UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON DIVISION

ENTERED
JUL 25
SAMUEL L. KAY, CLERK
U. S. District & Bankruptcy Courts
Southern District of West Virginia

R.W.B. of RIVERVIEW, INC.,
et al.,

Plaintiffs,

v. CIVIL ACTION NO. 2:00-0552

DONALD STEMPLE, Commissioner,
Alcohol Beverage Control Commission,

Defendant.

MEMORANDUM OPINION AND ORDER
GRANTING PRELIMINARY INJUNCTION

At a hearing on Plaintiffs' application for a preliminary injunction came Plaintiffs by J. Michael Murray, Jeremy A. Rosenbaum, and Kyle G. Lusk and came Defendant, in person, and by Jeffrey G. Blaydes, Gene Hal Williams, and Scott Johnson, Assistant Attorneys General of West Virginia. The parties submitted the issue on joint stipulations, oral arguments, and the briefs previously submitted. On that basis, the Court **GRANTS** the preliminary injunction application. A more expansive Memorandum Opinion and Order will follow.

I. *FACTUAL AND PROCEDURAL BACKGROUND*

The West Virginia Legislature enacted a law on March 11, 2000, effective from passage, "relating to regulating, restricting and

placing a prohibition on additional exotic entertainment facilities." (Br. in Supp. of Pls.' Mot. for a T.R.O. and for a Prelim. Inj., Ex. A. at 1.) The statute created Section twenty-three of Chapter sixty, Article four of the West Virginia Code "relating to regulating, restricting and placing a prohibition on *additional exotic entertainment facilities."* (Id.) "'*Exotic* entertainment' means live nude dancing, nude service personnel or live nude entertainment, and 'nude' means any state of undress in which male or female genitalia or female breasts are exposed." (Id. at 2.)

The statute provides a brief and very limited opportunity for exotic entertainment facility licensing and imposes criminal penalties on those who engage in unlicensed exotic entertainment. Any person who was operating a commercial facility offering exotic entertainment on March 11, 2000 could apply to the Defendant Alcohol Beverage Control Commissioner (Commissioner) for a license until July 1, 2000. See W. Va. Code § 60-4-23(e). "Thereafter no application for license may be received by the commissioner." Id.

On June 30, 2000, in response to Plaintiffs' application and with notice to Defendant, the Court issued a temporary restraining order (TRO) enjoining Defendant and his agents from enforcing the new statute and the regulations promulgated thereunder. By Order

of July 10, 2000, the Court *sua sponte* continued the TRO until this date and scheduled the preliminary injunction hearing for today.

II. DISCUSSION

A. Preliminary Injunction Standard

The Court applies a balancing test to determine whether a preliminary injunction is properly granted. See Blackwelder Furniture Co. v. Seilig Mfg. Co., 550 F.2d 189 (4th Cir. 1977). The sequential application of the Blackwelder factors was discussed most recently in Steakhouse, Inc. v. City of Raleigh, North Carolina:

> In deciding whether to grant a preliminary injunction, the district court is to consider three factors. First, it must balance the likelihood of irreparable harm to the plaintiff if the injunction is refused against the likelihood of irreparable harm to the defendant if it is granted. Second, the court should consider the likelihood that the plaintiff will succeed on the merits. The more the balance of harms leans away from the plaintiff, the stronger his showing on the merits must be. Finally, the court must consider the public interest.

166 F.3d 634, 637 (4th Cir. 1999)(citing Blackwelder). The plaintiff bears the burden of proving the factors favor the grant of an injunction. See Manning v. Hunt, 119 F.3d 254, 263 (4th Cir. 1997).

In applying the balancing test, the most important factors are the two factors regarding the balancing of harms. Id. A plaintiff

must demonstrate harm that is "'neither remote nor speculative, but actual and imminent.'" Id. (quoting Tucker Anthony Realty Corp. v. Schlesinger, 888 F.2d 969, 975 (2nd Cir. 1989)). If, after balancing the harm to the plaintiffs if the injunction were not granted against the harm to the defendants if the injunction were granted,

> the balance 'tips decidedly' in favor of the plaintiff, a preliminary injunction will be granted if 'the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberate investigation.' As the balance tips away from the plaintiff, a stronger showing on the merits is required.

Id. (citations omitted).

Finally, the Court notes that "'[T]he grant of interim relief [is] an extraordinary remedy involving the exercise of a very far-reaching power, which is to be applied only in [the] limited circumstances which clearly demand it.'" Steakhouse, 166 F.3d at 637 (quoting Direx Israel, Ltd. v. Breakthrough Med. Corp., 952 F.2d 802, 811 (4th Cir. 1991)).

