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

AB-9406
File: 47-227040 Reg: 13078040

WHBT, Inc.,
dba Mickey's
8857 Santa Monica Boulevard, West Hollywood, CA 96009,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John. W. Lewis

Appeals Board Hearing: December 4, 2014
Los Angeles, CA

ISSUED JANUARY 13, 2015

WHBT, Inc., doing business as Mickey's (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] (Department) suspending its license for 30 days for violations of Business and Professions Code section 25600 and Department rule 106(g) for its employees giving away alcoholic beverages; and for violations of Department rules 143.2(3), 143.3(1)(a) and 143.3(2) for the conduct of dancers performing at appellant's premises.

Appearances include appellant WHBT, Inc., through its counsel, Joshua Kaplan, and the Department of Alcoholic Beverage Control, through its counsel, Kerry K. Winters.

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[1]The decision of the Department, dated January 17, 2014, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on January 23, 1989. On February 19, 2013, the Department instituted a 16-count accusation against appellant. Counts 1, 11, and 13 charged that appellant permitted entertainers whose breasts and/or buttocks were exposed to view to perform on a stage that was not 18 inches above the floor level and removed at least six feet from the nearest patron. Count 2 charged that appellant permitted an entertainer to remain on the premises after exposing any portion of his genitals or anus, while counts 4 and 10 charged that appellant permitted various entertainers to remain on the premises while exposing their pubic hair, anus, vulva, or genitals to public view. Counts 3, 6, 7, and 14 charged that appellant permitted patrons to perform or simulate an act of sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation, or other sexual act on an entertainer on the premises. Counts 5, 8, 12, and 15 charged that appellant's agents or employees permitted patrons to touch, caress, or fondle the breasts, buttocks, anus, or genitals of entertainers on appellant's premises. Finally, counts 9 and 16 charged that appellant gave away distilled spirits.

The administrative hearing was held on October 30 and 31, 2013. Documentary evidence was received and testimony concerning the violations charged was presented by Department agents Brad Beach and Andrea Florentinus. Appellant presented the testimony of three witnesses: Jimmy Rodriguez, appellant's manager; Aaron Bradshaw, appellant's general manager; and Samuel Ortiz, a dancer who performed at the licensed premises on September 11, 2012.

On the first day of the hearing, following the conclusion of its case, the

Department moved to dismiss count 16 from the accusation;[2] appellant did not object and the Department's motion was granted. At the beginning of the second day, however, the Department moved to amend the accusation to include count 17 which charged that on September 11, 2012, appellant's employee, Jay McCracken, gave away distilled spirts to a person to whom appellant is authorized to sell in violation of rule 106(g). Appellant objected to the amendment on the grounds that appellant was not afforded the opportunity to file either a notice of defense or a notice of discovery, and requested a continuance from the administrative law judge (ALJ). The ALJ admitted the amended accusation over appellant's objection, but gave appellant the opportunity to brief its argument in favor of a continuance along with the rest of its closing argument. After the parties briefed their respective closing arguments, the ALJ granted the Department's motion to amend the accusation over appellant's objection; and after the hearing, the Department issued its decision finding that the charges had been proven and no defense was established.

Appellant filed a timely appeal raising the following issues: (1) Appellant should have been afforded a continuance after the Department filed a last-minute amendment to the accusation at the administrative hearing which presented new charges; (2) the accusation cannot be sustained due to an unlawful accumulation of counts in violation of *Walsh v. Kirby* (1974) 13 Cal.3d 95; (3) as a matter of law, appellant cannot be deemed to have permitted independent contractor dance performers to violate rule 143; (4) imposition of derivative liability would deny appellant due process and equal

[2]Count 16 alleged that, on September 11, 2012, Israel Zamora, appellant's employee, gave away distilled spirits in connection with the sale or distribution of an alcoholic beverage in violation of Business and Professions Code section 25600.

protection; (5) the allegations in counts 1 and 11 are not supported by any testimonial evidence and cannot be sustained; (6) the allegations of simulated sexual activity in counts 3, 6, 7, and 14 are not supported by legally cognizable evidence and cannot be sustained; (7) counts 3, 5, 6, and 14 cannot be sustained and must be dismissed as failing to provide appellant with fair notice; (8) no counts can be sustained based on a failure of proof; (9) counts 6, 8, and 9 cannot be sustained based on a failure of proof and/or a legal impediment; and (10) the penalty imposed is cruel and/or unusual punishment.

DISCUSSION

I

Appellant first contends that the ALJ abused his discretion when he denied appellant's request for a continuance. Specifically, appellant argues that Government Code section 11507 mandates that appellant should have been afforded a continuance because it did not have adequate time to prepare its defense to the new charge, count 17, in the amended accusation.

Government Code section 11507 provides:

> At any time before the matter is submitted for decision, the agency may file or permit the filing of, an amended or supplemental accusation or District Statement of Reduction in Force. All parties shall be notified of the filing. If the amended or supplemental accusation or District Statement of Reduction in Force presents new charges the agency shall afford the respondent a reasonable opportunity to prepare his or her defense thereto, but he or she shall not be entitled to file a further pleading unless the agency in its discretion so orders. Any new charges shall be deemed controverted, and any objections to the amended or supplemental accusation or District Statement of Reduction in Force may be made orally and shall be noted in the Record.

This statute has been interpreted to require that, if new charges are presented, the respondent *must* be afforded a reasonable opportunity to prepare a defense to

them. (*Thornbrough v. Western Placer Unified School Dist*. (2013) 223 Cal.App.4th 169, 180-181 [167 Cal.Rptr.3d 24], emphasis added; 20 Ops.Cal.Atty.Gen. 192, 193 (1952) ["section 11507 requires notice to the parties, reasonable opportunity to prepare defenses, and that any new charges shall be deemed controverted"].)

