ISSUED NOVEMBER 5, 1999

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

ECSTASY CORP. dba Gotham City 21516 Sherman Way Canoga Park, CA 91303, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7220 File: 42-307055 Reg: 97041424 Administrative Law Judge at the Dept. Hearing: Arnold Greenberg Date and Place of the Appeals Board Hearing: September 2, 1999 Los Angeles, CA

Ecstasy Corporation, doing business as Gotham City (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its on-sale beer and wine public premises license for 30 days for having permitted female entertainers to perform acts of simulated oral copulation, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from violation of Business and Professions

[1]The decision of the Department, dated August 20, 1998, is set forth in the appendix.

Code §24200, subdivision (a), and Rule 143.3(1)(a) and (1)(b).[2]

Appearances on appeal include appellant Ecstasy Corporation, appearing through its counsel, Joshua Kaplan, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine public premises license was issued on May 4, 1995. Thereafter, the Department instituted an accusation against appellant charging that appellant permitted each of two dancers to engage in acts of simulated oral copulation, in violation of Rule 143.3(1)(a) [4 Cal. Code Regs. §143.3, subd. (1)(a)].

An administrative hearing was held on March 24, 1998. The only witness at that hearing, Department investigator Stuart Thompson, testified about conduct he and Robert Rodriguez, a fellow Department investigator, observed during the performances of two dancers at the licensed premises, conduct which he concluded violated the Department rule prohibiting acts of simulated oral copulation.[3]

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[2] Although the accusation made no reference to Rule 143.3(1)(b), the Administrative Law Judge found that one of the two dancers also "caressed and grabbed her buttocks and occasionally spanked herself on the buttocks" (Finding of Fact 4-I], in violation of Rule 143(1)(b). However, it appears that he treated this merely as evidencing knowledge on the part of appellant's manager, and not as a violation for which discipline might be imposed.

[3] Thompson's direct testimony, pursuant to a stipulation between the parties, consisted of the contents of the report he prepared following his visit to appellant's premises on April 18, 1997. The report itself (Exhibit 2) is an amalgam of Thompson's observations and those of Robert Rodriguez.

Thompson's report (Exhibit 2), quoting Rodriguez, set forth a detailed description of the conduct of the first dancer, Jessi Restis, just after she had danced over to two male patrons seated near the stage:

> "Restis laid down on the stage with her back to the floor and spread her legs out in front of the two men. She then placed her right leg on the left shoulder of one of the men, and her left leg on the right shoulder of the other. Restis then began pulling the men's heads toward her crotch area with her ankles in a way which simulated oral copulation. As she did this ... Restis writh[ed] on the floor, and moan[ed] loudly as if she was engaged in sexual intercourse. This conduct went on for approximately 3-5 seconds as onlookers cheered.
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> "... Restis lean[ed] over the stage toward one of the male patrons. She then simulated licking the man with her tongue from his neck to his crotch area. She then pulled herself back up and grabbed the man's beer bottle that was sitting on the ledge of the stage. Restis then proceeded to lick her tongue around the bottle and bob her head up and down the opening as a form of simulated oral copulation."

In addition, according to the report, Restis later grabbed the back of the head of another man, pulled it toward her crotch, then began to pump the man's head back and forth several times in a manner which simulated oral copulation.

Thompson's report also described what he experienced during a lap dance provided by the second of the two dancers, a woman identified as Stephanie McDonald. According to Thompson, McDonald brushed her breasts in his face, making contact several times; placed her face into his crotch area and bobbed her head up and down "in a fashion which simulated oral copulation;" and caressed, grabbed and spanked her buttocks a number of times.

All of this, according to Thompson's report, took place while appellant's manager, Timothy Garrett, did nothing to stop it, thus permitting it to occur.

Subsequent to the hearing, the Department issued its decision which determined that each of the dancers had engaged in conduct simulating oral copulation, in violation of Rule 143.3(1)(a), and that dancer McDonald had caressed her bare buttocks, in violation of Rule 143.3(1)(b), and imposed a 30-day suspension of appellant's license.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) The evidence is insufficient as a matter of law to sustain the allegations of simulated sexual activity; (2) appellant was deprived of due process because of the unconstitutionality of Business and Professions Code §24210; and (3) the penalty is so excessive as to amount to cruel and unusual punishment.

DISCUSSION

I

Appellant contends that the conduct upon which the decision is based consisted of no more than ""suggestively erotic movements," which appellant equates with "dirty dancing."

Appellant argues, in substance, that there is a difference between imitating sexual intercourse or oral copulation and simulating such activity, because, for the latter, there must be exposure of and contact with the genital area. Appellant cites a 1995 decision of the Department (Basra Inc., Reg. No. 94030389) which, it argues, held on almost identical facts, that such conduct did not simulate sexual intercourse or oral intercourse within the meaning of Rule 143.3.

