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

**AB-9675**
File: 48-359693 Reg: 16085102

CLUB 215, INC.,
dba Club 215
2680 South La Cadena Drive,
Colton, CA 92324,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: D. Huebel

Appeals Board Hearing: October 4, 2018
Ontario, CA

**ISSUED OCTOBER 19, 2018**

Appearances: *Appellant*: Roger Jon Diamond as counsel for Club 215, Inc., doing business as Club 215.
*Respondent*: Jennifer M. Casey as counsel for the Department of Alcoholic Beverage Control.

OPINION

Club 215, Inc., doing business as Club 215 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] suspending its license for 30 days because appellant allowed several different individuals to violate rules 143.3(1)(a), 143.3(1)(c), and 143.3(2), and because on two occasions appellant's employees refused to comply with a request to examine appellant's books and records, as required by Business and Professions Code section 25753.

1. The decision of the Department, dated November 15, 2017, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on February 16, 2000. On September 26, 1997, appellant's license was subject to discipline for violations of rules 143.2(2), 143.2(3), and 143.3(2).

On December 12, 2016, the Department filed a 16-count accusation against appellant. Counts 1 through 7 and 10 through 13 each alleged that appellant allowed an agent or employee whose breasts or buttocks were exposed to perform while not on a stage at least 18 inches high and removed at least six feet from the nearest patron, a violation of rule 143.3(2). (See Code Regs., tit. 4, § 143.3(2).) Counts 8 and 9 alleged that appellant allowed an agent or employee to simulate a sexual act upon the premises, a violation of rule 143.3(1)(a). (See Code Regs., tit. 4, § 143.3(1)(a).) Count 14 alleged appellant's agent or employee permitted an individual to remain on the premises while her pubic hair, anus, vulva, or genitals were exposed to public view, a violation of rule 143.3(1)(c). (See Code Regs., tit. 4, § 143.3(1)(c).) Counts 15 and 16 each alleged that appellant's agent or employee failed to allow or refused to comply with a request to examine appellant's books and records, a violation of section 25753. (See Bus. & Prof. Code, § 25753.)

At the administrative hearing held on August 24, 2017, documentary evidence was received and testimony regarding the alleged violations was presented by Agent Vincent Rock of the Department of Alcoholic Beverage Control; by Job Romo, appellant's manager; by Fernando Navarro, appellant's employee; by Catherine Villareal, a performer at the licensed premises; and by Todd Gibboney, appellant's manager and chief executive officer.

Counts 1 and 2

Testimony established that on December 19, 2015, Agent Rock entered the licensed premises in a plainclothes capacity. Agent Rock sat in one of the chairs placed around the perimeter of a stage. Agent Rock ordered a Coors Light bottled beer for himself, which he was served and drank. The stage was somewhat rectangular in shape, raised approximately 18 inches from the floor, and had a fixed metal vertical pole near the center of the stage. A four inch wide drink/tip rail, raised approximately 12 inches high, ran along the perimeter of the stage. Along the border of the stage was a fixed two-inch thick horizontal metal pole, described as a "trip rail," inset from the edge of the stage approximately seven inches. Measuring from the back side of the trip rail—the side that was furthest away from the edge of the stage—to the edge of the drink/tip rail is three feet, or 36 inches.

At 8:40 p.m. the disc jockey (DJ) announced a dancer by the name of Mya, who took to the stage. Mya, wearing a bra and underwear, began dancing on the stage. During the second song, Mya removed her bra, exposing her breasts and nipples. Agent Rock was seated at the tip rail, approximately three feet away from Mya while she performed and he could see her breasts and nipples. (Count 1.) Mya eventually exited the stage.

The DJ announced another dancer, named Viera, who came out onto the stage wearing a black, one-piece lingerie. Viera danced on the stage to the first song. During the second song and dance Viera pulled the top of her lingerie down, exposing her breasts and nipples, during which she was approximately two feet away from Agent Rock, who could see the entirety of her breasts and nipples. Viera then got down on

both of her knees and pushed her chest out over the edge of the stage, with her breasts and nipples exposed, approximately one foot away from Agent Rock. (Count 2.)