Appellant argues that pursuant to section 11507 it should have been afforded a continuance because it did not have adequate time to prepare its defense to the new charge, count 17, in the amended accusation. (App.Br. at pp. 11-14.) The Department counters that count 17[3] was similar to count 9[4] in the original accusation, as they both pertained to the giving away of free goods. (Dept.Br. at p. 10.) The Department further contends that no new charges were presented in the amended accusation, that any defense applicable to count 9 would have applied to count 17, and that appellant did not offer any defense to either count and, in fact, its witnesses testified that they gave away alcohol on the day in question. (*Id.* [citing RT, Vol. I at pp. 147-148, 177].)

Both parties rely on *Buckley v. Savage* (1960) 184 Cal.App.2d 18 [7 Cal.Rptr. 328] to support their arguments. In *Buckley*, appellant real estate broker's license was revoked by the Commissioner of the Department of Real Estate. (*Id*. at p. 20.) Appellant filed a petition for writ of mandate compelling the Commissioner to desist

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[3]Count 17 reads: "On or about September 11, 2012, respondent-licensee's agent or employee Jay McCracken, gave away an alcoholic beverage to wit: distilled spirits, to a person to whom the respondent-licensee is authorized to sell, in violation of California Code of Regulations, Title 4, Division 1, Section 106(g). (Amendment to Accusation, Exhibit 14.)

[4]Count 9 reads: "On or about September 11, 2012, respondent-licensee's agent or employee Jay McCraken, directly or indirectly, gave away a premium gift or free goods in connection with the sale or distribution of an alcoholic beverage, to-wit: Distilled Spirits, in violation of Business and Professions Code Section 25600. (Accusation, Exhibit 1.)

from revoking appellant's license. (*Id*.) The trial court entered a judgment denying appellant's petition, and appellant appealed. (*Id*.) One ground for appeal was that, on the first day of the hearing, an amendment to the accusation was filed, and the court refused to grant a continuance in the matter, thereby depriving appellant of a fair hearing. (*Id*. at p. 32.)

As both parties here note, the court of appeal in *Buckley* rejected appellant's contention (*Id*.) First, the court observed that appellant's contention was not made to the trial court and thus the issue would not normally be considered on appeal. (*Id*.) The court went on to state, however, that the amendment in no way added new facts to the existing ones, and rather set forth that the appellant's conduct violated Business and Professions Code section 10176, subdivision (i), which was simply a catchall provision for three other counts already included in the accusation.[5] (See *Id*. at pp. 32-33.)

The Department contends that *Buckley* stands for the proposition that, because the amendment did not add new facts which were not already alleged in the initial accusation, there was no prejudice and a continuance was not warranted. (Dept.Br. at p. 11.) On this point we must agree. However, as appellant points out, there are significant differences between the amendment at issue in the instant case and that at issue in *Buckley*, which renders *Buckley* not controlling here.

First, in *Buckley* the additional charge merely cited a catchall provision from the same statute under which some of the charges in the original were brought, while here

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[5]As at issue in *Buckley*, subdivision (i) of Business and Professions Code section 10176 stated: "Any other conduct, whether of the same or a different character than specified in this section, which constitutes fraud or deceit." (*Buckley*, *supra*, at p. 20, fn. 1.)

the authority for count 17 was an altogether different rule not cited in the original accusation. Also unlike *Buckley*, count 17 in the amended accusation *did* allege new facts not alleged in the original accusation. Those new facts are that appellant's employee gave away (1) an alcoholic beverage to (2) a person to whom appellant was authorized to sell. (Amendment to Accusation, Exhibit 14.) Nowhere in the original accusation are those facts alleged; rather, count 9 merely reflects that appellant, directly or indirectly, gave away a premium gift or free goods, distilled spirits, in connection with the sale or distribution of an alcoholic beverage. (See Accusation, Exhibit 1.) Therefore, this case is markedly different than *Buckley*, and the holding in *Buckley* is inapplicable here.

Both parties also rely on *Raab v. Department of Alcoholic Beverage Control* (1960) 177 Cal.App.2d 333 [2 Cal.Rptr. 26]. There, the accusation was amended on several occasions prior to the administrative hearing, and the final version was not served on the petitioners until eighteen (18) days before the hearing began. (*Id*. at p. 334.) The petitioners' contention was based on the fact that they were provided no information as to the identity of the clerk alleged to have made the sale of an alcoholic beverage to a minor. (*Id*.) In rejecting the petitioners' contention, the court of appeal observed:

> The answer to this contention is that although objection was made, *no continuance was sought and the parties proceeded with the hearing*. Upon hearing it developed that the parties during the period in question employed three clerks. The trial court concluded that in view of all circumstances no unfair advantage was taken of petitioners in this regard, and we agree with that conclusion.

(*Id*., emphasis added.)

Appellant correctly calls attention to factual discrepancies between *Raab* and the

instant matter: (1) the amendment to the accusation in this case occurred not eighteen days before the hearing, but on the second day of the hearing. (See RT, Vol. II at pp. 5-8.); (2) unlike *Raab*, rather than moving on with the hearing, appellant here objected to the amended accusation and specifically requested a continuance and discovery. (*Id*. at pp. 5-6.) Therefore, to the extent that the decision in *Raab* was grounded on the fact that the appellant failed to properly raise an objection and request a continuance, it cannot be controlling here.

