

**A CONTESTED MATTER BEFORE THE DIRECTOR
OF THE IDAHO STATE POLICE**

IDAHO STATE POLICE, ALCOHOL BEVERAGE CONTROL,)	
)	CASE NO. 15ABC 029
Complainant,)	
)	License No. 6409
vs.)	Premise No. 1P-6409
)	
KRISTY A. BACKUS and)	DIRECTOR'S FINAL ORDER
BOYD'S SPORTS BAR, LLC)	
dba BOOMERANG SALOON,)	
)	
Respondent.)	
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This matter is before me, Colonel Ralph W. Powell, Director of the Idaho State Police, pursuant to the "Notice of Appeal" filed by Respondent on or about December 8, 2015. The parties have been given an opportunity to submit briefing on all disputed issues. I have reviewed that briefing and the contested case record filed in this matter. In accordance with the provisions of title 67, chapter 52, Idaho Code, and IDAPA 04.11.01, I hereby enter this Final Order affirming and adopting in full the administrative Hearing Officer's Findings of Fact, Conclusions of Law, and Preliminary Order ("Preliminary Order"), dated November 11, 2015, as well as the Hearing Officer's Decision Denying Respondent's Motion for Reconsideration and Objection to Decision, dated November 25, 2015. Based upon those Findings and Conclusions, Respondent's License No. 6409 is revoked.

I.
INTRODUCTION AND PROCEDURAL HISTORY

Alcohol Beverage Control ("ABC") is a Bureau within the Idaho State Police ("ISP"). On behalf of the ISP Director, ABC issues alcohol beverage licenses to bars

and other establishments. ABC has been delegated the authority to commence administrative proceedings against licensees for alleged violations of the Idaho Liquor Act (Title 23, Chapter 1, Idaho Code).

ABC issued a license to Boyd's Sports Bar LLC, d/b/a Boomerang Saloon, at 20 S. Main Street, Payette, Idaho. On the night of January 24, 2015, a male revue show was held at Respondent's bar. ISP officers attending the performance submitted reports alleging violations of the liquor laws occurred during the performance. A notice of violation and ultimately a formal written Complaint was filed against Respondent. On or about May 8, 2015, Respondent filed a written Answer to the Complaint.

The contested case proceeding was assigned to a Hearing Officer for purposes of conducting an evidentiary hearing and issuance of a Preliminary Order.

Following the hearing and receipt of briefing by the parties, the Hearing Officer entered his written Preliminary Order finding violations of Idaho Code § 23-614(1)(a), (b) and (d), as charged in the Complaint. Based upon those violations, the Hearing Officer's Order revoked Respondent's license.

Respondent filed a Motion for Reconsideration, which was denied by the Hearing Officer. The Hearing Officer rejected all the objections raised by Respondent and affirmed his Preliminary Order in all respects, except for modifying Finding of Fact No. 17 to state that one of the performers licked a woman patron's bare cleavage, rather than her bare breast.

It is from the Hearing Officer's Orders that Respondent has brought this petition for review to me, as ISP Director and agency head.

II. UNDISPUTED FACTS

Although the Respondent contested various alleged facts before the Hearing Officer, it does not do so here in its appeal to me, as the agency head. Respondent's December 8, 2015 "Notice of Appeal" states: "Respondent does not appeal from the finding by the hearing officer that prohibited act¹ were performed by the Girls Night Out The Show performers" In its brief on appeal, Respondent repeats this statement.

I will not presume error before the Hearing Officer. It is incumbent upon Respondent to raise any and all alleged errors in findings of fact or conclusions of law made by the Hearing Officer. Here, where Respondent has not challenged any of the Hearing Officer's findings and conclusions, it would be appropriate for me to assume they are all correct and not at issue. However, while not disputed by Respondent, I have conducted a thorough independent review of the contested case record and conclude that those findings of fact are fully supported by the preponderance of the evidence. Furthermore, my review convinces me that those factual findings constitute violations of Idaho Code § 23-614(1)(a), (b) and (d) as stated in the Hearing Officer's Conclusions of Law.

Therefore, I hereby adopt those Findings and Conclusions, and the Preliminary Order, in their entirety as my own. Having adopted in full the Findings of Fact stated in the Hearing Officer's Orders, they are the operative facts for purpose of this review.

¹ Respondent's statement is grammatically incorrect. Perhaps Respondent meant to say that it is not appealing the finding that "a prohibited act was performed." However, if that was the case it is reasonable to assume that Respondent would have expressly identified that one act. Not having done so, the more reasonable interpretation is that Respondent is acknowledging that multiple prohibited acts were performed. In any event, it makes no difference. Any ambiguity is irrelevant as Respondent has not contested any findings of fact in either its notice of appeal or briefing before me.

III. ISSUES

In both its Notice of Appeal and Brief on Appeal, Respondent identifies the issues as:

1. Is Idaho Code § 23-614(1)(a), (b) and (d) constitutional? and
2. Is the revocation of Respondent's license the appropriate sanction?

IV. DISCUSSION

A. The Constitutional "Issue"

Although listed as an issue, the Respondent goes on to state that it realizes that the constitutionality of Idaho Code § 23-614 cannot be challenged in these proceedings and that the only reason it is mentioned at all is to preserve the issue for judicial review. Notice of Appeal, p. 1; Respondent's Brief on Appeal, pp. 1-2.

