ISSUED SEPTEMBER 24, 1998

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

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| | ) | AB-6954 |
| Jagg, Inc. | ) | |
| dba Captain Cremes | ) | File: 48-221463 |
| 23642 Rockfield | ) | Reg: 97038802 |
| Lake Forest, CA 92630, | ) | |
| Appellant/Licensee, | ) | Administrative Law Judge |
| | ) | at the Dept. Hearing: |
| v. | ) | Rodolpho Echeverria |
| | ) | |
| | ) | Date and Place of the |
| DEPARTMENT OF ALCOHOLIC | ) | Appeals Board Hearing: |
| BEVERAGE CONTROL, | ) | July 8, 1998 |
| Respondent. | ) | Los Angeles, CA |
| | ) | |

Jagg, Inc., doing business as Captain Cremes (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 35 days, with 10 days stayed for a probationary period of one year for appellant permitting one entertainer to expose her buttocks when not on a stage at least 18 inches high and six feet from the nearest patron and another entertainer to fondle her breasts and genitals, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, and

[1]The decision of the Department, dated September 25, 1997, is set forth in the appendix.

Business and Professions Code § 24200, subdivisions (a) and (b), arising from a violations of Business and Professions Code § 23804 and Rules 143.3(1)(b) and 143.3(2) (4 Cal.Code Regs., § 143.3, subds. (1)(b) and (2)).

Appearances on appeal include appellant Jagg, Inc., appearing through its counsel, Ralph Saltsman, and the Department of Alcoholic Beverage Control, appearing through its counsel, David Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued, with conditions attached, on September 13, 1988. Thereafter, the Department instituted a four-count accusation against appellant charging that, on July 9, 1996, appellant permitted the acts described above, in violation of Department Rule 143.3 (counts 1 and 3) and a condition on appellant's license (count 4, sub-counts A and C.). In addition, the accusation charged appellant with permitting an entertainer to perform acts which simulated sexual intercourse, masturbation, and oral copulation in violation of Department Rule 143.3 (count 2) and a condition on appellant's license (count 4, sub-count B).

The pertinent part of the condition alleged to have been violated reads as follows:

> "Petitioner shall not offer any entertainment in violation of and within the purview of Rule 143.3 and 143.4 or Title 4 of the California Administrative Code, to-wit:
> "(a) Permit any person to perform acts or acts which simulate:
> (1) Sexual intercourse, masturbation, sodomy, bestiality, oral

> copulation, flagellation or any sexual acts which are prohibited by law.
> (2) The touching, caressing or fondling on the breast, buttocks, anus, or genitals.
> (3) The displaying [of] the pubic hair, anus, vulva or genitals.
>
> "(b) Subject to the provisions of subdivision (e) 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. . . ."

Parts (a) and (b) of this condition correspond, essentially word for word, to Rules 143.3(1) and 143.3(2), respectively.

An administrative hearing was held on May 12 and July 21, 1997, at which time oral and documentary evidence was received. At that hearing, testimony was presented by the Department investigators and a Department attorney who accompanied the investigators, by employees of appellant, and by the two entertainers named in the accusation concerning the events of July 9, 1996, and the operation of the premises.

Subsequent to the hearing, the Department issued its decision which determined that the Rule 143.3 violations had occurred as charged in counts 1 and 3 and that the condition violations had occurred as charged in count 4, sub-counts A and C. The decision also determined that the violations charged in counts 2 and 4, sub-count B, had not been established. The license was ordered suspended for 35 days, with 10 of the days of suspension stayed for a probationary period of one year. The Order stated that the penalty was imposed "[t]aking into consideration that the Department failed to establish the allegations in Count 2 and Count 4 Sub-

Count B . . . ."

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issue: The Department illegally determined the penalty by considering accumulated condition violations that duplicated rule violations.

DISCUSSION

Appellant contends that the Department impermissibly took into consideration condition violations that duplicated rule or statutory violations in determining the penalty in this case. Counts 1 through 3 recite violations of Rule 143.3 and count 4, sub-counts A, B, and C, recite the same conduct as violative of the condition on the license that merely repeats Rule 143.3. In determining the penalty to be imposed, the ALJ took into consideration both the violations of Rule 143.3 and the violations of the conditions.

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].)

The case of Cohan v. Department of Alcoholic Beverage Control (1978) 76 Cal.App.3d 905 [143 Cal.Rptr. 199], cited by appellant, appears to be on point. In that case, a two-count accusation was filed against the licensee: count 1 alleged

the violation of rule 143.4 and count 2 alleged the same conduct as a violation of a condition on the license that included a prohibition against the same conduct prohibited by Rule 143.3. The Department found both counts to be true and the license was ordered revoked. On appeal to this Board, the findings and decision were affirmed, but the matter was remanded to the Department for reconsideration of the penalty. On remand, the Department ordered a 30-day suspension for the Rule 143.3 violation and a consecutive 45-day suspension for the condition violation. The licensee appealed again, and the Board affirmed the penalty.

The appellate court stated that, while the Department could impose a condition that duplicated a rule in certain situations,

> "the licensee is entitled to assume that the department will assess the severity of the violation and determine a penalty suitable to the conduct involved; and that it will not tack on an additional penalty merely because the conduct in question violates both a condition and a rule."

The court held that "where a condition imposed on a license duplicates a department rule, relevant statute or ordinance, the department may impose discipline for one or the other violation, but not for both."

The Department brief basically agrees with appellant's position and asks that the Department be given the opportunity to review the penalty.

CONCLUSION

The decision of the Department is affirmed, but the penalty is reversed and remanded to the Department for reconsideration of the penalty.[2]

RAY T. BLAIR, JR., CHAIRMAN
BEN DAVIDIAN, MEMBER
JOHN B. TSU, MEMBER
ALCOHOLIC BEVERAGE CONTROL

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

Any party, before this final decision becomes effective, may apply to the appropriate 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.