Thus the issue before us boils down to whether appellant was afforded a reasonable opportunity to prepare his defense to count 17. "Authorities seem to agree that amendments to administrative pleadings should be freely allowed during as well as before the hearing, subject to the qualification that if new issues are raised or a party is surprised, the aggrieved party should have an opportunity to prepare a defense." (*Thornbrough*, *supra*, 223 Cal.App.4th at p. 181.)

The Department contends appellant was not "surprised" by the amendment to the accusation because any defense applicable to count 9 would have applied to count 17, and appellant did not raise a defense to count 9 during the administrative hearing.[6] (Dept.Br. at p. 10.) But section 25600 of the Business and Professions Code, the authority for count 9, states, in relevant part:

> (a)(1) No licensee shall, directly or indirectly, give any premium, gift, or free goods in connection with the sale or distribution of any alcoholic beverage, except as provided by rules that shall be adopted by the department to implement this section or as authorized by this division.

[6]The Department also argues that appellant never raised a defense to count 17. This argument is unconvincing because it is premised on the notion that appellant was expected to raise a defense against a charge that it did not know was being brought.

Rule 106(g),[7] however, the basis for count 17, provides:

> No licensee, in connection with a licensed business, shall give any alcoholic beverage to any person to whom the licensee is authorized to sell except as provided by in [*sic*] Rule 52 and Section 23386 of the Alcoholic Beverage Control Act.
>
> It is not the intent or purpose of this Rule to prohibit an on-sale licensee or any employee of such licensee from giving an incidental drink to a patron.

Clearly, the conduct at issue in count 9 relates quite generally to *any* premium, gift, or free goods given in connection with the sale or distribution of alcoholic beverages, while the conduct at issue in rule 106(g) specifically relates to the giving away of alcoholic beverages to persons to whom the licensee is authorized to sell.

On the surface, there are at least two defenses specific to a charge under rule 106(g) that would not necessarily apply to one under section 25600: that the gift was *not* an alcoholic beverage, or that the gift was *not* to a person to whom the licensee is authorized to sell.[8] Obviously, we do not and cannot pass on the likelihood of success of these defenses or any other potential defense to count 17 in this case. Appellant, however, was not afforded the opportunity to prepare or raise a defense to count 17 at the administrative hearing in violation of Government Code section 11507.

Finally, the Board is aware that the decisions whether to grant a continuance and of what length are typically entrusted to the discretion of the hearing officer. (See *Thornbrough*, *supra*, 223 Cal.App.4th at pp. 180-181.) When, as in this case, that

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[7]References to 106(g) are to section 106, subdivision (g) of title 4 of the California Code of Regulations.

[8]We understand, of course, that raising this latter defense in the context of giving away drinks would potentially subject a licensee to a myriad of other violations, but that point is irrelevant here.

discretion denies appellant its statutorily and constitutionally[9] protected right to prepare a defense against the charges brought, it constitutes abuse and must be reversed. The decision of the Department with regard to count 17 is reversed, and this matter is remanded for a full hearing on that count, and that count alone.

II

Appellant contends that the accumulation of counts in the accusation violated the principles established in *Walsh v. Kirby*, *supra*. Appellant maintains that the Department's continuation of its investigation for approximately two months was unreasonable and motivated by a desire to increase the penalty to be imposed on the license rather than to obtain appellant's compliance. Appellant argues that the Department acted unreasonably in that, upon learning of some of the violations alleged in the accusation, it did not move immediately to either counsel appellant or file an accusation.

In *Walsh*, *supra*, the licensee, who had a previously unblemished record, was charged with selling below an established "fair trade" price on a total of ten occasions. The statute involved did not provide for suspension or revocation, but each offense after the first was punishable by a $1,000 fine. The California Supreme Court concluded that the Department had acted improperly by accumulating violations for the purpose of driving the licensee into bankruptcy.

The Department counters that there is no evidence from which it might be

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[9] The constitutionality of a particular notice mechanism turns on whether it is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." (*Mullane v. Central Hanover Bank & Trust Co*. (1950) 339 U.S. 306, 314; [70 S.Ct. 652]; see also *Armstrong v. Manzo* (1965) 380 U.S. 545, 550 [85 S.Ct. 1187].)

reasonably inferred that its two visits to the premises were for any purpose inconsistent with the provisions of the Alcoholic Beverage Control Act. The Department relies on two previous decisions of this Board[10] and maintains that the length of an investigation lies within the discretion and expertise of the Department.

In *Chavez*, this Board summarized what it found to be the court's principal concern in *Walsh*:

> The vice seen by the court was the accumulation of financial penalties to the point where a licensee unable to pay them would be forced into bankruptcy, the equivalent of having his license revoked, coupled with the failure to give the licensee a chance to mend the error of his ways before that occurred.

(*Chavez* (1998) AB-6788 at p. 8.) The Board subsequently confirmed its position with regard to the Department's discretion in conducting investigations:

> The extent to which Department investigators should have contacted appellants concerning the investigation is a matter of discretion within the police powers granted [to] the Department. In the absence of clearly unreasonable delay, it is not for the Appeals Board to mandate at which point in an investigation the Department must inform a licensee that the licensed premises are under scrutiny. A continuing investigation may very well be needed to determine the existence of violations or the degree to which a law is being, or has been, violated.

(*Id*. at pp. 9-10.)

As this Board has stated previously, it is wary of substituting its judgment for that of the Department with respect to when an investigation has reached the point where an accusation should be filed. (See *Dirty Dan's, Inc*. (2012) AB-9155 at p. 6.) In the absence of any evidence that the Department intentionally prolonged the investigation for the purpose of obtaining a more severe penalty, it would seem inappropriate for the Board to infringe upon the Department's discretion in its conduct of an investigation.