In its brief, Respondent cites in passing a recent Ninth Circuit Court of Appeals case, Retail Digital Network, LLC v. Appelsmith, 810 F.3d 638 (9th Cir. 2016), for the proposition that alcohol regulations cannot override First Amendment considerations. However, Respondent makes no attempt to argue how Appelsmith, or any other case law, applies to the pending contested case before me.

First, failure to both adequately raise and argue issues on appeal constitutes a waiver. Bettwieser v. New York Irrigation Dist., 154 Idaho 317, 326, 297 P.3d 1134, 1143 (2013); State v. Zichko, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996) ("When issues on appeal are not supported by propositions of law, authority, or argument, they will not be considered."). Although the above-cited cases addressed failure of a litigant to raise issues before an appellate court that were litigated at the trial court level, the same principle applies here to bar issues that were or might have been litigated before

the Hearing Officer, but have not been properly raised and argued on further review before the agency Director. Therefore, under these principles, because the constitutionality of Idaho Code § 23-614 has not been properly raised and argued, it is not before me for review and decision.

Second, the Hearing Officer correctly recognized that under IDAPA 04.11.01.415, he had no authority to declare any ISP/ABC statute unconstitutional. And, while an administrative agency may issue a declaratory ruling on the applicability of a statutory provision to a particular issue (*see* Idaho Code § 67-5232), it is extremely doubtful that an agency has authority to declare a statute unconstitutional. This is apparently an area within the exclusive jurisdiction of the judiciary. State v. Abdullah, 158 Idaho 386, 464, 348 P.3d 1, 79 (2015) ("It is the courts alone that have the power to determine the validity or invalidity of a statute."), *quoting* Neill v. State, 896 P.2d 537, 555 (Okla. Crim. App. 1994); Miles v. Idaho Power Co., 116 Idaho 635, 640, 778 P.2d 757, 762 (1989) ("Passing on the constitutionality of statutory enactments, even enactments with political overtones, is a fundamental responsibility of the judiciary, and has been since *Marbury v. Madison*,....") [citation omitted].

In conclusion, the constitutionality of Idaho Code § 23-614 is not properly before me. And, even if it were, I have no authority to pass on the issue—that is the exclusive realm of the courts. Respondent essentially admitted this fact in its Notice of Appeal and Brief on Appeal. Since the constitutional question was noted by Respondent for the sole purpose of attempting to preserve it as an issue for judicial review, if necessary, I decline to address the question in this Final Order.

B. Is Revocation of the License the Appropriate Sanction?

While not contesting the Hearing Officer's Findings of Fact or Conclusions of Law, Respondent does challenge the Hearing Officer's revocation of its license. Indeed, the revocation of the license by the Hearing Officer is the only issue properly before me in this review. Respondent argues that revocation was too severe and that a more appropriate sanction would be a short suspension (at most 10 days) coupled with a small fine (perhaps \$1,000). Obviously, the selection of an appropriate sanction is dependent, in large part, upon the severity of the violations. Therefore, a discussion of those violations is necessary.

As mentioned above, there is no dispute regarding the material relevant facts in this case. The Hearing Officer articulated those facts in his Preliminary Order and I have expressly adopted and incorporated those factual findings and conclusions of law into this Final Order.

Those findings establish that Respondent hired a group of male performers (The Girls Night Out Show) to put on a show at its licensed establishment on the night of January 24, 2015. During the show, all four of the performers exposed their buttocks, including the entire cleft of their buttocks, to the audience. Findings of Fact No. 9. The performers fondled both the breasts and crotch areas of women in the audience through their clothing, placed the hands of women inside the pants of at least two of the performers and manipulated the hands of the women in order to fondle the genitals of the performers, and committed acts of simulated oral and sexual intercourse with members of the audience. One performer placed one of his hands down the front of a patron's shirt and onto her bare breast while simultaneously putting the patron's hand on the performer's genitals; while another performer pulled down the pants of a woman

in the audience thereby exposing the cleft of her buttocks. Findings of Fact No. 13 and 18. Another performer dressed as a fireman fondled his genitals in front of the audience and exposed the base of his penis to the view of the audience, while another performer dressed as a policeman pulled down his pants thereby exposing his pubic area to the view of the audience. Findings of Fact No. 16 and 19. Some of the acts were performed on the stage, while others occurred as the performers mingled with the audience. These and other prohibited acts under Idaho Code § 23-614(1)(a), (b) and (d) were observed, and some recorded, by two undercover ISP officers in the audience.

Kristy Backus (a/k/a Reid), the owner or manager of Respondent Boyd's Sports Bar, was present tending bar during the show. She heard, or should have heard, a loud announcement from one of the performers at the beginning of the show that the audience would see nude men during the event. Findings of Fact No 10. While at the bar, she had a clear view of the audience and while serving drinks in the audience area she had a clear view of the stage. Ms. Reid observed much of the performance, including simulated sex acts, fondling, and exposures. Findings of Fact No. 20. Yet Ms. Reid did nothing to stop these intentional prohibited acts. Indeed, by her conduct she permitted them to occur.

These are serious violations of Idaho law that not only authorize the Director to discipline the license, but also constitute misdemeanors.

Under Idaho Code § 23-614(3), the legislature has authorized the Director to impose a fine, suspend a license for up to six months, or revoke the license, in the event of any one violation of the statute. Here, there were multiple violations of subsection 23-614(1)(a), (b) and (d).

