ISSUED AUGUST 22, 2000

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

L.O.G., INC. dba La Sierra Restaurant 8632 Van Nuys Blvd. Panorama City, CA 91402, Appellant/Licensee,	)	AB-7463 File: 47-242112 Reg: 98045278
v.	)	Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	Date and Place of the Appeals Board Hearing: July 6, 2000 Los Angeles, CA

L.O.G., Inc., doing business as La Sierra Restaurant (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its on-sale general public eating place license for 30 days, with 10 days thereof stayed for a probationary period of one year, for violations of Business and Professions Code §25658, subdivisions (a) and (b) (sales to minors and permitting consumption by minors); 25602, subdivision (a) (sales to obviously intoxicated patrons); Penal Code §347b (contaminated spirits); and Health and Safety Code §§110545,

[1]The decision of the Department, dated July 29, 1999, is set forth in the appendix.

110560, and 110620 (contaminated spirits), contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, and Business and Professions Code §24200, subdivisions (a) and (b).

Appearances on appeal include appellant L.O.G., Inc., appearing through its counsel, Armando H. Chavira, and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on January 22, 1990. Thereafter, the Department instituted an accusation against appellant which contained seven counts charging the unlawful sale or furnishing of alcoholic beverages to minors (counts 6 through 12), four counts charging the permitting of consumption of alcoholic beverages by minors (counts 1, 2, 3, and 5), two counts charging the sale of alcoholic beverages to persons who were obviously intoxicated (counts 4 and 13), and two counts charging the sale and offering for sale of contaminated spirits (counts 14 and 15).

The accusation was based upon a Los Angeles Police Department raid on appellant’s premises at approximately 10:00 p.m. on July 10, 1998. The premises, licensed as a restaurant and operating as a nightclub, were large and crowded. Estimates of the number of patrons present at the time of the raid varied widely. The ALJ found that there were between 300 and 500 patrons in the premises

(Decision, page 5).[2] There seems to have been general agreement that approximately 20 percent of those present were minors who were there to socialize and dance, and the ALJ so found.

An administrative hearing was held on March 5, 1999, and May 10, 11, and 12, 1999, at which time oral and documentary evidence was received. A total of 20 witnesses testified, generating 675 pages of hearing transcript. No evidence was presented with respect to counts 3 and 12, and those counts were dismissed on the motion of Department counsel.

Subsequent to the hearing, the Department issued its decision from which this appeal has been taken. The Department sustained three of the four counts which charged that appellant had permitted the consumption of alcoholic beverages by minors, the two counts charging the sale of alcoholic beverages to persons obviously intoxicated, and the two counts charging the sale or offering for sale of contaminated spirits, but only one of the six counts charging the unlawful sale of an alcoholic beverage to a minor (count 11).

Appellant has filed a timely notice of appeal, and raises the following issues: (1) there was not substantial evidence that any minor consumed or was served an alcoholic beverage; (2) there was not substantial evidence to support a finding that

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[2] Security guard Victor Garcia estimated those present at "around 400." [IV RT 11.] Two of the officers involved in the raid gave much lower estimates. Officer Monterrosa estimated "well over 60" [I RT 122], and officer Dominguez estimated "probably over 70" [I RT 198]. Matias Meza. the owner of the restaurant/nightclub, estimated there were 300 to 350 people present. [IV RT 89-90.]

appellant's waitress actually or constructively observed the allegedly intoxicated patron at the time he was allegedly served an alcoholic beverage; (3) there was not substantial evidence to support a finding that patron Araconez was obviously intoxicated at the time he was served an alcoholic beverage. Appellant raises a number of subsidiary issues which will be discussed together with each of the three main issues.

DISCUSSION

I

Appellant contends that there was not substantial evidence that any minor consumed or was served an alcoholic beverage. It asserts that the testimony of the officers was inconsistent, contradictory and disjointed, and all minors subpoenaed to the hearing uniformly denied consumption or service of alcohol; that the evidence collected by the officers was destroyed, mishandled, mislabeled, and suffered from serious chain-of-custody problems and, therefore, could not support the findings; that although some of the minor counts were dismissed, all should have been because the same collection procedures were used in all the minor cases; and that in the consumption cases, there was no evidence that the named waitress employees actually or constructively observed consumption.

Before addressing specific contentions of appellant, it would be useful to summarize the rules which guide the Board in this appeal.

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's decision,

the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. The Appeals Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing.[3]

"Substantial evidence" is relevant evidence which reasonable minds would accept as a reasonable support for a conclusion. (Universal Camera Corporation v. National Labor Relations Board (1950) 340 US 474, 477 [71 S.Ct. 456]; Toyota Motor Sales USA, Inc. v. Superior Court (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].)

The credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. (Brice v. Department of Alcoholic Beverage Control (1957) 153 Cal.2d 315 [314 P.2d 807, 812] and Lorimore v. State Personnel Board (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640, 644].)

