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

AB-9099
File: 47–44014 Reg: 09071156

MAVERICK TAVERN, INC., dba Wild Goose
11604 Aviation Boulevard, Inglewood, CA 90304,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley

Appeals Board Hearing: May 5, 2011
Los Angeles, CA

ISSUED JUNE 15, 2011

Maverick Tavern, Inc., doing business as Wild Goose (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 30 days for having permitted entertainers at appellant's premises to engage in conduct violative of Department Rules 143.2 and 143.3

Appearances on appeal include appellant Maverick Tavern, Inc., appearing through its counsel, Joshua Kaplan, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on October 15, 1973.

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[1]The decision of the Department, dated February 26, 2010, is set forth in the appendix.

On May 20, 2009, the Department filed an accusation against appellant charging that, on January 15, 22, and 29, 2009, appellant permitted dancers at its premises to engage in conduct in violation of provisions of Rules 143.2[2] and 143.3.[3] Following an administrative hearing held on October 20 and 21, 2009, the administrative law judge (ALJ) issued a proposed decision in which he concluded that 34 of the original 55 counts of the accusation were supported by the evidence, and which dismissed the

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[2] Department Rule 143.2 (4 Cal. Code Regs. §143.2) provides, 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:
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> ¶...¶
>
> (2) To employ or use the services of any hostess or other person to mingle with the patrons while such hostess or other person is unclothed or in such attire, costume or clothing as described in paragraph (1) above.
>
> (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.

[3] Department Rule 143.3 (4 Cal. Code Regs. §143.3) provides, 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.
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> Live entertainment is permitted on any licensed premises, except that:
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> (1) No licensee shall permit any person to perform acts of or acts which simulate:
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> (a) Sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law.
>
> (b) The touching, caressing or fondling on the breast, buttocks, anus or genitals.
>
> (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.

remaining 21 counts.

Appellant has filed an appeal raising the following issues: (1) the accusation unlawfully accumulated counts, in violation of the principal established in *Walsh v. Kirby* (1974) 13 Cal.3d 95 [529 P.2d 33]; (2) the penalty imposed is unconstitutional and irrational; (3) as a matter of law, licensee cannot be deemed to have permitted lessees/independent contractors to violate Department Rules 143.2 and 143.3; (4) the accusation's allegations in counts 9, 16, 26, 28, 34, 39, 41, 43, 50, 54 and 55 of simulated sexual activity are not supported by legally cognizable evidence; (5) the evidence does not support the findings with respect to counts 2, 4, 10, 13, 15, 16, 18, 20, 21, 34, 36, 37, 49 and 50; (6) counts 8, 30 and 31 must be dismissed as failing to provide licensee with fair notice; and (7) counts 4, 10 and 17 cannot be sustained because of a failure or disparity of proof.[4]

DISCUSSION

I

Appellant operates a restaurant/nightclub called the Wild Goose which features, among other things, female topless dancing and the availability of what it refers to as

[4]A careful review of appellant's brief discloses that it has not directly contested the findings with respect to counts 6,14, 32, 33, 42, 45, 46 and 47. These counts involve the allegedly permitted activities of six different entertainers violative of Rule 143, and all but two (14 and 45) involve allegedly simulated sexual activity. The two exceptions consist of charges of the exposure of buttocks (count 14) and breasts (count 45) to view while not on a stage. In the concluding paragraph of appellant's brief, it states: "it is respectfully submitted that the remaining counts of the accusation cannot be sustained." Our reasoning as to the specifically-challenged counts in part IV, *post*, involving simulated sexual conduct applies equally to counts 6, 32, 33, 42, 46 and 47. In the absence of any specific ground raised by appellant, we consider counts 14 and 45 controlled by our reasoning with respect to credibility issues.

private dances. Appellant and each dancer who performs at appellant's premises have executed an eight-page form document (Exhibit H) entitled "Dancer Performance Lease." The document recites, among other things, that the lessee is not an employee nor an independent contractor of the lessor. Under the terms of the agreement, the dancer receives no compensation from appellant, and pays rent for each day she exercises the privilege of dancing in appellant's premises. She is permitted to establish, without any consultation with appellant, a fee for private dances, which, in addition to tips and gratuities, are hers alone. The dancer agrees to conform "all of her performances and all the incidents thereof" to all laws and regulations, including Department of Alcoholic Beverage Control rules and regulations. The document provides that, other than compliance with all legal requirements, "lessor imposes no rules or requirements at all."

All of the allegations in the accusation which were sustained involve conduct on the part of the dancers which the Department found to violate its Rule 143.2 and 143.3.

