

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

AB-9730

File: 47-343877; Reg: 16084259

CBDM REDLANDS, LLC,
dba The Library Gentleman's Club
1331 West Colton Avenue,
Redlands, CA 92374,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley

Appeals Board Hearing: February 7, 2019
Ontario, CA

ISSUED FEBRUARY 20, 2019

Appearances: *Appellant:* Donna J. Hooper, of Solomon, Saltsman & Jamieson, as
counsel for, CBDM Redlands, LLC,

Respondent: John P. Newton, as counsel for the Department of
Alcoholic Beverage Control.

OPINION

CBDM Redlands, LLC, doing business as The Library Gentleman's Club,
appeals from a decision of the Department of Alcoholic Beverage Control¹ suspending
its license for 30 days — with 15 days conditionally stayed for a period of one year
provided no further cause for discipline arises during that period — for permitting
female dancers to expose their breasts or buttocks within six feet of patrons; simulate

¹The decision of the Department, dated July 27, 2018, is set forth in the
appendix.

various sex acts; and perform or simulate touching of persons' breasts, buttocks, anuses, or genitals; or to encourage another to do so, in violation of California Code of Regulations, Title 4, Division 1, section 143.3, subdivisions 1(a)-(b), and (2), as well as 143.2, subdivision 3. (Rules 143.3² and 143.2.³)

²§ 143.3 - Entertainers and Conduct:

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.

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.

(b) The touching, caressing or fondling on the breast, buttocks, anus 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.

¶ . . . ¶

(Cal. Code Regs, tit. 4, §143.3(1) and (2).)

³Rule 143.2 - Attire and Conduct:

The following acts or conduct on licensed premises 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:

¶ . . . ¶

(3) To encourage or permit any person on the licensed premises to touch, caress or fondle the breasts, buttocks, anus or genitals of any other person.

¶ . . . ¶

(Cal. Code Regs, tit. 4, §143.2(3).)

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general eating place license was issued on September 28, 1998 and there is no record of prior discipline against the license.

On November 10, 2016 the Department instituted a 26-count accusation against appellant charging that on four separate occasions — April 23, 2015, May 14, 2015, December 17, 2015, and February 18, 2016 — appellant permitted its employees to violate rules 143.3(1)(a), 143.3(1)(b), 143.3(2), and 143.2(3).

Administrative hearings were held on December 5, 2017, and February 27, 2018. Documentary evidence was received and testimony concerning the violations charged was presented by Department Agents Edgardo Vega, Daniel Plotnik, Hayley Gonzalmen, and Vincent Rock. Appellant presented no witnesses.

Counts 1-6:

Testimony established that on April 23, 2015, Agent Vega entered the licensed premises at approximately 8:00 p.m. He went to the bar where he ordered and was served a beer. He had a clear view of the stage, approximately 15 feet away. An unidentified dancer came to the stage and danced topless, then left the stage.

The next dancer, Jane Doe #1, came on stage and removed her bra, exposed her breasts and nipples, and caressed her bare breasts. Patrons were inches away from her, handing her money as she danced. She then sat down and simulated masturbation by touching her crotch area over her underwear. Various employees observed her actions.

A third dancer, Jane Doe #2, came on stage and removed her bra, exposing her breasts and nipples. She fondled her breasts while dancing within an arm's length of the nearest patron. She then sat down and simulated masturbation by touching her

crotch area over her underwear. Various employees observed her actions.

Counts 7-9:

On May 14, 2015, Agent Vega returned to the premises shortly before midnight with Agent Vergara. Vega ordered and was served a Bud Light beer. A dancer identified as Leilani came on stage wearing a bra and panties. She removed her bra, exposing and fondling her breasts and nipples as she danced. She sat down and simulated masturbation by touching her crotch area over her underwear, then grabbed a female patron's head and pulled it into her groin. The patron moved her head from side to side, simulating oral sex. The agents left the club after Leilani left the stage.

Counts 10-13:

On December 17, 2015, Agent Plotnik entered the licensed premises and sat in the second row near the stage. A dancer, Jane Doe #3, took the stage. She removed her bra, fully exposing her breasts. She then simulated masturbation by touching her crotch area over her underwear. Various employees observed her actions.

