ISSUED AUGUST 22, 2000

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

WEI CHUN HOLDINGS, INC. dba Exchange Square 311-33 South Boylston Los Angeles, CA 90017, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	))))))))))))	AB-7415 File: 47-330642 Reg: 98044967 Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen Date and Place of the Appeals Board Hearing: July 6, 2000 Los Angeles, CA

Wei Chun Holdings, Inc., doing business as Exchange Square (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 45 days, with 25 days thereof stayed for a one-year probationary period, for having permitted female entertainers to engage in conduct involving simulated masturbation, simulated sexual intercourse, and the touching, caressing, and fondling of the breasts and genitals, and having violated conditions

[1]The decision of the Department, dated May 6, 1999, is set forth in the appendix.

on its license prohibiting topless dancing and requiring the presence of security guards in its parking lots, 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, subdivisions (1)(a) through (1)(c), and Business and Professions Code §23804.

Appearances on appeal include appellant Wei Chuan Holdings, Inc., appearing through its counsel, James E. Blancarte, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on April 14, 1998. Thereafter, the Department instituted an accusation against appellant charging, in a total of eight counts, that appellant permitted female dancers Lovella Ramirez, Sherry Thi Nguyen, and Vannary So, and male dancer Vu Xuan Dinh to engage in conduct violative of Department Rule 143.3, subdivisions (1)(a) through (1)(c). In addition, the accusation charged that appellant violated a number of conditions on its license.

An administrative hearing was held on February 23, 1999, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Department investigator Will Salao about events which transpired in connection with a G-string contest conducted in a banquet hall operated by appellant and made available to the promoter of the contest. Appellant's president, Luke Chia Chi also testified, as did Reath Heu, who passed out flyers promoting the

event, and Rodolfo Lara, a security manager for the company which supplied security for appellant.

Appellant corporation operates a large banquet facility known as Exchange Square in downtown Los Angeles. The premises is a two-story structure with two entrances, with the upstairs for Latino affairs and the downstairs for Asian affairs. It basically rents out the premises to private parties for banquets, birthdays and other events.[2]

Appellant's president, Luke Chia Chi, testified that, at the request of Ace Robins, a friend, the premises were made available to Robins without charge, for a birthday party for some girls. Appellant customarily derives revenues from the sale of drinks to party patrons.

The event, in fact, was sponsored by an entity known as Nocturnal Productions. Chi believed the party was a private event, and had no idea that Nocturnal Productions, of which Chi was unaware until approached by Robins, had designed the event to be open to the public. In fact, Nocturnal Productions had printed flyers to advertise the event, characterized in part as "Club Fever .. Midnight Showcase ... G-String Contest."[3]

There was a cover charge for admission, and a cover charge booth located

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[2] Appellant also maintains four separate off-street parking lots in the immediate vicinity of the premises. One of these lots is the basis for one of the two condition violation charges sustained by the Department.

[3] Appellant disputes the supplemental finding that the performers for the event were furnished by Nocturnal Productions.

inside the premises. Chi denied knowledge of both.

Subsequent to the hearing, the Department issued its decision which sustained five of the seven counts involving the conduct of dancers, and two of the subcounts of count 8 relating to license conditions.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) the evidence does not support the findings, and the findings do not support the decision; (2) the Department has misapplied Rule 143.3; and (3) the penalty is excessive. Issues 1 and 2 will be discussed together.

DISCUSSION

I

Appellant contends that the findings are not supported by the evidence, and do not support the decision. This contention, unfortunately, requires us to discuss the conduct of the dancers, which was described in somewhat graphic detail by the Department investigator whose testimony formed the basis for the findings.

The charges arose from the G-String contest which began around midnight. Three females from the crowd of patrons, followed by a male, mounted a stage and began dancing, after an announcement by a disc jockey that winners of the contest would be awarded $100 prizes.

Counts 4, 5, and 7

According to the testimony of Department investigator Will Salao, the first of the dancers, Lovella Ramirez, while dancing, rubbed her pubic area for a 10-second interval, using her right hand and middle finger, and, for a similar 10-second

interval, pressed her breasts together and fondled and licked them. This was the basis for count 5, which charged appellant with having permitted a violation of Rule 143.3, subdivision (1)(b). Count 5 was sustained.