Appellant argues that, as a matter of law it cannot be deemed to have permitted its lessee dancers to violate Rules 143.2 and 143.3. Appellant contends that each and every dancer named in the accusation was never an employee. Relying on the afore-described lease agreements with the dancers/entertainers, appellant denies any ability to exercise any control over them other than to require that they honor their agreement to comply with Department Rules 143.2 and 143.3, at the risk of being excluded from the premises if they do not. Appellant denies any knowledge of the specific conduct of the dancers whose conduct gave rise to the Department charges, claiming it had taken every reasonable step to prevent it from happening, by employing security personnel,

managers, and a DJ who was charged with viewing the 32 surveillance cameras. Thus, according to appellant, it cannot be said to have permitted the conduct attacked by the Department.

Appellant relies principally on the decision of the California Supreme Court in *Borello & Sons v. Dept. of Ind. Relations* (1989) 48 Cal.3d 341 [256 Cal.Rptr. 543] (*Borello & Sons*), and courts of appeal decisions in *McFaddin San Diego 1130, Inc. v. Stroh* (1989) 208 Cal.App.3d 1384 [257 Cal.Rptr. 8], and *Laube v. Stroh* (1992) 2 Cal.App.4th 364 [3 Cal.Rptr.2d 779].

We have no quarrel with appellant's argument that, applying the standards outlined in *Borello & Sons, supra*, for determining whether an employer-employee relationship exists, one might not be found. The decision in *Borello* is simply irrelevant, given the facts of this case.

In *Borello & Sons*, the issue was whether a grower was obligated to secure workers' compensation insurance for the migrant harvesters of its cucumber crop. The grower contended the workers were independent contractors excluded from the workers' compensation law. The grower relied on contracts designating the worker as a "share farmer," and which, among other things, recited that the parties deemed themselves principal and independent contractor rather than employer and employee.

The Division of Labor Standards Enforcement of the Department of Industrial Relations ("the Division") concluded that because of Borello's predominant control over the cultivation, harvest and sale of its cucumbers, and the workers' lack of investment in the crop, they could not be considered sharecroppers in the true sense. Hence, they were employees, and not independent contractors. On mandamus review, the trial

court affirmed the Division, the Court of Appeal reversed the trial court, and the Supreme Court, in turn, reversed the Court of Appeal and affirmed the Division's order. The Court stated:

> Borello and its amici (collectively, the growers) urge that the Court of Appeal properly found independent contractorship as a matter of law. By agreement and in actual practice, the growers urge, Borello retains the cucumber sharefarmers for a "specified result" – a completed harvest – relinquishing all "control" over the "means" by which the task is accomplished. Moreover, the growers note, the sharefarmers are paid a "specified recompense" based entirely on results. The growers stress that the harvesters furnish their own tools, exercise specialized skill, cannot be discharged, and have expressly accepted their independent status with its attendant risks and benefits. We disagree both with the growers' premises and with their conclusions.

(Borello & Sons, supra, 48 Cal.3d at pp. 349-350.)

Despite our belief that appellant's reliance on the *Borello* & Sons decision is misplaced, we think some of the court's more general observations do apply to this case. There, the court noted that the protections of the Workers Compensation Act had "a public purpose beyond the private interests of the workers themselves. Among other things, the statute represents society's recognition that if the financial risk of job injuries is not placed upon the business which produced them, it may fall upon the public treasury." (*Borello & Sons, supra*, 48 Cal.3d at p. 358.)

In the present case, there is a public purpose in the provisions of the Alcoholic Beverage Act and the Department Rules, in that someone other than the dancers themselves must be held responsible for their conduct. If there is no responsibility on the part of the business that benefits from their activities, the end result can only be detrimental to public welfare and morals.

Similarly, as the *Borello* & Sons decision observed that a determination that the

sharefarmers in that case were independent contractors would suggest "a disturbing means of avoiding an employer's obligation under other California legislation intended for the protection of 'employees'" (*Borello* & *Sons*, *supra*, at p. 359), so would a determination that appellant has no responsibility for the actions of its lessees have an adverse effect on welfare and morals unless a license-holder is held to account in some manner for their conduct.

