

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

AB-9768

File: 47-419125 Reg: 16084647

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: July 25, 2019
Los Angeles, CA

ISSUED AUGUST 12, 2019

Appearances: *Appellant:* Donna J. Hooper, of Solomon, Saltsman & Jamieson, as
counsel for Woodley Enterprises, Inc.,

Respondent: Sean D. Klein, 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 which revoked its license for permitting female dancers to expose their breasts or buttocks within six feet of patrons; simulate 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

¹The decision of the Department, dated November 15, 2018, is set forth in the appendix.

Code of Regulations, Title 4, Division 1, section 143.3², as well as 143.2³.

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).)

³ **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).)

FACTS AND PROCEDURAL HISTORY

Appellant's type 47 on-sale general eating place license was issued on December 27, 2004. There are two prior instances of discipline against the license.

On August 26, 2016 the Department instituted a 24-count accusation against appellant charging that on four separate occasions – February 13, 2016, February 20-21, 2016, February 27, 2016, and March 18, 2016 – appellant permitted its employees to violate rules 143.3(1)(a), 143.3(2), and 143.2(3).

Administrative hearings were held on March 21, 2017, November 8, 2017, February 12, 2018, and April 10, 2018. Documentary evidence was received and testimony concerning the violation charged was presented by Los Angeles Police Officers Arbi Parsekhian, Dorian Brown, Samuel Cho, and Pedro Zamora; Los Angeles Police Sergeant Jeffrey Graham; and Department Agent David Duran. Appellant presented no witnesses.

Counts 1-2:

Testimony established that on February 13, 2016, Officers Brown and Cho entered the licensed premises and ordered beers. Officer Cho noticed a dancer, Lauren Alvarez, performing a lap dance for a patron. During the dance, the patron repeatedly caressed the dancer's buttocks and no one made an effort to stop the patron.

Officer Brown noticed another dancer standing between a male patron's legs while he was seated. The patron was rubbing and squeezing her buttocks on the outside of her clothing, and again, no one made an effort to stop him.

Counts 3-8:

On February 20, 2016, at approximately 11:30 p.m., Sergeant Graham and Officer Cho entered the licensed premises and ordered beers, which they were served. They observed a woman dancing on the stage lean over the rail to allow a patron to give her a tip. The patron placed the tip inside her bikini top and fondled her breast. The dancer then squatted down in front of the patron and allowed him to fondle her vagina. No one attempted to stop the patron.

A second dancer then came on stage to perform. While she was about five feet away from Sergeant Graham, the dancer pulled her bikini top away from her body and exposed her breast. A patron subsequently placed a tip inside her bikini top, touching her breast.

That same evening, Officer Cho saw a third dancer performing lap dances. Over the course of two lap dances, Officer Cho observed the male patron grab her breasts over her clothing and fondle them. The patron also touched her buttocks, and at one point, licked them. No one attempted to stop him.

Finally, a fourth dancer began to perform on stage, and in the course of her routine, she touched her vagina on the outside of her bikini bottom and began to rub it in a manner that simulated masturbation. At some point, she walked over to a patron and let him squeeze and pat her buttocks.

Counts 9-12:

Sergeant Graham and Officers Brown and Cho returned to the licensed premises on February 27, 2016. Sergeant Graham noticed a woman dancing for a patron. While the dancer's back was to the patron, the patron reached around and began squeezing her breasts, which were covered by her top. No one made an attempt to stop the patron.

Officer Brown observed another unidentified dancer performing a lap dance. The patron was rubbing the dancer's buttocks over the top of her clothing, and later, rubbed her breasts as well. Again, no one made an attempt to stop the patron.

Subsequently, Officer Brown noticed a third unidentified dancer standing next to a customer, who was rubbing her buttocks with his right hand. A fourth dancer was performing for a customer at another booth, and that customer too was rubbing her buttocks with both hands. No one made any attempt to stop either of the two customers.

