ISSUED OCTOBER 24, 2000

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

II-S CORPORATION dba Nite Life 4307-13 Ohio Street San Diego, CA 92104, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7501 File: 48-56991 Reg: 98045080 Administrative Law Judge at the Dept. Hearing: John P. McCarthy Date and Place of the Appeals Board Hearing: August 3, 2000 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 conditionally revoked appellant's on-sale general public premises license, with imposition of the revocation stayed for a period of 36 months with a condition that a 30-day suspension be served, for permitting an entertainer to perform acts of simulated sexual intercourse, masturbation, and oral copulation, as well as permitting the negotiation of an act of prostitution, being contrary to the universal and generic

[1]The decision of the Department, dated September 9, 1999, is set forth in the appendix.

public welfare and morals provisions of the California Constitution, article XX, §22, and Business and Professions Code §24200, subdivision (a) and (b), arising from violations of the California Code of Regulations, title 4, §143.3(1)(a), and Penal Code §647, subdivision (b).

Appearances on appeal include appellant II-S Corporation, appearing through its counsel, Joshua Kaplan, and the Department of Alcoholic Beverage Control, appearing through its counsel, John Lewis.

FACTS AND PROCEDURAL HISTORY

Appellant's license was issued on September 1, 1997. Thereafter, the Department instituted an accusation against appellant charging the violations set forth above. An administrative hearing was held on July 8, 1999, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the seven counts of the accusation.

Subsequent to the hearing, the Department issued its decision which determined that only counts 2, 3, 4, and 7 were proven, which concerned simulated sexual intercourse, masturbation, oral copulation, and negotiated acts of prostitution.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raised the following issues: (1) the findings are not supported by substantial evidence, (2) appellant is not responsible for the conduct of its performers, and (3) the penalty is excessive.

DISCUSSION

I

Appellant contends the findings 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 [95 L.Ed. 456, 71 S.Ct. 456] and 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].)

Therefore, 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.[2] It is the Department that is authorized by the California Constitution to exercise its discretion whether to suspend or revoke an alcoholic beverage license, if the Department shall reasonably determine for "good cause" that the continuance of such license would be contrary to public welfare or morals.

A. Simulated Acts

The decision states that appellant's entertainer violated 4 California Code of Regulations, §143.3(1)(a), which states in pertinent part:

> "Acts or conduct on licensed premises in violation of this rule are deemed contrary to public welfare and morals, and therefore no on-sale license shall be held at any premises where such conduct or acts are permitted. (¶) Live entertainment is permitted on any licensed premises, except that: (¶) No licensee shall permit any person to perform acts of or acts which simulate: (a) Sexual intercourse, masturbation ... oral copulation ....[3]

The entertainer performed "multiple up and down thrusting moves with her hips" rising and falling over the Department's investigator's crotch (Finding VI). The entertainer while on the floor in front of the investigator, rubbed her covered genital

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

[3]The word "simulate" is defined as follows: "to give the appearance or effect of, to have the characteristics of but without the reality of, to make a pretense of, to give a false indication or appearance of, to take on an external appearance of, or act like ...." (Webster's third International Dictionary (1986), page 2122; Funk & Wagnalls Standard College Dictionary (1973), page 1252; and Webster's New World Dictionary, Third College Edition (1988), page 1251.)

area (Finding VII). Additionally, the entertainer placed her head in the investigator's crotch area, licking and on one occasion, biting, the clothing covering the investigator's genital area (Finding VIII).

The descriptive actions of the entertainer were detailed by Department investigator David Glosson [RT 11-16, 35-42].

The Appeals Board's decision in Two For The Money (1977) AB-6774, concerned the conduct of two dancers, one claimed to have simulated oral copulation, the other sexual intercourse. One dancer knelt, holding her hand in front of her mouth as if holding a cylindrical object, and moved her head, with her mouth open, toward and away from a stationary vertical pole on the stage. The other dancer, while clothed, sat on an investigator's lap and made grinding movements with her hips against his crotch. The Appeals Board found simulation in that case, stating:

> "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 ... 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 simulating 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 exotic dancing is constitutionally protected and cannot be prohibited as alleged simulated sexual activity ... 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.3rd 360 [120 Cal.Rptr. 847].)"

Appellant's argument that it is inconceivable that two people, fully clothed, one stationary (seated) and the other in a squatting motion, could simulate sexual intercourse, is very flawed. A full reading of the record shows the entertainer performing acts, which if done in the nude, would show obvious simulation of the prohibited acts. All the elements of simulated sexual intercourse, masturbation, and oral copulation, are present in the record.

