

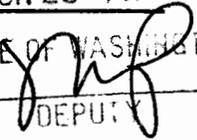
377094-8-II

37094-8

FILED
COURT OF APPEALS
DIVISION II

08 JUN 23 PM 2:43

IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON
BY  DEPUTY

JANINE BRUNSON, COLLEEN JOHNSON; AND CHRISTY TUCKER

Appellants,

Vs.

PIERCE COUNTY Et Al.

Respondents

APPELLANTS' REPLY BRIEF

Appeal from the Honorable Brian Tollefson
Pierce County Superior Court Nos. 06-2-13561-5, 06-2-13560-7, 06-2-13562-3
Entered on November 30, 2007

Gilbert H. Levy, Attorney for Appellants
Suite 330 Market Place One
2003 Western Avenue
Seattle, WA 98121
(206) 443-0670

TABLE OF CONTENTS

I. REPLY TO ARGUMENT THAT THE AUDITOR'S ACTION WAS NOT ARBITRARY AND CAPRICIOUS.....	1
II. REPLY TO ARGUMENT THAT A ONE YEAR LICENSE SUSPENSION FOR A FIRST OFFENSE DOES NOT VIOLATE THE FIRST AMENDMENT.....	2
III. REPLY TO ARGUMENT THAT LICENSE SUSPENSION ON THE BASIS OF STRICT LIABILITY DOES NOT VIOLATE THE FIRST AMENDMENT.....	4
IV. REPLY TO ARGUMENT THAT THE STANDARD OF PROOF IS NOT UNCONSTITUTIONAL.....	6
V. CONCLUSION.....	7

TABLE OF AUTHORITIES

Cases

<i>Bright Lights v. City of Newport</i> , 830 F. Supp. 378 (E.D. Kentucky 1993)	5
<i>DCR v. Pierce County</i> , 92 Wn. App. 660, 964 P. 2d 380 (1998)	2
<i>Hayes v. City of Seattle</i> , 131 Wn. 2d 706, 934 P. 2d 1179 (1997)	1
<i>Ino Ino, Inc. v. Bellevue</i> , 132 Wn. 2d 103, 937 P. 2d 154 (1997).....	2
<i>JJR Inc. v. Seattle</i> , 126 Wn. 2d 1, 891 P. 2d 120 (1995)	2
<i>Millenium Restaurants Group, Inc. v. City of Dallas</i> , 191 F. Supp. 2d 802 (N.D. Texas 2002).....	4
<i>O’Day v. King County</i> , 109 Wn.2d 796, 749 P. 2d 142 (1988).....	3
<i>Ongom v. State . Department of Health, Office of Professional Standards</i> , 159 Wn.2d 132, 148 P. 2d 1029 (2006).....	7
<i>State v. Parker</i> , 99 Wn. 2d 639, 994 P. 2d 294 (2000).....	6
<i>Wal Juice Bar, Inc. v. City of Oak Ridge, Kentucky</i> , ___ F. Supp. 2d ___, 2008 WL 1730293 (W.D. Kentucky 2008)	5

I. REPLY TO ARGUMENT THAT THE AUDITOR'S ACTION WAS NOT ARBITRARY AND CAPRICIOUS

Agency action is arbitrary and capricious if the action is willful and unreasoning without regard to the attending facts and circumstances. *Hayes v. City of Seattle*, 131 Wn. 2d 706, 934 P. 2d 1179 (1997). PCC 5.14.230(B) vests the auditor's representative with discretion to suspend or revoke a dancer's license on the basis of past violations of the ordinance. In this case, the Auditor's representative gave no consideration to attending facts and circumstances. She did not consider whether the Appellants had prior violations of the Pierce County Ordinance. HT 66. She did not consider whether they had a prior criminal record. HT 67. She did not consider any personal information about the Appellants. *Id.* She did not consider whether suspension for less than a year would be sufficient to deter future illegal conduct. HT 71. She was not even able to say how many violations of the ordinance would be sufficient to trigger the one-year suspension. HT 69. The Auditor's representative was asked the following question and gave the following answer:

Q: Are there any circumstances that you can think of where a suspension of less than a year – or a suspension of less than a year would be appropriate?

A: Not really. The ordinance clearly states that – what they can and cannot do, so any violations to the ordinance is a really serious matter, and it should be you know, isolated.

HT 69, 70.