Agent Rock left at approximately 9:50 p.m.

Counts 3 and 4

On January 8, 2016, at approximately 11:05 p.m., Agent Rock entered the licensed premises in a plainclothes capacity. He ordered a Coors Light bottled beer, which he was served and drank.

At 11:30 p.m., Viera—the same dancer from December 19, 2015—began dancing on the stage, wearing only a gold-colored bra and black underwear. While dancing to the second song on the stage, Viera removed her bra, exposing her breasts and nipples, which Agent Rock could see while seated at the tip rail, approximately three feet away from Viera. (Count 3.) Viera eventually left the stage.

A second dancer, identified only as Amber, began dancing on the stage, wearing a pink bra and black underwear. During her performance on stage, Amber removed her bra and Agent Rock could see Amber's breasts and nipples from approximately three feet away at the tip rail. (Count 4.)

Agent Rock left at about 1:00 a.m.

Counts 5 and 6

On January 21, 2016, at 8:35 p.m., Agents Rock, Gardner, and Gonzalmen entered the licensed premises in an undercover capacity. Agent Rock ordered a bottle of Coors Light beer, which he was served and drank.

At 8:40 p.m., a dancer by the stage name "Roxy," also known as Crystal Marie Rodriguez, took to the stage wearing a dark colored bra and underwear and began to

dance. During the second song, while Roxy was on the stage approximately two feet away from Agent Rock, Roxy removed her bra, exposing her breasts and nipples, which Agent Rock could see from his position at the tip rail. Roxy's breasts were exposed within approximately two feet of Agent Rock for a duration of 30 seconds on two separate occasions while she was on stage. (Count 5.) Roxy eventually left the stage.

A second dancer named Viera—the same dancer from December 19, 2015, and January 8, 2016—took the stage. Viera wore a gold-colored bra and black underwear while she danced on stage. At some point during her performance, she removed her bra, exposing her breasts and nipples, which Agent Rock could see from approximately two feet away. (Count 6.)

Count 7 through 14

On May 13, 2016, at 8:25 p.m., Agents Rock and Castillo, in a plainclothes capacity, entered the licensed premises. Agent Rock ordered a Modelo beer, which he was served and drank.

A dancer by the stage name "Jewel," also known as Jonelle Lashon Iles, began dancing on the stage wearing a black bra and white underwear. During the second song on stage, Jewel removed her bra, exposing her breasts and nipples, which Agent Rock could see from his position a the tip rail, with Jewel approximately three to four feet away from Agent Rock. (Count 7.) At some point while Jewel was on the stage and approximately three to four feet away from Agent Rock, she rubbed her clitoris and vaginal area with her index and middle fingers in a vertical motion, simulating masturbation for seven seconds. (Count 8.) Jewel eventually left the stage.

A second dancer by the stage name "Layla," also known as Christy Ann Donnelly, began dancing on the stage wearing an animal print bra and underwear. During the second song, while she was on the stage approximately four feet away from Agent Rock, Layla removed her bra, exposing her breasts and nipples, which Agent Rock saw. Thereafter, while Layla was on the stage, Agent Rock saw Layla rub her clitoris and vaginal area with her middle and index fingers over her underwear, for approximately three seconds, simulating masturbation. (Count 9.) Layla eventually left the stage.

A third dancer by the stage name "Lulu," also known as Thi Nga Thach, danced on the stage wearing a white bra and white underwear. During the second song on stage Lulu removed her bra, exposing her breasts and nipples, which Agent Rock could see from approximately three feet away. (Count 10.) While Lulu was on the stage, Agent Rock saw Lulu, on two separate occasions, rub her clitoris area with her middle finger over her underwear, for approximately five seconds, simulating masturbation. (Count 11.) After the second song, Lulu got off the stage.