B. Prostitution

The decision found (Finding XIII) that the entertainer who did the dances for investigator Glosson, was asked to orally copulate Glosson - a gift to Glosson of a "blow job" [RT 51-52, 54-55, 60-63]. She consented to do the activity after that evening's close of the business, for the price of $100. Detective Mark Carlson paid her $110.00, which sum was recovered from the entertainer following her arrest [RT 51-52, 54-55]. Apparently, there is a drink which had been ordered by the detectives called a "blow job." Also, the entertainer ordered one of these drinks which was paid for by detective Carlson [RT 62-63].

The record shows that the entertainer negotiated for the sum of $100, an illegal activity coming within the prohibition statutes concerning prostitution. After

the negotiations, she accepted the funds (she received $110 apparently due to the detective not having exact amounts).

Appellant's argument that the conversation concerning the "blow job" was concerning a drink by that name. However, the payment was made in a "heavy" sum of $100, a much greater amount than the cost of a drink.

Additionally, detective Carlson during examination, testified that he paid $20 for the four dances by the entertainer, or $5 per song, and gave the entertainer a $5 tip for her efforts in the dancing [RT 47-48].

Appellant's argument that the $100 payment was in fact a tip for the dancing, does not hold up to scrutiny in the face the relatively small sums paid for the dance and the tip for the dancing.

II

Appellant contends it is not responsible for the conduct of its performers. Appellant argues that imposition of any sanction due to the conduct of the entertainer would amount to strict liability, that is, since appellant adheres to an aggressive and extensive review of the conduct of its entertainers, it did not permit the violations, citing the case of Laube v. Stroh (1992) 2 Cal.App.4th 364 [3 Cal.Rptr.2d 779], for the proposition that there must be knowledge before liability attaches.

The case of Laube v. Stroh, supra, was actually two cases--Laube and Delena, both of which involved restaurants/bars--consolidated for decision by the Court of Appeal.

The Laube portion dealt with surreptitious contraband transactions between patrons and an undercover agent--a type of patron activity concerning which the licensee had no indication and therefore no actual or constructive knowledge–and the court ruled the licensee should not have been required to take preventive steps to suppress that type of unknown patron activity.

The DeLena portion of the Laube case concerned employee misconduct, wherein an off-duty employee on four occasions sold contraband on the licensed premises. The court held that the absence of preventative steps was not dispositive, but the licensee's penalty should be based solely on the imputation to the employer of the off-duty employee's illegal acts.

The imputation to the licensee/employer of an employee's on-premises knowledge and misconduct is well settled in Alcoholic Beverage Control Act case law. (See Harris v. Alcoholic Beverage Control Appeals Board (1962) 197 Cal.App.2d 172 [17 Cal.Rptr. 315, 320]; Morell v. Department of Alcoholic Beverage Control (1962) 204 Cal.App.2d 504 [22 Cal.Rptr. 405, 411]; Mack v. Department of Alcoholic Beverage Control (1960) 178 Cal.App.2d 149 [2 Cal.Rptr. 629, 633]; and Endo v. State Board of Equalization (1956) 143 Cal.App.2d 395 [300 P.2d 366, 370-371].)

The record shows the entertainer solicited her dancing for profit. Whether or not appellant received a portion of those funds, is not relevant. Appellant received the benefit of the stimulating performances, which, one would suppose, create a greater demand for alcoholic beverages, much to appellant's economic advantage.

Additionally, appellant's general manager did the hiring and training of the entertainers, and closely monitored their activities for lawfulness – not quite closely enough in this and the past cases which have come before this Board [Finding XV].

III

Appellant contends the penalty is excessive. 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) appellant had "An extensive record, some eight accusations since 1977." The record shows that six of the eight prior matters were rule 143 violations, five of which concerned the conduct at issue in the present appeal, (2) the Department in its recommendation for penalty to the ALJ, asked that the ALJ only consider the last two matters, a 1994 and 1997 violation, both Rule 143 of the same type as the present appeal. The record shows that the 1994 violation resulted in a 30/15-day suspension. The 1997 violation resulted in a 40/10-day suspension.

Considering such factors, the appropriateness of the penalty must be left to the discretion of the Department. It appears to us to be reasonable to now impress appellant with a stayed revocation "sword" to attempt to obtain compliance with

the law. The Department having exercised its discretion reasonably, the Appeals Board should not disturb the penalty.

With the extensive record of violations by appellant, it appears to us that the penalty is lenient [Finding XIX].

ORDER

The decision of the Department is affirmed.[4]

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
E. LYNN BROWN, 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 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.