Devon Nicole Ayala (aka Ariel) took the stage. She removed her bra, fully exposing her breasts, and then simulated masturbation on the outside of her bikini bottoms. She then approached another agent, Agent Lopez, who was sitting near the stage. She bent down and came within 12 inches of him while doing so. Various employees observed her actions.

A dancer identified as Azayz took the stage and removed her top, fully exposing her breasts. She then moved about the stage, coming within a foot of a patron. Various employees observed her actions.

(Note: counts 10-13 were subsequently dismissed because no evidence was presented that any alcoholic beverages were ordered, served, or consumed on this date.)

Counts 14-26:

On February 18, 2016, Agent Rock entered the licensed premises with Supervising Agent Hydar and Detective Barrette from the Riverside Police Department. Agent Rock went to the bar and ordered a distilled beverage. He took a seat with a clear view of the stage.

Cynthia Borja (aka Electra) danced for two songs, removing her bra and dancing topless during the second song, and coming within one foot of the patrons near the stage. Various employees were in a position to observe her actions.

Ayala took the stage and danced for two songs. She removed her bra, exposing her breasts during the second song. She lay down on the stage near the patrons who began putting tips on her breasts. She then crawled over to a patron, Jane Doe #4, who placed a tip in her bikini bottom. Jane Doe #4 slapped Ayala's buttocks. Various employees were in a position to observe these actions.

Agent Rock moved to a seat next to the stage. Alondra Luevanos (aka Ali) danced for two songs. During the second song she removed her jacket and bra, fully exposing her breasts. While topless she danced within 6 inches of Agent Rock. Various employees were in a position to observe her actions.

Bebe Simon danced for two songs. During the second song she removed her top, exposing her breasts. While topless she danced within one to two feet of Agent Rock. She simulated masturbation by touching her crotch area over her underwear, then leaned over the edge of the stage, rubbing her breasts. She then approached Detective Barrette and, while topless, hugged him. Various employees were in a position to observe her actions.

Desiree German (aka Alice) danced for two songs. During the second song she

removed her top, fully exposing her breasts. While topless she danced within one to two feet of Agent Rock. She simulated masturbation by touching her crotch area over her underwear, then crawled to a spot within 6 inches of Supervising Agent Hydar.

Various employees were in a position to observe her actions.

Ginger Stone (aka Autumn) danced for two songs. During the second song she removed her top, fully exposing her breasts. While topless she danced within one foot of Agent Rock, then grabbed his hand at the end of the song. Various employees were in a position to observe her actions.

Ruth Balderas Hurtado (aka Pearl) danced for two songs. During the second song she removed her top, fully exposing her breasts. While topless she danced within one foot of some patrons. Various employees were in a position to observe her actions.

Christina Bueno (aka Mary Jane) danced for two songs. During the second song she removed her top, fully exposing her breasts. While topless she came within one to two feet of some patrons. Various employees were in a position to observe her actions.

[name redacted] danced for two songs. During the second song she removed her top, fully exposing her breasts. While topless she came within one or two feet of Agent Rock and Detective Barrette. Various employees were in a position to observe her actions.

Agent Haley Gonzalmen entered the licensed premises in high-profile police attire, accompanied by other ABC agents. The dancers were identified and photographed, and each filled out an affidavit. All of the dancers stated that appellant's employees watch them as they dance.

On May 9, 2018, the administrative law judge (ALJ) submitted his proposed

decision — sustaining counts 1 through 9, and 14 through 26, dismissing counts 10 through 13, and recommending a 30-day suspension of the license with 15 days stayed for a period of one year, provided no further cause for discipline arises during that period. The Department adopted the proposed decision in its entirety on July 23, 2018, and issued its Certificate of Decision on July 27, 2018.

Appellant then filed a timely appeal raising the following issues: (1) the decision is not supported by substantial evidence because the Department failed to establish that the licensee was serving alcohol as alleged in the accusation, and (2) rules 143.2 and 143.3 violate the First Amendment of the United States Constitution and the California State Constitution, and are unconstitutionally vague and overbroad.

DISCUSSION

I

Appellant contends the decision is not supported by substantial evidence because the Department failed to establish that the licensee was serving alcohol as alleged in the accusation. It contends “the Department has jurisdiction over licensees only to the extent that they are exercising the privileges of their license. (AOB at p. 5.)