We said in a recent decision involving a business model similar to appellant's:

> There is a common thread running through all of the matters charged. The dancers are motivated by self interest to push the envelope with respect to what conduct is permitted and what conduct will generate more tips and more private dance revenue. The freedom with which these dancers may move from club to club ... invites them to engage in improper and illegal conduct while dancing on stage or providing private dances, knowing there will be another club, perhaps even in another city, where they can continue to perform, if barred from appellant's premises.
>
> Appellant, willingly or not, must accept the risks to its alcoholic beverage license flowing from dancer misconduct of the type observed in this case, because it is a direct and foreseeable consequence of the modus operandi it has chosen for its business. It is apparent from the relatively undisputed facts of this case that appellant materially underestimated the risks it had assumed, and failed to act appropriately in light of those risks.
>
> [¶ ... ¶]
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> We do not agree that the arrangement between Pure Platinum and the dancers insulates it from discipline warranted by the acts of the dancers described in the accusation which violate Department rules governing entertainer conduct. Appellant's argument exalts form over substance; the substance here is that appellant and the performers are engaged in a mutual business endeavor, in the nature of a loose and informal partnership or joint venture. Appellant's disclaimer of any employment relationship between it and the dancers is irrelevant. The arrangement between appellant and its dancers is designed to give the illusion of separateness, but the reality is a common pursuit of revenue by appellant and dancers, each having something to offer the other.

(*Clubary, Inc*. (April 5, 2011) AB-9098, petition for review pending.)

Just as the Workers' Compensation Act's "definition of the employment relationship must be construed with particular reference to the 'history and fundamental purposes' of the statute" (*Borello & Sons, Inc., supra*, 48 Cal.3d at p. 351), so must the relationship between appellant and its entertainers/dancers be considered in light of the history and fundamental purposes of the Alcoholic Beverage Control Act and duly-adopted Department Rules 143.2 and 143.3 The topless entertainment and private dances offered in appellant's premises are an integral part of its business. We agree with the Department that appellant cannot delegate its duty to operate a lawful business to its entertainers/dancers, whether they be employees, independent contractors, or, as appellant calls them, lessees.

It may well be that the business plan utilized by appellant is the most profitable way to operate a business featuring topless dancers. By providing, at nominal charge, a stage compliant with Rule 143.3, and space within the premises for the performance of private dances - commonly referred to by the Department and its investigators as "lap" dances, and, undoubtedly, called that because of the manner in which they are performed - appellant can offer female topless dancers (while on stage), and to mingle (while clothed) with and entertain patrons attracted to the premises because of the entertainment they provide. Appellant collects a $5 cover charge and the proceeds from the sale of food and alcoholic and non-alcoholic beverages purchased by its patrons. The dancers benefit from the fee they charge for a private dance, and tips and gratuities they receive.

Appellant argues that it is unfair to hold it liable for the conduct of the dancers because they are not subject to the Department's jurisdiction, and, because they are

neither employees nor independent contractors, their conduct cannot be imputed to appellant. Further, it argues, since its large security force, backed up by no less than 32 surveillance cameras, is unable to detect and prevent the conduct of the dancers who violate Rules 143.2 and 143.3, it cannot have permitted something it did not know about.

Appellant cites *McFaddin San Diego1130, Inc. v. Stroh* (1989) 208 Cal.App.3d 1384 [257 Cal.Rptr. 8] (*McFaddin*), for the proposition that a licensee cannot be deemed to have permitted conduct which it did not know about and had taken all reasonable attempts to prevent from occurring. We do not quarrel with appellant's reading of that case, but we are not persuaded, in light of the factual context of the present appeal, that it has any applicability.

In *McFaddin, supra*, the Appeals Board had sustained a decision of the Department which suspended the license of a nightclub operator for having permitted patrons on six occasions to unlawfully sell or distribute cocaine. The ALJ had found, as to two of the transactions, that the licensee's employees had not permitted the sales; as to another, that it was not established employees were involved in or aware of it; and as to the remaining three transactions, it was not established that any employee knew or reasonably should have known of the transactions. Nonetheless, the ALJ found grounds for suspension under Business and Professions Code section 24200, subdivision (a),[5] based on the occurrence of the sales. She did not find grounds for revocation under section 24200.5, because it was not established that the nightclub

[5]Section 24200, subdivision (a) provides, in pertinent part, that a ground for suspension exists "[w]here the continuance of the license would be contrary to welfare and morals."

operator knowingly permitted the drug sales.

The court reversed the order of the Board and the decision of the Department, holding that the nightclub operator could not be deemed to have permitted cocaine sales by patrons where it did not know of the transactions and had taken extensive measures[6] to prevent such transactions:

> Thus, we can affirm the Department's decision only if the facts support a determination Confetti [the licensee] "permitted or suffered" the drug transactions to be carried out on its premises. As more fully discussed below, the facts as found by the Department (i.e., Confetti did not know of the drug transactions and further had taken extensive preventive measures) do not support such a determination.

(McFaddin, supra, 208 Cal.App.3d at 1387, fn. omitted.)