In addition, while dancing, Ramirez's loosely-worn G-String dropped an inch or two and exposed her pubic hair from time to time. This was charged in count 7, as a violation of Rule 143.3, subdivision (1)(c). Count 7 was also sustained.[4]

While Ramirez was dancing, a male patron, Vu Xuan Dinh, jumped on the stage and began dancing with Ramirez. Then, investigator Salao continued, when Dinh sat on a platform at the rear of the stage, Ramirez sat on his lap and began rubbing her vaginal and buttock area in his crotch area. After at first remaining passive, in a supine position, Dinh began thrusting his crotch area to Ramirez's vaginal and buttock area. According to Salao, this continued for two or three minutes. Count 3, which charged that appellant permitted Dinh to engage in simulated sexual intercourse in violation of Rule 143.3, subdivision (1)(a), was sustained on the basis of this conduct.

Counts 2, 3, and 8(c)

These counts charged that appellant permitted Sherry Thi Nguyen (count 2) and Vannary So (count 3) to perform acts which simulated masturbation and sexual intercourse, in violation of Rule 143.3, subdivision (1)(a). In addition, appellant was charged with having permitted Nguyen to dance topless, in violation of a

[4] Although Ramirez also removed her top and danced topless, according to Salao, the accusation did not include a specific count relating to such activity.

license condition (count 8(c)).

Next, according to Salao's testimony, Nguyen and So removed their skirts to expose their G-strings, then began dancing close to each other. They then lay on the floor, interlocked their legs so that their vaginal areas met, and began rubbing each other. That lasted for one minute. Then, after the two resumed dancing, Nguyen bent over, and So, approaching from behind, began thrusting her pelvic area into Nguyen's buttock. This continued for approximately one-half minute. Counts 2 and 3 were sustained on the basis of this testimony.

At another point, Salao related, Nguyen, at the front of the stage, and dancing, removed her bra, exposing her breasts, for approximately one-half a minute, then put the bra back on and continued dancing. This conduct was the premise for count 8(c), which alleged a condition violation.[5] Count 8(c) was sustained by the decision.

Appellant attempts to minimize the conduct, contending that it lasted for only a short time in a 15- to 20-minute span, that the touching was of body parts still clothed, and that the activity found to be simulated sexual intercourse could well have been a form of dancing. None of these contentions are sufficiently persuasive to convince us there was no violation.

Appellant's principal contention, however, is that Rule 143.3 was never intended to apply to activities of the kind involved. Appellant contends that the

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[5] The condition provided that "there shall be no topless entertainment whether with male or female performers."

rule was intended to apply to premises which offered topless and/or nude entertainment or on-going acts of a sexual nature. Here, appellant contends, the activity was spontaneous and part of a private function that appellant had no reason to anticipate and could have done nothing to prevent.

We believe the ALJ was justified in drawing the conclusions he did from the testimony which was presented. Appellant's attempts to downplay the nature of the dancers' behavior is unavailing. Nor can we accept appellant's contention it was unable to anticipate the offensive conduct or powerless to prevent it.

The ALJ specifically rejected Chi's claim that he was outside the premises the entire time, and had no reason to know what was occurring inside. One of appellant's own witnesses, Reath Heu, testified that he, Heu, stood outside the premises passing out promotional flyers to whomever passed by or entered the premises. The flyers (see Exhibit 1) highlighted the G-string contest. If Chi was outside, as he claimed, it would seem he would have become aware of the G-string contest before it began.[6] Investigator Salao testified that 20 minutes before the contest was to begin, prospective contestants were told by a loudspeaker announcement that they would have to expose their G-strings. Moreover, there is evidence that the disc jockey was exhorting the "contestants" to continue. It is difficult to believe that appellant's management or security inside the premises could have been unaware of the activity. Yet, there is no evidence of any attempt

[6] Indeed, Chi admitted seeing the flyer the night of the event [RT 74].

by anyone to halt or prevent any of what occurred.

