

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

AB-9793

File: 47-419125; Reg: 18086345

WOODLEY ENTERPRISES, INC.,
dba Club 7557
7557-59 Woodley Avenue
Van Nuys, CA 91406,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: October 3, 2019
Los Angeles, CA

ISSUED OCTOBER 15, 2019

Appearances: *Appellant:* Ralph B. Saltsman, of Solomon, Saltsman &
Jamieson, as counsel for Woodley Enterprises, Inc.,

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

OPINION

Woodley Enterprises, Inc., doing business as Club 7557, appeals from a decision of the Department of Alcoholic Beverage Control¹ revoking its license, with revocation stayed upon the condition that no cause for disciplinary action occur within three years (and simultaneously suspending its license for 30 days) because its female dancers permitted and/or encouraged patrons to touch their buttocks in violation of California

¹The decision of the Department, dated January 11, 2019, is set forth in the appendix.

Code of Regulations, Title 4, Division 1, section 143.2(3).²

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general eating place license was issued on December 27, 2004. There are two prior records of departmental discipline against the license, both of which include violations of rule 143.2(3).

On January 18, 2018, the Department filed an accusation³ against appellants charging that on June 22, 2017, appellant's employee encouraged or permitted two male patrons to "touch, caress or fondle her breasts, buttocks, anus, or genitals, in violation of [rule] 143.2(3)." (Decision, at p. 4.) (Exh. 1.)

At the administrative hearing held on July 26, 2018, and the continued hearing on October 24, 2018, documentary evidence was received, and testimony was presented by Los Angeles Police Department Corporal Hugo Fuentes, appellant's employee/dancer Maria Magdalena, and appellant's security guard Eddy Lemeshko.

² **Rule 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).)

³ Although the accusation contained five counts, the Department did not present any evidence with respect to counts 3, 4, and 5. As a result, the Department found that those counts were "not established."

Testimony established that on June 22, 2017, Corporal Fuentes entered the licensed premises in an undercover capacity and ordered a beer at the bar counter. Cpl. Fuentes sat down at a table and noticed Magdalena (who goes by the stage name “Vanessa”) talking to two male patrons at the bar counter. Magdalena wore a black one-piece outfit which had a G-string type bottom. Both males began to spank the exposed portion of Magdalena's buttocks. Magdalena bent over slightly while the males were spanking her.

At the time, there was a bartender working behind the counter who was in position to see Magdalena and the men. A security guard was also situated at the door approximately eight feet away and in position to see the male patrons spank Magdalena. However, neither the bartender, the security guard, nor Magdalena made any attempt to stop the men.

On September 5, 2018, the administrative law judge (ALJ) submitted his proposed decision - sustaining counts 1 and 2 and dismissing counts 3 through 5. The ALJ recommended stayed revocation and a 30-day suspension of appellant's license. The Department adopted the proposed decision in its entirety on January 7, 2019 and issued its Certificate of Decision on January 11, 2019.

Appellant filed a timely appeal contending that counts 1 and 2 must be reversed because rule 143.2(3) is unconstitutionally vague and overbroad as to the term “buttocks.”

DISCUSSION

Appellant contends rule 143.2(3) is unconstitutionally vague and overbroad and, therefore, susceptible to arbitrary enforcement. (AOB, at pp. 4-12.)

Appellant makes the same arguments that it did in another recent case, *Woodley Enterprises, Inc.* (2019) AB-9768, at p. 8, where this Board held “[t]he plain language of the rule very clearly lays out what conduct is prohibited: rule 143.2(3) prohibits touching, caressing, or fondling the breast, buttocks, anus or genitals of another.” For the same reasons articulated in that case, the Board holds that rule 143.2(3) is neither vague nor overbroad. (See *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 61 [124 Cal.Rptr.2d 507] [“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.’”] (citing *People v. Otto* (1992) 2 Cal.4th 1088, 1108 [9 Cal.Rptr.2d 596]); see also *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.”].)

