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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

JANINE BRUNSON, COLLEEN JOHNSON and CHRISTY  
TUCKER, Appellants

v.

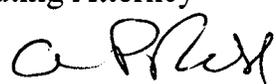
PIERCE COUNTY, et al., Respondents

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**Respondents' Response Brief**

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**I. ISSUES PRESENTED.**

Issue Number 1: Was the Auditor's decision to suspend the Appellants' adult entertainment license for one year arbitrary and capricious when the decision was exercised honestly and made with due consideration of the evidence?

Issue Number 2: Was the Auditor's decision to suspend Appellants' licenses for one year based on multiple violations of multiple provisions of the Adult Entertainment Ordinance arbitrary and capricious because the Auditor did not consider that the Appellants were the sole breadwinners for their families?

Issue Number 3: Was the Pierce County Adult Entertainment Ordinance, which forbids dancers from touching patrons in a manner seeking to excite the patron's sexual desires, a strict liability crime, thereby violating the First Amendment?

Issue Number 4: Was it a violation of due process to utilize the preponderance of evidence standard in a hearing that seeks to suspend a non-professional license when the licensing action is non-punitive in nature and when the Appellants admitted the violations?

## **II. FACTS**

### **APPELLANT BRUNSON**

On December 22, 2005, Deputy Brockway of the Pierce County Sheriff's Department, was working undercover at Fox's. Hearing Transcript (HT) p. 49. CP 82-88. Appellant Brunson approached the deputy and asked him if he wanted to buy a dance. Id. The deputy asked Brunson the cost of the dance and she responded, "Twenty dollars and up". HT pgs. 50, 55. CP 82-88. The deputy accepted. HT p. 50. CP 82-88. Brunson and the deputy went to a couch area on the north side of the business. Id. During the dance the deputy sat and Brunson danced within 10 feet of the deputy and she was not on stage. Id. During the dance, Brunson straddled the deputy's leg, rubbed her breasts on the deputy's face, and exposed her left nipple from her bikini top. HT pgs. 50-51. CP 82-88. She rubbed her hand against the deputy's groin. Id. She also rubbed her groin over her bathing suit bottom. HT p. 51. CP 82-88. After the dance was over, the deputy offered Brunson the twenty dollars and she took it from his hand. Id. At the hearing, Brunson testified that she danced in front of the deputy, within ten feet and she was not on a stage. HT p. 77. Brunson admitted that she had multiple physical contacts with the deputy. Id. She also admitted taking the money directly

from the deputy. CP 82-88. Brunson testified that the club was set up so that the dancers can have physical contact with the patrons. HT p. 79.

**APPELLANT JOHNSON**

On January 20, 2006, Deputy Clark of the Pierce County Sheriff's Department, was working undercover at Fox's. HT p. 30. The deputy testified that Appellant Johnson approached and asked him if he wanted to buy a dance. HT pgs. 30-31, 33-34. CP 75-81. When Johnson started the dance she was not on a stage and she was straddling the deputy's legs. HT p. 31. CP 75-81. During the dance, Johnson rubbed her breasts, her buttocks and her crotch area against the deputy's crotch. HT pgs. 30-31. Johnson also rubbed her hands against the deputy's crotch. HT p. 32. CP 75-81. After the dance was over, the deputy asked Johnson how much the dance cost. Id. The Appellant Johnson told the deputy that the dance was thirty dollars. Id. The deputy paid Johnson thirty dollars. Id. Johnson testified at the hearing that she danced for the deputy and that she was within ten feet of the deputy at the time of the dance. Id. During this dance, the Appellant Johnson admitted that she had multiple physical contacts with the deputy. Id. She also took the money from the deputy. HT p. 84. CP 75-81.

## **APPELLANT TUCKER**

Deputy Barnes and Detective Wright both were working undercover at Fox's on January 20, 2006. HT p. 37. CP 68-74. The Appellant Tucker asked each of these officers, at separate times, whether they wanted a dance. Id. Tucker told them that the dance was thirty dollars. HT p. 38. CP 68-74. Wright testified that during the dance Tucker was touching him and she was not on stage. Id. Wright testified that during the dance, Tucker rubbed her crotch and buttocks against the deputy's groin. Id. Wright testified that he purchased two dances from Tucker. Id. During the dance, Tucker rubbed her hands over Wright's genital area. HT p. 39. CP 68-74. Wright testified that after the two dances, he paid Tucker and she took the money. HT p. 40. CP 68-74. Barnes testified that Tucker was on his lap as she danced and she touched his groin area. HT p. 26. CP 68-74.