In arguing mitigation, Respondent points out that the viewing audience and all performers were consenting adults. Respondent argues that not only did no one complain, but several patrons voluntarily participated in the performance. In essence, Respondent argues that the patrons got what they paid for and essentially this is a "no harm, no foul situation." Respondent actually makes the outrageous statement that selling alcoholic beverages to a minor "is [a] much more serious offense than consenting adults watching and participating in the show." Respondent's Brief on Appeal, p. 3. Respondent urges me to, at most, impose a sanction comparable to that for a first time offense of selling alcohol to an underage person: a 10-day suspension and a \$1,000 fine. Respondent claims that a fine and a suspension would also be consistent with "other similar cases that have been reported in the media" *Id.*

Respondent's argument is extremely troubling. It demonstrates a complete lack of understanding and appreciation of the legislative intent in enacting this law. The conclusion urged by Respondent flies in the face of the policy statement of the legislature embodied in the clear statutory prohibitions.

Respondent states that, "Other similar cases that have been reported in the media have not resulted in revocation of the license but in a period of suspension and a fine." Brief on Appeal, p. 3. Because Respondent fails to identify or elaborate on these so-called "similar cases," I am unable to address this unsupported claim. Although unable to address this specific allegation, I can unequivocally say that the legislature takes sexual or simulated sexual acts committed on premises licensed to sell alcoholic beverages very seriously. Under Idaho Code § 23-1010A, the predecessor statute to Idaho Code § 23-614, violations of the type found here resulted in an automatic revocation of the license. See State ex rel. Richardson v. Pierandozzi, 117 Idaho 1, 784

P.2d 331 (1989) (revocation affirmed where dancers exposed pubic hair, anus and cleft of buttocks); Northern Frontiers, Inc. v. State ex rel. Cade, 129 Idaho 437, 926 P.2d 213 (Ct. App. 1996) (revocation affirmed where dancers exposed cleft of buttocks and allowed patrons to lick their nipples). Now, under Idaho Code § 23-614, revocation is no longer mandatory, but may be imposed in the exercise of the Director's sound discretion. See, generally Williams v. Idaho State Bd. of Real Estate Appraisers, 157 Idaho 496, 337 P.3d 655 (2014); Knight v. Dep't of Insurance, 124 Idaho 645, 862 P.2d 337 (Ct. App. 1993); Pence v. Idaho State Horse Racing Comm'n, 109 Idaho 112, 705 P.2d 1067 (Ct. App. 1985). These cases make clear that as long as the selected sanction is within the range of penalties available to me for the proven violations and I reach my decision in the exercise of reason, the sanction imposed will be affirmed on appeal.

To guide my discretion, I note that under the Penalty Schedule for common violations developed by my office, because of their serious nature, a prohibited sexual act committed by a licensee under Idaho Code § 23-614 ordinarily warrants revocation. However, this is just a starting point. A proper exercise of discretion requires that I also look at the specifics of the violations, the totality of the circumstances, and consider my available alternatives to determine whether deviation from the normally imposed sanction is justified. Having conducted such an examination, I see no basis for a departure from the usual sanction of revocation.

Like horse racing in Pence, *supra*, 109 Idaho at 116, 705 P.2d at 1071, the regulation of the liquor industry is subject to intense and pervasive regulation and supervision in the public interest. The public must have faith in the licensing scheme and be assured that only qualified and competent persons obtain and retain licenses. In

selecting an appropriate sanction, I am charged "to protect the public from those unfit to practice . . . and to deter future misconduct . . ." Williams, *supra*, 157 Idaho at 509; 337 P.3d at 668. Given the severity of the violations, the multiplicity of the violations, the irresponsible attitude of the Respondent toward the violations and the lack of any sufficient mitigating facts,² I conclude that anything less than revocation would not serve the public interest. Under the totality of the circumstances, revocation is the most appropriate sanction.

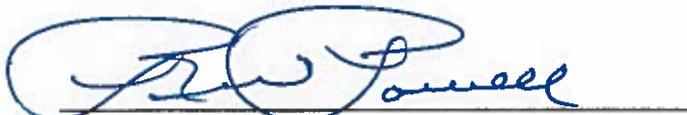
CONCLUSION

For the above-stated reasons, and those stated in the adopted and incorporated Preliminary Order, the Hearing Officer properly found that Respondent committed multiple violations of Idaho Code § 23-614(1)(a), (b) and (d), as charged. The violations are serious enough to warrant revocation of Respondent's license.

Accordingly, License No. 6409 issued to Respondent is revoked.

IT IS SO ORDERED.

DATED this 22 day of March 2016.



Colonel Ralph W. Powell, Director
Idaho State Police

² I reject as frivolous Respondent's apparent claim that revoking Respondent's license would not be in the public interest because it is the only bar in Payette County that allows smoking. I also reject Respondent's claim that it should not be held responsible for Ms. Reid's misconduct or suffer any negative consequences from that misconduct. I only have authority to discipline the alcohol beverage license. That license is issued to Boyd's Sports Bar, LLC d/b/a Boomerang Saloon. Any adverse consequence to Boomerang from my revocation of the license is not a relevant consideration.

DUE PROCESS AND APPEAL RIGHTS

This is a final order of the Director. Any party may file a motion for reconsideration of this final order within fourteen (14) days of the service date of this order. The Director will dispose of the petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See Idaho Code § 67-5246(4).