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[10] *Minshew* (2001) AB-7741 and *Chavez* (1998) AB-6788.

(*Id.*) Appellant has presented no such evidence in this case, and the Board finds that appellant's arguments with regard to the unlawful accumulation of counts must fail.

III

Appellant contends that, as a matter of law, it cannot be deemed to have permitted its dancers to violate rule 143.[11] Appellant argues that the dancers were independent contractors, and that there was no agency relationship between the dancers and appellant. Moreover, appellant argues that, because it had limited authority over the conduct of the dancers, it took all reasonable steps to prevent any illegal activity by the dancers so, to the extent that an agency relationship did exist, appellant maintains that liability cannot be imputed to it because the dancers were acting outside the scope of said agency. (App.Br. at pp. 16-23.)

Rule 143.2 states, in pertinent part:

> 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.

Rule 143.3 states, in pertinent part:

> 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

[11]References to rules 143.2 and 143.3 and their respective subsections are to sections 143.2 and 143.3 of title 4 of the California Code of Regulations, respectively, and to the various subdivisions of those sections.

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.

[¶. . .¶]

(c) The displaying of the pubic hair, anus, vulva 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.

Notably, neither rule 143.2 nor 143.3 limits the prohibited conduct to that of employees.

Appellant principally relies on *Borello & Sons v. Department of Industrial Relations* (*Borello*) (1989) 48 Cal.3d 341 [256 Cal.Rptr. 543], and courts of appeal decisions in *McFaddin San Diego 1130, Inc. v. Stroh* (1989) 208 Cal.App.3d 1384 [257 Cal.Rptr. 8]; *Laube v. Stroh* (1992) 2 Cal.App.4th 364 [3 Cal.Rptr.2d 779]; and *Santa Ana Food Market, Inc. v. Alcoholic Beverage Control Appeals Board* (1999) 76 Cal.App.4th 570 [90 Cal.Rptr.2d 523] to support its position that, because no employer-employee relationship exists between them, liability for the dancers' misconduct under rule 143 cannot be imputed to appellant.

Whether a formal employer-employee relationship exists under *Borello* is not controlling in cases such as this. (See *Maverick Tavern, Inc.* (1999) AB-9099 at p. 5.) This Board has time and again considered business relationships similar to that as between appellant and its dancers, and rejected the contention that a licensee can avoid liability arising from the conduct of performers on the licensed premises merely because of the nature of their business relationship. (*Id.*; *Basra* (1997) AB-6579 at pp.

5-6 ["We do not believe appellant may by a creation of an employment status or other business practices, avoid liability for misconduct on the premises which appellant through its employees either knew or should have known and anticipated."].) In *Maverick Tavern,* the Board observed:

> In this case, the licensee itself has placed in motion, and benefits from, the actions which are the focus of the Department's enforcement efforts . . . [T]he conduct in question arises in a context voluntarily engaged in by appellant in which the economic forces at play invite behavior antithetical to the objectives of Rules 143.2 and 143.3, and threaten public welfare and morals. Should this not give rise to a duty over and above that required when the conduct involves persons not under any control of a licensee but who are in [*sic*] engaged with a licensee in a mutually beneficial activity that generates violations like those in this case, violations that may very well be beyond the ability of the licensee to control or prevent? We think it does. Is this liability without fault? We think not.[fn.]
>
> There is a significant, and we think controlling, difference between the facts of this case and those involved in *McFaddin* and *Laube*. In both *Laube* and *McFaddin*, the violations were committed by parties having no prior relationship of any kind with the licensees other than as anonymous patrons. In this case, the transgressors were performing on the premises with the express permission of appellant, were known to appellant, and were engaged in a private money-making business activity which also rewarded appellant by attracting patrons who spent money on appellant's goods and services. We do not know what name this kind of relationship would go by, but it is definitely a mutually beneficial one ripe with potential consequences.

(*Maverick Tavern, Inc*., *supra*, at pp. 12-13.) Here, appellant itself placed in motion, and benefitted from, the actions that are the focus of these charges. Testimony established that appellant retained the services of Billy Francesca, a promoter, whose job was to promote events and bring clientele to appellant's establishment. (RT, Vol. I at pp. 142, 160.) While Francesca brought in the performers, the performers danced on stages provided by appellant for the purpose of providing eye candy for the patrons at the licensed premises. (RT, Vol. I at pp. 149, 156, 163.) Appellant paid dancers

directly via check, and the dancers also received tips from the patrons. (RT, Vol. I at pp. 161-162.) Appellant charged patrons a cover charge on Tuesdays, the nights of Francesca's events, and patrons purchased food and alcoholic beverages from the establishment while they were on the premises. (RT, Vol. I at p. 163.)

Appellant's argument that the loose nature of the relationship between appellant and its dancers "exalts form over substance." (*Clubary, Inc.* (2011) AB-9098 at p. 8.) Here there existed a clear, mutually beneficial relationship between appellant and the dancers at its establishment — the dancers received a check from appellant plus tips from its patrons, while appellant benefitted from the draw of additional, cover-charge-paying patrons who also purchased food and alcohol. Appellant's disclaimer of any employment relationship between it and the dancers is a red herring, not a shield against the enforcement of Rules 143.2 and 143.3.

It should come as no surprise to appellant that the dancers on its premises were encouraged to push the envelope when it came their performances. As appellant admits, "dancers were essentially actors ('wall paper') whose success depended upon their salesmanship in projecting an alluring and attractive appearance and personality to patrons so that the patrons would tip" them. (App.Br. at pp. 19-20.) Indeed, "the dancer's revenue depends upon the dancer's ability as an actor, creating an alluring illusion." (*Id*. at p. 20.) It is only reasonable that appellant, having put in motion the activity giving rise to the rule violations, must be held responsible for its consequences.