Jill Munns of the Auditor's office (Auditor) testified that she had made the decision to suspend the Appellant's license for a period of one year. HT pgs. 66, 72. Ms. Munns testified that she made that decision after reviewing the police reports and the ordinance. HT pgs. 67-69. Ms. Munns testified that she considered the multiple violations committed by each Appellant of dancing off the stage, multiple physical contacts and the dancers soliciting pay directly from the patrons. HT p. 67.

**A. PROCEDURAL HISTORY**

The Pierce County Auditor (Auditor) issued a one-year license suspension against the Appellant Brunson on August 30, 2006 (CP 82-88); on Appellant Johnson on August 19, 2006 (CP 75-81); and against Appellant Tucker on August 14, 2006 (CP 68-74). The order of suspension was based on the Appellants' violation of the Adult Entertainment Ordinance Pierce County Code , PCC § 5.14.190(H), (Platform and/or proximity to patron violation); PCC § 5.14.190(I), (Illegal contact with a patron); and PCC § 5.14.190(L), (Solicitation of pay or gratuity directly from a patron). Brunson, CP 82-88; Johnson, CP 75-81; Tucker, CP 68-74.

Appellants' appealed the license suspension. The matters were heard in front of the Pierce County Hearing Examiner (Hearing Examiner) on October 20, 2006. Brunson, CP 82-88; Johnson, CP 75-81; Tucker, CP 68-74. At this hearing, the Appellant successfully argued the Hearing Examiner must hear live testimony and determine whether the violations occurred and whether the period of suspension was excessive. HT p. 11.

On November 1<sup>st</sup>, 2006, the Hearing Examiner issued his report and decision affirming the Appellants' license suspensions. Brunson, CP 262-266; Johnson, CP 1-5; Tucker 278-282. The appeal to Pierce County

Superior Court was filed on November 30, 2006. Id. Following briefing and argument, the Superior Court issued an order denying the petition for writ of review and dismissing Appellants' claims. CP 254-255.

**III. ARGUMENT.**

**A. THE AUDITORS DECISION TO SUSPEND THE APPELLANTS' LICENSES FOR ONE YEAR WAS NOT ARBITRARY AND CAPRICIOUS.**

The county ordinance at issue puts restrictions on the conduct of the dancers who are required to be licensed. PCC 5.14.190 (See Appendix A). Appellants argue that the Auditor's licensing decision is arbitrary, capricious and an abuse of discretion because there are no written policies or guidelines determining how the Auditor exercises her authority. Appellants attach copies of the municipal codes of several cities in the Puget Sound region apparently to demonstrate the written standards are required. Appellants' Brief, Appendix C.

Absence of written policies and guidelines does not make the decision arbitrary and capricious. Folden v. Washington State Dept. of Social and Health Services, 744 F. Supp. 1507, 1527-28, W.D. Wash., 1990. The Appellants have cited no authority for the proposition that failure to use written standards violates due process. Because of the failure to cite authority for this proposition, the court need not consider

this argument. State v. Logan, 102 Wn. App. 907, 911, n.1, 10 P.3d 504 (2000).

The applicable standard of review in determining whether the suspension of Appellants' licenses should be upheld is the arbitrary and capricious standard. Teter v. Clark County, 104 Wash.2d 227, 234, 704 P.2d 1171 (1985). With respect to determining whether the action was arbitrary and capricious, "[t]he scope of court review should be very narrow, however, and one who seeks to demonstrate that action is arbitrary and capricious must carry a heavy burden." Pierce County Sheriff v. Civil Service Com'n of Pierce County, 98 Wn. 2d 690, 695, 658 P.2d 648, (1983). The arbitrary and capricious standard refers to willful and unreasoning action that is done without regard to or consideration of the facts and circumstances surrounding the action. Miller v. City of Tacoma, 61 Wash.2d 374, 390, 378 P.2d 464 (1963). "Where there is evidence in the record and room for two opinions, an action is not arbitrary and capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached." Miller, at 390. A decision is not arbitrary and capricious if made with due consideration of the evidence presented at the hearing. State ex rel. Perry v. Seattle, 69 Wn. 2d 816, 821, 420 P.2d 704 (1966).