In the Basra, Inc. case, which involved, in addition to the matters discussed here,

various other statutory and/or rule violations, the administrative law judge had made findings of fact regarding the conduct of two dancers whose actions led a police officer to believe that one of them had engaged in simulated sexual intercourse and the other in simulated oral copulation:[4]

> "[Mary Francis] Morell's performance included bending her knees and squatting down on the runway with her legs spread apart. In that position, Morell's crotch was level with and facing the head of a patron seated at the runway bar. Morell's crotch was fully covered and was about one foot away from the patron's face. The patron never touched any part of Morell's body with any part of his body during the forty to sixty seconds Morell gyrated in front of him. At no point did [police officer] Henry believe an act of oral copulation was occurring. ..."

> "[Police officer] Conner saw Nikki [the second dancer] dancing in close proximity to a seated patron whose legs were spread apart. Nikki maneuvered herself so the patron was facing her back. Nikki then moved as if she were going to squat down onto the patron's pelvic area. Nikki lowered and raised her hips several times for ten to fifteen seconds while music was playing. Nikki's genitals were covered. The patron's genitals were covered. At no point did any part of Nikki's buttocks touch any part of the patron's body.[5]

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> "Following the performance Conner believed simulated sexual intercourse, Nikki turned toward the patron, who remained seated, and while facing the patron Nikki squatted down one time and 'made a motion toward his crotch.' Nikki's face came within eight to ten inches of the patron's pelvic area. There was no evidence Nikki's mouth was open, that her tongue was out, or that her head moved back and forth."

Addressing these factual findings in his determination of issues,[6] the administrative law judge in Basra, Inc. stated:

> "Morell's and Nikki's performance's may have been suggestive, off-color, crude and vulgar, but they did not 'simulate' sexual intercourse or oral intercourse

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[4] Findings of Fact V through VIII of proposed decision dated April 14, 1995.

[5] Finding of Fact VII of proposed decision dated April 14, 1995.

[6] Determination of Issues V of proposed decision dated April 14, 1995.

> within the meaning of Rule 143.3. At all times the performer's and patrons' genitalia were covered. There was no penetration or manipulation of any part of any person's body by another and, indeed, there was never any contact between the performer and the patron during those portions of the performance the police officers felt simulated intercourse."

The Department did not adopt the proposed decision in Basra, Inc., but, instead, issued its own decision, pursuant to Government Code §11517, subdivision (c). Nonetheless, it adopted the factual findings quoted above, and, in its discussion of the Rule 143.3 issue, simply reiterated the first sentence of the administrative law judge's language set forth in paragraph 3, supra, omitting the reasons the proposed decision had tendered as to why the rule was not violated, and offering none of its own.[7] The case, consequently, is of little assistance to appellant, since there is nothing in the Department's action which can be said to be a ruling that conduct such as that in the present case is beyond the reach of Rule 143.3.

The Department contends that neither actual skin to skin contact, nor exposure of the genitals is essential to the violation. We are inclined to agree. The question is, what conduct short of that is enough to satisfy the rule, yet be such that it has gone far enough beyond the constitutionally protected area of free expression as not to implicate First Amendment rights.

In California v. LaRue (1972) 409 U.S. 109 [93 S.Ct. 390], the United States Supreme Court upheld the constitutionality of Rule 143.3, holding the Department's

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[7] Appellant also cites a proposed decision (Two For The Money, Inc., Reg. No. 98044467) which has not yet even been reviewed by the Department, in which an administrative law judge concluded that the act of a dancer in moving her hand up and down a beer bottle, in a manner suggestive of manual masturbation, did not constitute simulated oral copulation. We do not find this a meaningful precedent.

conclusion not irrational, that certain sexual performances and the dispensation of liquor by the drink ought not to occur in premises which have licenses. The Court carefully noted, however, that it was dealing only with the rule on its face, and while it was possible that specific future applications of the rule could engender problems of constitutional dimension, those problems would be considered as they arose. The Court may well have been responding to Justice Douglas's suggestion that a Shakespearean play might well contain "fondling" in the sense of the rule: "Certainly a play which passes muster under the First Amendment is not made illegal because it is performed in a beer garden." (California v. LaRue, supra, 409 U.S. at 121 (Mr. Justice Douglas dissenting).)[8]

The singular importance of the factual context is such, in this kind of case, that it is extremely difficult to compare the facts of one case to those of another and draw any meaningful conclusion. In each case, we think, the test must be whether the conduct which has been challenged is such that, in the context in which it is presented, no reasonable person observing it would be expected to arrive at any conclusion other than that the person or persons involved were simulating oral copulation or sexual intercourse. We think such an approach is consistent with both the rule and the constitution.