A fourth dancer by the stage name "Kashmir," also known as Janel Martinez, danced on the stage wearing a purple bra and underwear. She danced for two songs. During the second song, while Kashmir was on the stage approximately three feet from Agent Rock for 15 seconds, Kashmir removed her bra, exposing her breasts and nipples, which Agent Rock could see. (Count 12.)

Thereafter the Department inspection team entered the licensed premises and the stage dancing stopped. The agents conducted an inspection for 30 to 35 minutes

and then left. During the inspection the agents interviewed and photographed the dancers who were present in the licensed premises.

After the inspection team agents left, the DJ announced a fifth dancer to the stage, by the stage name "Jocelyn," also known as Catherine Rodriguez Villareal. Jocelyn danced on the stage wearing a white bra and underwear. During her performance on the stage Jocelyn removed her bra, exposing her breasts and nipples, while Agent Rock observed from a distance of approximately three feet away from Jocelyn. (Count 13.) Agent Rock thereafter observed Jocelyn sit down on the stage on her buttocks, plant the soles of her feet on the stage, spread her legs apart, and with her hand she pulled her underwear to the side, exposing her genitals, including the labia, for approximately three seconds. (Count 14.) After exposing her genitals for approximately three seconds, she moved her underwear back in place and continued her dance performance on stage. Agent Rock then observed as Jocelyn danced topless on the stage approximately one foot away from an unknown male patron with her breasts and nipples exposed.

Count 15

On May 26, 2016, a Department agent hand-delivered to Todd Gibboney, appellant's CEO, a Department Notice to Produce Records. Gibboney initialed the notice at the bottom left to acknowledge receipt thereof. The notice, dated May 26, 2015, requested, pursuant to provisions of section 25753 of the Business and Professions Code, that appellant furnish the requested information within 10 days of the date of the notice. The notice further informed appellant that failure to comply within the time period would result in an accusation filed against appellant's license. The

information requested included (1) copies of any and all work schedules for any and all staff members including employees, security, dancers, independent contractors, etc., at the licensed premises, and (2) copies of any and all employee records for all staff members, including stage names, names, addresses, telephone numbers, and driver's license numbers, at the licensed premises. Agent Rock was listed as the person to contact. The Riverside District Office address, telephone number, and Agent Rock's email address were provided on the notice.

Neither the Department nor Agent Rock received the requested information from appellant within the time frame requested. Gibboney has the authority to release such requested documents. There was no evidence presented that Gibboney or appellant were not capable of complying within the time period.

Count 16

On June 15, 2016, a Department agent hand-delivered to Job Romo, appellant's daytime manager and DJ, a Department Notice to Produce Records. Romo initialed the notice at the bottom left to acknowledge receipt thereof. The notice, dated June 17, 2017, requested, pursuant to provision of section 25753 of the Business and Professions Code, that appellant furnish the requested information within 10 days of the date of the notice. The notice further informed appellant that failure to comply within the time period would result in an accusation filed against appellant's license. The information requested included (1) copies of any and all work schedules for any and all staff members including employees, security, dancers, independent contractors, etc., at the licensed premises, and (2) copies of any and all employee records for all staff members, including stage names, names, addresses, telephone numbers, and driver's

license numbers, at the licensed premises. Agent Rock was listed as the person to contact. The Riverside District Office address, telephone number, and Agent Rock's email address were provided on the notice.

Romo informed the agent that he did not have access to the records requested and placed the Department notice in the drop box outside Gibboney's locked office inside the licensed premises. Romo thereafter advised Gibboney of the Department's notice and that he had placed said notice in Gibboney's box outside his office. Gibboney received the notice.

Neither the Department nor Agent Rock received the requested information from appellant within the time frame requested.