Finally, it is well-settled law that a licensee has an affirmative duty to ensure the licensed premises is not used in violation of the law and that the knowledge and acts of the employees are imputed to the licensee. (*Mack v. Dept. of Alcoholic Bev. Control* (1960) 178 Cal.App.2d 149, 153-154 [2 Cal.Rptr. 629.]; *Oconco, Inc*. (2000) AB-7365 at

pp. 3-4.) Actual knowledge of the acts is not required; constructive knowledge will suffice. (*Morell v. Dept. of Alcoholic Bev. Control* (1962) 204 Cal.App.2d 504, 514 [22 Cal.Rptr.405].) "This is true even for one-time acts of employees outside the scope of their employment, at least where there is some nexus between the acts and the alcoholic beverage license and the licensee has not taken 'strong steps to prevent and deter such crime.' " (*Oconco*, *supra*, at p. 4, quoting *Santa Ana Food Market, Inc. v. Alcoholic Bev. Control Appeals Bd.* (*Santa Ana*) (1999) 76 Cal.App.4th 570, 576 [90 Cal.Rptr.2d 523].)

Appellant argues that the alleged misconduct of the dancers had absolutely no nexus to the licensee's sale of alcoholic beverages. (App.Br. at p. 23 [citing *Santa Ana, supra*].) But, as mentioned above, testimony by appellant's own witness, Jimmy Rodriguez, established that the purpose of Francesca's events was to bring his own clientele into appellant's establishment (RT, Vol. I at p. 142), and Francesca presumably accomplished this, at least in part, through bringing in the dancers to entertain and act as eye candy for the patrons. Once the patrons were at the establishment, appellant would charge them a cover charge to enter, and sell alcoholic beverages to them while they were there. Hence, there is a "nexus" between the conduct of the dancers and appellant's sale of alcoholic beverages. Appellant's reliance on *Santa Ana* is misplaced.

IV

Appellant contends that imposition of derivative liability would deny appellant due process and equal protection. Appellant maintains it is constitutionally untenable and precedentially unknown to impose liability upon one individual for the alleged misconduct of another when the actual perpetrator is not personally liable for the

misconduct. (App.Br. at p. 23.) This contention has previously been rejected by the Board in *Funtastic, Inc*. (1998) AB-6920. There, the Board observed:

> [T]he 21st Amendment gives the states wide authority to regulate the sale of alcohol. (See *California v. LaRue* (1972) 409 U.S. 109 [93 S.Ct. 390].) Although the amendment does not supersede all other provisions of the United States Constitution in the area of liquor regulations, its broad sweep has been recognized as conferring more than the normal state authority over public health, welfare and morals. *(California v. LaRue*, *supra*, 409 U.S. at 114-115 [93 S.Ct. at 394-395].) In that case the Court upheld Rule 143.3 as a permissible means of curtailing social problems associated with nude dance bars. In so doing, the court cautioned against second-guessing the efficacy of regulatory measures, stating "wide latitude as to choice of means to accomplish a permissible end must be accorded to the state agency that is itself the repository of the State's power under the 21st Amendment." (409 U.S. at 116 [93 S.Ct. at 396].)

(*Id*. at pp. 11-12.) This same analysis establishes that appellant's claim in this case warrants rejection.

Finally, as referenced by the Department, there are many Department rules in which a licensee can be held liable while the person engaging in the activity giving rise to the violation cannot. As such, appellant's claim is plainly without merit.

V

Appellant contends there was not sufficient evidence to establish counts 1 and 11 in that there was no testimony that the stages used by the dancers were not elevated eighteen inches above floor level and removed at least six feet from the nearest patron. In short, appellant takes issue with these allegations because, in either case, "no distance to a patron was approximated." (App.Br. at p. 24.)

When an appellant contends that a Department decision is not supported by substantial evidence, the Appeals Board's review of the decision is limited to determining, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the

decision is supported by the findings. (Bus. & Prof. Code § 23084; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113].) In making this determination, the Board may not exercise its independent judgment on the effect or weight of the evidence, but must resolve any evidentiary conflicts in favor of the Department's decision and accept all reasonable inferences that support the Department's findings. (*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd*. (*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826]; *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734].) "Substantial evidence" is more than "any evidence;" it is relevant evidence which reasonable minds would accept as support for a conclusion. (*Universal Camera Corp. v. Labor Bd.* (1951) 340 U.S. 474, 477 [71 S.Ct. 456]; *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].)

Counts 1 and 11 both charge violations of rule 143.3(2). Rule 143.3(2) mandates that entertainers whose breasts and/or buttocks are exposed to view shall only perform on a stage at least 18 inches above the immediate floor level and removed at least six feet from the nearest patron.

Appellant's argument that there was not substantial evidence to support counts 1 and 11 is wholly unsupported by the record. With regard to count 1, Supervising Agent Beach testified that, on July 3, 2012, not only was he able to stand approximately five feet from the stage, but there were other people standing closer. (RT, Vol. I at p. 15.) Further, the pictures introduced as evidence during the administrative hearing clearly depict the dancer physically interacting with various patrons, one of whom was Agent Florentinus. (See Exhibits 7, 9.) The Department is correct in that, had the stage been

removed at least six feet from the nearest patron, such interaction would be impossible.