Pursuant to Idaho Code §§ 67-5270 and 67-5272, any party aggrieved by this final order may appeal this final order to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

An appeal must be filed within twenty-eight (28) days (a) of the service date of this final order, (b) of an order denying petition for reconsideration, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See Idaho Code § 67-5273. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of March 2016, I caused to be served, a true and correct copy of the foregoing Director's Final Order on the following individuals by the method indicated below:

David L. Posey
Attorney at Law
16 S. Main St.
P. O. Box 5
Payette, ID 83661
Facsimile: 208-965-8099
Email: dlp@davidposey.com

Certified Mail
 First Class Mail
 Hand Delivery
 Facsimile
 Statehouse Mail
 Email

Kenneth M. Robins
Deputy Attorney General
Alcohol Beverage Control
700 S. Stratford Dr.
Meridian, ID 83642
Facsimile: 208-884-7228
Email: ken.robins@isp.idaho.gov

Certified Mail
 First Class Mail
 Hand Delivery
 Facsimile
 Statehouse Mail
 Email

Roger L. Gabel
Deputy Attorney General
Contracts and Administrative Law Division
Office of the Attorney General
954 W. Jefferson, 2nd Fl.
P. O. Box 83720
Boise, ID 83720-0010
Facsimile (208) 854-8070
roger.gabel@ag.idaho.gov

Certified Mail
 First Class Mail
 Hand Delivery
 Facsimile
 Statehouse Mail
 Email

Christi Redenbo

Administrative Assistant

LAWRENCE G. WASDEN
Attorney General

STEPHANIE A. ALTIG
Lead Deputy Attorney General

KENNETH M. ROBINS
Deputy Attorney General
Idaho State Police
Idaho State Bar No. 4196
700 S. Stratford Drive
Meridian, Idaho 83642
Telephone: (208) 884-7050
Facsimile: (208) 884-7228

Attorney for Respondent

FILED
THIRD JUDICIAL DISTRICT COURT
PAYETTE COUNTY, IDAHO

MAY 09 2016

BETTY A. DRESSEN, CLERK
BY _____ DEPUTY

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF PAYETTE**

BOYD'S SPORTS BAR, LLC,)	Case No. CV-2016-316
dba: BOOMERANG SALOON,)	
)	
Petitioner,)	ORDER DENYING PETITIONER'S
)	MOTION FOR STAY
vs.)	
)	
IDAHO STATE POLICE, BUREAU OF)	
ALCOHOL BEVERAGE CONTROL,)	
)	
Respondent.)	
)	
)	

COME NOW, the parties in the above-captioned matter for hearing on Petitioner's Motion for Stay of the Agency's Revocation Order During Judicial Review. The Petitioner, Boyd's Sports Bar, LLC., appeared through counsel, David L. Posey, Attorney at Law; Respondent, Idaho State Police Bureau of Alcohol Beverage Control, appearing through counsel, Kenneth M. Robins, Deputy Attorney General for the State of Idaho.

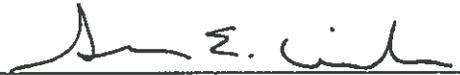
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MAY - 9 2016

IDAHO STATE POLICE
ALCOHOL BEVERAGE CONTROL

THE COURT, having considered the briefing and arguments submitted by counsel and being fully advised in the premises, does hereby order as follows:

IT IS HEREBY ORDERED that Petitioner's Motion for a Stay of the Agency's Order Revoking the Petitioners Alcohol beverage licenses is hereby DENIED.

DATED this 9th day of May, 2016.



HON. SUSAN E. WIEBE
DISTRICT COURT JUDGE
THIRD JUDICIAL DISTRICT
PAYETTE COUNTY, IDAHO



CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **ORDER DENYING PETITIONER'S MOTION FOR STAY** served on the following on this 9 day of May, 2016, by the following method:

David Lee Posey
Attorney at Law
P.O. Box 5
Payette, Idaho 83661
(208) 869-2325
dlp@davidposey.com

- U.S. First Class Mail, Postage Prepaid
- U.S. Certified Mail, Postage Prepaid
- Federal Express
- Hand Delivery
- Facsimile
- Electronic Mail

Kenneth M. Robins
Deputy Attorney General
Idaho State Police
Bureau of Alcohol Beverage Control
700 S. Stratford Drive
Meridian, Idaho 83642
(208) 884-7060
ken.robins@isp.idaho.gov

- U.S. First Class Mail, Postage Prepaid
- U.S. Certified Mail, Postage Prepaid
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Clerk of the District Court
Deputy Clerk

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IDAHO STATE POLICE
ALCOHOL BEVERAGE CONTROL

LAWRENCE G. WASDEN
Attorney General

STEPHANIE A. ALTIG
Lead Deputy Attorney General

KENNETH M. ROBINS
Deputy Attorney General
Idaho State Police
Idaho State Bar No. 4196
700 S. Stratford Drive
Meridian, Idaho 83642
Telephone: (208) 884-7050
Facsimile: (208) 884-7228

Attorney for Respondent

FILED
THIRD JUDICIAL DISTRICT COURT
PAYETTE COUNTY, IDAHO

MAY 09 2016

BETTY J. DRESSEN, CLERK
BY _____ DEPUTY

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF PAYETTE**

BOYD'S SPORTS BAR, LLC,
dba: BOOMERANG SALOON,

Petitioner,

vs.