The Auditor's representative testified that she reviewed the police reports and criminal complaints before making her decision. HT, p.67. Ms. Munns testified that she made that decision after reviewing the police reports and the ordinance. Id. Ms. Munns testified that in making her decision to suspend the licenses for a period of one year, she considered that each Appellant had committed multiple violations of the ordinance (dancing off the stage, multiple physical contacts and soliciting pay directly from the patrons). HT, pgs. 67, 72. Ms. Munns testified that these were serious violations. HT p. 72.

These violations were not inadvertent or unintentional. As Appellant Brunson testified the club was set up so that the dancers can have physical contact with the patrons. Brunson, HT p.80. It is clear from the testimony of Brunson and Johnson that the manner of their dance with the deputies was no different than any other dance they have performed at Fox's. Both Brunson and Johnson testified that they were not aware of rules governing their dancing and that if the rules were posted at Fox's, it was too dark in that establishment to read the rules. HT pgs 78 & 84. Brunson, CP 82-88; Johnson, CP 75-81. Appellants do not claim that there is no evidence in the record to justify the decision of the Auditor and the Hearing Examiner. In fact, two of the Appellants

(Brunson and Johnson) admitted to the violations Brunson, HT pgs. 77 & 79; Johnson, HT 84.

This testimony reflects that the Auditor correctly exercised discretion in deciding on the length of the suspension. Appellants' argument simply is that the Auditor should have also considered that the Appellants supported their families by dancing. That information was presented in the de novo before the Hearing Examiner as was the information that no previous violation had been found against the Appellants. HT pgs 78 & 84.

Appellant cites Norquest/RCA v. Seattle, 72 Wn. App. 467, 865 P.2d 18 (1994) for the proposition that a governmental action is arbitrary and capricious if the action is willful and unreasoning action in disregard of the facts and circumstances. Appellants' Brief, p.9. Norquest and Miller stand for the same proposition of law. Norquest also held that under the arbitrary and capricious standard of review of governmental action, the reviewing court does not make an independent assessment, but instead the court determines whether evidence presented adequately supports the action of the governmental body. Norquest at 24. The difference in the outcome between the two cases is simply that in Miller, the court found that evidence existed in the record justifying the decision. Miller, at 390-91. In Norquest, the court found that there was no

evidence existing in the record justifying the decision by the city. Norquest, at 25-26. The case in front of this court is more similar to Miller than Norquest. Appellants cite to State v. Pettit, 93 Wn. 2d 288, 296, 609 P.2d 1364 (1980), in support of the proposition that the Auditor did not exercise her discretion and instead relied on a fixed formula when she suspended the Appellants' licenses. . The court in Pettit, ruled that a fixed formula which required a particular action in every case constituted an abuse of discretion. Pettit, p. 296. There is no indication that the Auditor followed a set formula when determining the length of the sentence. The Appellants successfully argued to the Hearing Examiner that the hearing was a de novo hearing requiring live testimony. HT pgs. 10-11. At this hearing, the Appellants presented their mitigation and argued that the suspension was excessive.

**B. A ONE YEAR LICENSE SUSPENSION FOR  
MULTIPLE VIOLATIONS OF THE ORDINANCE  
DOES NOT VIOLATE THE FIRST AMENDMENT**

Washington courts have previously upheld the constitutionality of this county ordinance. DCR v. Pierce County, 92 Wn. App. 660, 964 P.2d 380 (1998); *review denied*, 137 Wn.2d 1030, 980 P.2d 1283 (1999). Similar municipal ordinances in Washington State have also been upheld. Ino Ino, Inc. v. City of Bellevue, 132 Wn.2d 103, 126, 937 P.2d 154 (1997), *cert. denied*, 522 U.S. 1053, 120 S. Ct. 1553, 146 L.Ed. 2d 459

(2000). Moreover, the constitutionality of similar ordinances (with respect to the distance restrictions and tipping requirements have been upheld by the federal courts as well. KEV, Inc. v. Kitsap County, 793 F.2d 1053 (9<sup>th</sup> Cir. 1986), Colacurcio v. City of Kent, 944 F. Supp. 1470 (W.D. Wash. 1996).

