ISSUED JULY 7, 2000

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-7394 File: 48/58-149027 Reg: 98044467 Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen Date and Place of the Appeals Board Hearing: May 4, 2000 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 revoked its on-sale general public premises license and caterer's permit for having permitted dancers in its employ to engage in conduct proscribed by Department Rules 143.3, subdivisions (1) (b) and (c), and 143.3, subdivision (2), [4 Cal. Code Regs. §§143.3 (1) (b) and (c) and 143.3(2)], contrary to the universal and generic public

[1]The decision of the Department, dated April 29, 1999, is set forth in the appendix.

welfare and morals provisions of the California Constitution, article XX, §22, and Business and Professions Code §24200, subdivisions (a) and (b).

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, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license and caterer's permit were issued on June 19, 1986. Thereafter, the Department instituted an accusation against appellant charging that dancers in its employ had engaged in simulated oral copulation (count 1); touched, caressed and fondled their breasts and genitals, or permitted a patron to do so (counts 2, 3 and 9); exposed their vaginas (counts 4 and 7); exposed their breasts while not on a stage at least 18 inches above the floor and at least six feet from the nearest patron (counts 5 and 10); and engaged in simulated sexual intercourse (count 6). In addition the accusation charged that a person under the age of 18 was allowed to enter and remain in the premises without lawful business therein (count 8); an alcoholic beverage was served to a person who was then obviously intoxicated (count 11); and appellant employed the services of an 18-year-old person in that portion of the premises primarily designed for the sale of alcoholic beverages for consumption on the premises (count 12).

An administrative hearing was held on February 24, 1999. Evidence was presented only with respect to counts 1 through 5, and the remaining counts were dismissed. Count 1 was found not to have been established by the evidence, but counts 2 through 5 were sustained. The proposed decision, which ordered

appellant's license revoked, was adopted by the Department, and this timely appeal followed.

Appellant now raises the following issues: (1) the decision is not supported by the findings and the findings are not supported by substantial evidence; (2) the penalty is excessive; and (3) the proceedings are constitutionally defective by reason of the unconstitutionality of Business and Professions Code §24210.

DISCUSSION

I

Appellant contends that the decision is not supported by the findings, which, in turn, are not supported by substantial evidence.

"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 [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 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].)

Where there are conflicts in the evidence, the Appeals Board is bound to

resolve them in favor of the Department's 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]; 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) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

Appellant attacks the credibility of the officer who testified with regard to the dancer identified in count 2 as "Rosie," claiming that his testimony included important matters not referred to in his contemporaneous report - specifically, the touching and caressing of her breasts and genitals.

The credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. (Brice v. Department of Alcoholic Beverage Control (1957) 153 Cal.2d 315 [314 P.2d 807, 812] and Lorimore v. State Personnel Board (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640, 644].) Unless the Board is satisfied that it was an abuse of discretion for the Administrative Law Judge to believe the testimony of the officer, it must respect his judgment as to the officer's credibility.

We have reviewed the testimony of the officer, and are not prepared to say that it is not worthy of belief. While it may be true that he testified about matters not in his report, that is only one of a number of considerations the ALJ would have taken into account.

Appellant's challenge to counts 3, 4, and 5 is that "the facts are simply de

minimus," since the touching was only for a few seconds of a six or seven minute dance, and the dancer's display of her vagina was only partial. Neither of these arguments, even assuming they are supported by the record, has any validity as to whether there was a violation, and, at best, would go to mitigation.

Appellant's brief is silent with respect to count 5, which charged the same dancer exposed her breasts while not removed at least six feet from the nearest patron. Officer Turner testified that the dancer was directly in front of him, a foot or two away, while topless.

Appellant's contention must be rejected.

II

Appellant contends the penalty is excessive. It argues that the Department prevailed on only four counts of the 12-count accusation, yet still ordered revocation. Appellant reasons that, because the Department prevailed on only four counts it is required to impose a lesser penalty than that which was originally sought.

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 stresses the fact that this is the third time appellant has been disciplined for similar violations.

The fact that the penalty may be severe is not a basis for setting a penalty order aside. Where, as here, a licensee appears to be a persistent violator, it would appear well within the wide discretion possessed by the Department.

III

Appellant contends that, because Business and Professions Code §24210 is unconstitutional, it was denied its due process right to a fair hearing.

The Appeals Board, as with other agencies, lacks the power to declare an act of the Legislature unconstitutional. For that reason, the Board declines to consider appellant's contention.

ORDER

The decision of the Department is affirmed.[2]

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

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[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 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.