In sum, the Auditor's action was based on an ad hoc policy that that multiple violations of the ordinance would trigger the maximum penalty regardless of the nature of the violations and regardless of the individual's past history of non-compliance. This is clearly not what the Pierce County Council had in mind when it vested the Auditor with discretion. The Auditor's decision was arbitrary and capricious and should be reversed.

**II. REPLY TO ARGUMENT THAT A ONE YEAR LICENSE
SUSPENSION FOR A FIRST OFFENSE DOES NOT VIOLATE
THE FIRST AMENDMENT**

While there are a number of cases upholding the constitutionality of similar licensing schemes, there is no case dealing with the issue before this Court. Neither Supreme Court's decision in *Ino Ino, Inc. v. Bellevue*, 132 Wn. 2d 103, 937 P. 2d 154 (1997) nor this Court's decision in *DCR v. Pierce County*, 92 Wn. App. 660, 964 P. 2d 380 (1998) dealt with license suspension. Both cases were concerned with whether the regulations in question were unconstitutional on their face. Neither Court looked at the question of whether a one-year license suspension was unconstitutional as applied to an entertainer who has no prior history of violations. *JJR Inc. v. Seattle*, 126 Wn. 2d 1, 891 P. 2d 120 (1995) dealt only with the question

of whether a stay of the license suspension was required pending judicial review. The only case that is remotely relevant is the decision of the Washington Supreme Court in *O'Day v. King County*, 109 Wn.2d 796, 749 P. 2d 142 (1988). There the Court upheld the licensing suspension provisions in the King County Ordinance against a double jeopardy challenge, holding that a license suspension of up to a year did not constitute punishment so as to trigger double jeopardy protection.¹ The plaintiffs in *O'Day* were not challenging the length of the license suspension nor is there any indication from the Court's recitation of the facts how long the license suspensions in that case were intended to last. The portion of that decision, which appears to sanction one-year license suspensions, is simply obiter dictum.

Appellants concede that the issue of whether a one-year license suspension for a first offense violates the fourth prong of the *O'Brien* test is one of first impression. However, the cases cited in the following section of this reply brief, invalidating regulations that permit license suspension on the basis of strict liability, do so based on the rationale that such restrictions are greater than essential to accomplish the government's

¹ The Court stated, "We conclude that the County intended to impose sanctions against a dancer's license as a remedial measure, aimed at protecting the younger clientele that frequents soda pop clubs. In addition, we conclude that license suspension or revocation of up to 1 year is not so punitive a sanction as to negate that intention." 109 Wn. 2d at 818.

legitimate goals. The same reasoning applies to imposition of a one-year license suspension for a first offense. Evidence that other municipalities have adopted a graduated system of licensing penalties, as indicated in the appendix to the opening brief, provides rather strong indication that legitimate legislative goals may be accomplished by less burdensome means.

III. REPLY TO ARGUMENT THAT LICENSE SUSPENSION ON THE BASIS OF STRICT LIABILITY DOES NOT VIOLATE THE FIRST AMENDMENT

Respondent apparently concedes that the license suspension provisions of the Chapter 5.14 of the Pierce County Code, coupled with the standards of conduct, provide for license suspension on the basis of strict liability. Taken together, these sections are traps for the unwary and a pretext for censorship. An entertainer who unwittingly dances nine and one half feet from the nearest patron may lose her license for up to one year.

There is additional authority for the proposition that license suspension on the basis of strict liability violates the First Amendment. In *Millenium Restaurants Group, Inc. v. City of Dallas*, 191 F. Supp. 2d 802 (N.D. Texas 2002), a local ordinance provided for automatic revocation of an adult nightclub business license if employees of the business were convicted of certain offenses within a one year period, regardless of

whether the business owner knew about the violation or took reasonable measures to prevent it. In overturning this restriction, the District Court held that it violated the third and fourth prong of *O'Brien*. With respect to the fourth prong, the Court stated:

The fourth prong is likewise violated because the regulation in question is not narrowly tailored to do only what is necessary to achieve a substantial governmental interest. *Id.* Revocation of a business license based on two convictions of employees for public lewdness over a one year period, without requiring any knowledge on the part of management, is a **greater restriction on free expression than is essential to the furtherance of the governmental interest because the predicate offenses do not tend to show that management is careless, reckless or incompetent.**

191 F. Supp. 2d 808, (emphasis supplied).

Other decisions reaching the same result as *Millenium Restaurants*, with regard to the unconstitutionality of revoking or suspending a speech related license on the basis of strict liability include *Bright Lights v. City of Newport*, 830 F. Supp. 378 (E.D. Kentucky 1993) and *Wal Juice Bar, Inc. v. City of Oak Ridge, Kentucky*, ___ F. Supp. 2d ___, 2008 WL 1730293 (W.D. Kentucky 2008).