Such activity as is at issue here receives no greater protection under the Washington State Constitution than it does under the First Amendment to the U.S. Constitution. Washington State courts have held that the “differences in the texts of art. I, § 5, [of the state Constitution] and the First Amendment” do not “justify greater state constitutional protection in the context of sexually explicit nude and semi-nude dancing.” Ino Ino, 132 Wn.2d at 119-20. In addition, Washington State courts have held that the proximity of the dance is not constitutionally protected expression, aside from the performance of the dance itself. DCR v. Pierce County, 92, Wn.App. at 674.

Proximity, tipping and dancer contact restrictions are analyzed as time, place and manner restrictions. DCR, at 676. “Government may impose reasonable time, place, and manner restrictions on speech that are (1) content neutral, (2) narrowly tailored to serve a substantial governmental interest, and (3) leave open alternative channels for communication.” Id. In upholding the Pierce County Ordinance, the court

in DCR found that the ordinance was content neutral, was narrowly tailored to serve a substantial governmental interest and it left open alternative channels for communication. Id. At 678-82. These findings were made even though the court also found that there is an expressive component to erotic dance. Id.

The one year license suspensions imposed by the Auditor are not excessive and they do not violate the due process clauses of the federal and state constitutions. Moreover, the Pierce County Ordinance is constitutional and it does not vest unbridled discretion in the Auditor to revoke or suspend a license. In order to satisfy requirements pursuant to the due process clause of the Fifth Amendment to the U.S. Constitution, and article I, § 3 of the Washington State Constitution, licensing of adult entertainment must contain sufficient procedural safeguards. JJR, Inc. v. City of Seattle, 126 Wn.2d 1, 6, 891 P.2d 720 (1995). Washington state courts have ruled that with respect to due process, a stay of adult entertainment license revocation and suspensions pending judicial review provided sufficient procedural safeguards to comport with the requirements of due process. JJR, at 6. The Pierce County Ordinance contains a provision that all suspensions/revocations are stayed pending an appeal. P.C.C. 5.02.090.

The Appellant's claim that the one year license suspension violates the fourth prong of the O'Brien test (the incidental restrictions on alleged First Amendment freedom is no greater than essential to the furtherance of the important or substantial governmental interest). Appellants' Brief, pgs. 13.

The ordinance at issue here has previously been found to be legitimate time, place and manner restrictions on conduct. DCR, at 683. The Supreme Court has held that "less restrictive alternative" analysis had never been used as a part of the inquiry into the validity of time, place and manner restrictions. Ward v. Rock Against Racism, 491 U.S. 781, 791, 109 S. Ct. 2746, 105 L. Ed. 661 (1989); Clark v. Community for Creative Non-Violence, 468 U.S. 288, 298, 104 S. Ct. 3065, 82 L. Ed. 2d 672 (1984). Appellants fail to cite to any case that holds that the consequence for violations of the ordinance must meet a "less restrictive alternative" test.

In their brief, Appellants cite to City of Los Angeles v. Alameda Books, for the proposition that a city may not pass a regulation to reduce secondary effects of nude dancing if it substantially reduces speech. Appellants' brief, p. 10-11. In City of Los Angeles, Justice Kennedy states, "[r]equiring a dancer to stand back ten feet while performing the

exact same dance is a trivial decrease in the quality of the speech.” Id at 740.

C. **THE PIERCE COUNTY ORDINANCE DOES NOT VIOLATE THE FIRST AMENDMENT BY IMPOSING STRICT LIABILITY.**

The Appellants argue that PCC 5.14.190, PCC 5.14.230(B) and PCC 5.14.250 violate the First Amendment because they permit criminal penalties and license suspension on the basis of strict liability. Appellants rely on State Ex. Rel. Lally v. Gump, 57 Wn.2d 224, 228, 356 P.2d 289 (1960), for the proposition that PCC 5.14 is unconstitutional because imposition of strict liability violates the First Amendment. . The court in Gump held that imposing strict liability on book sellers had a chilling effect on legitimate speech because the book seller would not carry books he thought there was a possibility that they were indecent. Gump at 227. The court in Gump was concerned that book sellers would limit the amount of books offered for sale to a number they could actually review. Id. Here, the Appellants knowingly danced in the laps of the officers; they knowingly danced off the stage; and, they knowingly made physical contact with the officers in a manner seeking to arouse or excite sexual desires. In Appellants cases, PCC 5.14.190 is clear as to what type of behavior is prohibited so it is unlikely that society will be denied the benefits of a protected forum of speech.