Counts 13-24:

On March 18, 2016, Sergeant Graham, along with Officers Brown, Zamora, Cho, Parsekhian, and Agent David Duran, entered the licensed premises and each ordered a beer. Officer Cho noticed a dancer, Nadia Marsden, dancing for a patron. Marsden sat in the patron's lap and began to gyrate. She turned to face the patron and pulled his face into her breasts. The patron moved his head back and forth.

Officers observed dancer Andrea Robertson perform a lap dance for a patron at a nearby table. During the dance, the patron began grabbing her buttocks over her bikini bottoms. At no point did she try to stop him. She also moved up and down on his lap, with her buttocks coming into contact with his groin, although they were fully covered.

Officer Cho stated he observed a patron caressing another dancer's buttocks during the course of a dance. Officer Parsekhian also noticed a woman sitting in the lap of a male patron. The male was squeezing her buttocks, and later, grabbed her breasts. The dancer was in a bikini the entire time, and did not attempt to stop the patron.

Officers also observed a separate unidentified woman dancing near the stage. As she danced, a patron walked by and slapped her buttocks. She turned and gave the patron a hug.

Officer Cho testified that he observed yet another dancer, Kenia Colindres, giving a lap dance to a patron. The patron grabbed her breasts and also reached down and grabbed her vagina. Neither Colindres nor anyone else attempted to stop him.

Officer Cho also noticed Jillian Aguilar giving a lap dance to a different patron. The patron grabbed her buttocks, attempted to kiss her breasts, then buried his face in them. Neither Aguilar nor anyone else tried to stop him.

Officer Zamora noticed Brittney Thompson sitting next to a patron. She took the patron over to the lap dance area, then returned to their seats approximately 20 minutes later. She stood up, and the patron tipped her by placing the money inside her bikini bottom. She pulled down her bottoms, completely exposing her buttocks. She then pulled down her top exposing her breasts. The patron cupped her breasts, and neither Thompson nor anyone else attempted to stop him.

Finally, Agent Duran saw Viana Romano perform a lap dance for a customer. The patron placed his hand inside Romano's bikini and touched her vagina. When she turned, the patron placed his hands inside her bikini bottoms and grabbed her buttocks. Neither Romano nor anyone else attempted to stop him.

On September 5, 2018, the administrative law judge (ALJ) submitted his proposed decision – sustaining counts 1-4, 6-14, 16-17, and 20-24, dismissing counts 5, 15 and 18-19, and recommending revocation of appellant's license. The Department adopted the proposed decision in its entirety on October 31, 2018 and issued its Certificate of Decision on November 15, 2018.

Appellant filed a timely appeal raising the following issues: (1) Counts 1, 2, 7, 11, 12, 14, and 16 must be reversed because rule 143.2(3) is unconstitutionally vague and overbroad as to the term "buttocks," and; (2) based on that reversal, the matter must be remanded for reconsideration of the penalty on the remaining counts. These issues will be discussed together.

DISCUSSION

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 pp. 7-14.)

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.)

Appellant fails to articulate how this Board has either the jurisdiction or the authority to overlook a directly relevant holding from the nation's highest court.

Further, 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. 7-15.) The Board disagrees. Appellant's claim that the language of 143.2(3) is so vague and broad that it does not "place a reasonable person on notice as to what conduct is permitted and what is prohibited" (*Id.* at p. 8) is pure hyperbole. The 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.

Appellant has given this Board no cause to look beyond the plain language of these rules — in spite of listing activities it claims the rules would prohibit, such as all types of dance (and specifically ballet) and professional sports such as football and baseball. (*Id.* at p. 9.) We disagree.

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.

Here, 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.⁴

ORDER

The decision of the Department is affirmed.⁵

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

⁴Since the Board affirms the Department's decision regarding counts 1, 2, 7, 11, 12, 14, and 16, there is no need to reconsider appellant's penalty under Rule 144.

⁵This 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.