B. West Virginia Statute Regulating Exotic Entertainment Facilities

As recently as March 2000, the Supreme Court reaffirmed, "nude dancing . . . is expressive conduct," although "it falls only within the outer ambit of the First Amendment's protection." City of Erie v. Pap's A.M., 120 S. Ct. 1382, 1391 (2000). The statute

at issue has the stated purpose of regulating, restricting, and prohibiting additional exotic entertainment, i.e, nude dancing, facilities. To carry out this object, the statute allows the Commissioner to issue licenses only to persons operating such facilities on March 11, 2000. Exotic entertainment license applications must be made by July 1, 2000. No others may ever apply. Cursory analysis demonstrates these conditions impose a prior, permanent, and infinite restraint on citizens wishing to engage in the constitutionally protected expressive activity of nude dancing. Accordingly, the Court **FINDS** and **CONCLUDES** the statute at issue involves a prior restraint of expressive conduct protected under the First Amendment of Constitution of the United States, at least for those individuals who may never be permitted to apply.

Any licensing scheme to engage in constitutionally protected expression must satisfy procedural and substantive safeguards required by Freedman v. Maryland, 380 U.S. 51 (1965). "Two evils" not tolerated in prior restraints are 1) unbridled discretion in the hands of a government official or agency and 2) failure to place limits on the time in which decisionmaker must act to issue the license. See FWB/PBS, Inc. v. City of Dallas, 493 U.S. 215, 225-26 (1990). This statute provides, "The commissioner may issue

a license to a person complying with the provisions of this chapter." W. Va. Code § 60-4-23(e) (emphasis added). "May" grants the Commissioner discretion to issue or not issue licenses, even though an applicant complies with every requirement of the law.

Under the regulations promulgated pursuant to the statute, a licensee must be a "bona fide club of good reputation in the community in which it operates." 175 W. Va. C.S.R. § 7.3.6.1.3 (emphasis added). Ownership and management must involve "suitable persons" at a "suitable place." Id. Owners must be "of good moral character or repute," id. § 3.6.2.j, and may not have "the general reputation of drinking alcoholic beverages or nonintoxicating beer to excess." Id. § 3.6.2.m (emphasis added). Issuance of a license may not be "detrimental to the interest, morals, safety or welfare of the public." Id. § 3.6.4.

These are just the sort of "boundless terms" and manipulable "malleable concepts" our Court of Appeals found constitutionally unacceptable because they clothe a decisionmaker with unfettered discretion. Steakhouse, 166 F.3d at 639. To meet constitutional muster, a licensing scheme must, *inter alia,* "sufficiently cabin the decision-maker's discretion." Id. at 638. Accordingly, the Court **FINDS** and **CONCLUDES** that the exotic entertainment statute confers unlimited discretion on the Commissioner in contravention

of constitutional requirements.[1]

The Supreme Court held in Elrod v. Burns, "The loss of First Amendment rights, for even minimal periods of time, unquestionably constitutes irreparable injury." 427 U.S. 347, 353 (1976)(citing New York Times v. United States, 403 U.S. 713 (1976)). The Defendant Commissioner, on the other hand, will not be harmed by the Court's injunction of his ability to issue licenses under a scheme that impedes the constitutional rights of West Virginia citizens and threatens them with criminal prosecution.

III. FINDINGS AND CONCLUSIONS

The balance of harms tips decidedly in favor of Plaintiffs. Additionally, as discussed above Plaintiffs have shown a probability they will prevail on the merits. Finally, the public interest is best served by unrelenting protection of the First Amendment rights of all its citizens, even those whose expressive conduct may be distasteful and offensive to many. Therefore, the Court **GRANTS** the preliminary injunction requested by Plaintiffs. Defendant Commissioner and his officers, agents, servants and employees and all persons in active concert or participation with

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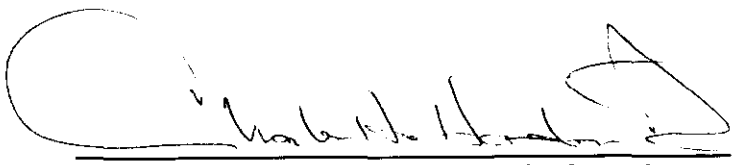
[1]The Court does not decide at this time whether the unconstitutional provisions of this statute are severable, nor whether the statute suffers from additional constitutional infirmities.

them are **ENJOINED** from implementing or enforcing West Virginia Code § 60-4-23 and West Virginia Legislative Rules, Title 175, Series 7, pending final judgment on the merits.

The Clerk is directed to send a copy of this Memorandum Opinion and Order to counsel of record by facsimile transmission and first class mail and publish on the Court website at www.wvsd.uscourts.gov.

ENTER: July 25, 2000



Charles H. Haden II, Chief Judge