IDAHO STATE POLICE, BUREAU OF
ALCOHOL BEVERAGE CONTROL,

Respondent.

) Case No. CV-2016-316
)
)
)
) **ORDER GRANTING PETITIONER'S**
) **MOTION TO DISMISS PETITION**
) **FOR REVIEW**
)
)
)
)
)

COME NOW, the parties in the above-captioned matter for hearing on Petitioner's Motion to Dismiss Petition for Review of the Agency's Order Revoking Petitioner's Alcohol Beverage Licenses. The Petitioner, Boyd's Sports Bar, LLC., appeared through counsel, David L. Posey, Attorney at Law; Respondent, Idaho State Police Bureau of Alcohol Beverage Control, appearing through counsel, Kenneth M. Robins, Deputy Attorney General for the State of Idaho.

ORDER GRANTING PETITIONER'S MOTION TO DISMISS PETITION FOR REVIEW
Page 1

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IDAHO STATE POLICE

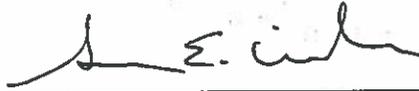
Background

On April 14, 2016, Petitioner filed its Petition for Review of the Agency's final decision revoking its retail alcohol beverage licenses. Petitioner also filed a motion for a stay of the Agency's Order revoking its retail alcohol beverage licenses and an affidavit in support of the motion on this same date. After the court denied Petitioner's motion for a stay, Petitioner moved to dismiss its Petition for Review of the Agency's Order revoking its alcohol beverage licenses. The Agency had no objection to the motion.

THE COURT, having considered the statements of counsel and being fully advised in the premises, does hereby order as follows:

IT IS HEREBY ORDERED that Petitioner's Motion to dismiss its Petition for Review of the Agency's Order Revoking the Petitioners Alcohol beverage licenses is hereby GRANTED.

DATED this 9th day of May, 2016.



HON. SUSAN E. WIEBE
DISTRICT COURT JUDGE
THIRD JUDICIAL DISTRICT
PAYETTE COUNTY, IDAHO

CERTIFICATE OF SERVICE

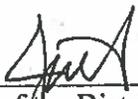
I hereby certify that a true and correct copy of the foregoing **ORDER GRANTING PETITIONER'S MOTION TO DISMISS PETITION FOR REVIEW** served on the following on this 9 day of May, 2016, by the following method:

David Lee Posey
Attorney at Law
P.O. Box 5
Payette, Idaho 83661
(208) 869-2325
dlp@davidposey.com

- U.S. First Class Mail, Postage Prepaid
- U.S. Certified Mail, Postage Prepaid
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- Hand Delivery
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- Electronic Mail

Kenneth M. Robins
Deputy Attorney General
Idaho State Police
Bureau of Alcohol Beverage Control
700 S. Stratford Drive
Meridian, Idaho 83642
(208) 884-7060
ken.robins@isp.idaho.gov

- U.S. First Class Mail, Postage Prepaid
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Clerk of the District Court
Deputy Clerk



MAY - 9 2016

IDAHO STATE POLICE
ALCOHOL BEVERAGE CONTROL

COPY

**DAVID E. WYNKOOP
SHERER & WYNKOOP, LLP
730 N. MAIN ST.
P.O. BOX 31
MERIDIAN, IDAHO 83680
(208) 887-4800
FAX (208) 887-4865
I.S.B. 2429**

BEFORE THE IDAHO STATE POLICE, ALCOHOL BEVERAGE CONTROL

IDAHO STATE POLICE,)
ALCOHOL BEVERAGE CONTROL)
)
Complainant,)
)
vs.)
)
KRISTY A. BACKUS and BOYD'S)
SPORTS BAR, LLC dba)
BOOMERANG SALOON)
)
Respondent.)
_____)

Case No. 15ABC 029
License No. 6409
Premise No. 1P6409

FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
PRELIMINARY ORDER

RECEIVED
NOV 16 2015
IDAHO STATE POLICE
ALCOHOL BEVERAGE CONTROL

An evidentiary hearing was held on October 6, 2015 pursuant to the Idaho Administrative Procedures Act. Idaho Code Title 67, Chapter 52 and the Idaho Alcohol Beverage Code, Idaho Code Title 23. The hearing was held to consider the complaint filed by the Idaho State Police, Alcohol Beverage Control ("ABC") against Respondent Kristy A. Backus, now known as Kristy Reid ("Ms. Reid") and Boyd's Sports Bar, LLC dba Boomerang Saloon (the "Bar"). The Complaint generally alleges that prohibited acts occurred at the Bar on January 24, 2015 in violation of the Idaho Alcohol Beverage Code. ABC seeks revocation of Respondent's retail alcohol beverage license.

Respondent appeared in person by and through Ms. Reid and through attorney David L. Posey. ABC appeared through its agency representative Russell Wheatley and through Kenneth M. Robins, Deputy Attorney General.

Both parties introduced exhibits into evidence and presented testimony. ABC presented the testimony of Tyler Jussell, Victoria McCarthy, Janet Murakami, Rocky Gripton, and Russell

Wheatley. Respondent presented the testimony of John Moore and Ms. Reid. Both parties cross-examined or had the opportunity to cross-examine the other party's witnesses.

