ISSUED MAY 24, 1999

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

II-S CORPORATION dba Nite Life 4307-13 Ohio Street San Diego, California 92104, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7058 File: 48-56991 Reg: 97039510 Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria Date and Place of the Appeals Board Hearing: April 1, 1999 Los Angeles, CA

II-S Corporation, doing business as Nite Life (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its on-sale general public premises license for 40 days, with 10 of those days stayed for a two-year probationary period, for one of its entertainers having fondled her breast and engaged in simulated masturbation in the course of a dance performance, conduct contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code §24200, subdivisions (a) and (b), in conjunction with Rule 143.3 (1)(a) and(1)(b) [4 Cal.Code Regs. §143.3, subds.(1)(a) and (1)(b)].

[1] *The decision of the Department, dated February 26, 1998, is set forth in the appendix.*

Appearances on appeal include appellant II-S Corporation, appearing through its counsel, William R. Winship, Jr., and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on September 1, 1977. Thereafter, the Department instituted an accusation against appellant charging that a dancer employed by appellant engaged in conduct violative of Department rules 143.3(1)(a) and 143.3(1)(b).[2]

An administrative hearing was held on November 7, 1997, at which time oral and documentary evidence was received. At that hearing, San Diego police officer Paul Rorrison testified that, in the course of an investigation at appellant's premises, he observed a dancer massage her breasts and insert her fingers in her bikini bottom and massage her pelvic area with her fingers.

Subsequent to the hearing, the Department issued its decision which determined that Rule 143.3 had been violated, and ordered appellant's license suspended. This timely-filed appeal followed, in which appellant raises the following issues: (1) the testimony of the police officer does not support the allegations of the accusation; (2) appellant presented significant evidence of mitigation; and (3) the penalty is excessive. Since the latter two issues are interrelated, they will be discussed together.

DISCUSSION

I

Appellant challenges the sufficiency of the evidence in support of the charge of

[2] *Rule 143.3, subds. 1(a) and (1(b) prohibit, among other things, a licensee's permitting live entertainment which involves persons performing acts of simulated masturbation or the touching, caressing or fondling of breasts.*

simulated masturbation, and the credibility of Officer Rorrison's testimony with regard to the charge that the dancer massaged her breasts while performing.

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's 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.[3]

Appellant appears to be asking the Appeals Board to reweigh the evidence, arguing that Officer Rorrison did not testify to having observed the dancer touch, caress, rub or massage her crotch area at any time. Without such evidence, appellant contends, the Department did not prove simulated masturbation. Appellant argues (App.Br. 5) that all the officer saw was the dancer "lifting the material [of her bikini bottom] up and down."

Appellant's description of the evidence is inaccurate. For example, Officer Rorrison testified, during direct examination, that during her second dance, in which her bikini top had been removed, the dancer "inserted her fingers under the bottom portion of her thong bikini and at one point she bent over with the rear end facing us. And

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[3] California Constitution, art. XX, § 22; Bus. and Prof. Code §§23084 and 23085; Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

while looking at us from between her legs, she used her thumb and hand to rub her vaginal area outside the bikini" [RT 14]. He further testified [RT 15]:

> Q. And during the first song, about what total period of time, adding them up, did Chrissy [the dancer] have her fingers underneath the bikini material rubbing that area?
>
> A. If it was 20 seconds each time, three times, so a minute, 60 seconds.

Appellant is correct to the extent it acknowledges that the dancer was lifting her bikini bottom up and down. But appellant overlooks that part of Officer Rorrison's testimony that the up and down movement was performed with three of the dancer's fingers inserted under the front of her bikini bottom, the up and down movement being accomplished through the manipulation of the middle finger. This is evidence amply sufficient to support the decision.

Appellant does not challenge, at least directly, the sufficiency of the evidence relating to the charge that the dancer massaged her breasts in the course of her performance. Instead, appellant challenges the credibility of the police officer. Appellant argues that, since the police officer's contemporaneous written report says only that the dancer "moved her left hand to her breast area," his detailed testimony of the dancer's behavior seventeen months later, after he would have been involved in numerous other vice investigations, could not be credible.

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].)

The Administrative Law Judge (ALJ) observed the officer when he testified, and chose to accept the officer's version of events. We cannot say that he abused

discretion in doing so. It is not unknown, nor uncommon, for a witness to remember events in greater detail than a summary of those same events in a report written months earlier, and it was up to the ALJ to decide whether the officer's testimony correctly described what he saw when he issued the citation.

II

Appellant challenges the penalty as excessive, and contends that it presented significant evidence of mitigation.

Appellant asserts that the premises has been the subject of "twice-a-week" vice inspections; its employees and its president have undertaken the Department's L.E.A.D. program; the premises was designed for maximum visibility for safety, control and service; that there are written rules of conduct, and dancers and employees are counseled about such rules; from two to five security people are on the floor watching for violations; and appellant terminates the employment of dancers who violate the rules.

It is well settled that 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, as here, 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].)

In this case, Department counsel sought, in addition to the suspension, a three-year period of probation. Given appellant's history of three Rule 143 violations in the prior eight years (as of the time the accusation was filed), it is hard to quarrel with the Department's notion that a substantial suspension and a lengthy period of probation

was in order. The ALJ, however, while imposing the 30-day suspension, conditioned the stay of a portion of the suspension with only a two-year probationary period, rather than the three sought by Department counsel. The penalty, although substantial, does not appear to be excessive.

Appellant is engaged in a high risk business, one in which dancers in its employ, because tips are part of their compensation package, are tempted to "push the envelope" by engaging in conduct which violates not only appellant's rules of conduct, but the Department's. As long as this is the norm, violations can be expected, and some of those violations may well occur under the scrutiny of a vice officer. When this happens, appellant has little reason to complain. That appellant adopts rules which its dancers are expected to follow, and charges all its employees with the duty of watching to ensure the dancers obey the rules, may well have been taken into account by the ALJ when he reduced the probationary period from three years to two. Whether he did, or not, it would seem that these measures are more to be seen as acts in appellant's self-interest, in keeping with its desire to continue in a high risk form of entertainment without breaking the rules, than measures warranting significant mitigation of an appropriate penalty.

ORDER

The decision of the Department is affirmed.[4]

TED HUNT, CHAIRMAN

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[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 order as provided by §23090.7 of said code.*

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code §23090 et seq.

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