Taken together these cases stand for the proposition that speech related licenses should not be revoked on the basis of inadvertent conduct. Dancers no less than business owners are entitled to First Amendment protection. PCC 5.14.230(B), which provides for license suspension or

revocation, on the basis of strict liability is therefore unconstitutional on its face.

IV. REPLY TO ARGUMENT THAT THE STANDARD OF PROOF IS NOT UNCONSTITUTIONAL

PCC 6.14.240(C) provides that the Auditor's burden of proof in a license suspension appeal is preponderance of the evidence. The Hearing Examiner in upholding the license suspension concluded that he did not have jurisdiction to consider constitutional claims.² It therefore would have been futile for the Appellants to argue in the administrative hearing that the burden of proof was clear, cogent and convincing based upon the Due Process Clause. Failure to make this argument in the Administrative Hearing should not be construed as waiver of the claim. Failure to object constitutes waiver unless the objection would be futile. *State v. Parker*, 99 Wn. 2d 639, 994 P. 2d 294 (2000). Here, an objection to the preponderance standard would have been futile and is therefore not waived.

Respondent's argument on burden of proof reduces itself the claim that dancers and their livelihoods are somehow less deserving of constitutional protection than other occupations. This argument was squarely rejected by the Supreme Court's decision in *Ongom v. State*.

² A copy of the Hearing Examiner's decision is contained in the Appendix to this Reply Brief.

Department of Health, Office of Professional Standards, 159 Wn.2d 132, 148 P. 2d 1029 (2006), which Respondent fails to distinguish or address. Respondent's argument discriminates against those who do not have the means to attend professional schools. The issue is not whether a particular profession is deserving of Due Process protection but whether a person may lose her livelihood as a result of agency action.

The decision of the Hearing Examiner should be reversed with instructions to reconsider the evidence with the correct standard of proof. Assuming that this Court finds that the Appellants did not suffer prejudice, this is a stand-alone constitutional claim that was properly pleaded under Title 42 United States Code § 1983. At the very least, the trial court should have granted injunctive and declaratory relief with respect to this claim.

V. CONCLUSION

The decision of the Superior Court along with those of the Hearing Examiner and the Auditor should be reversed. The case should be remanded to the Auditor with instructions to reinstate the licenses. Appellants should be awarded their costs and attorney fees.

DATED: June 23, 2008.



Gilbert H. Levy, WSBA #4805
Attorney for Appellants

APPENDIX

OFFICE OF THE HEARING EXAMINER

PIERCE COUNTY

REPORT AND DECISION

APPELLANT: Janine Brunson, License Number 17231
8101 116th Street E.
Puyallup, WA 98373

SUMMARY OF REQUEST: The appellant is appealing the suspension of her erotic dancer's license based upon alleged violations of the Pierce County Code § 5.14.190(H), (I) and (L).

SUMMARY OF DECISION: The decision of the Auditor is affirmed.

PUBLIC HEARING:

After reviewing the material submitted by Gilbert H. Levy, attorney for appellant as well as material submitted by the Pierce County Prosecuting Attorney, and examining available information on file, the examiner conducted a hearing on the appeal as follows:

The following exhibits were submitted and made a part of the record as follows:

EXHIBIT "1" - Hearing memorandum submitted by counsel for Ms. Brunson, Gilbert H. Levy dated September 27, 2006.

EXHIBIT "2" Auditor's Hearing Memorandum submitted by Alan Rose dated October 11, 2006.

The hearing was opened on October 20, 2006 at 2:00 p.m.

Parties wishing to testify were sworn in by the examiner and live testimony was taken.

INTRODUCTION

Pierce County Office of the Auditor Business License Department issued the suspension of Ms. Brunson's adult entertainment license for a period of one (1) year effective August 30, 2006, based upon a criminal complaint dated December 23, 2005 and subsequent order dated July 27, 2006.