ABC and Respondent submitted written closing statements on November 2, 2015. ABC presented a response on November 6, 2015. Respondent presented no response. Having carefully reviewed the record, the briefs, and the closing statements, these Findings of Fact, Conclusions of Law and Preliminary Order are hereby entered.

FINDINGS OF FACT

1. During all relevant times Respondent has been licensed to sell and serve liquor by the drink, license number 6409 (pursuant to Idaho Code §23-903), beer (pursuant to Idaho Code §23-1010), and wine by the bottle and drink (pursuant to Idaho Code §23-1306).

2. Each such license application required Respondent to sign a statement acknowledging that “[a]cceptance of this license by a retailer shall constitute knowledge of and agreement to operate by and in accordance to the Alcohol Beverage Code, Title 23”.

3. The licensed location is 20 S. Main Street, Payette, Idaho, premise number 1P-6409.

4. On or about November 18, 2014, Respondent entered into a Girls Night Out Artist Management Show Agreement with the Chippendale Girls Night Out Show to perform at the Bar on Saturday, January 24, 2015 from 9:00 p.m. to 11:30 p.m.

5. Respondent previously contracted with the same artist group to conduct a previous performance at the Bar.

6. Respondent advertised the Girls Night Out Show on the internet, by radio and with posters at the Bar. The advertisement included statements that:

- a. “Our sexy hunks will tantalize and tease...”
- b. The show includes the performers showing off their bodies and Performing sensual theatrics.
- c. The show will provide something “fun & exciting” for ladies.
- d. It is a “Male Revue Show.”

7. Ms. Reid was present at the Girls Night Out Show which commenced between 9:00 and 9:30 p.m. on January 24, 2015. Ms. Reid spent much of the time behind the bar, where



she may not have had a clear view of the stage area of the show but did have a clear view of the audience area, and some of the time in the audience area where she had a clear view of the stage area.

8. The audience area consisted of approximately sixty folding chairs with an aisle and three chairs on one side and two chairs on the other side of the aisle.

9. During the opening act, four performers turned their backs to the audience, bent over, and pulled down their pants, exposing their buttocks to the audience, including the entire cleft of their buttocks. The performers were wearing G-strings, the back of which was entirely enclosed within the crease of their buttocks and not visible from between the performers' butt cheeks.

10. At the beginning of the show, one of the performers shouted loudly into a microphone, amplified through a P.A. system, that the audience was going to see naked men during the show. The same performer announced that the performers were male Chippendales and asked those present to scream if they were ready to see naked men. Ms. Reid could not have avoided hearing these announcements.

11. A performer selected a woman from the audience and brought her to the stage area to sit on a chair. The performer stood behind the seated woman and fondled her breasts over her clothing. He then placed his clothed groin area next to the woman's face and repeatedly thrust his hips toward her face to simulate oral sex. He then used his hand to place the woman's hand inside his pants, thus manipulating the woman's hand to fondle his genitals.

12. A performer selected a woman from the audience and directed her to lie down on a blanket or comforter placed on the floor of the stage area. The performer took a pole and placed it on the clothed woman's crotch thrusting the pole up and down to simulate sex with a foreign object. A second performer wearing a loin cloth approached the woman who was lying on the stage and fondled her breasts over her clothes and lifted the back of his loin cloth completely exposing his bare buttocks to the audience while doing so.

13. The performer wearing the loin cloth later went into the audience area. He approached one seated woman and placed his hand down the front of her shirt onto her bare breast and with his other hand placed one of the woman's hands on his genitals. He lifted the back of his loin cloth exposing his entire buttocks to the audience and then gyrated on the woman's lap simulating sexual intercourse.

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14. A performer dressed as a cowboy placed a woman's hand inside his pants and underwear onto his bare genitals causing the woman to fondle his genitals.

15. The cowboy performer straddled a seated man's lap, simulating sex with the man.

16. A performer dressed as a fireman walked down a line of chairs in the audience area. He placed his crotch against the face of a seated woman and thrust his crotch back and forth simulating oral sex. With another seated woman, the fireman performer sat in the woman's lap moving back and forth. The fireman performer also fondled his genitals in the view of the audience, exposing the base of his penis to the view of the audience, and later his entire bare buttocks to the audience.

17. The cowboy performer walked into the audience and fondled several women's breasts and crotches. He also placed his face on the upper part of a woman's chest and licked the upper portion of the woman's bare breast.

18. A performer dressed as a police officer took a woman to the stage area, bent her over a chair and "frisked" her, fondling her breast, crotch and buttocks over her clothes. He then placed a flash light between the woman's legs against her vagina simulating a sex act. He then pulled the woman's pants part way down exposing the cleft of her buttocks.

19. The policeman performer straddled one or more women simulating sexual intercourse and placed his face in a woman's crotch simulating oral sex. He directed one woman to lay on top of him and directed her to simulate sexual intercourse while she straddled him. He pulled down his pants and underwear exposing his pubic area to the view of the audience. He also fondled the breasts of another woman over her clothes.

20. At times during the performance, Ms. Reid was in the audience taking drink orders and serving drinks. She could also observe the audience area during the entire performance. She observed much of the performance, including simulated sex acts, fondling, and exposures.