Appellants also cite to Threesome Entertainment v. Strittmather, 4 F. Supp. 2d 710 (N.D. Ohio 1998). This case is not analogous to Appellants cases because in Threesome, the court invalidated the code because it prohibited any touching, including inadvertent touching of a patron by a nude dancer. The Pierce County Code only prohibits touching with the intent to arouse sexual desire. PCC 5.14.190(I).

**D. THE COURT SHOULD REJECT APPELLANTS ARGUMENT WITH RESPECT TO BURDEN OF PROOF.**

Appellants' final argument is that PCC 5.14.240(C) violates due process because it permits license suspension on the basis of a preponderance of evidence standard of proof. Appellants argue that their interest in maintaining the adult entertainment licenses is the same interest as Dr. Nguyen had in keeping his medical license. In Nguyen v. Department of Health, 144 Wn.2d 516, 517, 29 P.3d 689 (2001), the Washington State Supreme Court held that the due process of law required proof by clear and convincing evidence before Dr. Nguyen could be deprived of his medical license.

It was not error for the Hearing Examiner to use the preponderance of the evidence standard of proof pursuant to PCC 5.14.240(C). At the hearing the Appellants conceded that preponderance of evidence standard of proof was the correct burden of proof. HT 11. In addition, the Nguyen

case is not applicable in this instance because Nguyen (and the cases following Nguyen) applies the higher standard of proof with respect to professional licenses. Appellants' licenses are occupational licenses.

Webster's New World Dictionary, College Edition, defines "profession" as:

a vocation or occupation requiring advanced training in some liberal art or science, and usually involving mental rather than manual work, as teaching, engineering, writing, etc.; especially medicine, law or theology.

Webster's New World Dictionary, College Edition. Washington State law defines the term "professional license" as

"professional license" means an individual, nontransferable authorization to carry on an activity based on qualifications which include: (a) Graduation from an accredited or approved program, and (b) acceptable performance on a qualifying examination or series of examinations.

RCW 18.118.020(8).

Washington State courts have required the higher standard of proof of clear and convincing evidence in disciplinary hearings in the following professions: physicians (Nguyen v. Department of Health, 144 Wn.2d 516, 29 P.3d 689 (2001)), engineers (Nims v. Bd. Of Prof'l Eng'rs & Land Surveyors, 113 Wn. App. 499; 53 P.3d 52 (2002)); real estate appraisers (Eidson v. Department of Licensing, 108 Wn. App. 712, 32

P.3d 1039 (2001)); nursing assistants (Ongom v. Department of Health, 159 Wn.2d 132; 148 P.3d 1029 (2006)); and midwives (O'Connor v. Department of Health, 129 Wn. App. 1035 (2005)). In order to obtain these licenses, one needs to complete a field of study and take a licensing examination: physician, RCW 18.71.50, RCW 18.71.51, RCW 18.71.070; engineers, RCW 18.43.040; real estate appraisers, RCW 18.140.080, RCW 18.140.100; nursing assistants, RCW 18.88A.085; and midwives, RCW 18.50.040.

There is no evidence in the record that would suggest an Adult Entertainment license is a professional license. In order to dance at an erotic dance studio such as Foxes, one needs a dancer license. PCC 5.14.100. No training or education is required in order to obtain a dancer's license. An applicant does not have to take a qualifying examination in order to obtain a dancer's license. The Appellants do not cite to any statute or any case law in support of the proposition that a dancer's license is a professional license.

