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

AB-9524
File: 47-451875; Reg: 14081633

MJT ZEBRA, INC.,
dba Zebra
2763 Sierra Highway, Rosamond, CA 93560,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: February 4, 2016
Los Angeles, CA

ISSUED MARCH 10, 2016

Appearances: *Appellant* : Joshua Kaplan as counsel for MJT Zebra, Inc.[1]
Respondent : Sean Klein as counsel for the Department of Alcoholic Beverage Control.

OPINION

MJT Zebra, Inc., doing business as Zebra (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[2] which revoked its license (with the revocation conditionally stayed for a period of three years) and concurrently suspended it for 30 days because appellant employed individuals for drink solicitation purposes; permitted individuals to loiter for the purpose of drink solicitation; permitted employees

[1]At the administrative hearing, appellant was represented by Julie Price, a non-attorney.

[2]The decision of the Department, dated July 22, 2015, is set forth in the appendix.

to accept alcoholic beverages for their own consumption; employed individuals to mingle with patrons while unclothed; permitted individuals to perform or simulate sexual acts; permitted entertainers whose breasts or buttocks were exposed to perform upon a stage that was not at least 18 inches above the floor level and at least six feet from the nearest patron; and permitted individuals to expose their genitals or anus, in violation of Business and Professions Code section 25657, subdivisions (a) and (b), and Department rules 143, 143.2(2), 143.3(1)(a), 143.3(1)(b), 143.3(1)(c), and 143.3(2).

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general eating place license was issued on June 27, 2007. On November 20, 2014, the Department instituted a 34-count accusation against appellant charging that on three separate occasions — April 10, 2014, April 17, 2014, and May 1, 2014 — appellant employed individuals for drink solicitation purposes; permitted individuals to loiter for the purpose of drink solicitation; permitted employees to accept alcoholic beverages for their own consumption; employed individuals to mingle with patrons while unclothed; permitted individuals to perform or simulate sexual acts; permitted entertainers whose breasts or buttocks were exposed to perform upon a stage that was not at least 18 inches above the floor level and at least six feet from the nearest patron; and permitted individuals to expose their genitals or anus.

At the administrative hearing held on April 1, 2015, documentary evidence was received and testimony concerning the violation charged was presented by Deputy Robert Riggs of the Kern County Sheriff's Department; Agent Paul Lopez and Agent Benjamin Delarosa of the Department of Alcoholic Beverage Control; and Detective John Ramirez, Detective Michael Golleher, and Sergeant David Boyd of the Bakersfield Police Department. Appellant presented no witnesses.

Testimony established that on April 10, 2014, April 17, 2014, and May 1, 2014, appellant's licensed premises was visited by undercover officers and/or agents working as part of a joint task force made up of members of the Kern County Sheriff's Department, the Bakersfield Police Department, and the Department of Alcoholic Beverage Control.

Counts 1 through 11:

On April 10, 2014, Dep. Riggs and Det. Golleher entered the premises and ordered beers, which they were served. Agent Lopez and Sgt. Boyd entered separately and ordered a beer and a rum and coke, which they were served.

Sarah Heller, using the stage name "Calli," was dancing on the stage in a bikini top and shorts. As she danced, she removed her shorts to reveal a g-string. (Ct. 1.)

Another dancer, Peggy, approached the officers and asked Dep. Riggs to buy her a shot. He agreed and ordered a shot from the bartender. The bartender served the shot to Peggy. (Cts. 2-3.)

Later, Peggy asked Dep. Riggs if he would like a lap dance, and he agreed. They went to a separate area where Peggy, in a bikini top and g-string, performed the lap dance and rubbed her crotch against his leg. (Ct. 4.)

A dancer identified as Desiree approached the officers and began playing pool with Agent Lopez and Sgt. Boyd. She asked Boyd to buy her a vodka and Red Bull, and he agreed. The bartender served the drink to Desiree. (Ct. 5.)

Later, Desiree went to the stage to dance. As she danced, she placed her leg on the tip rail, and as she moved her vagina was visible to Agent Lopez. (Cts. 7-8.)

After her dance, she asked Lopez to buy her another vodka and Red Bull. The bartender served her the drink and she played pool with the officers. While playing

pool, she placed her leg on the table and revealed her genitals. (Ct. 6.)

Heller approached Agent Lopez and asked for a Smirnoff and ice. The bartender served her the drink. (Cts. 10-11.)

