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

**AB-9406a**
File: 47-227040 Reg: 13078040

WHBT, INC.,
dba Mickey's
8857 Santa Monica Boulevard, West Hollywood, CA 90069,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: August 6, 2015
Los Angeles, CA

**ISSUED AUGUST 18, 2015**

Appearances: Joshua Kaplan, for appellant WHBT, Inc. Kerry K. Winters, for respondent Department of Alcoholic Beverage Control.

OPINION

This appeal is from a decision of the Department of Alcoholic Beverage Control[1] that suspended appellant's license for 30 days because its employees gave away alcoholic beverages in violation of Business and Professions Code section 25600; and for violations of Department rules 143.2(3), 143.3(1)(a), and 143.3(2) arising from conduct of dancers performing at appellant's establishment.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on January

[1]The decision of the Department, dated April 9, 2015, is set forth in the appendix along with the Department's original decision of January 17, 2014.

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 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. Also, 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 second day of the administrative hearing, 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 spirits to a person to whom

appellant is authorized to sell in violation of rule 106(g) which provides, in pertinent part, that "no licensee . . . shall give any alcoholic beverage to any person to whom the licensee is authorized to sell . . . ." (Cal. Code Regs., tit. 4, § 106, subd. (g).) Appellant objected to the amendment on the ground that it was not afforded the opportunity to file 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. The ALJ then issued a proposed decision finding that the violations charged were proved and no defense was established. On December 27, 2013, the Department adopted the ALJ's proposed decision, and, on January 17, 2014, the Department certified its decision. The Department's decision imposed a penalty of 30 days' suspension in light of the violations.

Appellant filed a timely appeal of the Department's decision before this Board. The original appeal raised the following issues: (1) appellant should have been afforded a continuance after the Department filed a last-minute amendment to the accusation presenting new charges on the second day of the administrative hearing; (2) the accusation cannot be sustained due to an unlawful accumulation of counts in violation of *Walsh v. Kirby* (1974) 13 Cal.3d 95 [118 Cal.Rptr. 1]; (3) appellant cannot be legally deemed to have permitted independent contractor dance performers to violate rule

143[2]; (4) imposition of derivative liability denies appellant due process and equal 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.

The Board issued its decision on the appeal on January 13, 2015, affirming the Department's decision as to counts 1, 3, 5, 6, 7, 8, 9, 11, and 14, but reversing and remanding the decision for a full hearing on the merits of count 17. (See *WHBT, Inc*. (2015) AB-9406, at p. 29.) The Board found that, in light of the violations sustained, the 30-day suspension adopted by the Department was well within the prescribed limits of the Department's discretion pursuant to section 144 of article 4 of the California Code of Regulations (rule 144). (See *id*. at p. 28.)

Following the Board's decision in *WHBT, Inc.*, *supra*, rather than hold a full administrative hearing on count 17 alone, the Department dismissed that count from the accusation. (Order of Apr. 9, 2015.) The Department left the remainder of its January 17, 2014 decision — including the 30-day suspension — intact. (*Ibid*.)

[2]References to rule 143 and its subdivisions are to section 143 of title 4 of the California Code of Regulations.

Appellant filed a timely appeal of the Department's April 9, 2015 decision contending: (1) the decision by the Department is void; (2) the accusation cannot be sustained due to an unlawful accumulation of counts in violation of *Walsh v. Kirby*, *supra*; (3) appellant cannot, as a matter of law, be deemed to have "permitted" the independent contractor dance performers to violate rule 143; (4) imposition of derivative liability would deny due process and equal protection; (5) the allegations of 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. Issues (2) through (10) will be addressed together below.

DISCUSSION

I

Appellant contends the order in the Department's April 9, 2015 decision is void. That order reads as follows: "Count 17 of the accusation is dismissed. In all other respects, including penalty, the Department's decision adopted on January 17, 2014, stands." Appellant claims there is no decision by the Department "adopted" on January 17, 2014, that the only previous decision was adopted instead by the Department on December 27, 2013. (App.Br. at p. 12.) As such, appellant claims, the order of the Department is void because "it reaffirms a non-existent decision." (*Ibid*., citing *Le*

*Strange v. City of Berkeley* (1962) 210 Cal.App.2d 313 [26 Cal.Rptr. 550]; *Stout v. Dept. of Employment* (1959) 172 Cal.App.2d 666 [342 P.2d 918].)

