ISSUED JUNE 11, 1998

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

JAGG, INC. dba Captain Creme's 23642 Rockfield Lake Forest, CA 92630, Appellant/licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6878 File: 48-221463 Reg: 96034922 Administrative Law Judge at the Dept. Hearing: John A. Willd Date and Place of the Appeals Board Hearing: April 1, 1998 Los Angeles, CA

Jagg, Inc., doing business as Captain Creme's (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for ten days, with five days thereof stayed, for having permitted an entertainer to mingle with patrons while attired in a manner which exposed the cleft of her buttocks, and to perform acts which included her touching her buttocks against the chest and groin of a Department investigator and the touching of her

[1]The decision of the Department, dated May 15, 1997, is set forth in the appendix.

breasts against his chest, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from violations of Rules 143.2(2) and 143.3(1)(b) [4 Cal.Code Regs. §143.2, subd. (2); 143.3, subd. (1)(b)], and Business and Professions Code §§23804 and 24200, subdivisions (a) and (b).

Appearances on appeal include appellant Jagg, Inc., appearing through its counsel, Ralph Barat Saltsman, 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 13, 1988. Thereafter, the Department instituted a four-count accusation against appellant charging that on June 21, 1995, two entertainers
mingled with patrons while attired in a manner which exposed the clefts of their buttocks, and engaged in the touching of their breasts and buttocks to the chest and groin parts of the bodies of Department investigators. An amended accusation was later filed, adding a fifth count, which charged the violation of a condition on the license prohibiting appellant from permitting any violations of Rule 143.3 and 143.4.

An administrative hearing was held on March 19, 1997, at which time oral and documentary evidence was received. At that hearing, no testimony or

evidence was presented with respect to two counts regarding one of the entertainers.

As to the remaining counts, Department investigator Parzik testified that on the night in question, dancer Donna Marie Newsome danced on a stage while topless and wearing a thong-type bikini bottom. After completing her dance, she left the stage and walked around the room expressing her thanks to people who had tipped her. When she approached the table where Department investigators were seated, Parzik asked her to perform a chair dance for him. According to his testimony, Newsome exposed her buttocks to him in the course of the chair dance. Newsome was wearing the bikini bottom in which she had danced, as well as the top. Newsome turned her back to Parzik, and he observed that the rear portion of her bikini bottom had disappeared into the cleavage or crack between her two buttocks. Parzik also testified that at other times during the dance, Newsome rubbed her buttocks against his chest and groin area, and rubbed her breasts against his chest [RT 17-20].

Donna Marie Newsome also testified, and denied Parzik's assertions. She identified a photo of herself taken while she was wearing a bikini of the same style she wore on the night in question, which showed that the material did not disappear between the cheeks of her buttocks. She also denied rubbing her buttocks on Parzik's chest and groin, stating that would have been impossible

because of the height of the couch on which Parzik was seated, and denied as well touching his chest with her breasts [RT 44].

Subsequent to the hearing, the Department issued its decision which determined that the Department had satisfied the allegations in the accusation relating to Newsome. In determining the period of suspension, the Administrative Law Judge (ALJ) cited appellant's efforts to comply with Rules 143.2 and 143.3, which he described as "a rather decent effort."

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant contends that neither rule was violated, since the entertainer did not touch her own breasts or buttocks, and did not expose the cleft of her buttocks.

DISCUSSION

Appellant initially contends that since the entertainer did not touch her own breasts or buttocks, but instead her breasts and buttocks came into contact with the investigator, Rule 143.3(1)(b) is not applicable. It argues that previous Board cases have all involved circumstances where the entertainers were touching their own bodies, and suggests that the Department's position endangers such traditional ballroom dancing, such as the waltz, tango, and foxtrot.[2]

[2] Appellant also suggests that the rule should not apply where the patron involved in the touching is a department investigator. In our view, in the absence of some identifiably improper conduct on the part of the investigator, such a prohibitive application of the rule would be entirely unreasonable.

The Department cites the decision of the Appeals Board in Hollywood Sunset (1998) AB-6827, where some of the conduct was very similar to that in this case. The Appeals Board there relied on a definition of touch which encompassed a contact, a rub, or a contact in a moving motion. We see no reason to depart from that reasoning, and the facts here dictate a similar result.

Appellant argues there must be skin-to-skin touching, but concedes that an entertainer touching, fondling or caressing her own breast or vaginal area, even though covered with clothing, would probably run afoul of the rule. Here, where there was clearly the touching of a partially exposed breast and exposed buttocks skin to a patron's cloth-covered body, in a manner totally alien to any traditional ballroom dance style, the rule is clearly violated.

Appellant also contends that the Department investigator lacks expertise upon which to base his conclusion that the cleft of Newsome's buttocks was exposed while she performed the chair dance. Thus, appellant asserts, it was error for the Department to base its decision on Parzik's unsupported conclusion.

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."

Appellant does not challenge Parzik's testimony of what he saw, which was a thong-type bikini, the bottom half of which included a narrow band in the back

which disappeared between the two sides of the buttocks. Such attire clearly leaves exposed the cleft of the buttocks as defined in accordance with the standard dictionary definition of buttock:[3]

> "either of the two rounded prominences, separated by a median cleft that forms the lower part of the back in man [and woman] and consists largely of the gluteus muscles"

We think the Department, by relying upon a dictionary definition for the meaning of its rule, provides, by its interpretation, a sufficiently bright line. The thong bikini 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.

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." The Board also considered the issue in Robles (1997) AB-6720, where it expressed its preference for the dictionary definition of the term over an anatomical or medical definition.

We see no reason in this case to accept any definition of "cleft of the buttocks" that differs from what was said in Robles. And the fact that Parzik may

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[3] Webster's Third New International Dictionary, 1986.

lack a full understanding of the meaning of the term is immaterial; what is critical to the decision is what he saw.

CONCLUSION

The decision of the Department is affirmed.[4]

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

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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 decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate 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.