**ISSUED NOVEMBER 14, 2000**

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

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| 4805 CONVOY, INC.<br>dba Dream Girls<br>4805 Convoy Street<br>San Diego, CA 92111,<br>Appellant/Licensee,<br><br>v.<br><br>DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,<br>Respondent. | ) | AB-7526<br><br>File: 47-203381<br>Reg: 99045665<br><br>Administrative Law Judge<br>at the Dept. Hearing:<br>Rodolfo Echeverria<br><br>Date and Place of the Appeals Board Hearing:<br>September 7, 2000<br>Los Angeles, CA |

4805 Convoy, Inc., doing business as Dream Girls (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its on-sale general public eating place license for 35 days, with 10 of those days stayed for a probationary period of one year, for having permitted an entertainer to expose her breasts while on a stage but within six feet of the nearest patron, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of 4 Cal. Code

[1]The decision of the Department, dated November 18, 1999, is set forth in the appendix.

Regulations. §143.3, subdivision (2) (Department Rule 143.3(2).)

Appearances on appeal include appellant 4805 Convoy, Inc., appearing through its counsel, William R. Winship, Jr., and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on October 16, 1987. Thereafter, the Department instituted a three-count accusation charging that appellant permitted an entertainer to engage in conduct simulating flagellation and conduct simulating oral copulation, and to perform on a stage while her breasts were exposed but at a distance less than six feet from the nearest patron.

An administrative hearing was held on April 22 and September 21, 1999, following which the Administrative Law Judge (ALJ) issued a proposed decision sustaining only the charge relating to the dancer's having violated the six-foot rule of Rule 143.3(2).[2] The Department adopted the proposed decision as its own, and this timely appeal followed.

In its appeal, appellant raises the following issues: (1) the evidence does not support the findings; (2) appellant did not "permit" the violation; and (3) the penalty is unnecessarily severe, and an abuse of the Department's discretion.

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[2] Rule 143.3, subdivision (2), provides, in pertinent part:

"[E]ntertainers whose breasts and/or buttocks are exposed to view shall perform only upon a stage at least 18 inches above the immediate floor and removed at least six feet from the nearest patron."

DISCUSSION

I

Appellant contends that the findings are not supported by the evidence. It contends that both of the police officers who testified were "severely impeached and hopelessly confused" (App.Br., page 2).

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

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]

What these two broad principles mean in the context of this case, is that it is

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

not the Board's function to retry the case. Nor is it the Board's function to second-guess the Department and the Administrative Law Judge (ALJ) on the issue of witness credibility, which is what appellant is really asking the Board to do. It is well settled that 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].) Viewed in light of these limitations, there is ample evidence in support of the findings.

All three counts of the accusation were based upon the activities of a single performance by a dancer identified as "Jessica." The only count which was sustained was that involving the violation of the requirement that an entertainer whose breasts are exposed must be on a stage and at least six feet from the nearest patron.

San Diego police officer Paul Coney testified [I RT 17-19] that, during an evening visit to appellant's premises, he observed a dancer identified as "Jessica," while in a kneeling position, "back her buttocks back to the end of the stage back to the row of the stage where the chairs are seated." There were no patrons sitting in that area at the time, according to Coney, but an unidentified female then approached to within three feet of Jessica, "smacked" her with a riding crop, and then "just walked through the crowd." When this occurred, Jessica's "back end was towards the back touching, actually, the outer part of the railing where people

sit." Jessica remained in this position "a couple of seconds at most ... approximately five seconds" [I RT 34, 36], and then moved away from the front of the stage.

Janine Edmond testified that she was the person who officer Coney referred to as "Jessica." She normally performs at a totally nude establishment in Lemon grove, and, after being selected show girl of the year, had been invited to perform at Dream Girls [II RT 41, 43]. Although admitting [II RT 45-46] she may have "got a bit too close" to her girl friends, who were watching from the "front row, front stage," she denied being whipped by anyone. As to whether she was ignoring the rule that she remain six feet from a customer, she testified [II RT 50:

> "Pretty much. Not ignoring, just kind of forgot. I'm used to not working with those type of rules, so I guess it kind of slipped my mind with my dance."

We are of the view that the evidence is more than sufficient to establish a violation of Rule 143.3, subdivision (2).[4] That the conduct constituting the violation was of relatively short duration is irrelevant on the issue of whether there was, in fact, a violation of the rule.