We are guided by the Appeals Board's decision in Two For The Money, Inc. (1997) AB-6774. That case involved the conduct of two dancers, one claimed to have

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[8] We think it appropriate to call to counsel's attention the fact that the material quoted in appellant's brief, at page 9, said to be the holding of the Court in Ginzburg v. United States (1966) 383 U.S. 463, 498 [86 S.Ct. 942, 956], is, in fact, language excerpted from the dissenting opinion authored by Mr. Justice Stewart, and is not the holding of the Court.

simulated oral copulation, the other sexual intercourse. One dancer knelt, holding her hand in front of her mouth as if holding a cylindrical object, and moved her head, with her mouth open, toward and away from a stationary vertical pole on the stage. The other dancer, while clothed, sat on an investigator's lap and made grinding movements with her hips against his crotch.

Responding to the appellant's reliance upon a dictionary definition of "simulate" which placed emphasis on an intent to deceive, the Board cited other dictionary definitions,[9] and stated:

> "Clearly, the element of deception that appellant emphasizes is not present in every definition of 'simulate;' the primary emphasis in the definitions appears to be on the resemblance, not on the intent to deceive by the resemblance. We therefore reject appellant's contention that to simulate oral copulation or sexual intercourse the act must be such that onlookers would think that oral copulation or sexual intercourse were actually taking place.
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> "While the activities ... would not deceive anyone into thinking that actual oral copulation or sexual intercourse were occurring, they clearly were intended to and did resemble or give the appearance of those acts. It might be said that the activity in count 2 was 'suggestive' of oral copulation rather than simulating it, and the activity in count 6 might be described as 'stimulating' rather than 'simulating.' However, these activities were suggestive and stimulating precisely because the dancers 'feigned' or 'pretended' or 'imitated' sexual acts; in other words, they simulated oral copulation and sexual intercourse. We cannot say that the Department exceeded its discretion in finding these acts to be violative of Rule 143.3.

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[9] Webster's Third New International Dictionary, Unabridged (1986), p. 2122 - "1.To give the appearance of: FEIGN, IMITATE 2. To have the characteristics of: RESEMBLE."

Funk & Wagnalls Standard College Dictionary (1973), p. 1252 - 1. "To assume or have the appearance of, without the reality; counterfeit; imitate. 2. To make a pretense of."

Webster's New World Dictionary. Third College Edition (1988, p. 1251 -"to give a false indication or appearance of; pretend; feign 2. to have or take on the external appearance of; look or act like."

> "Appellant also argues that it is constitutionally impermissible to interpret 'simulated' sexual activity as prohibiting 'merely suggestive or erotic dancing without anatomical exposure for such exotic dancing is constitutionally protected and cannot be prohibited as alleged simulated sexual activity.' ... We disagree. This is not a case in which constitutionally protected expression is at issue. Appellant has certainly not specified a protected activity that is involved here. In any case, the restriction in Rule 143.3 does not prohibit dancing, lewd or otherwise; it simply prohibits lewd acts in an establishment licensed to sell alcoholic beverages. There simply is no constitutional issue here. (See Kirby v. Alcoholic Beverage Control Appeals Board (1975) 47 Cal.App.3d 360 [120 Cal.Rptr. 847]."

Given the content and context of their performances, we have no difficulty in concluding that both dancers engaged in conduct violative of Rule 143.3.

II

Appellant contends that it was deprived of due process because the administrative hearing was conducted before an administrative law judge who was appointed by the Director of the Department of Alcoholic Beverage Control pursuant to Business and Professions Code §24210.

Since appellant's attack is fundamentally directed at the constitutionality of the statute, the Board must decline to address the issue. Under article 3, §3.5, of the California Constitution, an administrative agency lacks jurisdiction to hold an act of the Legislature unconstitutional, except in certain circumstances, none of which are present in this case.

III

Appellant contends that the 30-day suspension constitutes cruel and unusual punishment.

The Appeals Board will not disturb the Department's penalty orders in the absence of an abuse of the Department's discretion. (Martin v. Alcoholic Beverage

Control Appeals Board & Haley (1959) 52 Cal.2d 287 [341 P.2d 296].) However, where an appellant raises the issue of an excessive penalty, the Appeals Board will examine that issue. (Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183].)

We have done so, and do not find a 30-day suspension at all shocking or even suggestive of an abuse of discretion, given the conduct involved.

ORDER

The decision of the Department is affirmed. [10]

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

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[10] This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate district court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.