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

AB-7863
File: 48-221463 Reg: 00048542

JAGG, INC., dba Captain Creme
23642 Rockfield, Lake Forest, CA 92630,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: February 13, 2003
Los Angeles, CA

ISSUED APRIL 16, 2003

Jagg, Inc., doing business as Captain Creme (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which ordered its license revoked for permitting conduct by various entertainers in violation of Department Rule 143.3(1)(a) and 143.3(1)(b) (4 Cal. Code Regs. §143.3, subd. (1)(a) and (b).) The order of revocation was conditionally stayed for a period of two years, subject to there being no cause for disciplinary action during such period. A 20-day suspension was also ordered.

Appearances on appeal include appellant Jagg, Inc., appearing through its counsel, Ronald Talmo, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

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[1]The decision of the Department made pursuant to Government Code section 11517, subdivision (c) , dated July 25, 2001, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general license was issued on September 13, 1988. Thereafter, the Department instituted an accusation against appellant charging, in 21 counts, that appellant permitted entertainers to engage in conduct prohibited by Department Rule 143.3(1)(a) and 143.3(1)(b) (4 Cal. Code Regs. §143.3(1)(a) and (b)).[2]

An administrative hearing was held on September 29 and November 21, 2000, at which time oral and documentary evidence was received. At that hearing, testimony was presented about the conduct of a number of dancers witnessed by Department investigators.

Subsequent to the hearing, the Administrative Law Judge (ALJ) issued a proposed decision which concluded that only one of the 21 counts of the accusation could be sustained, the conduct proven with respect to the remaining counts being protected by the First Amendment to the United States Constitution. The Department rejected the proposed decision and, pursuant to Government Code section 11517,

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[2] Rule 143.3(1)(a) and 143.3(1)(b) provide:

> 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 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, vulva or genitals.

subdivision (c) issued its own decision, finding that violations had been established with respect to 16 counts of the accusation, and rejecting appellant's constitutional claims.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant contends that the Department erred in rejecting its claims that the dancers' conduct was protected under the First Amendment, because no finding was made that the conduct in question was obscene. Appellant also contends that the Department is estopped from enforcing Rule 143.3 by the decision in *LSO, LTD. v. Stroh* (9th Cir. 2000) 205 F.3d 1146.

DISCUSSION

The Department reasoned as follows in rejecting appellant's constitutional claims:

> Respondent's argument that Rule 143.3 is unconstitutional because it "prohibits speech that has always been protected in a non-alcohol setting" is similarly rejected. Respondent relies on *LSO, Ltd.* [sic] *v. Stroh* (2000) 205 F.3d 1146 and *44 Liquormart, Inc.* [*v. Rhode Island*] (1996) 517 U.S. 484. This reliance is misplaced.
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> In *LSO Ltd. v. Stroh* (Id.) The 9th Circuit of Appeal dealt with Rule 143.4, which prohibits pictures, films, and visual reproductions of the proscribed acts in Rule 143.3. The *LSO* court held that LSO had the right to exhibit non-obscene works of art on the premises of an ABC licensed premises free from the proscriptions of Rule 143.4.
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> However, in the instant case, non-obscene art is not the issue, but rather the conduct of adult entertainers in ABC licensed premises is. In *California v. LaRue* (1972) 409 U.S. 109, the United States Supreme Court held Rule 143.3 is valid on its face. Further, the court expressly declined to frame the issue as one of whether the dancer's conduct was obscene or some form of communicative conduct. Instead, the Department's findings "... embodied in these regulations, that certain sexual performances and the dispensation of liquor by the drink ought not to occur at premises that have licenses was not an irrational one.' *Id. at 118*.
>
> Thus, the issue in a Rule 143.3 case such as this centers around the Department's ability to regulate the conduct of exotic dancers where liquor is

> sold. The respondent mistakenly interprets *44 Liquormart, Inc*., Supra, 517 U.S. 484,as eroding the holding in *LaRue*. The *44 Liquormart, Inc*. court merely disavowed the *LaRue* court's rationale using the 21st Amendment. The *44 Liquormart, Inc.* court concluded that a 21st Amendment analysis was unnecessary because the same conclusion regarding exotic dancing in licensed establishments would have been reached by examining and applying the State's inherent police powers to regulate such conduct.
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> Indeed, many States [sic] today invoke their police powers to regulate the conduct of exotic dancers without violating Constitutionally [sic] protected rights. (*Sammy's of Mobile, Ltd. v. City of Mobile* (1998) 140 F.3d 993; *City of Erie v. Pap's AM* (2000) 120 S.Ct. 1382.)
>
> According to the case law, Rule 143.3 is a valid exercise of the State's inherent police powers to regulate conduct in premises licensed to sell liquor by the drink.

The facts of this case are strikingly similar to those in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (Vicary)* (2002) 99 Cal.App.4th 880 [122 Cal.Rptr.2d 914] in which the Court of Appeal for the Fourth Appellate District reversed a decision of the Appeals Board which had held that Rule 143.3(1)(b) could not be constitutionally applied to conduct of exotic dancers that had not been found to be obscene.

Vicary was decided after the briefs in this appeal had been filed. Neither party has submitted supplemental briefs.

The *Vicary* court rejected the contention that the decision in *LSO, LTD. v. Stroh*, *supra*, 205 F.3d 1146, required that Rule 143.3 be struck down, describing the Department's threat in that case to revoke the license of a convention center if it permitted a trade show to include a display of erotic art and photographs as a "heavy footed attempt to regulate fully protected expression." Concluding its opinion, the court wrote:

> [W]e decline to hold that a state may prohibit performers from having sex with animals in bars, but must permit female dancers to rub their genitals and snap

their bare breasts at the customers. (Footnote omitted.) In terms of the potential for negative secondary effects, the distinction is one of degree and is not significant.

Agreed, dancers of this sort are entitled to at least some First Amendment protection. However, they are not entitled to flout rules enacted in the hope of maintaining some level of decorum in the potentially inebriated patrons not only while in the premises, but after they leave. The state, through the Department, has not prohibited dancers from performing with the utmost level of erotic expression. They are simply forbidden to do so in establishments which serve alcohol, and the Constitution is not thereby offended.

(In light of *Vicary* , the grounds for relief proffered by appellant are without merit.

ORDER

The decision of the Department is affirmed.[3]

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[3] 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.