With regard to count 11, Agent Florentinus testified, on September 11, 2012, there was nothing preventing patrons from walking up to the performer, who was performing on a stage that was at a direct line from the bartender. (RT, Vol. I at p. 114.) She further testified that a patron approached the performer and pulled down the performer's underwear, exposing his buttocks. (RT, Vol. I at pp. 112-113.) Again, had the stage been removed at least six feet from the nearest patron, such interaction would be most unlikely. Additionally, appellant's own employee, Jimmy Rodriguez, testified "a patron can walk *right up*" to appellant's stages. (RT, Vol. I at p. 149, emphasis added.) Altogether, there was substantial testimonial and documentary evidence in the record to support the violations charged in counts 1 and 11.

Finally, the words "barricade" and "barrier" were used several times throughout the administrative hearing while witnesses were being examined about the physical separation between the on-stage performers and the patrons on the evenings in question. (See RT, Vol. I at pp.15, 92, 93, 97, 112, 114, 149.) Notably, however, rule 143.3(2) does not require there to be a physical barrier between patrons and performers[12] and hence the lack of such a barrier cannot in itself give rise to a violation of the rule. That said, adding the requirement of a physical barrier between patrons and performers to rule 143.3(2) would no doubt assist both the Department and licensees in ensuring consistent enforcement of and compliance with the rule, respectively. As such, the Board recommends the Department consider amending rule

[12]Rather, the rule only requires the stage to be at least 18 inches above the immediate floor level and removed at least six feet from the nearest patron. (See Cal. Code Regs., tit. 4, § 143.3(2).)

143.3(2) to provide additional guidance for its agents and for licensees as to measures that can and/or should be in place to ensure compliance.

VI

Appellant contends that the allegations of simulated sexual activity in counts 3, 6, 7, and 14 are not supported by legally cognizable evidence and therefore cannot be sustained. Appellant argues that the dancers' actions as alleged within those counts, while they may be viewed by some as vulgar, do not constitute "simulated sexual activity." (App.Br. at p. 24.) Appellant relies on a definition of "simulated" which, in the context of rule 143.3, entails a requirement that the viewer must be deceived into believing that the actual sexual conduct had occurred. (*Id*. at pp. 24-25.)

In *Two for the Money, Inc.* (1997) AB-6774, the appellant, notably represented by appellant's counsel in this case, argued that "simulate" involved an intent to deceive or to make to look genuine while not. (*Id*. at p. 5.) The Board observed:

> While the activities in counts 2 and 6 would not deceive anyone into thinking that actual oral copulation or sexual intercourse were occurring, they clearly were intended to and did resemble or give the appearance of those acts. It might be said that the activity in count 2 was "suggestive" of oral copulation rather than simulating it, and the activity in count 6 might be described as "stimulating" rather than "simulating." However, these activities were suggestive and stimulating precisely because the dancers "feigned" or "pretended" or "imitated" sexual acts; in other words, they simulated oral copulation and sexual intercourse. We cannot say that the Department exceeded its discretion in finding these acts to be violative of Rule 143.3.

(*Id.* at p. 6.) The requirement that the onlooker be deceived into believing the sexual activity was actually taking place was subsequently rejected by other decisions of this Board. (See *Maverick Stations, Inc.*, *supra*; *Ecstasy Corp*. (1999) AB-7220 [neither actual skin contact nor exposure of genitals is essential to a violation of rule 143.3].)

In this case, the ALJ made the following findings of fact pertinent to these

counts:

> 8. While Jenko was dancing on the stage, a female approached him. She was holding money in her hand. Jenko crouched down and spread his legs. The cloth was still covering his genitals. Jenko placed his hand on the head of the female patron and moved her head up and down from his genitals simulating oral copulation. Jenko did this five times. The female then gave Jenko the money she was holding. Agent Marquez took a photo of Jenko and the female patron during this time. See Exhibit 7.
>
> 9. A male patron then approached Jenko. He too was holding money in his hand. Jenko grabbed the male's free hand and placed it on his (Jenko's) penis. Jenko moved the male's hand up and down on his (Jenko's) penis simulating masturbation. The male patron then gave Jenko the money he was holding.
>
> 10. Department Agent Andrea Florentinus then approached Jenko. Agent Florentinus was holding money in her hand. Jenko crouched down and placed his leg around Florentinus' head and pulled her head into his groin. Jenko moved her head back and forth several times simulating oral copulation. Jenko then grabbed Florentinus' hand, placed it on his chest and moved her hand downward onto his penis. Florentinus then handed the money to Jenko. Agent Marquez took two photos during these events. See Exhibits 8 and 9.
>
> [¶ . . .¶]
>
> 16. While Ortiz was dancing to the music on the chair, he was approached by a male Asian who was holding money. The male's mouth made contact with Ortiz' penis and simulated oral copulation.

(Findings of Fact ¶¶ 8-10, 16.)

Thus, the ALJ made extensive findings as to the conduct that he believed was violative of rule 143.3; nothing in these findings appears to be erroneous, and there is no evidence that the Department abused its discretion in adopting them. Moreover, appellant's interpretation of "simulated" is overly narrow and contrary to several previous decisions of this Board — this interpretation is therefore rejected.

Finally, appellant contends that what the Department "has really done is to unconstitutionally expand beyond all reasonable recognition the scope of [rule 143.]"

(App.Br. at p. 26.) On this point we must disagree. The Department's authority to regulate the sale of alcohol in licensed premises is vested in it by article XX, section 22, of the California Constitution. (See *Kirby v. Alcoholic Bev. Control Appeals Bd.* (1975) 47 Cal.App.3d. 360, 365 [120 Cal.Rptr. 847].) By enforcing rule 143.3 in this case, the Department is simply penalizing lewd acts in an establishment licensed to sell alcoholic beverages — something that is within its constitutional authority and the scope of rule 143.3. (See *California v. LaRue* (1972) 409 US 109, 118 [93 S.Ct. 390]; *Kirby*, *supra*, at p. 365; *Two for the Money, Inc*., *supra*, at pp. 6-7.)