The order was issued pursuant to alleged violations of Pierce County Code:

§5.14.190(H) "All dancing shall occur on a platform intended for the purpose which is raised at least 18 inches from the level of the floor and no closer than 10 feet to any patron";

§5.14.190(I) "No dancer or employee shall fondle, caress or touch a patron in a manner which seeks to arouse or excite the patron's sexual desires"; and

§5.14.190(L) "No dancer shall solicit any pay or gratuity directly from the patron."

This matter was heard by the undersigned Deputy Hearing Examiner on October 20, 2006. Represented at the proceedings were the appellant, Janine Brunson, personally and by and through her attorney, Gilbert H. Levy, Attorney at Law; Alan Rose, Pierce County Prosecuting Attorney; and Jill Munns of the Pierce County Auditor's Office Business License Officer.

For the purposes of this decision all section numbers referred to Pierce County Code "PCC" unless otherwise indicated.

After due consideration of the evidence solicited during the appeal hearing, the following shall constitute the Findings of Facts, Conclusions and Decision of the Deputy Hearing Examiner on this appeal.

FINDINGS, CONCLUSIONS AND DECISION

FINDINGS:

1. The appellant appeals an order of license suspension issued by Pierce County Office of the Auditor Business License Department effective August 30, 2006, suspending the appellant's adult entertainment license for a period of one (1) year.
2. The order is based upon alleged violations of 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 or acceptance of the same directly from any patron).

3. Upon oral examination Deputy Byron Brockway, of the Pierce County Sheriffs Department testified that on December 22, 2005, he entered Foxes, located at 10707 Pacific Avenue South, Tacoma, Washington 98444, at approximately 7:00 p.m. Appellant, who identified herself as "Heaven", approached the deputy. Appellant asked the deputy if he wanted to buy a dance. He asked how much the dance would be. She responded Twenty Dollars (\$20.00). The deputy accepted.
4. Ms. Brunson led the deputy to another area of the club and preformed a dance for him. During her dance the appellant sat Deputy Brockway in a chair and danced directly in front of him. She rubbed her breasts and groin on the deputy, grinding her hips against the deputy's groin, touched the deputy's groin with her hands, rubbed and exposed her breasts, and touched her groin area outside of her bikini. After the dance was over, the deputy paid her Twenty Dollars (\$20.00) directly.
5. Approximately an hour and a half (1 ½ hours) to an hour forty-five minutes (1 ¾ hours) later other officers from the Pierce County Sheriffs Department arrived. Deputy Brockway identified "Heaven" to the other officers. Officer Brockway was able to identify "Heaven" as Janine Brunson from tattoos and other distinguishable marks. Deputy Brockway also identified Janine Brunson at the hearing on October 20, 2006, as the person who had given him a dance on December 22, 2005.
6. The Pierce County Sheriff filed the criminal complaint against Janine Brunson, Cause No. 5YC004527, incident number 053561126.
7. Ms. Brunson testified at the hearing on October 20, 2006, and admitted having danced in front of the deputy within less than 10 feet and without a stage. She admitted that she had multiple physical contacts with the deputy. She admitted taking money directly from the deputy.
8. The Pierce County Office of the Auditor Business License Department issued the suspension of Ms. Brunson's adult entertainment license for a period of one (1) year effective August 30, 2006, based upon a criminal complaint dated December 23, 2005 and subsequent order dated July 27, 2006.
9. Ms. Brunson submitted a timely appeal of the suspension of her license.

10. Pierce County Code provides in relevant provisions that:

All dancing shall occur on a platform intended for the purpose which is raised at least 18 inches from the level of the floor and no closer than 10 feet to any patron;

PCC §5.14.190(H).

[n]o dancer or employee shall fondle, caress or touch a patron in a manner which seeks to arouse or excite the patron's sexual desires;

PCC §5.14.190(I).

[and] [n]o dancer shall solicit any pay or gratuity directly from the patron.

PCC §5.14.190(L).

11. Violations of any of these provisions may result in the revocation of the licensee's Adult Entertainment License. The Pierce County Code provides the standards for revocation and suspension of an Adult Entertainment License:

The auditor shall revoke or suspend for a specified period of not more than one [1] year, any dancer [. . .] license if he/she determines that the licensee or applicant has: [. . .] violated or permitted violation of any provision of this chapter.

PCC §5.14.230(B).

