ISSUED MARCH 30, 2000

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

R.I.P. ROCAS, INC. dba Playtime Bar 13324 Sherman Way North Hollywood, CA 91605, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7354 File: 48-158499 Reg: 98044519 Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen Date and Place of the Appeals Board Hearing: February 3, 2000 Los Angeles, CA

R.I.P. Rocas, Inc., doing business as Playtime Bar (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked its license, but stayed revocation, conditioned upon its service of a 30-day suspension and a two-year period of discipline-free operation, for having permitted entertainers to dance topless while not farther than six feet from the nearest patron, and for permitting an entertainer to solicit an act of prostitution, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from violations of Department Rule 143.3(2) (4 Cal. Code Regs. §143.3, subd. (2)) and Penal Code §647, subdivision (b).

[1]The decision of the Department, dated February 4, 1999, is set forth in the appendix.

Appearances on appeal include appellant R.I.P. Rocas, Inc., appearing through its counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on July 25, 1984. Thereafter, the Department instituted an accusation against appellant charging that, on a single evening, seven dancers performed topless while not farther than six feet from the nearest patron. In addition, the accusation charged that one of the dancers solicited an undercover officer for an act of prostitution.

An administrative hearing was held on December 7, 1998, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision sustaining all of the charges of the accusation and ordering a conditionally-stayed revocation.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) the finding that Rule 143.3(2) was violated is, as to all but a single count, not supported by substantial evidence; (2) the alleged solicitation of an act of prostitution is not supported by substantial evidence; and (3) the penalty constitutes an abuse of discretion.

DISCUSSION

I

Appellant contends that there is not substantial evidence to support the

findings, with one exception, that appellant permitted entertainers to violate Rule 143.3(2) by dancing topless within six feet of a patron.[2] It argues that, without a finding of the existence of 12-inch tiles upon which an investigator testified his distance estimates were based, there is no factual basis for the conclusion that the six-foot distance limitation was violated.

Rule 143.3(2) provides in pertinent part:

> "Subject to the provisions of subdivision (1) hereof, entertainers whose breasts ...are exposed to view shall perform only upon a stage at least 18 inches above the immediate floor level and removed at least six feet from the nearest patron."

The dancers in question were on a stage. The issue is whether they were the proper distance from the nearest patron when performing.

Appellant cites Mohilef v. Janovici (1996) 51 Cal.App.4th 267 [58 Cal.Rptr.2d 721] for the proposition that there must be substantial evidence in support of the findings that the six-foot rule was breached. This is elementary.

"Substantial evidence" is relevant evidence which reasonable minds would accept as a reasonable support for a conclusion. (Universal Camera Corporation v. National Labor Relations Board (1950) 340 US 474, 477 [95 L.Ed. 456, 71 S.Ct. 456]; Toyota Motor Sales USA, Inc. v. Superior Court (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].) When, as in the instant matter, the findings are attacked on the ground that there is a lack of substantial evidence, the Appeals Board, after considering the entire record, must determine whether there is

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[2] It should be noted that, as to one of the dancers, appellant concedes the violation of the rule. (See App.Br., page 8.)

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 conflicts 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.2d 658].)

We do not think it at all critical that the Administrative Law Judge (ALJ) made no specific finding regarding the 12-inch tiles. It is enough that there was substantial evidence in the record to support his findings that the dancers approached closer than six feet to the patrons. That evidence exists by way of the testimony of investigator Spencer that he noted locations of the various dancers as they performed, and later measured from where he was seated to each of those locations [RT 25-26], and as to each found the distance to be less than six feet.

II

Appellant also contends that the evidence fails to show an essential element of the crime of solicitation of an act of prostitution, i.e., an overt act separate and apart from any agreement to engage in an act of prostitution. It asserts that the police officer did not testify to an overt act, and the decision does not refer to any overt act.