VII

Appellant contends that counts 3, 5, 6, and 14 cannot be sustained as they fail to provide it with the rudiments of fair notice under the due process clauses of the United States and California Constitutions. Appellant argues that the accusation, investigative report, and testimony of the investigators failed to identify all the suspects in question. (App.Br. at 26.)

As noted by the Department, this Board has already labeled this argument a "sham." (*Funtastic, Inc*., *supra*, at p. 5.) In that case, the Board rejected the appellant's contention because, based on the testimony of the appellant's own witness, the appellant would have been able to search its records and identify the dancers involved. (*Id*.)

In this case, counts 3, 5, and 6 all identify the dancer, Giovanni Jenko, whose conduct was at issue on July 3, 2012. Similarly, count 14 identifies Samuel Ortiz, the dancer from September 11, 2012 whose conduct was at issue in that charge. Samuel Ortiz testified at the administrative hearing and was therefore available to answer any questions regarding a potential defense that appellant opted to raise. Moreover,

appellant's general manager, Aaron Bradshaw, testified that appellant issues checks and IRS Form 1099's to each of the dancers. (RT, Vol. I at pp. 161-163.) Between the accusation, the tax documents, and the check stubs, appellant had sufficient information available to it in order to identify the dancers whose conduct is at issue in these counts.

VIII

Appellant contends that there was a failure of proof with respect to the charges in all of the counts alleging that appellant "permitted" the behavior in question. Appellant maintains that the counts referenced above were not proved because there was no evidence presented that it gave the dancers permission to engage in such misconduct.

As discussed above, it is well-settled law that a licensee has an affirmative duty to ensure the licensed premises is not used in violation of the law and that the knowledge and acts of the employees are imputed to the licensee. (*Mack, supra,* 178 Cal.App.2d at 153-154.) Actual knowledge of the acts is not required. (*Morell, supra,* 204 Cal.App.2d at 514.)

Indeed, this Board has previously rejected this identical contention. (*Dirty Dans, Inc.*, *supra*, at p. 10.) In *Dirty Dan's, Inc.*, the Board stated "[i]t is irrelevant whether appellant encouraged or gave permission for the dancers to engage in this misconduct, and the specific identities of appellant's agents or employees who permitted the behavior are equally irrelevant." (*Id*. at pp. 10-11.)

Here, the record reflects that the dancers' conduct was open and obvious for patrons and employees of the licensed location to see. The ALJ found that, on July 3, 2012, the dancer was performing on a stage that was about three feet high in the center

of the premises. The bartenders, servers and security personnel observed or should have observed his conduct. (See Findings of Fact ¶ 11.) Morever, appellant's own manager, Jimmy Rodriguez, testified that on September 11, 2012, he could see one of the dancers performing and would occasionally glance over at him. (RT, Vol. I at p. 148.) Finally, Agent Florentinus' testified that Elias Diaz, the dancer whose conduct gave rise to the violation charge in count 11, was dancing on a stage that was at a direct line to the bartender. (RT, Vol. I at p. 114.) There is therefore sufficient evidence in the record to support that appellant's agents or employees permitted the conduct in question, and it is irrelevant whether appellant expressly encouraged or gave for permission for the dancers to engage in such conduct.

IX

Appellant contends that counts 7 and 8 must be dismissed because the Department, specifically Agents Beach and Florentinus, entrapped Jenko to engage in the unlawful conduct alleged therein.

As cited by appellant, this Board looks to the teachings of *People v. Barraza* (1979) 23 Cal.3d 675 [153 Cal.Rptr. 459] in assessing whether a licensee has been the victim of entrapment. In that case, the court, after a discussion of the leading cases on the subject, held that the test was whether "the conduct of the law enforcement agent [was] likely to induce a normally law-abiding person to commit the offense." (*Id.* at pp. 689-690.) The court continued:

> For the purposes of this test, we presume that such a person would normally resist the temptation to commit a crime presented by the simple opportunity to act unlawfully. Official conduct that does no more than offer that opportunity to the suspect — for example, a decoy program — is therefore permissible; but it is impermissible for the police or their agents to pressure the subject by overbearing conduct such as badgering, cajoling, importuning, or other affirmative acts likely to induce a normally

law-abiding person to commit the crime.

(*Id*. at p. 690.)

Appellant maintains that, because Agent Florentinus approached Jenko with currency readily visible in her hand, it encouraged Jenko to commit a violation, thereby entrapping him. (App.Br. at p. 28.)

In *4805 Convoy, Inc*., an undercover police detective approached a dancer as she sat at the bar, and requested that she perform a couch dance for him — the dancer did so for several minutes without violating rule 143.3. (*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (*4805 Convoy, Inc.*) (2002) 100 Cal.App.4th 1094, 1097 [122 Cal.Rptr.2d 854].) After the first dance was over, the detective indicated that he wanted a second dance if there would be "more skin involved," but did not offer the dancer any additional money for complying with the request. (*Id*.) The dancer performed the second dance in which she exposed her breasts and buttocks, rubbed her breasts against the detective's body, and showed him her anus, perineum and vaginal area. (*Id*. at pp. 1097-1098.) This Board found that the detective's conduct amounted to entrapment but the Court of Appeal, relying heavily on *Barraza*, reversed.