This Board is bound by the factual findings in the Department’s decision so long as those findings are supported by substantial evidence. The standard of review is as follows:

We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department’s findings of fact. [Citations.] We must indulge in all legitimate inferences in support of the Department’s determination. Neither the Board nor [an appellate] court may reweigh the evidence or exercise independent judgment to overturn the Department’s factual findings to reach a contrary, although perhaps equally reasonable, result. [Citations.] The function of an appellate board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to

substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

(Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Masani) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

When findings are attacked as being unsupported by the evidence, the power of this Board begins and ends with an inquiry as to whether there is substantial evidence, contradicted or uncontradicted, which will support the findings. When two or more competing inferences of equal persuasion can be reasonably deduced from the facts, the Board is without power to substitute its deductions for those of the Department—all conflicts in the evidence must be resolved in favor of the Department's decision. (*Kirby v. Alcoholic Bev. Control Appeals Bd. (1972) 25 Cal.App.3d 331, 335 [101 Cal.Rptr. 815]*; *Harris v. Alcoholic Beverage Control Appeals Board (1963) 212 Cal.App.2d 106 [28 Cal.Rptr.74].*)

Therefore the issue of substantial evidence, when raised by an appellant, leads to an examination by the Appeals Board to determine, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. The Appeals Board cannot disregard or overturn a finding of fact by the Department merely because a contrary finding would be equally or more reasonable. (Cal. Const. Art. XX, § 22; Bus. & Prof. Code § 23084; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113]*; *Harris, supra*, at 114.)

Appellant argues that the record does not establish that it was exercising the privileges of its ABC license — or, in other words, that it was serving alcohol — on the three dates for which charges in the accusation were sustained. As such, it contends

the decision is not supported by substantial evidence.

Appellant is asking this Board to disregard specific findings in the decision that alcohol was being served on the three dates in question. Those findings explicitly find that appellant was indeed exercising the privileges of its license on those dates. To wit, regarding April 23, 2015: “Agent Edgardo Vega entered the Licensed Premises at approximately 8:00 p.m. He walked to the bar counter and ordered a beer, which he was served.” (Finding of Fact, ¶ 5.) Similarly, regarding May 14, 2015: “Agent Vega returned to the Licensed Premises. He entered and ordered a Bud Light beer, which he was served.” (Finding of Fact, ¶ 8.) And finally, regarding February 18, 2016: “Agent Rock went to the bar and ordered a distilled beverage.” (Finding of Fact, ¶ 14.)

Appellant maintains Agent Vega was not certain when he testified about what he ordered on April 23, 2015, or May 14, 2015 (AOB at pp. 6-7), and that Agent Rock only testified about February 16, 2016 — not February 18, 2016 as alleged in the accusation (AOB at p. 8.) However, as *Masani* instructs: “we must accept as conclusive the Department’s findings of fact.” (*Masani, supra.*) The decision specifically finds that alcohol was served on all three dates (Findings of Fact, ¶¶ 5, 8, and 14). And, as the Department points out, the use of February 16 rather than 18, in the transcript of Agent Rock’s testimony, is more likely than not a typographical error by the court reporter. Voluminous other testimony and evidence established that he was testifying about the final night of the investigation — February 18, 2016 — consequently, appellant’s argument must fail.

Even if, arguendo, appellant were correct about it not exercising the privileges of its license on the three dates in question, the Department argues that a licensed premises does not “lose its character” simply because it ceases serving alcohol. (RRB

at p. 7, citing 55 *Ops. Cal. Atty. Gen.* 342 (1972).) As the Department points out, such a rule could lead to absurd results wherein a licensee could cease serving alcohol during the times its dancers were topless within six feet of patrons. Surely the legislature did not intend such an absurd result.

We agree with the Department that in this matter, the prohibited acts or conduct occurred, and the prohibited acts or conduct occurred on a licensed on-sale premises. There is no requirement that the licensee be exercising its licensed privileges during the time of the forbidden conduct. In the instant matter, however, it is clear from the findings that appellant was exercising its licensed privileges. The Board may not reweigh the evidence to make contrary findings on this point.

II

Appellant contends rules 143.2 and 143.3 violate the First Amendment of the United States Constitution and the California State Constitution, and that they are unconstitutionally vague and overbroad. (AOB at p. 11.)