21. The entire performance was viewed by Idaho State Police officers Victoria McCarthy and Janet Murakami. Ms. McCarthy videotaped much of the performance using a digital video camera. The officers sat approximately three to four rows back from the stage area and had a clear view of the entire performance.

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ANALYSIS

Respondent permitted prohibited acts, as defined by Idaho Code §23-614 at the Bar on January 24, 2015. Idaho Code §23-614 provides:

(1) No person, partnership, association or corporation shall conduct, permit, or encourage any of the following acts or activities in or upon premises licensed pursuant to title 23, Idaho Code:

(a) Employment or use of any person, including allowing any person on the 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.

(b) Employment or use of any person who touches, caresses or fondles the breast, buttocks, anus or genitals of any other person, or who is so touched, caressed or fondled by another person.

(c) Employment or use of any person to wear or use any device or covering, exposed to view, which simulates the breast, genitals, anus, pubic hair or any portion thereof;

(d) Employment or use of any person to perform acts of or acts which simulate sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law.

There was credible testimony from Victoria. McCarthy and from Janet Murakami regarding their first-hand observations of the performers actions as set forth in the Findings of Fact. Their testimony was not credibly disputed. Their testimony was corroborated by video of the performance.

Ms. Reid admitted to having viewed video of the event placed into evidence as Exhibit 18. She admitted that she observed exposures of the buttocks and simulated sex. She did not dispute that prohibited acts occurred. Her defense was that she was behind the bar mixing drinks for much of the evening and that from behind the bar her view of the stage area was obscured. However, there is no dispute that Ms. Reid could fully observe the audience area even while she was behind the bar. Ms. Reid acknowledged that part of her time during the performance was spent in the audience area conducting various activities. From the audience area Ms. Reid had a clear view of the stage. She could not have avoided viewing many of the prohibited acts.

Ms. Reid's testimony that she did not know prohibited acts were occurring at the Bar on January 24, 2015 is not credible. The advertising promoted a sexually charged event. Ms. Reid had previously hired the same group to perform at the Bar. In the opening act a performer loudly announced at least twice that the patrons would see "naked men." Many of the prohibited acts

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occurred in the audience area. Ms. Reid's own testimony did not dispute that she had an unobstructed view of the audience area from behind the bar. Ms. Reid spent part of her time in the audience area where she had a clear view of the stage. Given the sexually charged nature of the performance, it is not credible that Ms. Reid was unaware that prohibited acts were occurring.

Ms. Reid admitted to having observed some of the exposure and fondling incidents but testified to her understanding that only full nudity constituted a prohibited act under Idaho law. The fact that Ms. Reid may have been unaware of what acts are prohibited by Idaho Code §23-614 is not a defense. When she signed her license applications she agreed to be aware of the requirements of the Idaho Alcohol Beverage Code and to operate in accordance with those requirements.

Ms. Reid hired the performers. The nature of their show was a Chippendales male revue designed to titillate and arouse the audience. Even if Ms. Reid did not visually observe each and every prohibited act, she was well aware of what was occurring. What occurred was not an inadvertent wardrobe malfunction. Rather, it was a highly sexual performance where the performers repeatedly and intentionally committed acts prohibited by Idaho Code §23-614. Ms. Reid and her staff observed these repeated prohibited acts and made no effort to stop them.

Respondent also presented the testimony of John Moore. Mr. Moore is a long-time friend of Ms. Reid and was stationed at the entrance to the Bar to take tickets and to serve as a bouncer if the need arose. Mr. Moore expressed his understanding that only nudity constituted a prohibited act under the liquor control statutes. When asked about a performer simulating oral sex with a patron, Mr. Moore responded that there is no violation even if the performer grabs her head and gyrates in front of her simulating oral sex, since the patron is over 21 and the performer is wearing a G-string. Mr. Moore commented that the patron got her money's worth. Mr. Moore testified he did not observe some of the acts that Ms. Reid admitted to observing, further undermining his credibility. Either Mr. Moore was too far from the stage and audience area to observe what occurred, or, as a friend of Ms. Reid's for many years, he turned a blind eye to what occurred. His testimony is clearly contradicted by the testimony of Ms. McCarthy and Ms. Murakami and the video introduced into evidence. His testimony is not credible.

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CONCLUSIONS OF LAW

A. On January 24, 2015, Respondent permitted multiple male performers to expose the entire cleft of their buttocks to the view of others and one or more male performers to expose his/their pubic area and genitals to the view of others. Respondent also permitted the exposure of the cleft of at least one audience member's buttocks to the view of others. Ms. Reid and other Respondent employees worked at this event and did nothing to prevent these occurrences. Respondent violated Idaho Code § 23-614(1)(a).

B. On January 24, 2015, Respondent permitted multiple male performers to fondle the breasts and genitals of multiple women in the audience of the Girls Night Out Show event. Ms. Reid and other Respondent employees also worked at the event and did nothing to prevent these occurrences. Respondent violated Idaho Code § 23-614(1)(b).

C. Ms. Reid was present at the licensed premise on January 24, 2015, when the violations referenced in A and B occurred. Violations of the provisions of the Idaho Code, Title 23, occurred by Respondent's agents, employees, and servants or other person acting on behalf of Respondent.

Violation – Misdemeanors. – A violation of any of the provisions of this act by any agent, employee, servant, or other person in any way acting in behalf of the licensee shall be presumed to be a violation by the licensee...

