ISSUED OCTOBER 22, 1997

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

LETICIA N. and RIGOBERTO L. ROBLES dba Starz 2528 West Rosecrans Avenue Gardena, CA 90249, Appellants/Licensees, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6720 File: 47-060684 Reg: 95033996 Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen Date and Place of Appeals Board Hearing: August 6, 1997 Los Angeles, CA

Leticia N. and Rigoberto L. Robles, doing business as Starz (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which ordered their on-sale general public eating place license suspended for 35 days, with enforcement of 15 days thereof stayed for a probationary period of one year, for having permitted female entertainers in their employ to violate certain prohibitions of §§ 143.2 and 143.3 of the California Code of Regulations (Cal.Code Regs., Title 4, Ch.1, §§143,2 and 143.3 (Rules 143.2 and 143.3), being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, and the

[1] The decision of the Department dated August 22, 1996, is set forth in the appendix.

rules cited..

Appearances on appeal include appellants Leticia N. and Rigoberto L. Robles, appearing through their counsel, Ralph Barat Saltsman; and the Department of Alcoholic Beverage Control, appearing through its counsel, David B. Wainstein.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale general public eating place license was issued on July 30, 1974. Thereafter, the Department filed an accusation alleging in 18 counts that on May 19 and 23, 1995, dancers employed by appellants violated various portions of Rules 143.2 and 143.3, subdivision 2 (Cal.Code Regs., title 4, §§143.2 and 143.3, subd. (2)) in the course of entertaining patrons.

An administrative hearing was held on March 5, 1996, and June 12, 1996, at which time the Department presented testimony of two investigators (Shawn Collins and Eric Froeschner), and appellants presented the testimony of Dr. Theodric Blue Hendrix, Jr., a Board-certified obstetrician and gynecologist; appellants' manager, Samantha Sanson; Kevin Bruff, a DJ employed by appellants; and Ivan Spencer, a patron.

Department investigator Collins testified that he visited appellants' premises on two occasions. On the first visit, on May 19, 1995, he observed entertainer Johnson perform a "chair dance" while wearing a bikini top and a "thong-type bottom" consisting of "a very thin piece of material in the back" [I RT 31]. He observed what he understood was the cleft of her buttocks, which he described as "where each half

comes together to form the crack" [I RT 32].[2]

Investigator Collins testified that Johnson performed a "chair dance" for him, in the course of which she spread his legs apart, and, while standing between them, first placed her buttocks six inches from his face, then placed her buttocks under his groin area, rubbed several times, pressed her breast on his face, pulled her bikini top aside exposing the top of her left areola, bent over and rubbed her middle finger over the top of her covered vagina, and again rubbed his groin area [I RT 34]. He testified that during her dance she also caressed her breast approximately four times [I RT 34-35]. When Johnson was bent over, he could see both her buttocks clearly [I RT 35]. None of this took place on a stage [I RT 36].

Entertainers Church and Shepard each performed, separately, for Collins during his second visit on May 23, 1995. Church was wearing a "multi-colored, thong-type

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[2] The ALJ sustained Mr. Saltsman's objection to the remaining portion of Collins' answer, that "when you were looking at the back of her, the material disappeared." However, on cross-examination, appellant's own counsel elicited essentially the same testimony [RT 70]:

"Q. So was there any time when you could not see the material at all?

A. Yes.

Q. When was that?

A. When she was standing up.

Q. So that the material disappeared altogether?

A. Yes."

bikini," the thong of which was very thin in the back, permitting him to see each buttock [I RT 40]. He described Church's performance as similar to his earlier experience with Johnson. Church "repeatedly" ground her buttocks into his groin area [I RT 41], twice placed her breasts close to his face, on one of the times touching his nose, and once in the course of the performance straddled his right leg and thrust her hips in a sexual manner [I RT 41]. At times her back was to him, and she would rub her buttocks into his groin. When her back was to him, he could clearly see her buttocks [I RT 44].

Collins described Shepard's costume as similar to that of the other two performers [I RT 79]. When she performed for him, she straddled the middle portion of his thigh and thrust her hips, at one point rubbing her vaginal area on his thigh [I RT 84-85].

Collins conceded that he had taken no medical or anatomy courses in the course of his education. He said he was told by a Department training instructor that the "cleft of the buttocks is where two halves come together to form the crack" [I RT 51-52].

Shepard also performed for Department investigator Froeschner who had accompanied Collins on the May 23, 1995, visit. Froeschner testified that Shepard pressed her buttocks into his groin, rubbing up and down for approximately three to five seconds, doing this on three occasions in the course of the dance. In addition, he testified, she pressed his face with her breast, and, while straddling his leg, rubbed her

covered vagina up and down his arm and hand [I RT 90-91, 101-103].