Appellant acknowledges that “California appellate courts have ruled on the constitutionality of Rules 143.2 and 143.3.” (*Ibid.*; also see: *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, and in spite of this being a California appellate court which was overturned by the United States Supreme Court, appellant argues “[i]t is time to revisit this continually evolving issue” because courts in other jurisdictions have found similar provisions unconstitutional. (AOB at p. 11.)

In *California v. LaRue* (1972) 409 U.S. 109 [93 S.Ct. 390], the United States Supreme Court reviewed the constitutionality of rule 143.3 and concluded it was a rational measure to regulate conduct in premises licensed to sell alcoholic beverages.

The Court 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." (*Ibid.*) 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.)

This Board has neither the jurisdiction nor the authority to overlook a directly relevant holding from the nation's highest court. While appellant argues that "the expansive reading of the 21st Amendment the Court took in *LaRue* has since been explicitly disapproved of" (ACB at p. 6, citing *44 Liquormart, Inc. V. Rhode Island* (1996) 517 U.S. 484), it ignores the explicit language in that case which states: "[w]ithout questioning the holding in *LaRue* . . ." In other words, while the Court in the *Liquormart* case may have disliked some of the reasoning in *LaRue*, it categorically did not overrule it. (*Id.* at p. 516.)

Notably, appellant does not appear to dispute the fact of the violations. Instead, it attempts to escape discipline by arguing that the rules are vague and overbroad, and therefore unenforceable. (AOB at pp. 11-18.) We disagree. Appellant's claim that "licensees must guess at which acts will offend the Department" (*Id.* at p. 13) is pure hyperbole. The plain language of the rules very clearly lays out what conduct is prohibited: rule 143.3(1)(a) bans acts which simulate sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited

by law; rule 143.3(1)(b) forbids entertainers from touching, caressing, or fondling the breast, buttocks, anus or genitals; and rule 143.2(3) prohibits touching, caressing, or fondling the breast, buttocks, anus or genitals of another.

Appellant has given this Board no cause to look beyond the plain language of these rules — in spite of listing an exaggerated litany of things it claims the rules would prohibit, such as: Shakespeare, Broadway shows, popular music performers, all types of dance — including ballet, modern dance, salsa, tango, hip-hop, and jazz — and professional sports such as football and basketball. (*Id* at pp 13-16.) We disagree entirely.

6. 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], 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."].)

Moreover, the rules supply their own justification: rule 143.2 states:

The following acts or conduct on licensed premises 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.

Rule 143.3 states:

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.

The rules are intended to prevent *the precise conduct they proscribe*. Therefore, conduct in violation of either rule is *per se* contrary to public welfare and morals. This is neither vague nor overbroad.

The Department has determined that the plain language of these rules 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.

ORDER

The decision of the Department is affirmed.⁴

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

⁴This 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.

APPENDIX

**BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA**

**IN THE MATTER OF THE ACCUSATION
AGAINST:**

**CBDM REDLANDS, LLC
THE LIBRARY GENTLEMAN'S CLUB
1331 W. COLTON AVE
REDLANDS, CA 92374**

ON-SALE GENERAL EATING PLACE - LICENSE

**Respondent(s)/Licensee(s)
Under the Alcoholic Beverage Control Act**

RIVERSIDE DISTRICT OFFICE

File: 47-343877

Reg: 16084259

CERTIFICATE OF DECISION

It is hereby certified that, having reviewed the findings of fact, determination of issues, and recommendation in the attached proposed decision, the Department of Alcoholic Beverage Control adopted said proposed decision as its decision in the case on July 23, 2018. Pursuant to Government Code section 11519, this decision shall become effective 30 days after it is delivered or mailed.

Any party may petition for reconsideration of this decision. Pursuant to Government Code section 11521(a), the Department's power to order reconsideration expires 30 days after the delivery or mailing of this decision, or if an earlier effective date is stated above, upon such earlier effective date of the decision.

Any appeal of this decision must be made in accordance with Business and Professions Code sections 23080-23089. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005, or mail your written appeal to the Alcoholic Beverage Control Appeals Board, 1325 J Street, Suite 1560, Sacramento, CA 95814.