We are not convinced appellant's argument on this point is anything other than an attempt to convert a minor mound of a typographical error into a mountain of a ground for reversal. Rather than face a justly imposed, albeit strict, penalty for the violations sustained against it, appellant would have this Board elevate what is no more than a bagatelle (i.e., a typo and the Department's use of the word "adopted"[3] as opposed to "certified"[4] in its order) into reversible error. No prejudice to appellant has resulted from what appears to be nothing more than a simple clerical error by the Department. Appellant was, or reasonably ought to have been, well aware of the decision to which the Department was referring in its April 9, 2015 order. To the extent the Department's order can be deemed to have been mistaken in its referenced date of decision, the error was harmless. Moreover, the 30-day suspension was originally imposed by the Department when it *certified* the ALJ's proposed decision on January 17, 2014, and affirmed by this Board in our original decision in this case, which was published on January 13, 2015. (See *WHBT, Inc*., *supra*.) Appellant has had over eighteen months from the Department's original decision[5] — and over six months from this Board's decision — to prepare itself for the imposition of the penalty. Appellant's

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[3]The ALJ's proposed decision was *adopted* by the Department on December 27, 2013.

[4]The ALJ's proposed decision was *certified* by the Department on January 17, 2014.

[5]Not to mention the fact that it has been approximately three years since the violations giving rise to the accusation and penalty took place.

argument for further delay in the imposition of the Department's decision is rejected.

II

Appellant also contends: the accusation cannot be sustained due to an unlawful accumulation of counts in violation of *Walsh v. Kirby*, *supra*; appellant cannot, as a matter of law, be deemed to have "permitted" the independent contractor dance performers to violate rule 143; imposition of derivative liability would deny due process and equal protection; the allegations of counts 1 and 11 are not supported by any testimonial evidence and cannot be sustained; the allegations of "simulated" sexual activity in counts 3, 6, 7, and 14 are not supported by legally cognizable evidence and cannot be sustained; counts 3, 5, 6, and 14 cannot be sustained and must be dismissed as failing to provide appellant with fair notice; no counts can be sustained based on a failure of proof; counts 6, 8, and 9 cannot be sustained based on a failure of proof and/or a legal impediment; and the penalty imposed is cruel and/or unusual punishment. (See App.Br. at pp. 12-29.)

The Board has already addressed — and squarely rejected — each of the aforementioned issues the first time this case came before us on appeal. (See *WHBT, Inc.*, *supra*, at pp. 10-28.) As referenced in the Department's brief, "the rule of 'law of the case' generally precludes multiple appellate review of the same issue in a single case." (*People v. Gray* (2005) 37 Cal.4th 168, 196 [33 Cal.Rptr.3d 451].) "Where a decision upon appeal has been rendered . . . and the case is returned upon a reversal, and a second appeal comes to [the] court directly or intermediately, for reasons of policy and convenience, [the court] generally will not inquire into the merits of said first

decision, but will regard it as the law of the case." (*Ibid.*, citing *In re Rosenkrantz* (2002) 29 Cal.4th 616, 668 [128 Cal.Rptr.2d 104].)

The principal reason for the law of the case doctrine is judicial economy, and the doctrine will be applied where the point of law involved was necessary to the prior decision and was actually presented and determined by the appellate body. (*Gray*, *supra*, at pp. 196-197.) While the doctrine will not be adhered to where its application will result in an unjust decision,[6] "the unjust decision exception does not apply when there is a mere disagreement with the prior appellate determination." (*Id*. at p. 197, quoting *People v. Stanley* (1995) 10 Cal.4th 764, 786 [42 Cal.Rptr.2d 543.], internal quotation marks omitted.)

In this case, appellant has not alleged that the Board's decision in *WHBT, Inc.*, *supra*, resulted in substantial injustice, nor has it alleged any circumstances that merit an exception to the "law of the case" doctrine. As such, the doctrine applies to this case, and, in the interest of judicial economy, the Board will not consider issues (2) through (10) again here. If appellant disagreed with our initial resolution of these issues, then the appropriate forum in which to challenge the disposition was with the court of appeal or the California Supreme Court in accordance with Business and Professions Code section 23090 et seq. Because appellant failed to do so within the time frame allotted by statute, the matter is now settled, and the Board's original disposition of issues (2) through (10) is final.

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[6]Examples of "unjust decisions" include where there has been a manifest misapplication of existing principles resulting in substantial injustice, or where the controlling rules of law have been altered by a decision intervening between the first and second appellate determinations. (*Gray*, *supra*, at p. 197.)

III

Finally, though we did not discuss a most troubling aspect of the Department's methods of investigation in our original decision in *WHBT, Inc.*, *supra*, the Board feels compelled this time around to comment on the conduct of the Department's investigating agents in this matter, particularly Agent Florentinus' conduct during the events giving rise to counts 7 and 8 of the accusation.