The Petitioner asserts that dancer's should receive the same evidentiary standard as a medical doctor or a nurse. Petitioner's Opening Brief, p.17-19. In Nguyen v. Department of Health, the court held that the minimum evidentiary standard is based on the nature of the interest at stake. 144 Wn. 2d 516, 523-24. In Nguyen, the doctor's interest was

identified as the “potential loss of patients, diminished reputation, and professional dishonor”. Nguyen, at 521-22. The petitioners have not identified any evidence in the record demonstrating that they will suffer any dishonor or diminished reputation as a dancer in an erotic dance studio for violating the Pierce County Code with respect to adult entertainers.

In this matter before the court, the petitioners have not demonstrated that any stigma attaches to their loss of the license. The petitioners have not demonstrated that their reputations, will suffer as a result of this licensing action with respect to their dancer licenses. Arguably, it is employment as a dancer that carries the stigma and a loss of reputation to any extent there is a reputation. Additionally, the licenses actions are not quasi-criminal. Even though the license action is brought to protect the public and the action is brought as a result of alleged misconduct, the action is not punitive in nature. In O’Day v. King County, 109 Wn.2d 796, 818; 749 P.2d 142 (1988), the Washington State Supreme Court ruled that a license sanction for violations of adult entertainment codes is remedial and not punitive in nature. The Hearing Examiner utilized the correct standard of proof in these licensing actions.

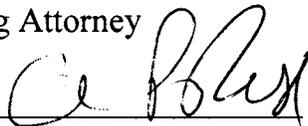
Even if this court finds that the Hearing Examiner should have used a “clear and convincing evidence” standard, the Appellants can not demonstrate any prejudice because the Appellants admitted the violations.

**IV. CONCLUSION**

The license suspension and the decision of the Hearing Examiner should be affirmed.

DATED: May 21, 2008

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Prosecuting Attorney

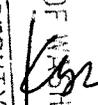
By   
ALLEN P. ROSE  
Deputy Prosecuting Attorney  
Attorneys for Respondents  
Ph: (253)798-6385 / WSB # 19045

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing Respondent's Response Brief was delivered this 22nd day of May, 2008, to ABC-Legal Messengers, Inc., with appropriate instruction to forward the same to the following parties:

Gilbert H. Levy  
Suite 330 Market Place One  
2003 Western Avenue  
Seattle, WA 98121

  
CHANDRA ZIMMERMAN

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COURT OF APPEALS  
DIVISION II  
08 MAY 23 PM 1:43  
STATE OF WASHINGTON  
BY   
DEPUTY

**Pierce County Code**

**5.14.190 Operation Restrictions - Unlawful Acts Designated.**

Violation of any subsection (A.-S.) shall be a separate and distinct offense.

A. No person, firm, partnership, corporation, or other entity shall advertise, or cause to be advertised, an erotic dance studio without a valid erotic dance studio license issued pursuant to this Chapter.

B. No later than March 1 of each year, an erotic dance studio licensee shall file a verified report with the Auditor showing the licensee's gross receipts and amounts paid to dancers for the preceding calendar year.

C. An erotic dance studio licensee shall maintain and retain for a period of two years the names, addresses, and ages of all persons employed as dancers by the licensee.

D. No erotic dance studio licensee shall employ as a dancer a person under the age of 18 years of age or a person not licensed pursuant to this Chapter.

E. No person under the age of 18 years shall be admitted into an erotic dance studio.

F. No erotic dance studio licensee shall serve, sell, distribute, consume, or possess any intoxicating liquor or controlled substance upon the premises of the licensee.

G. An erotic dance studio licensee shall conspicuously display the studio licenses required by this Chapter.

H. All dancing shall occur on a platform intended for that purpose which is raised at least 18 inches from the level of the floor and no closer than ten feet to any patron.

I. No dancer or employee shall fondle, caress, or touch any patron in a manner which seeks to arouse or excite the patrons' sexual desires.

J. No patron shall fondle, caress, or touch any dancer or employee in a manner which seeks to arouse or excite the patrons' sexual desires.

K. No patron shall pay or give any gratuity directly to any dancer.

L. No dancer shall solicit any pay or gratuity directly from any patron.

M. No dancer or employee shall expose their breasts below the top of the areola or expose any portion of the pubic hair, vulva or genitals, anus and/or buttocks, except upon a stage at least 18 inches above the immediate floor level and removed at least 10 feet from the nearest patron.