Ms. Sanson, manager of the premises, identified certain photos, later used in the course of the testimony of Dr. Hendrix. Bruff, the DJ, testified that he was present on both evenings in question, and denied that any of the activity described by the investigators took place. Spencer, the patron, testified similarly.

Dr. Hendrix testified that, in his opinion, the cleft of the buttocks was the deepest crease between the buttocks, with the anus being the place where the cleft would reside [II RT 63, 66]. Shown one of the photos (Exhibit B) offered as an exhibit, Dr. Hendrix agreed there were two reasons why the cleft, as he defined it, was not visible - the clothing was covering part of it, and the buttocks themselves were covering the remainder [II RT 77-78]. He conceded, however, that the dictionary definition of buttock, as "either of the two rounded prominences, separated by a median cleft that forms the lower part of the back in man and consists largely of the gluteus muscles"[3] was, "as between excellent and poor," a "fair" definition, and would describe the area someone may be able to recognize as the cleft [II RT 70].

Following the hearing, the Administrative Law Judge (ALJ) filed his proposed decision in which he sustained the charges of the accusation with respect to eight of the counts (2, 4, 5, 7, 10, 12, 15, 17). The ALJ found the Department had not

[3] Webster's Third New International Dictionary (Unabridged), 1986, page 305.

sustained the charges with respect to five counts (1, 6, 8,11 and 13),[4] and the Department dismissed five counts (3, 9, 14, 16 and 18) in the course of the hearing. The ALJ rejected the definition of "cleft of the buttocks" tendered by appellant's expert. Instead, he stated that it was highly unlikely that the rule contemplated an arcane medical definition, and more likely contemplated the common dictionary understanding of the term, as urged by the Department - the definition Dr. Hendrix conceded represented a fair middle point.

Thereafter, appellants filed their timely notice of appeal. In their appeal, appellants appear not to challenge the correctness of the Department's decision with respect to counts 4 and 5. As to the remainder of the counts which were sustained by the Department, appellants contend with respect to counts 2, 7 and 12 that the Department has exceeded its jurisdiction by expanding the definitional terms of rule 143.2, subdivision (2), to include parts of the body not necessarily within the rule when read in a narrow and clear manner, as required by the First Amendment. Appellants contend that the Department lacks a clear and understandable definition of the term "cleft of the buttocks," and argues that the Department's failure to use the correct definition, the one given by appellants' expert witness, amounts to reversible

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[4] Counts 1, 6 and 11, which charged appellants with having permitted three female employees to expose the clefts of their buttocks, in violation of rule 143.2, subdivision (1), were dismissed on the ground the evidence failed to show the employees had been employed to sell or serve alcoholic beverages. Counts 8 and 13, charging appellants with having permitted two of the three employees to expose the clefts of their buttocks while not on a stage, in violation of rule 143.3, subdivision (2), were dismissed because the rule did not apply.

error. Similarly, as to counts 10, 15 and 17, appellants argue that the conduct described by the investigators as "simulated sexual intercourse" was simply dancing; as a consequence, that definitional term also lacks clarity. Appellants contend that by relying on the "subjective guessing" by untrained investigators as to the meanings of these terms, Rule 143 is not enforced even-handedly. Finally, appellants attack the penalty as excessive.

DISCUSSION

a. Issue involving exposure of the cleft of the buttocks (counts 2, 7 and 12).

Appellants contend with respect to counts 2, 7 and 12 that the Department has exceeded its jurisdiction by expanding the definitional terms of rule 143.2, subdivision (2), to include parts of the body not necessarily within the rule when read in a narrow and clear manner, as required by the First Amendment. Appellants contend that the Department lacks a clear and understandable definition of the term "cleft of the buttocks," and argues that the Department's failure to use the correct definition, the one given by appellants' expert witness, amounts to reversible error.

The term buttocks is well-defined, and is generally understood to refer to the two prominences consisting largely of the gluteous muscles. The dispute in this case is over the meaning of the narrower term "cleft of the buttocks." Either of the definitions contended for in this case, the anatomical definition urged by appellants and the dictionary meaning urged by the Department, would appear to contemplate some degree of partial nudity.

Appellants do not challenge the investigators' descriptions of the manner in which the three women who were the subject of their testimony were attired. Each of the three was dressed in similar fashion, wearing what were described as thong-type bikinis, the bottom half of which consisted of a paneled front and a narrow band in the back which disappeared between the two sides of the buttocks, although covering the anus and vaginal area. Such attire clearly leaves exposed the cleft of the buttocks as defined in accordance with the standard dictionary definition quoted above (see page 5, supra).