The court ultimately concluded that "where a licensee does not reasonably know of the specific drug transactions and further has taken all reasonable measures to prevent such transactions, the licensee does not 'permit' the transactions." (*McFaddin, supra*., at p.1390.) In a footnote, the court acknowledged that, in its mind, the issue of strict liability under section 24200, subdivision (a), remained an open question: "In light of our approach to this case in which we analyze the issues in the context of the pleadings, we do not reach the question whether under section 24200(a) the Department could suspend or revoke a license based solely on the occurrence of the drug transactions. We have declined to address this question despite the parties' overtures to do so." (McFaddin, supra, at p. 1387, fn. 3.)

In *Laube v. Stroh,* (1992) 2 Cal.App.4th 364, 367 [3 Cal.Rptr.2d 779] (*Laube),*

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[6]The "extensive measures" employed by Confetti included polygraph tests on employees; use of undercover personnel to monitor activities of employees; the postings of conspicuous signs warning of arrests and prosecutions for drug sales; and checks of the restrooms every 10 minutes.

drug transactions involving patrons took place in the Pleasanton Hotel, described by the court as "an upscale type hotel, bar and restaurant," and described by the Pleasanton Chief of Police to be clean, orderly, and an exemplary establishment.

In *Laube* the court reversed decisions of the Department and the Appeals Board which had ruled that the licensee had permitted drug transactions by failing to take preventive measures, even though the evidence indicated that he neither knew or had reason to know of the drug trafficking. The court rejected the Department's reading of the *McFaddin* decision:

> We respectfully differ with the Board's perception of *McFaddin* and its antecedents, and hold that a licensee must have knowledge, either actual or constructive, before he or she can be found to have "permitted" unacceptable conduct on a licensed premises.

(2 Cal.App.4th, at p. 377.)[7]

The court's decision traced the development of the concept of "permitting" as a basis for liability, and drew on the decision in *Marcucci v. Board of Equalization* (1956) 138 Cal.App.2d 605 [292 P.2d 264] (*Marcucci*), a case in which a licensee was charged with permitting a minor to consume beer on her premises. The licensee's bartender observed the minor consuming the beer. The *Laube* court restated the holding of the *Marcucci* court in its own words:

> The *Marcucci* case perhaps states it best. A licensee has a general, affirmative duty to maintain a lawful establishment. Presumably,

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[7]The *Laube* decision also addressed a separate appeal by a licensee whose off-duty employee had engaged in drug transactions on the premises. The court ordered the decisions of the Board and Department in that case annulled, and remanded the matter to the Department, stating that it was "impossible to determine from the Board's decision to what extent the action against the licensee was based on the *McFaddin* issue or on the imputation to petitioner of the knowledge of the off-duty employee. (*Laube v. Stroh, supra*, at p. 379.)

> this duty imposes upon the licensee the obligation to be diligent in anticipation of reasonably possible unlawful activity, and to instruct employees accordingly. Once a licensee knows of a particular violation of the law, that duty becomes specific and focuses on the elimination of the violation. Failure to prevent the problem from recurring, once the licensee knows of it, is to "permit" by a failure to take preventive action. This is a more reasonable alternative to the Board's interpretation of *McFaddin* and one more consistent with logic and reasonable fairness. The Attorney General, at oral argument, essentially conceded the point by stating that his main concern – which we certainly share – was the Department's ability to act against the licensee who *knows* of illicit activity and fails to prevent its recurring.

(Laube v. Stroh, supra, 2 Cal.App.4th at p. 379.)

The facts of the present appeal are very different from these cases. 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. Unlike *McFaddin, Laube*, and *Marcucci*, this case does not involve conduct inside the premises by patrons or outside the premises by sellers of narcotics, loiterers, or intoxicated persons. Instead, the 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 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.[8]

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[8]We cannot ignore the fact that Department investigators discovered 34 separate violations of Rules 143.2 and 143.3 during the course of only three visits in a two week period. As previously noted, there is evidence that appellant relied on security

(continued...)

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.

Appellant virtually concedes that its business plan is inherently at odds with Rules 143.2 and 143.3 It says in its brief, at page 61:

> Dancers' theatrical dance profession requires them to possess a high level of skill in order to achieve income as exotic dancers at licensee's venue consisting of dance ability, acrobatic balance (training for such being necessary), alluring and erotic appeal, acting ability in order to project a fantasy of availability and interest, sales skills in order to market themselves to sell private dances.

That dancers earning their income from tips and private dances are tempted or have an incentive to offer an "alluring and erotic appeal" or a "fantasy of availability" that transcends the restrictions and prohibitions of Department rules should come as no surprise to anyone. It is precisely for that reason that the level of diligence a licensee

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[8](...continued)
personnel and surveillance cameras, but the record is silent as to their effectiveness, or the degree of intensity applied to their observations.