On June 29, a Department agent hand-delivered to Romo another Department Notice to produce records. Romo initialed the notice at the bottom left to acknowledge receipt thereof. The notice, dated June 17, 2017, requested, pursuant to provision of section 25753 of the Business and Professions Code, that appellant furnish the requested information within 10 days of the date of the notice. The notice further informed appellant that failure to comply within the time period would result in an accusation filed against appellant's license. The information requested included (1) copies of any and all work schedules for any and all staff members including employees, security, dancers, independent contractors, etc., at the licensed premises, and (2) copies of any and all employee records for all staff members, including stage names, names, addresses, telephone numbers, and driver's license numbers, at the licensed premises. Agent Rock was listed as the person to contact. The Riverside

District Office address, telephone number, and Agent Rock's email address were provided on the notice.

Romo informed the agent that he did not have access to the records requested and placed the Department notice in the drop box outside Gibboney's locked office inside the licensed premises. Romo thereafter advised Gibboney of the Department's notice and that he had placed said notice in Gibboney's box outside his office. Gibboney received the notice.

Thereafter Agent Rock received from Gibboney an incomplete response to the Notice to Produce. The information not produced included the work schedules and employee records, including stage names, names, addresses, telephone numbers, and driver's license numbers, for dancers Mya, Viera, and Amber.

After the hearing, the Department issued a decision determining that counts 1 through 15 were proved and no defense was established. Count 16, which alleged that appellant's employee Job Romo failed to comply with a request to examine appellant's books and records, was dismissed. A penalty of 30 days' suspension was imposed.

Appellant then filed this appeal contending the Department applied the various subdivisions of rule 143.3 in an unnecessarily strict manner and without regard for the purpose of the rules, and that the rule itself is an unconstitutional infringement on free speech and due process.

DISCUSSION

Appellant contends that for a law to be valid, there must be "some legitimate non arbitrary purpose for the rule." (App.Br., at p. 12.) Appellant insists "[i]t is arbitrary and

capricious for the Department to regulate the distance between the patron and the performer where there is zero evidence of misconduct by anyone." (*Id.*, at p. 20.)

Appellant claims "[i]t is obvious that the rules in question were designed to prohibit patrons and dancers from touching each other." (*Id*., at p. 11.) Appellant points out that there is no evidence that any dancers touched any patrons. (*Id*., at p. 12.) Moreover, according to appellant, Agent Rock "testified that he made no effort to keep track of what percentage of the time during the performance the dancer was more than six feet away" or "within six feet" of him. (*Id.*, at p. 9.) Appellant argues the Department is therefore engaging in "overly aggressive law enforcement" by pursuing appellant for mere technical violations of rule 143.3 and its subdivisions. (*Id*., at p. 11.) Appellant contends "no purpose is served by strictly interpreting a rule that only has to do with the placement of the dancer on the stage while topless." (*Id.*, at p. 12.) Appellant contends there is no harm to society where, as here, the patrons simply "have better views of the dancers." (*Id.*, at p. 13.)

Appellant initially emphasizes it is not making a "facial" challenge to rule 143.3 of the sort litigated in *La Rue.* (*Id.*, at p. 11; see also *Cal. v. La Rue* (1972) 409 U.S. 109 [93 S.Ct. 390] [finding Department rules 143.3 and 143.4 constitutional despite licensees' First Amendment objections].) Nevertheless, appellant argues,

> This is not the People's Republic of North Korea or the Kingdom of Saudi Arabia. This is the United States of America. Patrons at clubs are protected by the First and Fourteenth Amendments to the Untied [*sic*] States Constitution (freedom of speech). The artists themselves have free speech rights to entertain. Would any one [*sic*] think that at a movie theater a patron would not be able to sit right near the screen if he or she wanted to do so.
>
> The point of this argument is that it is impermissible under our constitutional democracy to prohibit the location of the dancer in relation to the patron.

(App.Br., at p. 13.) Appellant goes on to claim that rule 143.3 is unconstitutional as applied in this case, and violates both the First and Fourteenth Amendment of the U.S. Constitution as well as the due process clause of the California constitution. (*Id*., at p. 15.) Appellant cites a number of cases prohibiting content-based restrictions on erotic material. (*Ibid.*) Appellant acknowledges the Department may have a valid interest in preventing touching between the patron and the dancer, but reiterates that there is no evidence of touching in this case. (*Id.*, at p. 19.)