Desiree performed lap dances for Sgt. Boyd and Agent Lopez. While dancing for Boyd, she ground her genital area into his leg. He held up a dollar as a tip, and she pulled aside her bra to expose a portion of her breast. She also pulled aside her bikini bottom and exposed her vaginal area. (Ct. 9.)

Counts 12 through 25:

On April 17, 2014, Agent Delarosa and Det. Ramirez entered the licensed premises. They each ordered and were served a beer. Sgt. Boyd and Agent Lopez entered separately. They ordered a rum and Coke and a beer, then went to play pool. At the pool table, Boyd was approached by Heller who asked him to buy her a beer, which he ordered from the bartender. (Cts. 12-13.)

Heller took to the stage and danced. As she did so, she exposed her buttocks and slapped herself on the buttocks at least once. She also thrust her hips back and forth in a sexually suggestive manner while dancing on the pole. (Cts. 14-15.)

Desiree approached the officers and asked Det. Ramirez to buy her a drink. He agreed. She ordered and was served a shot of tequila from the bartender — who also served Ramirez and Delarosa two more beers. (Cts. 16-17.)

Later in the evening, Desiree asked the officers to join her outside for a smoke. They exited, then re-entered the premises. Desiree then asked them to buy her another drink. They agreed. A shot of tequila and two beers were ordered by Ramirez and served to them by the bartender. They took their drinks out to the patio. (Ct. 18.)

Someone came outside and told Desiree it was her turn to dance on stage. She went to the stage and danced. At the end, as she collected her tips, she pulled her bikini bottom away from her body and exposed her vagina to some of the patrons. (Ct. 19.)

Desiree, Ramirez, and Delarosa again went outside to the smoking area and were joined by a dancer identified as Kashmere. The four of them then re-entered and began playing pool. Desiree asked Det. Ramirez to buy her another drink, and he agreed. They went to the bar where the bartender served Desiree a vodka and Red Bull. (Ct. 20.)

Kashmere asked Agent Delarosa to buy her a tequila. He agreed, and they went to the bar. The bartender served Kashmere a tequila. (Cts. 22-23.)

Kashmere then went to the stage to dance. During the dance, a male patron leaned over the tip rail and held a bill over his nose. Kashmere placed her buttocks on the man's face and picked up the bill with the cheeks of her buttocks. She did this more than once during the course of her dance. (Ct. 24.)

A woman identified as Lynn then took the stage. When she finished, she went around the stage picking up her tips. She solicited additional tips by pulling down her bikini bottom and exposing her vagina. (Ct. 25.)

<u>Counts 26 through 34:</u>

On May 1, 2014, Agent Lopez, Sgt. Boyd, Det. Golleher, and Det. Riggs returned to the licensed premises and sat at the bar. They ordered drinks, then began to play pool.

Peggy approached Golleher and Riggs and offered to give them lap dances. They agreed, and she performed lap dances for each of them. (RT at p. 80; Findings

of Fact, ¶ 27.) No counts in the accusation reflect this testimony.

Candace Gaines, using the stage name "Gemini" approached the bar and asked the licensee, Igor Slobodski, to buy her a drink. Slobodski pointed to Sgt. Boyd and said she should ask him. She did, and Boyd bought her a Bud Light Platinum beer. (Cts. 29-31.)

Later, Gaines took the stage. She approached the tip rail while dancing, and a patron reached out and placed a bill in her g-string. Boyd also held out a bill. Gaines came over, placed the bill on his arm, then picked up the bill with her buttocks. (Ct. 26.)

Brandi Solis then went to the stage to dance. A patron placed a bill on the tip rail, she came over and picked it up, then had the patron turn around and lean over the tip rail backwards. She placed the bill on his face, then sat on his face as she picked the bill up with her buttocks. Det. Golleher placed a tip on the rail. When Solis came near him, she pulled her g-string away from her buttocks, exposing them. She then had Golleher place the tip in her g-string. (Cts. 27-28.)

Heller approached Agent Lopez and asked him to buy her a drink. He agreed. She ordered and was served a Tequila Sunrise. Later, she danced, and Det. Golleher placed a bill on the tip rail. Heller came over and allowed Golleher to place the bill in her bra strap. (Cts. 32-34.)