It may well be true, as appellant has contended in its brief, that the violations could be measured in seconds. These rule violations do not depend on a stop watch.

must maintain in such an atmosphere is very high, and in this case, as the findings indicate, was not met. Appellant points to its employment of security guards, managers, and a DJ, and video cameras throughout the premises (App. Br., at p. 30). Its owner even monitors the dancers from his home through an internet connection. (*Id*., at pp. 169-170.) Despite all this, Department investigators discovered 34 violations during three visits over a short two-week period.

In our view, it does not matter that the dancers and appellant entered into a so-called lease agreement, one which disclaims an employer-employee relationship.[9] Rule 143.3 expressly applies to conduct by entertainers. Appellant's exposure to liability is not derivative and is not imputed. Its exposure flows from what it permitted.[10]

Appellant makes much of the freedom the dancers enjoy to choose when to perform, to choose their costumes, and to retain all their tips and private dance

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[9]Even appellant's president, who was formerly its manager, was uncertain what the legal status of its dancers was:

> "Q. In January of '09, what was your intention as far as the legal relationship was to be between dancers and Maverick Tavern, Inc.?
> A. They've always been lessee, independent contractor.
> [II RT 159].

What is more, even appellant's brief (at page 55) states that "each and every dancer" was "at all times relevant a lessee/independent contractor and not ever an employee."

[10]We find irrelevant appellant's assertion - in underlined uppercase letters, no less - that it is crucial to note that "the decision below contains absolutely no legal/factual analysis or discussion of this critical and determinative issue, to wit: the legal distinction as to derivative liability between a [*sic*] "independent contractor/lessee" versus "an employee."

(App. Br., p.67.)

revenues, and says this is proof of the absence of any employment or agency liability. In our mind, this proves little.

The argument that the conduct of the dancers cannot be imputed to appellant is a red herring. The issue is not that the conduct of the dancers is imputed to appellant, although it might seem fair that it could be. Instead, the issue is whether appellant can be deemed to have permitted the conduct in question. It is readily apparent from the findings that appellant, by the way it purposely conducted its business, created a situation beyond its ability to control, and so can be said to have permitted what occurred.

Appellant's brief concedes that "[t]he dancers' revenue depends upon the dancer's ability as an actress, creating the illusion of erotic availability and erotic allure." (App.Br., p. 61.) That may very well be true. But appellant and its dancers have interests in common, as well as competing interests. Both depend on revenue from male patrons, appellant in its sale of alcohol and food, and the dancers in their tips and fees from private dances. Appellant exacts a contractual requirement from the dancers that they comply with the Department's rules. Unfortunately for appellant, its ability to enforce that contractual obligation is often after the fact. It should not be a surprise for an adult business dependent upon free-lance entertainers offering "alluring and erotic appeal, acting ability in order to project a fantasy of availability and interest, sales skills in order to market themselves to sell private dances" (*Ibid*.) to find that some of the entertainers engage in activities that contravene the Department's rules in order to

encourage interest and generosity from appellant's male patrons.[11] By delegating to the performers the responsibility for complying with Rule 143, appellant has abdicated its responsibility as a licensee.

Appellant is offering a kind of entertainment in the context of an economic relationship in which a dancer depends for her income from the premises on inducing male patrons to tip or buy private dances. In a sense, market forces at the premises work at odds with the objectives of the Department's rules. Compounding this potential for trouble, the dancers were told they must comply with Department rules, but, according to the testimony of Mr. Kroeze, were never furnished a copy of the rules until after the events which gave rise to this case. [RT 163.]

As we said in *Clubary, Inc., supra*, "[a]ppellant's argument exalts form over substance." The substance here is that appellant and the performers are engaged in a mutual business endeavor, in the nature of a loose and informal partnership or joint venture, with a built-in conflict of interest. Appellant recognizes the conflict, evidenced by its desire to distance itself from the dancers' conduct. If appellant is unable to control the conduct of the dancers, a suspension, or worse, will be the cost of doing business. 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.

Indeed, the relationship between appellant and its "lessee" dancers strongly resembles an employer-employee relationship despite the artifices adopted by

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[11]As appellant's owner so colorfully put it, "Plus, they have to make an illusion, you know, like they're only in love with that guy, you know. But once that guy's wallet is empty, they're ain't no more love, you know." [II RT 180.]

appellant to escape that characterization. Appellant's profit expectations are not realistically premised on the modest "lease payments" it receives from the dancers. Their entertainment is offered because it is a draw to appellant's business. They are essential to its business in the same way that waiters, bartenders, and DJ's are. The only difference is that appellant, in an attempt to shield itself from exposure, has afforded the dancers a free reign, subject only to requirement that *they* comply with a requirement shown by the facts of this case frequently to be ignored or flouted.