Appellant does not appear to challenge counts 8 and 9, alleging simulated sexual acts in violation of rule 143.3(1)(a); count 14, alleging appellant allowed a performer to reveal her genitals in violation of rule 143.3(2); or count 15, alleging the failure to comply with a request to examine appellant's books and records, in violation of Business and Professions Code section 25753. (See generally *ibid.*)

We will address appellant's constitutional arguments first before moving on to its regulatory objections.

In *La Rue*, the United States Supreme Court considered the constitutionality of certain provisions of Department rules 143.3 and 143.4. (See generally *La Rue*, *supra*.) The court noted that the Department, in adopting these rules in 1970, invited public comment and "heard a number of witnesses on the subject at public hearings." (*Id.*, at p. 110.) The court wrote, "[t]he story that unfolded was a sordid one," and described the content of the transcripts of those hearings:

> References to the transcript . . . indicated that in licensed establishments where "topless" and "bottomless" dancers, nude entertainers, and films displaying sexual acts were shown, numerous incidents of legitimate concern to the Department had occurred. Customers were found engaging in oral copulation with women entertainers; customers engaged in public masturbation; and customers placed rolled currency either directly into the

> vagina of a female entertainer, or on the bar in order that she might pick it up herself. Numerous other forms of contact between the mouths of male customers and the vaginal areas of female performers were reported to have occurred.
>
> Prostitution occurred in and around such licensed premises, and involved some of the female dancers. Indecent exposure to young girls, attempted rape, rape itself, and assaults on police officers took place on or immediately adjacent to such premises.

(*Id*., at p. 111.) Accordingly, the Department imposed rules limiting the type of entertainment that could be provided at licensed establishments—including the provisions at issue in appellant's case, which have remained unchanged since their adoption in 1970. (See *ibid*.; see also Code Regs., tit. 4, § 143.3.) The Supreme Court acknowledged the validity of the Department's aims:

> A common element in the regulations . . . appears to be the Department's conclusion that the sale of liquor by the drink and lewd or naked dancing and entertainment should not take place in bars and cocktail lounges for which it has licensing responsibility. Based on the evidence from the hearings that it cited to the District Court . . . we do not think it can be said that the Department's conclusion in this respect was an irrational one.

(*Id.*, at p. 115-116.)

The Court then rejected the contention that the regulations at issue were an unconstitutional restraint on the freedom of speech. (*Id.*, at p. 118.) It noted, "the critical fact is that California has not forbidden these performances across the board. It has merely proscribed such performances in establishments that it licenses to sell liquor by the drink." (*Id.*, at p. 118.) As the Court observed, the Twenty-First Amendment to the U.S. Constitution "has been recognized as conferring something more than the normal state authority over public health, welfare, and morals," and therefore bestows a presumption of validity with regard to the states' regulation of alcoholic beverages. (*Id.*, at p. 114.)

Here, appellant merely restates the same arguments made in *La Rue*—that rule 143.3 imposes an unconstitutional limitation on the freedom of speech. The Supreme Court held it does not; rule 143.3 instead represents a valid exercise of the state's authority under the Twenty-First Amendment. (*Id.*, at pp. 114-118.) This Board has neither the jurisdiction nor the authority to overlook a directly relevant holding from the nation's highest court.

We are left, then, to consider appellant's contention that the Department's application of rule 143.3 is "arbitrary and capricious." (App.Br., at p. 20.) Notably, appellant does not appear to dispute the fact of the violations. (See generally App.Br.) Instead, it attempts to escape discipline by arguing that the violations caused no harm.