On or after September 6, 2018, a representative of the Department will contact you to arrange to pick-up the license certificate.

Sacramento, California

Dated: July 27, 2018

RECEIVED

JUL 30 2018

**Alcoholic Beverage Control
Office of Legal Services**



**Matthew D. Botting
General Counsel**

**BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA**

IN THE MATTER OF THE ACCUSATION AGAINST:

CBDM Redlands LLC	}	File: 47-343877
dba The Library Gentleman's Club	}	
1331 W. Colton Ave.	}	Reg.: 16084259
Redlands, California 92374	}	
	}	License Type: 47
Respondent	}	
	}	Word Count: 14,500 & 6,500
	}	
	}	Reporter:
	}	Brywn Whatford & Shelby Maaske
	}	Kennedy Court Reporters
	}	
<u>On-Sale General Eating Place License</u>	}	<u>PROPOSED DECISION</u>

Administrative Law Judge Matthew G. Ainley, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at San Bernardino, California, on December 5, 2017 and February 27, 2018.

John P. Newton, Attorney, represented the Department of Alcoholic Beverage Control.

Melissa H. Gelbart, attorney-at-law, represented respondent CBDM Redlands LLC.

The Department seeks to discipline the Respondent's license on the grounds that, on four separate dates, the Respondent permitted fourteen different individuals to violate the prohibitions contained in rule 143.2(3),¹ rule 143.3(1)(a), rule 143.3(1)(b), and rule 143.3(2) while inside the Licensed Premises. (Exhibit 1.)

Oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the hearing. The matter was argued and submitted for decision on February 27, 2018.

FINDINGS OF FACT

1. The Department filed the accusation on November 10, 2016.

¹ All rules referred to herein are contained in title 4 of the California Code of Regulations unless otherwise noted.

2. The Department issued a type 47, on-sale general eating place license to the Respondent for the above-described location on September 28, 1998 (the Licensed Premises).
3. There is no record of prior departmental discipline against the Respondent's license.
4. The Licensed Premises contains an elevated stage. A series of seats are located around the stage. There is another section of seating farther away from the stage and a bar area.

**April 23, 2015
(Counts 1-6)**

5. On April 23, 2015, Agent Edgardo Vega entered the Licensed Premises at approximately 8:00 p.m. He walked to the bar counter and ordered a beer, which he was served. While sitting at the bar counter, he had a clear view of the stage, approximately 15 feet away.
6. A dancer, Jane Doe #1, took the stage and began to perform. While on the stage, she removed her bra, fully exposing her breasts. She caressed her breasts, touching and squeezing them. While she was doing so, various patrons began giving her money, either by handing it to her or by throwing it towards her. Some of the patrons came within inches of her. Jane Doe #1 sat down on the stage and began to rub her vagina over the outside of her bikini bottoms in a manner which simulated masturbation. Various employees were in a position to observe Jane Doe's #1 actions.
7. Another dancer, Jane Doe #2, subsequently took the stage and began to perform. During the course of her performance, she removed her bra, fully exposing her breasts. She began to fondle her breasts with her hands. She came within arm's length of some of the patrons sitting around the stage while doing so. Jane Doe #2 subsequently sat down on the stage and began to rub her vagina over the outside of her bikini bottoms in a manner which simulated masturbation. Various employees were in a position to observe Jane Doe #2's actions.

**May 14, 2015
(Counts 7-9)**

8. Shortly before midnight on May 14, 2015, Agent Vega returned to the Licensed Premises. He entered and ordered a Bud Light beer, which he was served.
9. A dancer identified only as Leilani took the stage. During her performance, she took off her bra and exposed her breasts, which she began to fondle. She then sat down and

began to rub her vagina over the outside of her bikini bottoms. Leilani reached over, grabbed a female patron's head, and pulled it into her groin. The patron began moving her head in a manner which simulated oral sex.

December 17, 2015
(Counts 10-13)

10. On December 17, 2015, Agent Daniel Plotnik entered the Licensed Premises. He sat down just outside the main seating area near the stage (a second row of seating).

11. A dancer, Jane Doe #3, took the stage and began performing. During her performance, she removed her bra, fully exposing her breasts. She reached down and began to simulate masturbation over the outside of her bikini bottoms for a few seconds. Various employees were in a position to observe her actions.