Rules 143.3(1)(a) and 143.2(3) provide that it is a violation for a licensee to permit "any person" on the premises to engage in any of the prohibited conduct described therein. It follows that, to the extent that Jenko — the dancer whose conduct is at issue in counts 7 and 8 — violated the law, Agent Florentinus is equally culpable as a "co-participant" in the violation. She not only waved money in her hand as a "tip" for Jenko, but buried her face in his crotch to aid in simulation of the act of fellatio, completely unnecessary behavior given she and other Department personnel present witnessed other patrons participating in analogous violations of the law.

The practice of undercover officers engaging in conduct that is itself unlawful under the guise of an investigation has been described by at least one legal scholar as "authorized criminality." (Joh, *Breaking the Law to Enforce it: Undercover Police Participation in Crime* (2009) 62 Stan.L.Rev. 155, 157 (hereafter *Breaking the Law*).) Professor Joh warns of the inherent dangers of such police practices in a democratic society, including the lack of transparency in undercover operations and the manner and frequency with which authorized criminality is exercised, the unfettered discretion

given to law enforcement agencies in performing such investigations,[7] and the moral ambiguities confronting an investigator who is, for all intents and purposes, allowed to act above the law in enforcing it. (See *id*. at pp. 181-192.) Professor Joh also notes that, in such situations, the targets of investigations in which authorized criminality is used are unfortunately left with few defenses against their prosecution — namely, entrapment and violation of the target's due process rights by outrageous police action — and these defenses are infrequently asserted and rarely successful. (*Id*. at pp. 171-176.)

The Board's trouble with Agent Florentinus' conduct during the instant investigation is grounded in the same concerns expressed in *Breaking the Law*, *supra*. Given the nature of the violations alleged in the accusation, and the fact that the investigating agents had already witnessed Jenko behave unlawfully — behavior that prompted counts 3, 5, and 6 (see, e.g., RT, Vol. I, at pp. 99-103) — with other patrons, was it necessary for Agent Florentinus to approach Jenko holding tip money? What

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[7]In her article, Joh observes:

> [C]ourts often justify authorized criminality by a vaguely defined principle of necessity. For example, if necessity requires a balancing of costs and benefits, few courts consider the potential harms when undercover investigators participate in crime. Typically, courts take the view that "criminal proceedings are not designed to establish the relative equities among police and defendants." While a few opinions have expressed ambivalence about the "unattractive business" of investigative deception while affirming the target's conviction, courts tend not to delve too deeply into the issues raised by undercover policing that have been discussed here. Instead, they frequently find it sufficient to declare that authorized criminality is a necessary though unpleasant evil.

(*Breaking the Law*, *supra*, at pp. 186, footnotes omitted.)

benefit was realized by Agent Florentinus' participation in the unlawful conduct with Jenko without any resistance, hesitation, or disengagement whatsoever? (See RT, Vol. I, at pp. 119-121.) Indeed, if a balancing of costs and benefits were warranted in this case, what benefit — moral, societal, or otherwise — was gained by Agent Florentinus' participation in the offense? Our questions are rhetorical as the response to them is obvious.

We do not pass on these questions now. Appellant raised an entrapment defense the first time this matter was brought before us on appeal, but we found — and still do find — said defense to be unavailing to appellant given the facts of this particular case. (See *WHBT, Inc.*, *supra*, at pp. 24-27.) That established, we note that, as appellant passively references in its brief, although curiously in reference to an unrelated matter,[8] California courts have recognized that, under rare circumstances, "[s]ufficiently gross misconduct could conceivably lead to a finding that conviction of the of the accused would violate his constitutional right to due process of the law. [Citation.]" (*People v. Guillen* (2014) 227 Cal.App.4th 934, 1005 [174 Cal.Rptr.3d 703], quoting *People v. McIntire* (1979) 23 Cal.3d 742, 748, fn. 1 [153 Cal.Rptr. 237].) If the Department continues to push the proverbial envelope by having its investigators

[8]Appellant's brief states, "[i]t has been held that sufficiently gross misconduct by law enforcement in connection with the commission of an offense violates the Due Process clauses of the United States and California constitutions sufficient to negate any conviction for such an offense. [Citation.] In the instant matter, it is respectfully submitted that there is both entrapment and a Due Process violation in that the minor decoy intentionally distracted the clerk in question in order to effectuate a violation." (App.Br. at p. 26.)

engage in unnecessary and legally questionable (yet apparently administratively authorized) criminality during their undercover investigations, it is increasingly likely this Board will find the balance shifting in favor of a licensee's due process rights. Therefore, we urge the Department to disseminate this opinion to all personnel engaged in undercover activities as an example of questionable tactics.

ORDER

The decision of the Department is affirmed.[9]

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

[9]This final decision 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 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.