After the hearing, the Department issued its decision which sustained counts 3, 5, 8-9, 11-12, 14, 16, 20-21, 25, 27-28, 30, and 32. Counts 2, 6, 13, 18, 23, 29, and 34 were also sustained, but no penalty was imposed for them because the counts duplicated the violations in counts 3, 5, 11, 12, 16, 21, 30, and 32. Counts 1, 4, 7, 10, 15, 17, 19, 22, 24, 26, 31, and 33 were dismissed.

Appellant then filed a timely appeal raising the following issues: (1) The lay representation of appellant constituted the unauthorized practice of law, and the Department's complicity in allowing it constitutes a denial of due process; (2) appellant was never advised of the possibility of adverse consequences should it proceed without legal counsel; (3) the counts regarding drink solicitation are not supported by substantial evidence to prove that the drinks were alcoholic beverages; (4) there is no substantial evidence to establish that the alleged drink solicitors were employees, therefore no liability can be imputed to appellant; (5) the Department unlawfully accumulated counts; and (6) the penalty constitutes cruel and unusual punishment. The first and second issues will be discussed together.

APPLICABLE LAWS

The laws alleged to have been violated in this matter are set forth together below for ease of reference.

Business and Professions Code section 25657:

> It is unlawful:
>
> (a) For any person to employ, upon any licensed on-sale premises, any person for the purpose of procuring or encouraging the purchase or sale of alcoholic beverages, or to pay any such person a percentage or commission on the sale of alcoholic beverages for procuring or encouraging the purchase or sale of alcoholic beverages on such premises.
>
> (b) In any place of business where alcoholic beverages are sold to be consumed upon the premises, to employ or knowingly permit anyone to loiter in or about said premises for the purpose of begging or soliciting any patron or customer of, or visitor in, such premises to purchase any alcoholic beverages for the one begging or soliciting.
>
> Every person who violates the provisions of this section is guilty of a misdemeanor.

(Bus. & Prof. Code, § 25657.)

Rule 143 - Employees of On-Sale Licensees Soliciting or Accepting Drinks:

> No on-sale retail licensee shall permit any employee of such licensee to solicit, in or upon the licensed premises, the purchase or sale of any drink, any part of which is for, or intended for, the consumption or use of such employee, or to permit any employee of such licensee to accept, in or upon the licensed premises, any drink which has been purchased or sold there, any part of which drink is for, or intended for, the consumption or use of any employee.
>
> It is not the intent or purpose of this rule to prohibit the long-established practice of a licensee or a bartender accepting an incidental drink from a patron.

(Cal. Code Regs., tit. 4, § 143.)

Rule 143.2 - Attire and Conduct:

> 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:
>
> (1) To employ or use any person in the sale or service of alcoholic beverages in or upon the licensed premises while such person is unclothed or in such attire, costume or clothing as to expose to view any portion of the female breast below the top of the areola or of any portion of the pubic hair, anus, cleft of the buttocks, vulva or genitals.
>
> (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.
>
> (4) To permit any employee or person to wear or use any device or covering, exposed to view, which simulates the breast, genitals, anus, pubic hair or any portion thereof.

(Cal. Code Regs, tit. 4, § 143.2.)

§ 143.3 - Entertainers and Conduct:

> 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 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.
> >
> > (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.
>
> No licensee shall permit any person to use artificial devices or inanimate objects to depict any of the prohibited activities described above.
>
> No licensee shall permit any person to remain in or upon the licensed premises who exposes to public view any portion of his or her genitals or anus.

(Cal. Code Regs, tit. 4, § 143.3.)

DISCUSSION

I

Appellant contends the lay representation of appellant — by Julie Price — at the administrative hearing constituted the unauthorized practice of law, and that the Department's complicity in allowing lay representation constitutes a denial of due process. (App.Br. at p. 4.) Appellant contends it was never advised of the right to licensed legal counsel, nor the possibility of adverse consequences should it proceed

without legal counsel. (*Id*. at p. 11.)

Appellant contends that the administrative law judge (ALJ) improperly allowed Price, a non-lawyer, to engage in the unauthorized practice of law, a misdemeanor, by allowing her to represent appellant at the administrative hearing. (See Bus. & Prof. Code, §§ 6125, 6126(a).)[3] In addition, appellant asserts that Price was incompetent as a matter of law to provide such representation, and as a result appellant was deprived of adequate and competent counsel.

