took place. Although she was present on December 1, her testimony indicates she arrived after at least part of the events which formed the basis for the charges in the accusation alleged to have occurred that day.

Mrs. Dease testified that she arrived at 8:00 p.m., and learned from Taylor that the Anaheim police had already been at the premises, supposedly interrogating employees about sales to minors. She testified she was unaware of Taylor having performed after her arrival, but did claim to have seen part of Natasha's performance, but denied seeing any of the conduct claimed by the investigators. However, she admitted that she had not watched Natasha during most of her performance.

Corine Allison ("Taylor") testified that she had probably given two or three thousand dance performances, mostly in sex-oriented bars, was well-familiar with the rules governing topless dancing, and had never before been named in a Department

accusation. She denied cupping her breasts with her hands, or pushing her hands across her breasts. The only time she went near her breasts, she claimed, was possibly when removing her bra.

James Elliott, the disk jockey, testified that one of his responsibilities was to maintain the rules and regulations of the dancers. He understood the rules to require full breast coverage and full buttocks coverage while on stage, and to be within the limits of an inner square (of the stage) when topless. He observed Taylor dancing on both November 9 and December 1, and denied having seen her touch or fondle her breasts in the manner described by the investigators. Finally, he said he had not seen Natasha perform on the evening of December 1.

Natasha did not testify. Thus, the only evidence which conflicted with the testimony of the investigators was Mrs. Dease's denial she had seen anything improper, a denial substantially weakened by her admission she had not watched most of the performance.

Appellants focus their attack on the sufficiency of the evidence on the testimony of Department investigator Johnson, barely acknowledging that the second investigator (Spencer), initially called as an adverse witness, essentially confirmed all material aspects of Johnson's testimony. [See RT 136-141, 146-151.] Appellants contend that, with respect to the events of November 9, "it is impossible to determine to what degree and, more importantly, to what extent the perception of Investigator Johnson was colored by his admitted consumption of alcoholic beverages prior to the time the

alleged incident or violation took place." (App.Br., p. 6). Appellants argue that Johnson's inability to remember certain details of the events of the evening demonstrates that he has no independent recollection of events, so his testimony should be disregarded.

Appellants have, in their reply brief, launched an attack on the practice of Department investigators to order drinks while they are in a licensee's premises conducting an undercover investigation. They contend that the "apparent consumption" of alcoholic beverages by the investigators in the course of their investigation is "an exercise of bad judgment" and a failure to exercise due care and good faith in the performance of their duties and responsibilities to the licensee, and to the general public upon driving home after consuming alcohol. Appellants see this is an "outrageous and astounding Departmental policy" [App.Rep.Br., unnumbered final page].

We think appellants' position excessive, both generally and in the context of this case. The Board is familiar with the techniques employed by undercover investigators for the Department, including their practice of ordering drinks, and consuming some small portion of the drink, or, on occasion, even finishing the drink and ordering a second. Needless to say, playing the role of a patron requires the investigator to engage in such activities as part of his cover. While it is possible that, in the rare case, an investigator can act irresponsibly, we are confident that, in such an instance, misbehavior will be dealt with appropriately.

Investigator Johnson testified that he ordered an alcoholic beverage, but he never testified that he drank it. To the contrary, when asked "What do you usually drink?" Johnson's reply was "I don't" [RT 90].[3] As Department counsel notes in his brief, part of the undercover nature of the investigator's work requires him, in the role of a patron, to order drinks, tip, and do other things of the kind a typical customer might do. There is nothing in appellants' papers that shows that anything improper occurred, and a review of the record reveals a complete absence of any impropriety on the investigator's part.

Appellants also quote extensively from the testimony of Taylor concerning her knowledge of the rules, her experience in sex-oriented night clubs, and her denial of doing any of the things targeted by rule 143.

The Administrative Law Judge ("ALJ"), having heard this conflicting evidence, concluded that the charges of the accusation were true. Where there are conflicts in the evidence, the Appeals Board is bound to resolve them in favor of the Department's

---

[3] Appellants assume that investigator Johnson's response to a question directed at determining when he observed something [RT 66] establishes that he, in fact, did consume an alcoholic beverage. The testimony does not support the assumption:

"Q. Was this before or after you had a drink?

"A. It would be before and after.

Appellants argue that this testimony refutes the assertion by the Department that all Johnson did was order a drink. Appellants overlook his specific statement [RT 90] that he does not drink.

decision, and must accept all reasonable inferences which support the Department's findings. (Kirby v. Alcoholic Beverage Control Appeals Board (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857] (substantial evidence supported both the Department's and the license-applicant's position); Kruse v. Bank of America (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 271]; Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control (1968) 261 Cal.App.2d 181 [67 Cal.Rptr. 734, 737]; Gore v. Harris (1964) 229 Cal.App.2d 821 [40 Cal.Rptr. 666].) The ALJ was in the best position to determine whether and to what extent investigator Johnson's testimony might be suspect, and it is obvious that he found it competent and credible.

There is ample evidence to support the ALJ's findings and determinations. Somewhat indicative of the ALJ's impressions of the defense testimony is seen in his Supplemental Finding, where he admonishes appellants to take a hard look at their policies and practices in regard to bringing them into compliance, cautioning them that if his warning is not taken seriously, their license could be in jeopardy. Given the weight such findings and determinations must be accorded under the law, the Board has little choice but to affirm the ALJ's finding of a violation..

II

Appellants contend that 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].)

Department counsel at the administrative hearing recommended a 45-day suspension. The ALJ ordered a 50-day suspension, but stayed enforcement of 10 days, resulting in a net suspension of 40 days. Whether 40 days of actual suspension plus 10 additional days only if there is another violation during a period of probation, is more severe than a straight 45-day suspension is an open question.

Appellants were given a 20-day suspension, effective February 10, 1994 (Reg. No. 93028871).

There were a total of four violations involving two entertainers.

Considering such factors, the dilemma as to the appropriateness of the penalty must be left to the discretion of the Department. In our view, the Department exercised its discretion reasonably.

CONCLUSION

The decision of the Department is affirmed.[4]

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

[4] 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.