II

Appellant offers several reasons why, in its view, it did not "permit" the violation. First, appellant asserts that it had no reason to suspect that someone might "surreptitiously" approach the stage. Second, it claims that it undertook

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[4] Police officer High did not witness that portion of Jessica's performance which was the subject of officer Conley's testimony. He testified concerning the two counts of the accusation which were not sustained.

impressive measures to prevent any such violations, including the employment of extra staff, the holding of regular meetings with its dancers regarding the rules and permitted conduct, and the actual assignment of staff personnel specifically to watch for improper conduct by the dancers. Third, appellant contends that the Department's decision is internally inconsistent, in that the reason the flagellation count was not sustained was because neither appellant nor the dancer could have anticipated someone would "come up and smack" Jessica on the buttocks. If appellant did not permit flagellation because it could not have anticipated it, appellant argues, then it could not have permitted a violation of the six foot rule for the same reason.

The familiar words from Laube v. Stroh (1992) 2 Cal.App.4th 364 [3 Cal.Rptr.2d 779] are apropos here:

> "The Marcucci[5] case perhaps states it best. A licensee has a general, affirmative duty to maintain a lawful establishment. Presumably this duty imposes upon the licensee the obligation to be diligent in anticipation of reasonably possible unlawful activity, and to instruct employees accordingly. Once a licensee knows of a particular violation of the law, that duty becomes specific and focuses on the elimination of the violation. Failure to prevent the problem from recurring, once the licensee knows of it, is to 'permit' by a failure to take preventive action."

While appellant may not have known of the violation, there are a number of reasons why it should have known that such a violation might occur. Its own track record of Rule 143.3 violations, by itself, is enough to put appellant on notice that it is engaged in a high risk operation. The fact that Jessica was a performer at a

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[5] Marcucci v. Board of Equalization (1956) 138 Cal.App.2d 605 [292 P.2d 264.

non-licensed establishment offering totally nude entertainment, where there was no concern for compliance with Rule 143 or anything similar, was another high risk factor working against appellant. That the dancers were in some sort of competition, as indicated in the testimony of John Zea [II RT 12], was another red flag.

While the efforts appellant did exert, both before Jessica's performance, with the instructions and admonitions concerning the dance rules, and then during the performance, when its staff cut off her music and ordered her off stage, would not, in light of Laube v. Stroh, eliminate the existence of a violation, they would at least be evidence of mitigation. Which brings us to appellant's final contention, that regarding penalty.

III

Appellant contends that the penalty is so severe as to constitute an abuse of discretion.

It is well settled that the Department has a very broad discretion when it comes to the imposition of penalty (see Martin v. Alcoholic Beverage Control Appeals Board & Haley (1959) 52 Cal.2d 287 [341 P.2d 296, 300-301]), and its determination of the penalty will not be disturbed in the absence of an abuse of that discretion.

In Martin v. Alcoholic Beverage Control Appeals Board & Haley, supra, the court said , with reference to the penalty in that case:

> "The most that can be said is that reasonable minds might differ as to the propriety of the penalty imposed, but this fact serves only to fortify the conclusion that the Department acted within the broad area of discretion

conferred upon it."

The ALJ declined to follow the Department's recommendation of a stayed revocation and a 60-day suspension, imposing instead the 35-day suspension, 10 days of which were stayed, which is the subject of this appeal. He did so, he explained, because the Department had prevailed on only one of the three counts of the accusation, and because of appellant's mitigation testimony.

The Board has, in cases where it has sensed a desire to punish a licensee, remanded a case to the Department with instructions to reconsider the penalty. That does not appear to be the case here. Instead, the Department had three instances of prior discipline to consider, the most recent of which involved a 1995 incident involving simulated oral copulation, and the touching and caressing of their breasts by dancers. The record does not reveal the nature of the conduct involved in the other disciplinary matters.[6]

There is no doubt that even the reduced penalty ordered by the ALJ, and adopted by the Department will be severe, in terms of its impact upon appellant and its employees. But the cases say that however harsh a penalty may be, that alone is not enough to warrant setting it aside.

ORDER

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[6] The Board's records reveal an additional instance of discipline, involving a sale to a minor, which was not mentioned in the the proposed decision, and, it must be assumed, not considered by the Department. 4805 Convoy, Inc. (1998) AB-6988.

The decision of the Department is affirmed.[7]

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

[7] 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.