II

Citing *Walsh v. Kirby*, *supra*, 13 Cal.3d 95, appellant argues that the Department violated the principle established in that case by unlawfully accumulating counts for the purpose of increasing the penalty it could exact. According to appellant, the Department believed it had developed evidence of violations in its very first visit to the premises, but, instead of proceeding with an accusation, continued its investigation by visiting the premises twice more for the purpose of accumulating additional matters to support a greater penalty.

In *Walsh v. Kirby, supra*, the licensee sold distilled spirits to an undercover investigator at a price below that dictated by a then-existing fair trade law. The law provided for a $250 fine for a first offense, and a $1000 fine for each succeeding offense. Under the statute, a licensee could not appeal or seek a writ from a Department finding of violation without first paying the fine under protest or posting a security bond. The Department did not proceed with an accusation with regard to the first such sale until it had accumulated an additional nine identical violations, resulting in a total fine of $9250. Additionally, the Department charged a sale of wine below the

scheduled price. The matter went to hearing, and the charges in all 11 counts were sustained. The licensee posted a security bond, proceeded with an appeal, and the Appeals Board, while sustaining the monetary fines, reversed that part of the Department's order imposing a 10-day suspension for the wine transaction. The Court of Appeal ordered the Board's decision annulled, and the Supreme Court granted a hearing. While the matter was pending in the Supreme Court, the Department filed a second accusation alleging an additional 21 fair trade violations, all alleged to have occurred after the first accusation had been filed. Following a hearing on the second accusation, and the imposition of $21,000 in additional fines, the licensee declared bankruptcy. Walsh, the trustee in bankruptcy, became the petitioner in the Supreme Court proceeding.

The Supreme Court held that the Department had abused its discretion by proceeding in a manner intended to force the licensee into bankruptcy by generating fines in an amount beyond his ability to pay, contrary to the intent of the statute to warn violators and induce compliance by providing for a modest penalty for a first violation, with substantially increased penalties should compliance not be induced. The Court acknowledged that the discretion invested in the Department is broad and inclusive, and not subject to judicial control when exercised within its limits, but concluded that "[t]he particular vice in the instant case, however, lies in the subjective determination by the department that it would seek a penalty beyond that provided for a first violation in light of the licensee's previous good record." (*Walsh v. Kirby, supra*, 13 Cal.3d at pp. 103, 105.)

The present case is entirely different. Department investigators visited

appellant's premises only three times over a span of two weeks, and in the course of those visits observed what they believed were of 55 violations of Department rules governing the attire and conduct of entertainers.[12] The Department sustained 34 of those counts. There is no evidence from which it might reasonably be inferred that the Department's visits to the premises were for any purpose inconsistent with the provisions of the Alcoholic Beverage Control Act.

The Board has been reluctant to decide just when the Department must conclude an investigation and proceed with an accusation. The Board, especially in cases of this nature, is not equipped to assess when the evidence which has been accumulated in the course of an investigation is of such force and quantity as to compel the Department to halt the investigation and proceed with an accusation. Much involves the nature of the conduct, its extent, the likelihood such conduct may continue, and many other factors peculiarly within the province of the prosecutor.

The decision in *Walsh v. Kirby, supra,* cannot be read as holding that the Department must proceed with an accusation immediately once its investigation discovers a violation. As the Court said:

> We recognize that in order to fortify its evidence of a violation to be later charged in an accusation the department may deem it prudent to obtain evidence of more than one sale in technical violation of the statute before filing an accusation. *The gathering of such supportive evidence would not in itself, of course, constitute arbitrary or capricious conduct.*

Walsh v. Kirby, 13 Cal.2d at 105 (italics added.*)*

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[12]The first Department visit to the licensed premises on January 9, 2009, accounted for eight counts of the accusation, the second visit on January 15, 2009, accounted for an additional 20 counts, and the third on January 22, 2009, another 25 counts. One entertainer alone was the subject of 28 separate counts of the accusation.

We are not prepared to say that three visits over a span of two weeks constitutes arbitrary or capricious conduct in this case.

III

Appellant contends, in language echoing that used by its counsel in other appeals this Board has heard, that the 30-day suspension ordered in this case is "unconstitutional and irrationally unreasonable in that it constitutes cruel and/or unusual punishment" (App. Br., p.48), and "the very essence of an abuse of discretion, irrationality and cruel and/or unusual punishment." (*Id*. at p.50.)

Appellant cites no case authority for its claim that an administrative license suspension constitutes cruel and unusual punishment under either the California or United States Constitutions, and we are unaware of any such authority.