The Court of Appeal, in *Caressa Camille v. Department of Alcoholic Beverage Control* (2002) 99 Cal.App.4th 1094 [121 Cal.Rptr.2d 758], rejected an identical proposition in the context of an administrative proceeding. The court stated that the prohibition against non-attorney corporate representatives is applicable only to proceedings in *courts of record*. The Department has been granted limited judicial power, but "an administrative tribunal is not a 'court of record' as defined by article VI, section 1 of the California Constitution." (*Id*. at p. 1103.) While "courts of record are entitled to expect to be aided in resolution of contested issues by presentation of causes through qualified professionals rather than a layperson," such issues "are greatly minimized in the more informal setting of a proceeding in a court which is not of record." (*Ibid*., internal quotations omitted.) The same reasoning applies to the present situation.

With regard to representation by a non-attorney, courts have uniformly found that procedural rules "must apply equally to parties represented by counsel and those who forgo attorney representation." (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 984

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[3]Section 6125 provides that "No person shall practice law in California unless the person is an active member of the State Bar." Section 6126, subdivision (a), provides that one who engages in the unauthorized practice of law is guilty of a misdemeanor.

[884 P.2d 126].) Parties proceeding in propria persona are "entitled to the same, but no greater, consideration than other litigants and attorneys." (*Nelson v. Gaunt* (1981) 125 Cal.App.3d 623, 638 [178 Cal.Rptr. 167].)

Whether or not Price was competent to represent appellant at the hearing is not properly an issue in this appeal. The right to the effective assistance of counsel is a criminal law concept, not applicable to administrative license disciplinary actions. "While due process requires the right to counsel, the right to 'effective' counsel in civil proceedings that lack overhanging criminal penalties has yet to be recognized." (*White v. Bd. of Med. Quality Assurance* (1982) 128 Cal.App.3d 699, 707 [180 Cal.Rptr. 516].)

Appellant contends that the ALJ violated due process by not advising appellant of the potential consequences of proceeding without legal counsel. It also asserts that it did not knowingly, understandingly, or intelligently waive the presence of counsel to assist it at the hearing.

The Court of Appeal in *Borror v. Department of Investment* addressed similar contentions:

> Reconciling the nature of the administrative proceeding with the foregoing principles and authorities, we conclude that in a proceeding to revoke or suspend a license or other administrative action of a disciplinary nature the licensee or respondent is entitled to have counsel of his own choosing, which burden he must bear himself, and that he is not denied due process of law when counsel is not furnished him, even though he is unable to afford counsel. Such a proceeding does not bear a close identity to the aims and objectives of criminal law enforcement, but has for its objective the protection of the public rather than to punish the offender. There is no constitutional requirement, therefore, that the hearing officer or the agency advise a party that he is entitled to be represented by counsel and that if he cannot afford counsel one will be afforded him. In proceedings under the Administrative Procedure Act there is a statutory requirement, however, that a party be advised that he is entitled to be represented by counsel chosen and employed by him. (§ 11509.) In the present case the licensee does not maintain that she was deprived of this right.
>
> Since the requirements of due process are satisfied in a

> proceeding under the Administrative Procedure Act, insofar as representation by counsel is concerned, if a party is advised that he is entitled to be represented by counsel employed by him and such attorney is permitted to represent him in the proceeding, there is no requirement, in the event that the party does not choose to be represented by counsel, or does not have the funds with which to hire an attorney, that the analogies of the criminal law be followed in ascertaining whether there has been an intelligent waiver of counsel. Accordingly, there is no requirement that the hearing officer determine whether the accused understands the nature of the charge, the elements of the offense, the pleas and defenses which may be available, or the punishment or penalty which may be exacted. In this regard we apprehend that as to all of the elements, other than the last mentioned, these are adequately specified under the Administrative Procedure Act in the accusation (§ 11503) and the notice of defense (§ 11506). As to the penalties involved, it is inconceivable that a licensee is not aware by virtue of the licensing procedures of the sanctions which may be imposed for violation of his duties and obligations as such licensee.

(*Borror v. Dept. of Investment* (1971) 15 Cal.App.3d 531, 543-544 [92 Cal.Rptr. 525].)

As the language quoted above indicates, the requirements of due process and section 11509 of the Administrative Procedure Act were satisfied once the licensee was advised of its right to be represented by counsel. The licensee in *Borror* was so advised, and that was sufficient to uphold the decision in that case. The licensee in the present case was also provided with the notice required by the APA (See Exhibit 1, at p. 1), and we believe this is sufficient to affirm the decision of the Department on this issue.