Appellants argue in their brief that the use in rule 143.2, subdivision (1), of the five anatomical terms - pubic hair, anus, cleft of the buttocks, vulva and genitals - requires that the five terms be construed in an interrelated fashion. Thus, they contend, the anatomical or medical definition of the term "cleft of the buttocks" should be preferred over the ordinary meaning of the term based on a dictionary definition. Under the definition put forth by appellant's expert medical witness, the cleft of the buttocks is where the two hemispheres which form the buttocks physically connect, where any separation could only be done surgically. According to appellant's expert, the buttocks themselves would prevent the cleft from being exposed. Under this approach, the cleft would not be the surface area where the hemispheres of the buttocks happen to touch - forming the crack or line where the hemispheres come together, as observed by the investigators. Thus, under appellants' theory, there was no violation of either rule, since even the narrow band described by the investigators

admittedly concealed the anus and vaginal area.

Appellants seek a bright line definition of the term "cleft of the buttocks." We think the Department, by relying upon dictionary definitions for the meaning of its rule, provides, by its interpretation, as bright a line as circumstances permit. The thong bikinis described by the investigators in this case, with a rear strap that is essentially invisible or concealed between the two buttocks, will not meet the requirement of the rule, and licensees who wish to offer this type of viewing for their patrons would be expected to offer it only from a stage. Absent more compelling evidence than what appellant has presented here for the usage of medical terminology, we see no reason not to defer to the Department's interpretation of its own rule, so long as it is not unreasonable.

The Board visited a similar issue in Angels Night Club, Inc. (1995) AB-6487, and there looked as well to the standard dictionary meaning of the term buttock to arrive at the meaning of the term "cleft of the buttocks."[5] We see no reason in this case to formulate a definition of "cleft of the buttocks" that differs from what was said there.

b. Issue involving simulated sexual intercourse (counts 10, 15 and 17).

Appellants contend that the conduct described by the investigators as "simulated sexual intercourse" was simply dancing. Appellants claim that the term "simulated

[5] In footnote 5 of that decision, the Board quoted from Webster's Third New International Dictionary, 1986, which defines the word buttock as "either of the two rounded prominences separated by a median cleft that form the lower part of the back in man [woman] and consists largely of the gluteus muscles."

sexual intercourse" lacks clarity, and contend that by relying on the "subjective guessing" by untrained investigators as to the meanings of the terms, Rule 143 is not enforced even-handedly.

We know that some dance forms can appear erotic, and that on occasion there may be contact between the lower portions of the male and female bodies in the course of such dancing. Nonetheless, where the degree of sexual content in the performance, combined with provocative costumes worn by the dancers, rises to certain levels, it may not be unreasonable to perceive the conduct as a simulation of sexual intercourse.

The ALJ's findings were conclusory in nature, without pinpointing any particular thing the dancers did which he perceived as simulating sexual intercourse. However, it would not be unreasonable for the ALJ to have concluded, as the investigator witnesses did, that the rubbing of the dancers' virtually-unclad buttocks directly against the investigators' groin areas,[6] was simulated sexual intercourse within the meaning of Rule 143. Anyone observing this conduct in isolation would probably reach the same conclusion.

The Board addressed the issue of simulated sexual intercourse in Gypsie, Inc.

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[6] Investigator Collins testified that entertainer Ana Johnson did this three different times in the course of a chair dance performed for him [RT 34], and that entertainer Stephanie Church repeatedly ground her buttocks into his groin and straddled his hip and engaged in thrusting motions, in another such "dance" [RT 41, 44]. Investigator Froeschner testified that entertainer Kimberly Shepard pressed her buttocks into his groin and rubbed up and down his groin and stomach on three occasions during a similar dance for him [RT 90].

(1989) AB-5718, which, interestingly enough, involved male entertainers. The Board looked at such factors as the proximity of the bodies of the persons involved, the manner in which they were clothed, and the nature of the movements of the actors, and determined that, in some of the instances challenged by the Department, there was simulated sexual intercourse. Importantly, the Board acknowledged in Gypsie, Inc. that the Department was entitled to some deference in interpreting its own rules.

We think that the Department introduced sufficient evidence in the instant case to establish that the alleged acts of simulated sexual intercourse occurred, and that its interpretation of the rule as applicable to such conduct was a reasonable interpretation.

c. Issue concerning penalty.

Appellants contend that the penalty ordered is excessive in light of the fact that appellants have been licensed since 1974, have had only one prior violation (in 1993), and have vigorously complied with the ABC rules of conduct, failing only with respect to counts 4 and 5.

It is true, as appellants point out, 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]), but 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].)

Appellants' contention that the penalty is excessive was grounded on their

assumption that only counts 4 and 5 of the accusation would survive appeal. Since that is not the case, and since the suspension which was ordered is reasonable in light of the number and kinds of violations established, appellants' contention is without merit.

CONCLUSION

The decision of the Department is affirmed.[7]

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

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[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 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.