> Rule 143.3 states, in relevant part,
>
> Live entertainment is permitted on any licensed premises, except that:
>
> (1) No licensee shall permit any person to perform acts of or acts which simulate:
>
> > (a) Sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law.
> >
> > [¶ . . . ¶]
> >
> > (c) The displaying of the pubic hair, anus, vulva or genitals.
>
> (2) Subject to the provisions of subdivision (1) hereof, entertainers whose breasts and/or buttocks are exposed to view shall perform only upon a stage at least 18 inches above the immediate floor level and removed at least six feet from the nearest patron.

(Code Regs., tit. 4, § 143.3.)

Appellant has given this Board no cause to look beyond the plain language of rule 143.3. With regard to statutory law, the Supreme Court has stated, "Where, as here, legislative intent is expressed in unambiguous terms, we must treat the statutory

language as conclusive; 'no resort to extrinsic aids is necessary or proper.'" (*Equilon Enterprises v. Consumer Cause, Inc*. (2002) 29 Cal.4th 53, 61 [124 Cal.Rptr.2d 507] [acknowledging, however, that legislative history reinforced the plain-language analysis], citing *People v. Otto* (1992) 2 Cal.4th 1088, 1108 [9 Cal.Rptr.2d 596].) Courts have extended this reasoning to regulations. (See, e.g., *Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (2003) 109 Cal.App.4th 1687, 1695 [1 Cal.Rptr.3d 339], citing *Schmidt v. Foundation Health* (1995) 35 Cal.App.4th 1702, 1710-1711 [42 Cal.Rptr.2d 172] ["Generally, the same rules of construction and interpretation applicable to statutes are used in the interpretation of administrative regulations."].)

We need not consider, as appellant urges, whether there was physical contact between patrons and dancers, or quibble over "what percentage of the time during the performance" each dancer dallied within six feet of patrons. (App.Br. at p. 9.) Those facts are extraneous and irrelevant to the plain language of rule 143.3.[2]

Moreover, rule 143.3 supplies its own justification: "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." (Code Regs., tit. 4, § 143.3.) Clearly, rule 143.3. was not simply intended

2. In its closing brief, appellant shifts to a new argument: that it was deprived of its right to a fair hearing when the ALJ sustained objections to certain lines of questioning, including the relative duration of each violation. (See generally App.Cl.Br.) It argues there are "degrees of crimes in many situations," draws an analogy with the various degrees of murder, and contends the violations here were not particularly serious. (*Id.*, at p. 3.) It was that argument, appellant insists, that it was denied when the ALJ sustained the Department's objections. There are two problems with this argument. First, because there are not "degrees" of a rule 143.3 violation, these lines of questioning were irrelevant and properly excluded. (See Code Regs., tit. 4, § 143.3.) Second, this argument was improperly raised in the closing brief, depriving the Department of the opportunity to respond.

to prevent touching between patrons and performers; it was intended to prevent *the precise conduct it proscribes*. Conduct in violation of rule 143.3 is itself contrary to public welfare and morals. It need not rise to the level of actual touching to merit disciplinary action.

Appellant suggests discipline based on the plain language of rule 143.3 is "arbitrary and capricious" and constitutes "overly aggressive law enforcement." (App.Br., at p. 9.) In *La Rue*, however, the Supreme Court acknowledged the concerns that led the Department to enact rule 143.3, and found that "wide latitude as to choice of means to accomplish a permissible end must be accorded to the state agency that is itself the repository of the State's power under the Twenty-first Amendment." (See *La Rue*, *supra*, at p. 111.) In other words, the Department has determined that the plain language of rule 143.3 is the best means to protect public welfare and morals, and by operation of the Twenty-First Amendment, that determination is entitled to deference before the courts and this Board.

Appellant does not dispute the fact of the violations alleged, and has failed to show that the Department misapplied the law. We therefore affirm on all counts.

ORDER

The decision of the Department is affirmed.[3]

BAXTER RICE, CHAIRMAN
PETER J. RODDY, MEMBER
MEGAN MCGUINNESS, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

3. This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 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 section 23090 et seq.