II

Appellant contends the counts regarding the solicitation or acceptance of an

alcoholic beverage by an employee are not supported by sufficient evidence to prove that the drinks were alcoholic beverages.

This Board is bound by the factual findings in the Department's decision so long as those findings are supported by substantial evidence. The standard of review is as follows:

> We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. [Citations.] We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor [an appellate] court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. [Citations.] The function of an appellate board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

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, § 23804; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113].) "Substantial evidence" 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 Ct.* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].)

It is presumed that when an alcoholic beverage is ordered, an alcoholic

beverage is served. (*Mercurio v. Dept. of Alcoholic Bev. Control* (1956) 144 Cal.App.2d 626, 634-635 [301 P.2d 474]; *Griswold v. Dept. of Alcoholic Bev. Control* (1956) 141 Cal.App.2d 807, 811 [297 P.2d 762].) Appellant presented no evidence to controvert this presumption.

Testimony established that in each count, an alcoholic beverage was ordered or served. In counts 2 and 3, the "bartender poured the shot from a bottle of alcohol and served it" (Findings of Fact, ¶ 7); in count 5, "[Desiree] asked Sgt. Boyd to buy her a vodka and Red Bull" (Findings of Fact, ¶ 9); in count 6, "the bartender served [Desiree] with another vodka and Red Bull" (Findings of Fact, ¶ 11); in counts 10 and 11, "Heller approached Agent Lopez and told the bartender to add a Smirnoff and ice to his order" (Findings of Fact, ¶ 12); in counts 12 and 13, "[Heller] asked him to buy her a beer" (Findings of Fact, ¶ 15); in count 16, "[Desiree] ordered a shot of tequila from the bartender, who served it to her" (Findings of Fact, ¶ 17); in count 18, the officers "ordered a shot of tequila and two beers" (Findings of Fact, ¶ 18); in count 21, "The bartender served Desiree a vodka and Red Bull" (Findings of Fact, ¶ 21); in count 23, "Kashmere asked Agent Delarosa to buy her a tequila" (Findings of Fact, ¶ 22); in counts 29 and 30, "Sgt. Boyd bought [Gaines] a Bud Light Platinum beer" (Findings of Fact, ¶ 29); and in counts 32 and 43, "Heller ordered, and was served, a Tequila Sunrise" (Findings of Fact, ¶ 26).

The Board is entitled to presume that the drinks served were the same ones that were ordered. Substantial evidence supports a finding that the beverages served in connection with these counts were alcoholic beverages, since alcoholic beverages were ordered and no evidence was offered to support an alternate conclusion.

III

Appellant contends there is not substantial evidence to establish that the individuals named in the accusation were employees, or that the licensee had knowledge of the alleged violations. Appellant maintains that without substantial evidence to establish an agency relationship, no liability can be imputed to the licensee. (App.Br. at p. 15.)

Appellant argues that the dancers named in the accusation were not employees, 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, to the extent that an agency relationship did exist, liability cannot be imputed to it because the dancers were acting outside the scope of said agency.

Appellant principally relies on 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] to support its position that, because no employer-employee relationship exists between them, liability for the dancers' misconduct cannot be imputed to appellant. These cases, however, do not support appellant's contentions.

Both the *McFaddin* and *Laube* cases involved the sale of drugs under circumstances where employers did not know, nor could have known, that such sales were taking place. The present case, by contrast, involves dancers getting up on stage and taking off their clothes — something certainly not done covertly, but rather easily seen by everyone, including customers, bartenders, and security personnel, as well as the licensee, Mr. Slobodski. Testimony established that the licensee was present during the dancing and watched it himself. (RT at p. 87.) Testimony also established that in addition to being present and seeing the conduct taking place, Mr. Slobodski

took no action to prevent it. (RT at pp. 111-112.) Finally, the evidence established that the licensee himself instructed one of the dancers to ask Sgt. Boyd to buy her a drink. (RT at p. 115.) The argument that the licensee did not know what was taking place does not withstand scrutiny.

As the Board has said previously, a licensee cannot escape liability for the actions of its entertainers by characterizing its dancers as independent contractors rather than employees. The evidence established that the dancers were called up to dance by the DJ (RT at p. 31); that one dancer told Det. Riggs that she worked at the bar (RT at p. 15); that the dancers had access to dressing rooms; and that the dancers interacted with the licensee and bartenders in a way that customers would not. (See RT at p. 31.)