CONCLUSIONS:

1. The Deputy Hearing Examiner has jurisdiction over this appeal pursuant to PCC §1.22.080(B)(2).
2. The appellant has raised claims that the suspension of her license violates the Due Process and Freedom of Speech Clauses of the Federal and State Constitutions and is further barred by the equitable doctrine of Collateral Estoppel.
3. As an administrative agency is a creation of the legislature without inherent or common law powers, and may exercise only those powers conferred either expressly or by necessary implication, the issues raised by appellant are beyond the

scope of the Deputy Hearing Examiner's authority. *Skagit Surveyors and Engineers LLC, the friends of Skagit County* 135 Wn. 2d 542, 558, 958 P.2d 962 (1998); *Chaussee v. Snohomish County Counsel* 38 Wn. App. 630, 636, 689 P.2d 1084 (1984); *State vs. Munson*, 23 Wn. App. 522, 524, 597 P.2d 440 (1979); See *Human Rights Commission v. Channey School District* 30, 97 Wn.2d 118, 125, 641 P.2d 163 (1982).

4. The office of the Hearing Examiner and thereby Deputy Hearing Examiner is not authorized by statute to issue decisions regarding Constitutional issues and are further not authorized to provide decisions regarding equitable remedies. *Skagit Surveyors and Engineers LLC, the friends of Skagit County* 135 Wn. 2d 542, 558, 958 P.2d 962 (1998); *Chaussee v. Snohomish County Counsel* 38 Wn. App. 630, 636, 689 P.2d 1084 (1984).
5. As the Hearing Examiner does not have the authority to issue decisions on the constitutional issues asserted, or the authority to apply equitable doctrines, the scope of this review in this matter is limited to the provisions of the Pierce County Code providing the Auditor with the power to suspend or revoke or deny a license based upon violations of the PCC.
6. PCC §5.14.240 provides that the Hearing Examiner's decision shall be based upon a preponderance of the evidence and that the burden of proof shall be on the auditor.
7. The Pierce County Code provides that where a dancer is either not on an eighteen (18) inch platform while dancing, or is closer than ten (10) feet from a patron while dancing they are in violation of PCC §5.14.190(H) and §5.14.250.
8. The Pierce County Code provides that dancer/patron contact where a dancer in a erotic studio fondles, caresses or touch a patron in manner which is sought to arouse or excite the patron's sexual desires is contrary to this provision of the Pierce County Code. PCC §5.14.190(I) and §5.14.250.
9. The Pierce County Code provides that a dancer who unlawfully in an erotic dance studio solicits a gratuity or is paid directly from the patron violates this portion of the Pierce County Code. PCC §5.14.190(L) and §5.14.250.
10. The record, evidence submitted and testimony of Deputy Byron Brockway and the appellant, Janine Brunson, confirms that the appellant committed the violations upon which the suspension was based during her dance for Deputy Brockway. The appellant was not on a platform while performing, was within 10 feet of the deputy, had multiple contacts between areas of the deputy's body, her breasts, buttocks,

and crouch area, additionally she accepted money directly from the deputy in violation with PCC 5.14.190(H), (I), (L), and PCC §5.14.250.

11. PCC §5.14.230(B) authorizes the Office of the Auditor of Pierce County to suspend, deny or revoke a licensee based upon violations of the aforementioned Code for a period of not more than one year.

DECISION:

License suspension 17231 of the Department of the Auditor, Pierce County is hereby affirmed.

ORDERED this 1st day of November 2006.



GARETTE N. MOORE
Deputy Hearing Examiner

TRANSMITTED this _____ day of November, 2006, to the following:

APPELLANT: Janine Brunson
APPELLANT'S ATTORNEY: Gilbert H. Levy

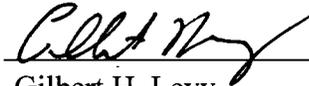
OTHERS:

Al Rose, Pierce County Prosecuting Attorney
Pierce County Prosecuting Attorney's Office, Attn. Intern
Jill Munns, Business License Department, Pierce County Auditor
Susan Long, Pierce County Council
Pat McCarthy, Pierce County Auditor

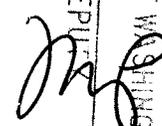
CERTIFICATE OF SERVICE

I certify that on this date, I caused to be delivered by legal messenger a true and copy of the foregoing to Deputy Prosecuting Attorney Allen Rose, attorney for the Respondents.

Dated this 23 day of April 2008



Gilbert H. Levy
Attorney for Appellants

FILED
COURT OF APPEALS
DIVISION II
08 JUN 23 PM 2:43
STATE OF WASHINGTON
BY  DEPUTY