With regard to the notion shared by the Board and the licensee that the dancer did not harbor a preexisting criminal intent but instead merely responded to the detective's request, the court found that it was misplaced. (*Id*. at 1100.) Specifically, the court stated the following:

> First, such an analysis is based on a subjective standard that focuses on the suspect's state of mind (known as the "origin-of-intent" test), rather than an objective standard that focuses primarily on the conduct of the officer, to determine the issue of entrapment. The California Supreme Court has expressly rejected this analysis. (*Barraza*, *supra*, 23 Cal.3d at pp. 686-690.) Second, even if the officer was aware that [the dancer] had a financial motivation to commit the violation, this does not render his

> request overbearing or make the request anything more than the mere opportunity for [the dancer] to act on her financial motivation by committing the regulatory violation.
>
> For purposes of determining the issue of entrapment, [the detective's] conduct in this case is virtually indistinguishable from the conduct of officers involved in a typical undercover drug operation, in which an officer approaches a possible drug source on the street and offers to buy drugs. Such a request has been uniformly held to be a permissible police stratagem absent additional overbearing conduct or pressure by the officer. (*Provigo Corp. v. Alcoholic Bev. Control Appeals Bd. [*(1994) 7 Cal.4th 561, 569 [869 P.2d 1163]].)
>
> [The Detective's] conduct in this case was not of such a nature that it was "likely to induce a normally law-abiding person to commit the offense." (*Barraza*, *supra*, 23 Cal.3d at pp. 689-690.)

(*Id*. at pp. 1100-1101.)

We agree with the Department that the analysis and conclusion from *4805 Convoy, Inc.* apply to this case. Agent Florentinus testified that it was not necessarily her intention to approach Jenko holding the money in a manner in which he could see it. (RT, Vol. I at p. 117.) She further indicated that she only had the money because she intended to tip him if he danced or stripped or anything. (*Id.*) The Board is not convinced that holding tip money while approaching a dancer would likely induce a law abiding individual to violate rule 143.3. Indeed, appellant admits that the primary revenue source for dancers on the premises is their tips (App.Br. at pp. 19-20), and we presume, for appellant's sake, that appellant would not allow such dancers to ever perform on the premises if their "primary revenue source" in and of itself induces them to behave unlawfully. Clearly then, an undercover agent's mere offering of a tip cannot, without more, be classified as entrapment.

All in all, Agent Florentinus' conduct is no different than that of a typical undercover drug operation where an officer approaches a possible source and offers to

buy drugs; such conduct has been uniformly upheld absent additional overbearing conduct. (*4805 Convoy, Inc.*, *supra*, 104 Cal.App.4th at 1100-1101.) Appellant has not offered any evidence of such additional overbearing conduct in this case and appellant's contention is therefore rejected.

X

Appellant contends that the penalty imposed by the Department is cruel and/or unusual punishment, a characterization of constitutional dimension that, given the circumstances of this case, is a "reach." This Board may examine the issue of excessive penalty if it is raised by an appellant (*Joseph's of Cal. v. Alcoholic Bev. Control Appeals Bd.* (1971) 19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183]) but will not disturb the Department's penalty order in the absence of an abuse of discretion. (*Martin v. Alcoholic Bev. Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) If the penalty imposed is reasonable, the Board must uphold it even if another penalty would be equally, or even more, reasonable. "If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within its discretion." (*Harris v. Alcoholic Bev. Control Appeals Bd.* (1965) 62 Cal.2d 589, 594 [43 Cal.Rptr. 633].)

Rule 144 provides that "[d]eviation from [the Penalty Guidelines] is appropriate where the Department *in its sole discretion* determines that the facts of the particular case warrant such deviation — such as where facts in aggravation or mitigation exist." (Cal. Code Regs., tit. 4, § 144, emphasis added.)

Moreover, the Penalty Policy Guidelines further address the discretion necessarily involved in an ALJ's recognition of aggravating or mitigating evidence:

Penalty Policy Guidelines:

> The California Constitution authorizes the Department, in its discretion[,] to suspend or revoke any license to sell alcoholic beverages if it shall determine for good cause that the continuance of such license would be contrary to the public welfare or morals. The Department may use a range of progressive and proportional penalties. This range will typically extend from Letters of Warning to Revocation. These guidelines contain a schedule of penalties that the Department usually imposes for the first offense of the law listed (except as otherwise indicated). These guidelines are not intended to be an exhaustive, comprehensive or complete list of all bases upon which disciplinary action may be taken against a license or licensee; nor are these guidelines intended to preclude, prevent, or impede the seeking, recommendation, or imposition of discipline greater than or less than those listed herein, in the proper exercise of the Department's discretion.

Of the sixteen counts remaining in the accusation after the amendment, the Department dismissed six of them. As discussed in Section I, *supra*, the Department's decision with regard to count 17 is reversed and remanded for a hearing on the merits of that count. The nine remaining counts all pertain to violations of various subsections of rules 143.2 and 143.3, as well as Business and Professions Code section 25600, and were justifiably sustained. The penalty schedule of rule 144 provides that a single violation of either rule 143.2 or rule 143.3 merits 30 days' suspension to revocation, and there is no default penalty prescribed for a violation of section 25600. The ALJ found that no evidence of either aggravation or mitigation was presented. (See Conclusions of Law ¶ 26.) Therefore, a 30 day suspension was proposed by the ALJ and adopted by the Department. This penalty is well within the prescribed limits of rule 144 and, even disregarding count 17, the Board finds no reason to upset that penalty in this case.

ORDER

The decision of the Department with regard to counts 1, 3, 5, 6, 7, 8, 9, 11 and 14 is affirmed. The Department's decision with regard to count 17 is reversed and remanded for a hearing on the merits of that charge.[13]

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[13]This order of remand is filed in accordance with Business and Professions Code section 23085, and does not constitute a final order within the meaning of Business and Professions Code section 23089.