12. Some time later, Devon Nicole Ayala (also known as Ariel) took the stage. During her performance, she took off her bra, fully exposing her breasts. She placed her hand near her groin and began to rub it in a circular motion over the outside of her bikini bottoms for three to five seconds, simulating masturbation. She then approached Agent Lopez, who was sitting near the stage, and bent down. She came within approximately 12 inches of him while doing so. Various employees were in a position to observe her actions.

13. A dancer only identified as Azayz subsequently took the stage and began to perform. She removed her top, fully exposing her breasts. She then began moving around the stage, coming within a foot of a patron. Various employees were in a position to observe her actions.

February 18, 2016
(Counts 14-26)

14. On February 18, 2016, Agent Vincent Rock entered the Licensed Premises. Among the people he was working with were Supv. Agent Hydar and Det. Barrette, Riverside P.D. Agent Rock went to the bar and ordered a distilled beverage. He took a seat with a clear view of the stage.

15. Cynthia Borja (also known as Electra) danced for two songs on the stage. During the second song, she took off her bra and danced topless. While topless, she danced within one foot of some of the patrons sitting around the stage. Various employees were in a position to observe her actions.

16. Ayala subsequently took the stage. She also danced for two songs. During the second song, she took her bra off, fully exposing her breasts. Ayala lay down on the stage near the patrons, who began to put tips on her breasts. Ayala crawled over to a female patron, Jane Doe #4, who placed a tip in her bikini bottom. Ayala turned around and Jane Doe #4 slapped her buttocks. Various employees were in a position to observe Ayala's actions.

17. Agent Rock moved to one of the seats along the stage. Alondra Luevanos (also known as Ali) took the stage and performed for two songs. She took off her jacket and bra during the second song, fully exposing her breasts. While topless, she danced within six inches of Agent Rock. Various employees were in a position to observe Luevanos' actions.

18. Bebe Simon took the stage and performed for two songs. During the second song, she took her top off, fully exposing her breasts. While topless, she danced within one or two feet of Agent Rock. Simon rubbed her clitoris over the outside of her bikini bottoms for one to two seconds. She then leaned over the edge of the stage, pushed her breasts out, and rubbed them. Simon approached Det. Barrette and, while topless, hugged him. Various employees were in a position to observe Simon's actions.

19. Desiree German (also known as Alice) came out on the stage and danced for two songs. During the second song, she removed her top, fully exposing her breasts. While topless, she danced within one to two feet of Agent Rock. She rubbed her clitoris for one to two seconds over the outside of her bikini bottoms. Still topless, German crawled over to a spot within six inches of Supv. Agent Hydar. Various employees were in a position to observe German's actions.

20. Ginger Stone (also known as Autumn) subsequently danced two songs on the stage. During the second song, she removed her top, fully exposing her breasts. While topless, she danced within one foot of Agent Rock and, at the end of the song, grabbed his hand. Various employees were in a position to observe her actions.

21. Ruth Balderas Hurtado (also known as Pearl) also danced for two songs. She removed her top during the second song, fully exposing her breasts. While topless, she danced within one foot of some of the patrons. Various employees were in a position to observe her actions.

22. Christina Bueno (also known as Mary Jane) came out on stage and danced for two songs. For the second song, she removed her top, fully exposing her breasts. While topless, she came within one or two feet of some of the patrons. Various employees were in a position to observe her actions.

23.e Finally, [name redacted] took the stage and danced for two songs. She removed her top during the second song, fully exposing her breasts. While topless, she came within one or two feet of Agent Rock and Det. Barrette. Various employees were in a position to observe her actions.e

24.e Except as set forth in this decision, all other allegations in the accusation and all other contentions of the parties lack merit.e

CONCLUSIONS OF LAW

1.e Article XX, section 22 of the California Constitution and section 24200(a) providee that a license to sell alcoholic beverages may be suspended or revoked if continuation of e the license would be contrary to public welfare or morals.e

2.e Section 24200(b) provides that a licensee's violation, or causing or permitting of a violation, of any penal provision of California law prohibiting or regulating the sale of alcoholic beverages is also a basis for the suspension or revocation of the license.e