The penalty, a 30-day license suspension, is at the low end of the "30 day suspension to revocation" standard penalty contained in the Department's Rule 144 Penalty Guidelines for offenses involving lewd conduct, such as the Department found had occurred in this case. It is absurd to characterize such a penalty as "irrational" or "cruel and/or unusual."

The Appeals Board may not disturb the Department's penalty orders in the absence of an abuse of the Department's discretion. *(Martin v. Alcoholic Beverage Control Appeals Board & Haley* (1959) 52 Cal.2d 287 [341 P.2d 296].) We find none here. Given the number and variety of violations found by the Department, a 30-day suspension appears remarkably lenient.

IV

Appellant's argument that the findings with respect to the counts involving

simulated conduct are based on evidence that is not legally cognizable is largely directed at the credibility of the testimony of the Department investigators. Appellant cites a number of contradictions between the oral testimony of the investigators and the content of reports they prepared shortly after their visits to the licensed premises.

Appellant argues that the investigators testified in "remarkably identical language" regarding certain aspects of the dancers' performance during the private dances. The question whether this suggests that the investigators coordinated their testimony, or simply that a dancers' style was repetitive, is not one for this Board to decide. The Board's review of a Department decision is closely circumscribed by law. In reviewing the Department's factual findings, the Board must resolve all conflicts in the evidence in the Department's favor and it is bound by those findings that are supported by substantial evidence even if it believes a contrary finding is more reasonable. (*Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control* (1970) 2 Cal.3d 85, 94-95 [84 Cal.Rptr. 113]; *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd*. (2002) 100 Cal.App.4th 1094 [123 Cal.Rptr 2d 278].)

The credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. (*Lorimore v. State Personnel Board* (1965) 232 Cal.App.2d 183, 189 [42 Cal.Rptr. 640]*; Brice v. Dept. of Alcoholic Bev. Contro*l (1957) 153 Cal.App.2d 315, 323 [314 P.2d 807].) The investigator's testimony, accepted as true by the trier of fact, is substantial evidence.

Appellant further argues that to "simulate" sexual activity as used in Rules 143.2 and 143.3 means that the viewer must be led to believe he is seeing the actual sexual

conduct (App. Br., p. 70), but concedes that components of the dancers' conduct can be viewed as "vulgar or suggestive." (*Ibid*.) Given the almost infinite flexibility of the English language, it would seem there is little difference between the two words, "simulated" and "suggestive." The definitions of these words in Webster's Third New International Dictionary offer no comfort to appellant.[13]

Decisions of the Board over the years have never said that the "simulated conduct" challenged as violative of Rule 143.3 must be such as to lead the viewer to believe he or she is seeing actual sexual intercourse or oral copulation. Appellant's theory that there must be actual deception is simply wrong, and consistently rejected by the Board.[14]

In *Two For The Money* (1997) AB-6774, the Board rejected the contention that, to simulate, the act must be such that onlookers would think the sexual conduct was

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[13]**Simulate** ... 1 : to give the appearance or effect of: FEIGN, IMITATE ... 2 : to have the characteristic of: RESEMBLE

Simulated ...of a feigned or imitated character: MOCK, SHAM

(Webster's 3d New Internat. Dict. (2002) (Unabridged) p. 2122.)

Suggestive ... 1 a: giving a suggestion or hint ... 1 b: full of suggestions stimulating thought : PROVOCATIVE, SEMINAL 1 c: stirring mental associations : PREGNANT, EVOCATIVE

2 : suggesting or tending to suggest something considered improper or indecent : OFF- COLOR, RISQUE

(*Ibid*. at p. 2286.)

[14]Acknowledging that "these brief components of a larger theatrical dance performance may be viewed by some as vulgar or suggestive" (App. Br., p.70), appellant insists they are "nothing more than erotic dancing," and do not constitute simulated sexual intercourse or simulated oral copulation because no reasonable man could describe them as "deceptive" in causing observers to believe there was actual penetration of a vagina or a mouth by a penis, or a resemblance thereof, when there really was not.

actually taking place:

> 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 dancers "feigned" or "pretended" or "imitated" sexual acts.

In *Robles* (1997) AB-6720, it was argued that the term "simulated sexual intercourse" lacked clarity and that by relying on the "subjective guessing" by untrained investigators as to the meanings of the terms, Rule 143 is not enforced even-handedly.