Here, the Department found that appellant's employee allowed patrons to touch her buttocks, which is conduct clearly prohibited under rule 143.2(3). Since those findings are supported by substantial evidence, the Department's decision must stand.⁴

Further, whether a regulation is susceptible to arbitrary enforcement does not automatically render it invalid. If that were the case, there would be few, if any, rules or regulations. In this matter, appellant has not made the requisite showing (or even alleged) that any rules were arbitrarily enforced against it. Rather, it seems as though appellant solely disagrees with the inclusion of touching buttocks as equal to breasts,

⁴ Since the Board does not find rule 143.2(3) vague or overbroad, it does not need to address appellant and respondent's arguments as to the Board's authority to decide on rule 143.2's constitutionality.

anus, or genitals. That is an argument for the legislature or appropriate regulatory body, not this Board.

ORDER

The decision of the Department is affirmed.⁵

SUSAN A. BONILLA, CHAIR
MEGAN McGUINNESS, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁵ 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.

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:**

WOODLEY ENTERPRISES INC.
CLUB 7557
7557-59 WOODLEY AVE
VAN NUYS, CA 91406

ON-SALE GENERAL EATING PLACE - LICENSE

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

VAN NUYS DISTRICT OFFICE

File: 47-419125

Reg: 18086345

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 January 7, 2019. 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 February 21, 2019, a representative of the Department will contact you to arrange to pick up the license certificate.

Sacramento, California

Dated: January 11, 2019



Matthew D. Botting
General Counsel

RECEIVED
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Alcoholic Beverage Control
Office of Legal Services

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

IN THE MATTER OF THE ACCUSATION AGAINST:

Woodley Enterprises Inc.
dba Club 7557
7557-59 Woodley Ave.
Van Nuys, California 91406

Respondent

} File: 47-419125
}
} Reg.: 18086345
}
} License Type: 47
}
} Word Count: 4,000 & 6,000
}
} Reporter:
} Samantha Ruiz & Justyne Johnson
} Kennedy Court Reporters
}
} **PROPOSED DECISION**

On-Sale General Eating Place License

Administrative Law Judge Matthew G. Ainley, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Van Nuys, California, on July 26, 2108 and October 24, 2018.

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

Ralph Barat Saltsman and Donna J. Hooper, attorneys-at-law, represented respondent Woodley Enterprises Inc.

The Department seeks to discipline the Respondent's license on the grounds that, on or about June 22, 2017, the Respondent permitted three different individuals to violate the prohibitions contained in rule 143.2(3),¹ rule 143.3(1)(a), and rule 143.3(1)(b) while inside the above-captioned 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 October 24, 2018.

FINDINGS OF FACT

1. The Department filed the accusation on January 18, 2018.

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 December 27, 2004 (the Licensed Premises).

3. The Respondent's license has been the subject of the following discipline:

<u>Date Filed</u>	<u>Reg. No.</u>	<u>Violation</u>	<u>Penalty</u>
8/18/2015	15082922	B&P Code § 23402, & 4 CCR §§ 143.2(3), 143.3(1)(a), 143.3(1)(b), 143.3(1)(c) & 143.3(2)	Rev. stayed 3 years w/30-day susp.
10/28/2013	13079429	Pen. Code § 647(b), 4 CCR §§ 143.3(1)(a), 143.3(1)(b) & 143.3(2)	30-day susp. w/15 days stayed 1 year

The foregoing disciplinary matters are final. (Exhibits 2-3.)

4. On June 22, 2017, Corporal Hugo Fuentes, LAPD, entered the Licensed Premises with his partner. He ordered a beer at the bar counter, which he was served.

5. Cpl. Fuentes sat down at a table a little to the east of the bar counter. He noticed Vanessa talking to two males at the bar counter. She wore a black one-piece outfit, the lower portion of which was similar to a G-string. Both of the males began to spank the exposed portion of Vanessa's buttocks. She bent over slightly while they were doing so.

6. There was a bartender working behind the counter who was in position to see Vanessa and the men. A security guard was situated at the door approximately eight feet away who was also in a position to see this. Neither the bartender nor the security guard made any attempt to stop this behavior. No other employee attempted to stop it either.

7. Maria Magdalena testified that she is employed at the Licensed Premises as a dancer and that she uses the stage name Vanessa. She described the rules which dancers must follow while performing. Among other things, the rules prohibit dancers from coming into contact with patrons with respect to their whole body, prohibit customers from touching the dancers, and require dancers to move constantly rather than stand in one place. If a customer touches her, she is supposed to put the customers hands down and tell him no.

8. Magdalena testified that security guards are always watching the dancers. If a customer is a problem, she can call one of the security guards over. The security guards sometimes come over on their own.

