ISSUED OCTOBER 23, 1997

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

TWO FOR THE MONEY, INC. dba Sunset Strip 5214 Sunset Boulevard Los Angeles, CA 90027, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6774 File: 48-149027 Reg: 96035553 Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria Date and Place of the Appeals Board Hearing: July 2, 1997 Los Angeles, CA

Two for the Money, Inc., doing business as Sunset Strip (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended appellant's on-sale general public premises license for appellant permitting dancers to violate various provisions of Rule 143.3 in that they exposed their buttocks and breasts when not on a stage at least 18" high and at least 6' away from the nearest patron, they simulated oral copulation and sexual intercourse, and they touched their genitals, being contrary to the universal and generic public welfare

[1] The decision of the Department, dated November 7, 1996, is set forth in the appendix.

and morals provisions of the California Constitution, article XX, §22, arising from violations of Business and Professions Code §§24200, subdivisions (a) and (b), and California Code of Regulations, title 4, §143.3, subdivisions (1) and (2) (Rule 143.3).

Appearances on appeal include appellant Two for the Money, Inc., appearing through its counsel, Joshua Kaplan, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon Logan.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on June 19, 1986. Thereafter, the Department instituted an accusation against appellant's license, alleging various violations of Rule 143.3 on two different dates by five different dancers.

An administrative hearing was held on September 27, 1996, and conducted as a default pursuant to Business and Professions Code §11520 because appellant did not appear at the hearing. At the hearing, Department investigators presented testimony concerning the actions of the dancers at appellant's premises.

Subsequent to the hearing, the Department issued its decision which determined that appellant had permitted the violations of Rule 143.3 as alleged, with the exception of counts 10 and 11, which were dismissed because the Department did not present any evidence regarding those counts. The Department ordered the license suspended for 30 days, with 15 days of the suspension stayed for a probationary period of one year.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) the Department's decision is not supported by its findings and its findings are not supported by substantial evidence in the record in that there was no evidence of measurement of the distance from the dancers to the patrons, and the actions of the dancers did not constitute "simulated oral copulation" or "simulated sexual intercourse" since the acts were not "made to look genuine;" (2) the allegations of simulated sexual activity cannot constitutionally be applied to acts that were merely suggestive or erotic dances without some exposure of the genitals; (3) the penalty imposed is excessive, cruel, and unusual in that it is the same penalty as that recommended by the Department without any reduction for the finding that two of the counts charged were not sustained; and (4) Business and Professions Code §24210, allowing the Department to use its own Administrative Law Judges to hear cases, is unconstitutional.

DISCUSSION

I

Appellant contends that the decision is not supported by the findings and the findings are not supported by evidence in the record.

Count 1 charged that Linda Dalziel exposed her buttocks when she was within six feet of the nearest patron, in violation of Rule 143.3, subdivision (2). Appellant argues that there was no evidence presented that the investigator had measured the distance or had the expertise to make an accurate estimate of the

distance. Appellant also argues that there is no evidence in the record showing the distance between dancer and patron with regard to counts 4 and 9.

Generally, any ordinary individual is capable of ascertaining whether someone is within six feet of another person. It does not require actual measurement nor does estimation of that distance require an expert. Appellant has given no reason why the investigator could not make this determination of distance just as well as any other ordinary individual; therefore, this argument fails.

Count 4 involved a "table dance," in which the dancer ordinarily performs directly in front of and close to an individual patron. In this case, the dancer was actually touching the investigator, Shawn Collins [RT 19], and was clearly within six feet.

With regard to count 9, appellant is correct: there was no testimony as to how far away dancer Christine Whitney was from the patrons. However, the investigator testified that Yvette Adams was within six inches of his face during her dance and that his contact with Ms. Whitney was the same as that with Ms. Adams [RT 32]. The logical inference is that Ms. Whitney was also within six inches of the investigator at some point during her dance.

Count 2 charged that appellant allowed Dalziel to simulate oral copulation, in violation of Rule 143.3, subdivision (1)(a).[2] Kneeling on the stage, and holding her

[2]This rule provides, in pertinent part:

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

hand in front of her mouth as if she were holding a cylindrical object, Dalziel moved her head, with her mouth open, toward and away from a stationary vertical pole on the stage [RT 13-14]. Appellant argues that this cannot constitute "simulated oral copulation" since simulation requires that the act be made to look genuine, and no one would be led to believe that Dalziel was actually performing fellatio under those circumstances.

Count 6 charged that another dancer simulated sexual intercourse. The dancer, who was clothed, sat on the investigator's lap and made "grinding" movements with her hips against his crotch. Here again, appellant argues, there was no simulated sexual activity, since there was no exposure of and contact by the genitals of either the dancer or the investigator. Appellant contends that "dirty dancing" is not prohibited, and these performances were no more than that.

Appellant states that: "In Webster's New Collegiate Dictionary, 1977, page 1083, 'simulate' and 'simulation' are defined as follows: 'To feign or assume the outward qualities or appearance of . . . usually with the intent to deceive; made to look genuine . . . while not.'" Other dictionaries yield similar definitions of "simulate":

Webster's Third New International Dictionary, Unabridged (1986), p. 2122 - "1. To give the appearance or effect of: FEIGN, IMITATE 2. to have the characteristics of: RESEMBLE."
Funk & Wagnells Standard College Dictionary (1973), p. 1252 - "1. to assume or have the appearance or form of, without the reality; counterfeit; imitate. 2. to make a pretense of."

(a) Sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law."

Webster's New World Dictionary, Third College Edition (1988), p. 1251 - "1. to give a false indication or appearance of; pretend; feign 2. to have or take on the external appearance of; look or act like."

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 in counts 2 and 6 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 erotic dancing is constitutionally protected and cannot be prohibited as alleged simulated sexual activity." (App. Br. at 10.) 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.3d 360 [120 Cal.Rptr. 847].)

II

Appellant contends that the penalty is excessive and penalizes appellant for asserting its right to a hearing. The penalty should be 20 percent less than the originally proposed penalty, according to appellant, since appellant "actually prevail[ed] and defeat[ed] 20% of the counts originally alleged against it." (App. Br. at 15.) Because the penalty is the same as that (allegedly) sought by the Department before the hearing, appellant contends, "it is patently obvious that it is not fair, it is not reasonable, it does not conform to the spirit of the law and it does not subserve the ends of substantial justice . . . ." (App. Br. at 15.)[3]

[3]Appellant makes much of the fact that it "won" on 20 % of the counts in the accusation. In reality, one of the Department's witnesses did not show up at the hearing, so the Department did not present evidence on two of the counts, and they were dismissed. In addition, neither appellant nor its representative appeared at the hearing. To say that appellant "won" on these counts seems to be something of an overstatement.

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) there were still 11 counts found against appellant; (2) the second visit by the Department investigators found the same kind of violations as had been found in the first visit, four months previously; (3) appellant's manager was present on both occasions and did nothing to stop the actions of the dancers; and (4) the manager had been warned after the first visit, so he was clearly on notice about the problem. 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. Even if appellant had actually "won" on two of the counts, there does not appear to be abuse in a 15-day actual suspension.

III

Appellant contends that Business & Professions Code §24210, which allows the Department to use its own ALJ's at administrative hearings, is unconstitutional.

This Board is precluded by article 3, §3.5, of the California Constitution from declaring a statute unconstitutional or unenforceable. Therefore, we decline to consider this issue.

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 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 decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate 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.