This Board has time and again considered business relationships similar to that between appellant and its dancers, and has consistently 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. (*Maverick Tavern, Inc.* (1999) AB-9099 at p. 5; *Basra Inc.* (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.)

In this case 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 ABC laws. 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].)

IV

Appellant contends the Department unlawfully accumulated counts and that this practice violates the principles established in *Walsh v. Kirby* (1974) 13 Cal.3d 95 [118 Cal.Rptr.1]. Appellant maintains that the Department continued its investigation for an unreasonable period of time, for the purpose of accumulating charges, so that it could increase the penalty should its charges be sustained. It argues that, once the Department had determined there had been a violation, it was obligated to warn appellant that such conduct was occurring or file an accusation. In either case, appellant argues, it could have acted aggressively to put a stop to the unlawful activity.

In *Walsh v. Kirby*, *supra*, the licensee, who had a previously unblemished record, was charged with selling below an established "fair trade" price on a total of 10 occasions. The statute involved did not provide for suspension or revocation, but each offense after the first was punishable by a $1000 fine. The California Supreme Court concluded that the Department had acted improperly by accumulating enough violations to drive the licensee into bankruptcy. (*Id*. at p. 104.)

The Department argues that *Walsh v. Kirby* is distinguishable from the instant case, because — unlike *Walsh*, where an ever-increasing monetary fine was imposed — this case involves "an umbrella-type penalty which applies whether there are one or a hundred violations." (Dept.Br. at p. 11.) We agree. A single violation of Business

and Professions Code section 25657 can result in license revocation, as can a single violation of rules 143, 143.2, or 143.3.

In the past, the Board has stated that 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, unless the additional visits can be shown to be unreasonable, arbitrary or capricious. (See *Dirty Dan's*, Inc. (2012) AB-9155, at pp. 4-6.) No such evidence has been presented here. In the absence of any evidence that the Department intentionally prolonged the investigation for the purpose of obtaining a more severe penalty, or evidence that the additional visits were unreasonable, arbitrary, or capricious, it would be inappropriate for the Board to infringe upon the Department's discretion in its conduct of an investigation.

V

Appellant contends the penalty constitutes cruel and unusual punishment. It contends that the penalty is disproportionate to the offense, citing the California Constitution's provisions proscribing cruel and unusual punishment. However, the concept of cruel and unusual punishment is the province of criminal law, and the term has no application in administrative proceedings.

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 counts brought under Business and Professions Code section 25657(a) for drink solicitation, seven counts were sustained and one count was dismissed. All four counts were dismissed that charged violations of section 25657(b) for loitering for the purpose of drink solicitation. Of the counts brought under rule 143, for an employee soliciting or accepting an alcoholic beverage, one count was sustained and seven counts were sustained without penalty. Both counts charging a violation of rule 143.2(2), regarding the attire of entertainers, were dismissed. Of the counts pertaining to the conduct of live entertainers, three counts charging a violation of rule 143.3(1)(a) were dismissed. Two counts charging a violation of rule 143.3(1)(b) were sustained and one count was dismissed. Three counts charging a violation of rule 143.3(1)(c) were sustained. Finally, two counts charging a violation of rule 143.3(2) were sustained and one count was dismissed.

The ALJ made the following observations and findings regarding the penalty in this matter:

> The Department requested that the Respondent's license be revoked. The Respondent did not recommend a penalty in the event that the accusation were sustained. The recommended penalty under rule 144 for drink-solicitation violations ranges from a 15-day suspension up to revocation. For violations of rule 143.2 and 143.3, the recommended penalty ranges from a 30-day suspension up to revocation.
>
> Dancers working at the Licensed Premises solicited drinks on eight different occasions. This indicates that such conduct was regularly occurring. There are no prior violations for drink solicitation, however, so aggravation is not warranted in this case.
>
> The rule 143.3 violations, on the other hand, are an ongoing issue as indicated by the prior. In this case, four different dancers violated 143.3 on three different dates. Some of these violations bordered on incidental, some were quite deliberate. Some aggravation is warranted, although

> outright revocation is too harsh under the circumstances. The penalty recommended herein complies with rule 144.

(See Penalty, at p. 10.)

The penalty of revocation — conditionally stayed for a period of three years — in addition to two concurrent 30-day suspensions was proposed by the ALJ and adopted by the Department. This penalty is well within the prescribed limits of rule 144.

ORDER

The decision of the Department is affirmed.[4]

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
PETER J. RODDY, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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

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