The Department counters that the overt act is found in the entertainer's suggestions that the two could go to one of their cars to have sex, or to

somewhere dark, or to her house in Canoga Park.[3]

Penal Code §647, subdivision (b), as amended in 1986, provides:

> "A person agrees to engage in an act of prostitution when, with specific intent to so engage, he or she manifests an acceptance of an offer or solicitation to so engage, regardless of whether the offer or solicitation was made by a person who also possessed the specific intent to engage in prostitution. No agreement to engage in an act of prostitution shall constitute a violation of this subdivision unless some act, in addition to the agreement, is done within the state in furtherance of the commission of an act of prostitution by the person agreeing to engage in that act. As used in this subdivision, 'prostitution' includes any lewd act between persons for money or other consideration."

The 1986 amendment was extensively discussed in In re Cheri T., (1999) 70 Cal.App.4th 1400 [83 Cal.Rptr.2d 397], a case in which the court ruled that the act in addition to the agreement - the overt act - could either precede or follow the agreement: "Given the plain meaning of this statute, we presume the Legislature meant what it said: for there to be a violation of the statute, there must exist both an act and an agreement, but in no particular order."

Explaining its reasoning, the court stated:

> "The overt act requirement of California conspiracy law exists to provide conspirators an opportunity to reconsider and terminate their agreement and therefore avoid punishment. Senate Bill 2169 [the bill amending §647, subdivision (b)] was amended to require an overt act in order to serve an entirely different purpose, however - to ease concerns that ambiguous comments or statements might lead to false arrests for violation of section 647, subdivision (b). That purpose can be served by interpreting the language to require proof of some overt act in furtherance of the agreement which clarifies or corroborates that an agreement to engage in an act of

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[3] The Department notes that the dancer charged with soliciting prostitution hid from the police, and, after a search, was found underneath a table. While this may suggest a consciousness of guilt, it falls short of supplying the requisite overt act.

> prostitution was actually made. It is not necessary to impose the additional requirement that the clarifying or corroborative act must occur after the agreement was made. ... The language of Senate Bill 2169 was clear and unambiguous. It requires only that there be some act in addition to an agreement. It does not state that the act must follow the agreement, although it could have so provided."

In In re Cheri T., supra, the minor charged with solicitation grabbed the officer's crotch to assure him she was not a police officer. This, the court said, was sufficient as an overt act, even though it occurred before the agreement to engage in prostitution was made. The court also concluded, in an alternative holding, that the act of instructing the officer to drive to a dark place for the purpose of consummating the agreed-upon sex act, was an overt act following the making of the agreement. It is this part of the court's holding upon which the Department relies.

As noted above, the Department relies on portions of the conversation which formed the basis for the ALJ's finding that an act of prostitution had been solicited. That conversation is set forth in the report (Exhibit A) prepared by the officer, and was introduced into evidence by appellant.

We do not know enough about the conversation which took place in In re Cheri T. to know why the court was satisfied that a suggestion as to where to go for the sex act was the requisite overt act. It seems there can be a very fine line between a statement which is part of the negotiation process and one sufficiently separate from that process to be considered an overt act. Here, the statements the Department contends were an overt act seem to us not sufficiently separable from

the negotiation process as to constitute an overt act. If the Department is correct, the requirement of an overt act will have been reduced to an empty gesture.

III

Appellant claims the penalty - a stayed revocation and an actual 30-day suspension - constitutes an abuse of discretion. Appellant's contention appears to be premised on its view that there was only a single violation of Rule 143.3. (See App.Br., at page 13.)

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].

It is obvious that we disagree with appellant's apparent premise that there was only a single violation, that involving the count on which they concede a violation occurred.

However, in light of our decision that the prostitution count should be reversed, it is appropriate to remand the case to the Department for reconsideration of the penalty. We cannot discern how much of the penalty was attributable to the count which is being reversed, and the likelihood that the Department would simply reimpose the original penalty is sufficiently uncertain as to indicate that a remand is appropriate.

ORDER

The decision of the Department is affirmed as to counts 1 through 7 of the accusation, reversed as to count 8, and remanded to the Department for reconsideration of the penalty.[4]

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[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 final 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.