There is nothing in the language of Rule 143.3 which says it applies only to establishments which routinely offer what we shall refer to as "adult entertainment." Appellant has cited no authority in support of its contention, and we are aware of none.

Count 8(a)

This count charged that appellant violated a condition in its license which required that a security guard be posted in each of its parking lots during the hours between 8:00 p.m. and one hour after closing, by failing to have a guard in one of the lots, the lot designated "Lot D."[7]

Investigator Salao testified that he and Los Angeles police officer Dawson stood in front of Lot D for about a half-hour at each of two locations. Although he saw several security guards in the area of the premises, including two motorcycle units, he saw no security guard on Lot D during the entire time.

Rodolfo Lara, a security manager for the company which furnishes security for appellant, testified that a guard was assigned to lot D on the night in question, and blamed Salao's failure to see him on the possibility that the guard was

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[7] The condition states:

> "Between the hours of 8:00 p.m. and one (1) hour past closing, or until the lot is locked off to prevent public use, the petitioner(s) shall provide no less than 5 (at least one per lot) licensed uniformed security guard(s) in the parking lots and shall maintain order therein and prevent any activity which would interfere with the quiet enjoyment of their property by nearby residents. No security guards shall be required for any lot locked off from public use."

occupied on a lower level of the parking lot which was not visible from Salao's vantage point.

A surprising amount of testimony was directed at this issue, and in the words of the ALJ [at RT 145, 148, and 166],

> "This is so simple, but spending more and more time, the more confusing it gets. I'm not sure why."
> ...
>
> "Because there are a lot of conflicting issues. It sounds like people are talking about a different thing, or they believe they could be talking about a different thing when there is just one physical thing in that location."
> ...
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> "You got three witnesses saying three different things of the same location, at the same time, and it's just a question of credibility."

Our review of the transcript has led us to conclude that the ALJ's conclusion that there was no guard stationed at Lot D is supported by substantial evidence. Lara testified that the guard would have been expected to patrol the lot every 20 to 30 minutes. The suggestion that the guard, during the entire hour Salao was observing the lot, might have been on a lower level, which Lara indicated was usually used only when there was no parking in the upper level, is unlikely. There was no evidence of any activity that would have required his presence on the lower level to the point where he could not conduct his usual patrol pattern of every 20 to 30 minutes.

Ultimately, as the ALJ indicated, it became a question of credibility, which he resolved in favor of the Department.

II

Appellant contends that a 45-day suspension, even with 25 days thereof stayed, is excessive for the type of violation and degree of offense committed. It asserts that a customary penalty for an "intended" violation of Rule 143 is only 10 or 15 days, and the unexpectedness of the activity, coupled with the fact this was a first offense, warrants more lenient treatment. Finally, appellant characterizes the violation based upon the offering of topless entertainment as "actually laughable," and the finding regarding the parking lot security guard unsupported.

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 recommended a 60-day suspension with 30 days stayed. The ALJ declined to adopt this recommendation, stating:

> "[B]ased on the violations of law and conditions which have not been proved, a lesser sanction is in order in the interest of justice. Without any guidance from the parties as to what would be an appropriate sanction, the undersigned under the totality of the circumstances, recommends a sanction as shown in the order."

By its adoption of the proposed decision, the Department adopted his recommended penalty.

We think the Department accorded insufficient consideration to the fact that the Rule 143 activities took place in the context of a private function, and during a

relatively short span of time. In addition, the entertainment was not of the type customarily offered by appellant, which may explain its failure to act as promptly as might have a licensee offering that kind of entertainment on a regular basis. For these reasons, we have concluded that the penalty is excessive such as to amount to an abuse of discretion.

ORDER

The decision of the Department is affirmed except as to penalty. The penalty portion of the decision is reversed and the case is remanded to the Department for reconsideration of the penalty in light of the comments herein.[8]

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

Board Member Ray T. Blair, Jr., did not participate in the deliberation of this appeal.

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[8] 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.