

ISSUED SEPTEMBER 2, 1999

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD
OF THE STATE OF CALIFORNIA

JAGG, INC.	)	AB-6954a
dba Captain Cremes)	
23642 Rockfield	)	File: 48-221463
Lake Forest, CA 92630,	)	Reg: 97038802
Appellant/Licensee,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Rodolpho Echeverria
)	
DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	July 1, 1999
	)	Los Angeles, CA
)	

Jagg, Inc., doing business as Captain Cremes (appellant), appeals from a Decision Following Appeals Board Decision ¹ which reimposed a license suspension of 35 days, with 10 days stayed for a probationary period of one year after the Appeals Board, on September 24, 1998, affirmed the decision of the Department in

¹The Decision Following Appeals Board Decision, dated February 1, 1999, is set forth in the appendix.

AB-6954,² but reversed the penalty and remanded the matter to the Department for reconsideration of the penalty.

Appearances on appeal include appellant Jagg, Inc., appearing through its counsel, Ralph Saltsman, and the Department of Alcoholic Beverage Control, appearing through its counsel, David Sakamoto.

FACTS AND PROCEDURAL HISTORY

PRIOR APPEAL: The Department instituted a four-count accusation against appellant charging that, on July 9, 1996, appellant permitted one entertainer to expose her buttocks when not on a stage at least 18 inches high and six feet from the nearest patron and another entertainer to fondle her breasts and genitals, in violation of Department Rule 143.3 (counts 1 and 3) and a condition on appellant's license (count 4, sub-counts A and C.). In addition, the accusation charged appellant with permitting an entertainer to perform acts which simulated sexual intercourse, masturbation, and oral copulation in violation of Department Rule 143.3 (count 2) and a condition on appellant's license (count 4, sub-count B). Parts (a) and (b) of the condition involved correspond, essentially word for word, to Rules 143.3(1) and 143.3(2), respectively.

Subsequent to a hearing, the Department issued its decision which determined that the Rule 143.3 violations had occurred as charged in counts 1 and

²The decision of the Department, dated September 25, 1997, is set forth in the appendix.

3 and that the condition violations had occurred as charged in count 4, sub-counts A and C. The decision also determined that the violations charged in counts 2 and 4, sub-count B, had not been established. The license was ordered suspended for 35 days, with 10 of the days of suspension stayed for a probationary period of one year. The Order stated that the penalty was imposed “[t]aking into consideration that the Department failed to establish the allegations in Count 2 and Count 4 Sub-Count B”

On appeal, appellant argued that the Department illegally determined the penalty by considering condition violations that duplicated rule violations. The Department did not disagree with appellant's argument, and asked that it be given the opportunity to review the penalty. This Board agreed, relying on Cohan v. Department of Alcoholic Beverage Control (1978) 76 Cal.App.3d 905 [143 Cal.Rptr. 199], and affirmed the Department decision, but reversed the penalty and remanded the matter to the Department for reconsideration of the penalty.

PRESENT APPEAL: On remand, the Department issued its February 1, 1999, decision imposing the same penalty of 35 days' suspension, with 10 days stayed for a one-year probationary period. However, the penalty was said to be based this time on Determinations I, III, and V of the original administrative decision, which find violations of Rules 143.3(2) and 143.3(1)(b). This decision omitted reference to Determination IV which found violations of conditions.

Appellant filed a timely re-appeal with the Appeals Board, arguing that imposition of the same penalty on reconsideration is an abuse of discretion.

DISCUSSION

Appellant asserts that, “[i]n a most amazing display of disregard for the directive given by the Appeals Board, “ the Department “simply re-imposed the same penalty under the guise of eliminating the condition violation as a basis for penalty.” Appellant argues that “if a 35 day suspension with 10 days stayed constitutes an abuse of discretion in the initial decision rendered by the Department, then a 35 day suspension with 10 days stayed constitutes an abuse of discretion when issued in the Department's Decision Following Appeals Board Decision.” (App. Br. at 2.) Appellant asks that the penalty be reversed.

In the original appeal, the penalty imposed was based on both the Rule 143.3 violations (Counts 1 and 3) and the condition violations (Count 4, sub-counts A and C). Unfortunately, as is too often the case, the ALJ did not break down the penalty to show how much was attributable to each violation. However, some part of the original penalty was attributable to the condition violation.

We agree with appellant that the Department may not simply remove any reference to the condition violations and say, in essence, that no part of the penalty was attributable to those violations. With absolutely no explanation or justification, reimposition of the same penalty when two counts were reversed is arbitrary and an abuse of discretion.

ORDER

The decision of the Department is reversed.³

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

³This 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.