The Board disagreed, stating:

> We know that some dance forms can appear erotic, and that on occasion there may be contact between the lower portions of the male and female bodies in the course of such dancing. Nonetheless, where the degree of sexual content in the performance, combined with provocative costumes worn by the dancers, rises to certain levels, it may not be unreasonable to perceive the conduct as a simulation of sexual intercourse.
>
> The ALJ's findings were conclusory in nature, without pinpointing any particular thing the dancers did which he perceived as simulating sexual intercourse. However, it would not be unreasonable for the ALJ to have concluded, as the investigator witnesses did, that the rubbing of the dancers' virtually-unclad buttocks directly against the investigators' groin areas, was simulated sexual intercourse within the meaning of Rule 143 [*sic*]. Anyone observing this conduct in isolation would probably reach the same conclusion. [Fn. omitted.]

In *Ectasy Corp*. (1999) AB-7220, it was argued that to establish simulated sexual intercourse or oral copulation there must be exposure of and contact with the genital area. The Board agreed with the Department that neither actual skin contact nor exposure of the genitals is essential to the violation. Citing the United States Supreme

Court decision upholding the facial constitutionality of Rule 143.3,[15] the Board stressed the factual setting of each particular case:

> The singular importance of the factual context is such, in this kind of case, that it is extremely difficult to compare the facts of one case to those of another and draw any meaningful conclusion. In each case, we think, the test must be whether the conduct which has been challenged is such that, in the context in which it is presented, no reasonable person observing it would be expected to arrive at any conclusion other than that the person or persons involved were *simulating* oral copulation or sexual intercourse. We think such an approach is consistent with both the rule and the constitution.

Other Board decisions are to the same effect. (See, e.g., *II-S Corporation* (2000) AB-7501.)

V

Appellant contends that the evidence does not support the findings with respect to counts 2, 4, 19, 13, 15, 16, 18, 20, 21, 34, 36, 37, 49 and 50. These counts involve Jacqueline Oliveira, who danced as "Tracy." Appellant's argument once again is an attack on the investigator's credibility.

Appellant argues that the investigators' failure to note certain details of Ms. Oliveira's anatomy, which she described as a prominent scar near her vagina, a large tattoo on her thigh, and the laser removal of her pubic hair, coupled with her denials of having exposed her breast and buttocks, compels the conclusion that none of their testimony is credible.

Appellant does not deny that Oliveira danced several times for the investigators. The fact that they may have not noticed certain aspects of her anatomy while she

[15] *California v. LaRue* (1972) 409 U.S. 109 [93 Sup.Ct. 390].

danced, is simply another fact the ALJ could have considered. As we noted above, at page 22, the issue of credibility is for the trier of fact. We find nothing in Oliveira's testimony that compels a contrary determination as a matter of law.

VI

Appellant contends that it was denied due process by the Department's failure to identify the dancer or dancers referred to in counts 8, 30 and 31 of the accusation who were the subject of testimony from Investigator Garcia. Count 8 refers to an unidentified dancer as "Jane Doe," while counts 30 and 31 refer to an unnamed, unidentified African-American female.

Appellant does not dispute Garcia's testimony that the dancer (or dancers) performed on the stage in appellant's premises, accompanied by music provided by appellant, and there was no evidence of any attempt to remove one or both of them as trespassers. Appellant's business practice of requiring a lease agreement as a condition of performing would suggest that appellant would have known, or had the ability to learn, the identity of one or both of them prior to the administrative hearing. We fail to see how appellant was prejudiced.

VII

Finally, appellant argues that there is a prejudicial disparity of proof between the allegations in the accusation and the evidence with respect to counts 4, 10, and 27. Count 4 alleges, in part, that Tracy, "whose breast were [*sic*] exposed to view," violated Rule 143.3. Appellant argues that the allegation is so uncertain as to deprive the licensee of notice of the charge. As to counts 10 and 27, appellant alleges that although the accusation alleges the dancers involved in those counts exposed their

"breasts," the evidence established that each exposed only a single breast.

We agree with the Department that the variance between the pleading allegations and the proof is insubstantial (counts 10 and 27), and that any objection to the awkwardness of the language in count 4 is untimely. (Gov. Code, subd.§ 11506(c).

VIII

It should be clear from what we have written that we have not relied on a concept of liability without fault. Appellant by its considered and voluntary act adopted a business plan designed to insulate itself from exposure under Rules 143.2 and 143.3. Appellant's efforts to do so in this case have failed. The history of cases involving this kind of entertainment, as reflected in the Board decisions cited herein, as well as others not cited, reveals a continuing effort by licensees to shield themselves from the acts and conduct of entertainers in their premises. Employees, independent contractors, lessees, what will be next?

ORDER

The decision of the Department is affirmed.[16]

FRED ARMENDARIZ, CHAIRMAN
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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

Any party may, before this final decision becomes effective, apply to the appropriate district court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.