ISSUED DECEMBER 22, 1997

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

MAGGIORA ENTERPRISES dba Innskeep Inn 705 Laurel Avenue El Verano, CA 95433, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6760 File: 48-224179 Reg: 96036347 Administrative Law Judge at the Dept. Hearing: Jeevan Ahuja Date and Place of the Appeals Board Hearing: Sacramento, CA September 3, 1997

Maggiora Enterprises, doing business as Innskeep Inn (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which ordered its on-sale general license suspended for a total of 25 days, with 10 of those days stayed for a probationary period of one year, for appellant's bartender having permitted an alcoholic beverage to be consumed between the hours of 2:00 a.m. and 6:00 a.m., and for having permitted the bartender to be in possession of amphetamine, a controlled

[1] The decision of the Department dated October 31, 1996, is set forth in the appendix.

substance,[2] being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from violations of Business and Professions Code §25631 and Health and Safety Code §11377.

Appearances on appeal include appellant Maggiora Enterprises, appearing through its counsel, Paul A. Neuer; and the Department of Alcoholic Beverage Control, appearing through its counsel, Nicholas R. Loehr.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general license was issued on November 15, 1988. Thereafter, the Department instituted an accusation alleging, in count 1, that appellant's bartender permitted the consumption of an alcoholic beverage by a patron between the hours of 2:00 and 6:00 a.m., a time when it was unlawful to do so, and, in count 2, that appellant permitted its bartender to be in possession of methamphetamine, a controlled substance.

An administrative hearing was held on August 28, 1996, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the alleged violations.

Sheriff's deputies David Smith and David Rankin testified that in the course of a routine check of the premises, at approximately 4:15 a.m., they observed what

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[2] The suspension represents a combined 10-day suspension for the consumption charge and a 15-day suspension, with 10 days stayed, for the controlled substance charge, ordered to be served consecutively.

appeared to be alcoholic beverages being consumed by two persons inside the premises. Their suspicions were confirmed after the deputies knocked and were permitted to enter. Appellant's bartender, James Wright, was arrested after it was learned he was the subject of an outstanding warrant, and a search of his person found an envelope containing a small amount (.09 grams) of what was later determined to be methamphetamine.

Joseph F. Maggiora, president of appellant, testified that while he normally conducts background checks of his bartenders, he had not done so with respect to Wright. Maggiora testified Wright had been employed on a part-time basis for approximately eight months, that he had known him for two years, from Wright's having done tile work for a client of Maggiora, and at no time had he ever appeared to be under the influence of drugs. Maggiora was unaware of Wright's prior conviction of driving under the influence of alcohol.

Maggiora testified that all employees were given instructions not to serve intoxicated patrons, and not to serve alcoholic beverages after 2:00 a.m. Further, that appellant maintained a strong anti-drug policy, which was reflected in a sign posted in a conspicuous location, warning that anyone possessing drugs for use or sale would be prosecuted to the full extent of the law. Maggiora was aware generally of the risk that drug usage could occur, but was not aware of any specific instance of any drug transaction occurring on the premises. Appellant states that the clientele of the bar

are, for the most part, senior citizens, persons who are generally hostile to drug usage, so he had no knowledge of, or reason to suspect, the presence of illegal drugs on the premises.

Subsequent to the hearing, the Department issued its decision which determined that both of the violations alleged in the accusation had been established. Appellant thereafter filed its timely notice of appeal.

In its appeal, appellant disputes the finding that it permitted the bartender to possess a controlled substance, contending that the finding is not supported by substantial evidence.

DISCUSSION

Appellant challenges only that part of the Department's decision which found that appellant permitted the bartender to possess a controlled substance. Appellant contends that its principals had neither knowledge nor reason to believe the bartender might possess a controlled substance while in the premises.

Appellant cites McFaddin San Diego 1130, Inc. v. Stroh (1989) 208 Cal.App.3d 1384, 1390 [257 Cal.Rptr.2d 8], and Laube v. Stroh (1992) 2 Cal.App.4th 364, 376 [3 Cal.Rptr.2d 779], and argues that appellant's lack of any knowledge or reason to suspect Wright would possess a controlled substance precludes a determination it "permitted" him to possess the controlled substance.

McFaddin San Diego 1130, Inc., supra, concerned several transactions which

occurred on the premises involving patrons selling or proposing to sell controlled substances to undercover agents. While the licensee and its employees did not know of the specific occurrences, they knew generally of contraband problems and had taken numerous preventive steps to control such problems. The McFaddin court held that since (1) the licensee had done everything it reasonably could to control contraband problems, and (2) the licensee did not know of the specific transactions charged in the accusation, the licensee could not be held accountable for the incidents charged.

Laube v. Stroh, supra, was actually two cases - Laube and De Lena, both of which involved restaurants/bars - consolidated for decision by the Court of Appeal.

The Laube portion of the decision dealt with surreptitious contraband transactions between patrons and an undercover agent - a type of patron activity concerning which the licensee had no indication and therefore no actual or constructive knowledge--and the court ruled the licensee should not have been required to take preventive steps to suppress that type of unknown patron activity.

The De Lena portion of the decision concerned employee misconduct. An off-duty employee on four occasions sold contraband on the licensed premises. The court held that the absence of preventative steps was not dispositive, but the licensee's penalty should be based solely on the imputation to the employer of the off-duty employee's illegal acts.

The imputation to the licensee/employer of an employee's on-premises

knowledge and misconduct is well settled in Alcoholic Beverage Control Act case law. (Morell v. Department of Alcoholic Beverage Control (1962) 204 Cal.App.2d 504 [22 Cal.Rptr. 405, 411]; Harris v. Alcoholic Beverage Control Appeals Board (1962) 197 Cal.App.2d 172 [17 Cal.Rptr. 315, 320]; Mack v. Department of Alcoholic Beverage Control (1960) 178 Cal.App.2d 149 [2 Cal.Rptr. 629, 633]; and Endo v. State Board of Equalization (1956) 143 Cal.App.2d 395 [300 P.2d 366, 370-371].)

The McFaddin case involved patron activity, so is not helpful to appellant. The Laube case also involved patron activity. Both of these cases concluded that, where the licensee is unaware of the drug transactions and has taken all reasonable steps to prevent them from occurring, it will not be found to have "permitted" the transactions within the meaning of Business and Professions Code §24200.5. But where the licensee has knowledge, actual or constructive, of the unacceptable conduct, it can be charged with having permitted it. Here, the licensee has constructive knowledge, since it is vicariously responsible for the bartender's conduct. That appellant may have lacked personal knowledge is not a defense. The law deems appellant to have the requisite knowledge, since it bears the responsibility for the acts of its employees on the licensed premises.

CONCLUSION

The decision of the Department is affirmed.[3]

BEN DAVIDIAN, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
JOHN B. TSU, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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

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