Idaho Code §23-935

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D. On January 24, 2015, Respondent permitted numerous female patrons to touch and fondle the buttocks and genitals of four male performers. Ms. Reid and other Respondent employees worked at the event and did nothing to prevent these occurrences. Respondent violated Idaho Code § 23-614(1)(b).

E. Ms. Reid was present at the licensed premise on January 24, 2015, when the violations referenced in D occurred. Any violation of the provisions of the Idaho Code, Title 23, by any agent, employee, servant, or other person, in any way acting in behalf of a licensee constitutes a violation by Respondent pursuant to Idaho Code § 23-935.

F. On January 24, 2015, Respondent permitted four male performers to perform simulated sex acts, including simulated sexual intercourse and simulated oral copulation, with

numerous patrons attending the Girls Night Out Show event. Ms. Reid and other Respondent employees worked at this event and did nothing to prevent these occurrences, in violation of Idaho Code §23-614(1)(d).

G. Ms. Reid was present at the licensed premise on January 24, 2015, when the above-referenced violations occurred. Any violation of the provisions of Idaho Code, Title 23, by any agent, employee, servant, or other person, in any way acting in behalf of a licensee is a violation by Respondent pursuant to Idaho Code § 23-935.

H. Ms. Reid, owner of Respondent, contracted for the performance and observed much of the performance and many of the prohibited acts. She did nothing to stop the performance until it was over or nearly over after she observed a performer kissing a patron in the restroom. Ms. Reid admits she observed the showing of the buttocks by the performers and the simulated sex acts during the performance. She turned a blind eye to what was occurring. This blind eye approach does not mitigate her responsibility for what occurred at the Bar on January 24, 2015. *See* Idaho Code §§23-614 and 23-935.

I. The Hearing Officer is not authorized in this proceeding to consider Respondent's arguments that portions of the Idaho Alcohol Beverage Code are unconstitutional. *See* IDAPA 04.11.01.415. Respondent has presented no cogent argument that a court of competent jurisdiction has declared the relevant statutes unconstitutional.

PRELIMINARY ORDER

The alcohol beverage licenses of Respondent are hereby revoked pursuant to Idaho Code §§23-933, 23-1037 and 23-1331.

COMPLIANCE WITH IDAPA 04.11.01.730

(a) This is a preliminary order of the hearing officer. It can and will become final without further action of the agency unless any party petitions for reconsideration before the hearing officer issuing it or appeals to the hearing officer's superiors in the agency. Any party may file a motion for reconsideration of this preliminary order with the hearing officer issuing the order within fourteen (14) days of the service date of this order. The hearing officer issuing this order will dispose of the petition for reconsideration within twenty-one (21) days of its

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receipt, or the petition will be considered denied by operation of law. See §67-5243(3), Idaho Code.

(b) Within fourteen (14) days after (a) the service date of this preliminary order, (b) the service date of the denial of a petition for reconsideration from this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this preliminary order, any party may in writing appeal or take exceptions to any part of the preliminary order and file briefs in support of the party's position on any issue in the proceeding to the agency head (or designee of the agency head). Otherwise, this preliminary order will become a final order of the agency.

(c) If any party appeals or takes exceptions to this preliminary order, opposing parties shall have twenty-one (21) days to respond to any party's appeal within the agency. Written briefs in support of or taking exceptions to the preliminary order shall be filed with the agency head (or designee). The agency head (or designee) may review the preliminary order on his own motion.

(d) If the agency head (or designee) grants a petition to review the preliminary order, the agency head (or designee) shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. The agency head (or designee) will issue a final order within fifty-six (56) days of receipt of the written briefs or oral argument, whichever is later, unless waived by the parties or for good cause shown. The agency head (or designee) may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order.

(e) Pursuant to §67-5270 and §67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which:

- i. A hearing was held;
- ii. The final agency action was taken;
- iii. The party seeking review of the order resides, or operates its principal place of business in Idaho; or

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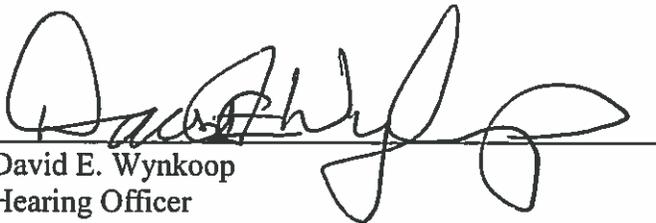
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iv. The real property or personal property that was the subject of the agency action is located.

(f) This appeal must be filed within twenty-eight (28) days of this preliminary order becoming final. See §67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.

DATED this 11th day of November, 2015.


David E. Wynkoop
Hearing Officer

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of November, 2015, I served a true and correct copy of the foregoing FINDINGS OF FACT, CONCLUSIONS OF LAW AND PRELIMINARY ORDER upon each of the following, by the method indicated below:

Kenneth M. Robins
Deputy Attorney General
Alcohol Beverage Control
700 S. Stratford Drive
Meridian, Idaho 83642

XX via facsimile to 208-884-7228
XX via U.S. mail, postage prepaid
XX via email to ken.robins@isp.idaho.gov

David L. Posey
Attorney at Law
16 S. Main St.
P.O. Box 5
Payette, Idaho 83661

XX via facsimile to 208-965-8099
XX via U.S. Mail, postage prepaid
XX via email to dlp@davidposey.com


Janet L. Monzo

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