3.e Rule 143.2(3) prohibits a licensee from encouraging or permitting any person on the licensed premises to touch, caress, or fondle the breasts, buttocks, anus, or genitals of any other person. All such acts or conduct are contrary to public welfare or morals and,e therefore, no on-sale license shall be held at any premises where a licensee permits such conduct or acts.e

4.e Rule 143.3(1) prohibits a licensee from permitting any person to perform acts of, or acts which simulate, sexual intercourse, masturbation, sodomy, bestiality, oral copulation,e flagellation, or any sexual acts which are prohibited by law. Rule 143.3(1) also prohibitse a licensee from permitting any person to perform acts of, or acts which simulate, the touching, caressing, or fondling of the breast, buttocks, anus, or genitals as well as the displaying of the pubic hair, anus, vulva, or genitals. All such acts or conduct aree contrary to public welfare or morals and, therefore, no on-sale license shall be held at any premises where a licensee permits such conduct or acts.e

5. Rule 143.3(2) permits live entertainment on a licensed premises by entertainers whose breasts, buttocks, or both are exposed to view, provided that such entertainers performe upon a stage at least 18 inches above the immediate floor level and removed at least six feet from the nearest patron. Performances which violate these restrictions are contrarye to public welfare or morals and, therefore, no on-sale license shall be held at any premises where a licensee permits such performances.e

6.e Cause for suspension or revocation of the Respondent's license exists under Articlee XX, section 22 of the California State Constitution, and sections 24200(a) and (b) for thee

violations of rules 143.2(3), 143.3(1)(a), 143.3(1)(b), 143.3(2) alleged in counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, and 26. (Findings of Fact ¶¶ 5-9 & 14-23.)

7. On April 23, 2015, Jane Doe #1, a dancer, removed her bra and fully exposed her breasts. While her breasts were exposed, she came within inches of various patrons. (Count 1.) During this time, she caressed and squeezed her breasts. (Count 3.) She also rubbed her vagina over the outside of her bikini bottoms in a manner which simulated masturbation. (Counts 2-3.) A second dancer, Jane Doe #2, also removed her bra and fully exposed her breasts. While her breasts were exposed, she came within an arm's length of some of the patrons. (Count 4.) Additionally, she fondled her breasts with her hands. (Count 6.) Finally, she rubbed her vagina over the outside of her bikini bottoms in a manner which simulated masturbation. (Counts 5-6.) (Findings of Fact ¶¶ 5-7.)

8. On May 14, 2015, Leilani, a dancer, took off her top and began to fondle her breasts. (Count 8.) She also rubbed her vagina over the outside of her bikini bottoms. (Counts 7-8.) While topless, Leilani reached over and grabbed a female patron's head and pulled it into her groin. (Count 9.) (Findings of Fact ¶¶ 8-9.)

9. On February 18, 2016, Cynthia Borja (aka Electra), a dancer, took off her bra and danced topless. While so exposed, she came within one foot of some of the patrons. (Count 14.) Another dancer, Devon Nicole Ayala (aka Ariel), also took off her bra, fully exposing her breasts. She lay down on the stage near various patrons who placed money on her exposed breasts. (Count 15.) She then approached a patron who placed a tip in Ayala's bikini and slapped Ayala's bottom. (Count 16.) A third dancer, Alondra Luevanos (aka Ali) took off her jacket and bra, fully exposing her breasts. While topless, she danced within six inches of one of the agents. (Count 17.) (Findings of Fact ¶¶ 14-17.)

10. While dancing on the stage, Bebe Simon took her top off, fully exposing her breasts. While topless, she danced within a couple feet of one of the agents. At the end of her routine, still topless, she hugged one of the other officers. (Count 18.) During her routine, Simon rubbed her clitoris over the outside of her bikini bottoms for one to two seconds. She then leaned over the edge of the stage, pushed her breasts out, and rubbed them. (Counts 19-20.) (Finding of Fact ¶ 18.)

11. Another dancer, Desiree German (aka Alice) removed her top while dancing, fully exposing her breasts. While topless, she danced within a couple feet of one of the agents and, later, came within inches of a second agent. (Count 22.) She also rubbed her clitoris for one to two seconds over the outside of her bikini bottoms. (Count 23.) Finally, four dancers took the stage one after another and, while performing, removed their tops to fully expose their breasts. While so exposed, Ginger Stone (aka Autumn) danced within

one foot of one agents (count 23), Ruth Balderas Hurtado (aka Pearl) danced within one foot of some of the patrons (count 24), Christina Bueno (aka Mary Jane) came within one or two feet of some of the patrons (count 25), and [name redacted] came within a couple of feet of one of the agents. (Findings of Fact ¶¶ 19-23.)