9 Magdalena denied that anyone spanked her in the manner described by Cpl. Fuentes. If someone had tried to do so, she would have placed his hands down as required by the rules.

10. Magdalena testified that management is very strict and that any dancer who broke one of the rules would be fired. She indicated that there were no warnings.

11. Eddy Lemeshko testified that he is a security guard at the Licensed Premises. His duties include watching the stage and the lap dance area. He is in charge of the floor and is supposed to ensure that the dancers follow the rules. He personally informs the dancers of the rules in advance and talks to them if he sees any problems. Dancers are suspended for violating the rules and, if they continue to be a problem (e.g., break the rules three times), are ultimately fired. He believed that Vanessa may have been suspended one time.

12. Lemeshko testified that the Respondent has made some changes in the last few years to prevent problems. It brightened the lights and lowered the backs of the booths to provide greater visibility and added mirrors to allow a better view into the lap dance area. The Respondent uses two or three security guards depending upon the day of the week.

13. Lemeshko testified that he did not see anyone spanking Vanessa as described by Cpl. Fuentes.

14. The Department did not present any evidence with respect to counts 3, 4, and 5.

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

CONCLUSIONS OF LAW

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

2. 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.

3. 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,

therefore, no on-sale license shall be held at any premises where a licensee permits such conduct or acts.

4. 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, flagellation, or any sexual acts which are prohibited by law. Rule 143.3(1) also prohibits 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 are 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.

5. Cause for suspension or revocation of the Respondent's license exists under Article XX, section 22 of the California State Constitution, and sections 24200(a) and (b) for the violations of rule 143.2(3) alleged in counts 1 and 2. (Findings of Fact ¶¶ 4-6.)

6. Using the factors set forth in Evidence Code section 780, the testimony of Cpl. Hugo Fuentes describing the incident is found to be credible, while the testimony of Maria Magdalena (aka Vanessa) to the contrary is found to be not credible. Cpl. Fuentes testified in a straightforward manner and his testimony was internally consistent. Not only was Magdalena's testimony inconsistent with that of Cpl. Fuentes, but it was inconsistent with Eddy Lemeshko's testimony. For example, Lemeshko described an incremental system for enforcing the rules, while Magdalena testified that anyone violating the rules would be fired outright. Lemeshko's testimony that he did not see the incident described by Cpl. Fuentes is of no help to the Respondent since there is no evidence that he was the security guard whom Cpl. Fuentes testified was eight feet away from Magdalena and the two men or was otherwise in a position to see the incident.

7. Cause for suspension or revocation of the Respondent's license was not established for the violations of rules 143.2(3), 143.3(1)(a), and 143.3(1)(B) alleged in counts 3, 4, and 5. (Finding of Fact ¶ 14.)

PENALTY

The Department requested that the Respondent's license be revoked in light of the prior disciplinary actions against the Respondent for the same type of violations. In the Department's view, the violations at issue here are simply the latest in an ongoing course of conduct. The Respondent argued that, if the accusation were sustained, a short suspension would be appropriate since the evidence established only one, rather minor, violation. Both parties are correct, at least in part. It is disconcerting that this is the Respondent's third such violation and, further, that it occurred while the Respondent was under a stayed revocation. The incident in question, however, was relatively mild. As

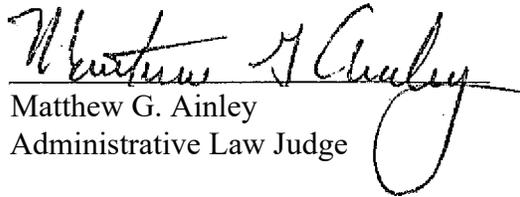
such, outright revocation is excessive for the violation at issue here. The penalty recommended herein complies with rule 144.

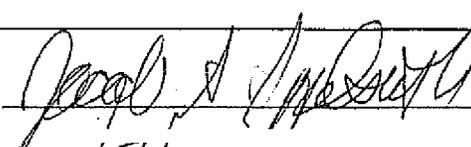
ORDER

Counts 1 and 2 are sustained. With respect to these violations, the Respondent's on-sale general eating place license is hereby revoked, with the revocation 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 three years 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. Additionally, the Respondent's license shall be suspended for a period of 30 days.

Counts 3, 4, and 5 are dismissed.

Dated: November 15, 2018


Matthew G. Ainley
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By: 
Date: <u>1/7/19</u>