12. Cause for suspension or revocation of the Respondent's license was not established for the violations of rule 143.3(1)(a) and rule 143.3(2) alleged in counts 10, 11, 12, and 13. (Findings of Fact ¶¶ 10-13.)

13. With respect to count 10, Agent Daniel Plotnik testified that Jane Doe #3 simulated masturbation. Unlike the testimony related to all of the other counts, his testimony lacked any detail to support his conclusion. On cross-examination, the Respondent did not challenge this conclusion in any way. Accordingly, Agent Plotnik's conclusion is sufficient to find that the violation occurred as alleged. With respect to counts 11 and 12, the testimony established that Devon Nicole Ayala (aka Ariel) took off her bra and fully exposed her breasts. While so exposed, she came within 12 inches of one of the agents. She also placed her hand on her groin and rubbed it in a manner simulating masturbation. Finally, with respect to count 13, Azayz, a dancer, removed her top and fully exposed her breasts. While so exposed, she moved around the stage and came within one foot of a patron. (Findings of Fact ¶¶ 10-13.)

14. The dancers' actions as set forth in the previous paragraph appear to establish that violations of rule 143.3(1)(a) and rule 143.3(2) occurred on the Licensed Premises. However, both rules apply only if the Respondent is exercising the privileges of the license at the time. No evidence was presented that any alcoholic beverages were ordered, served, or consumed on December 17, 2015. Accordingly, counts 10, 11, 12, and 13 must be dismissed.

PENALTY

The Department requested that the Respondent's license be suspended for period of 30 days, with 15 days stayed, for the violations set forth above. In the Department's view, some mitigation was warranted based on the Respondent's roughly 18 years² of discipline-free operation. The Respondent argued that, if the accusation were sustained, a 15-day suspension was warranted.

Rule 144 provides that, for violations of rule 143.2 or 143.3, a penalty ranging from a 30-day suspension up to revocation is appropriate. Some mitigation is warranted based on the Respondent's discipline-free licensed history. Additionally, the violations in this case are relatively mild compared to many of the cases brought by the Department—the

² From the date the license was issued through the date the accusation was filed.

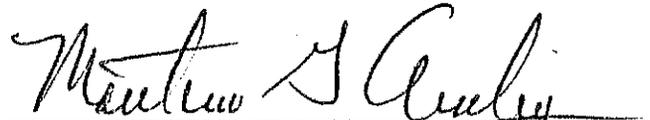
majority of the violations involve dancers being topless within six feet of patrons, while relatively few involve dancer-patron contact. Conversely, the evidence established a clear pattern of violations—performers danced to one song, removed their tops, then danced to a second song, often within six feet of patrons. While dancing topless is not prohibited, the fact that numerous dancers came within six feet of patrons indicates that such conduct was commonplace. The penalty recommended herein complies with rule 144.

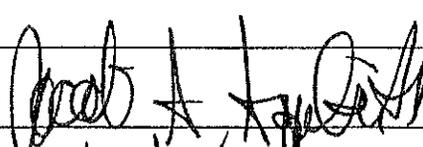
ORDER

Counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, and 26 are sustained. With respect to these violations, the Respondent's on-sale general eating place license is hereby suspended for a period of 30 days, with execution of 15 days of the suspension stayed, upon the condition that no subsequent final determination be made, after hearing or upon stipulation and waiver, that cause for disciplinary action occurred within one year from the effective date of this decision; that should such determination be made, the Director of the Department of Alcoholic Beverage Control may, in his discretion and without further hearing, vacate this stay order and reimpose the stayed penalty; and that should no such determination be made, the stay shall become permanent.

Counts 10, 11, 12, and 13 are dismissed.

Dated: May 9, 2018


Matthew G. Ainley
Administrative Law Judge

<input checked="" type="checkbox"/> - Adopt
<input type="checkbox"/> Non-Adopt: _____
By: 
Date: 7/23/18