Where there are conflicts in the evidence, the Appeals Board is bound to resolve them in favor of the Department's decision, and must accept all reasonable inferences which support the Department's findings. (Kirby v. Alcoholic Beverage

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[3] California Constitution, article XX, § 22; Business and Professions Code §§23084 and 23085; Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

Control Appeals Board (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857]; Kruse v. Bank of America (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 271]; Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control (1968) 261 Cal.App.2d 181 [67 Cal.Rptr. 734, 737]; and Gore v. Harris (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

Counts 1, 2, and 5 (Consumption by minors)

Enrique Guzman, the subject of count 1, denied having consumed any alcoholic beverage on the night in question. He testified that he volunteered to take an alcohol breath test, but was not permitted to do so.

Los Angeles Police Officer Guadalupe Ruiz,[4] on the other hand, testified that he observed Guzman, who appeared to be under the age of 21, drinking an amber-colored liquid from a clear bottle which had in white letters the word "Corona," and the words beer on the bottom. As he watched, Guzman continued drinking. [II RT 37-38.]

Jesus Vazquez, the subject of count 2, also denied having consumed any alcoholic beverage in the premises, and testified he made the same denial on the night in question. He also volunteered to take an alcohol breath test, and was taken up on his offer. When the results of the test showed the presence of alcohol, Vazquez

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[4] Officer Ruiz was the undercover officer who observed the consumption by the four individuals as to whom the Administrative Law Judge (ALJ) sustained the charge of the accusation. It would appear that the ALJ placed considerable weight on his testimony, in each case, that he observed the individual consuming beer. The Corona bottle, a distinctive clear white, is readily recognizable. Given this, appellant's chain of custody argument, with respect to these counts, need not be addressed.

Ruiz also testified with respect to one of the intoxicated patron counts.

testified, he remembered that he had consumed three beers at work before coming to La Sierra [1 RT 46].

Officer Ruiz testified that he observed Vazquez, who was seated three tables away, also consuming an amber-colored liquid from a bottle labeled "Corona." Vazquez also appeared to Ruiz to be under the age of 21.

Maria Gonzalez, the subject of count 3, testified that she was accompanied to the premises by her aunt, and that each of them consumed only water. No one else sat at their table, she testified, and there were no beer bottles on the table.

Officer Ruiz, on the other hand, testified that, as with the previous two minors, he saw Gonzalez drink an amber-colored liquid from a clear glass bottle labeled Corona. [II RT 45].

Ruiz further testified that he brought each of these three minors, and the bottles from which they consumed, to a designated area where the minors were being detained and the evidence collected, under the supervision of officers specifically assigned to that task. He placed the bottles, together with each person's name, into a box being used to hold the evidence. [II RT 52.]

The fact that the testimony of officer Ruiz and that of the three minors involved in counts 1, 2, and 5 is in sharp conflict is not a concern of the Board. The ALJ resolved the conflict in favor of the officer, and, unless the Board can conclude that the testimony of the officer was inherently incredible, that is the end of it under the rule governing witness credibility. The evidence establishes that there was consumption by each of the three minors.

The more serious issue appellant raises is his contention that, as to each

instance, there must be evidence that the licensee's employee had either actual or constructive notice of the occurrence of a violation, i.e., consumption by a minor, before a finding of a violation can be made. Otherwise, contends appellant, when the ALJ based his findings solely upon officer Ruiz's testimony that he saw the minors drinking, he imposed a strict liability standard on appellant, contrary to the holding in Laube v. Stroh (1992) 2 Cal.App. 4th 364 [3 Cal.Rptr.2d 779].

Department counsel argued at the hearing [IV RT 127, 156] that there is an affirmative duty placed upon the licensee to ensure there is no consumption by minors, citing Mercurio v. Department of Alcoholic Beverage Control (1956) 144 Cal.App.2d 626 [301 P.2d 474].

Mercurio, which did not involve minors at all, addressed the issue whether proof that the licensee "knowingly" permitted waitresses to accept alcoholic beverages was required under Business and Professions Code §24200 and Department Rule 143. Holding that it was not, the court found it immaterial that while the accusation alleged the permitting was done "knowingly," there was no proof of that. In reaching the result it did, the court cited and distinguished Endo v. Board of Equalization (1956) 143 Cal.App.2d 395 [300 P.2d 366], on the ground that, in that case, the statute specifically required that the act be done knowingly:

> "There the court was dealing with section 24200.5 (a), Business and Professions Code, which expressly requires that the licensees 'permitting' the illegal sale of narcotics must be 'knowingly' done. The very fact that rules and laws providing for violations for which disciplinary action may be taken, provide that some violations must be 'knowingly' done and as to others the word 'knowingly' is omitted, indicates that in the latter cases there is no requirement that the violations be knowing ones."

Section 25658, subdivision (d) provides that any on-sale licensee "who knowingly

permits a person under the age of 21years to consume any alcoholic beverage in the on-sale premises" is guilty of a misdemeanor, whether or not he or she knows the person is a minor. Penal Code §7, subdivision 5, defines the word "knowingly" as used in the Penal Code:

> "The word 'knowingly' imports only a knowledge that the facts exist which bring the act or omission within the provisions of this code. It does not require any knowledge of the unlawfulness of such act or omission."

This definition has remained unchanged since its enactment in 1872. Thus, if the accusation had been pled under §25658, subdivision (d), the consumption charges would fail, since there is no evidence that any employee of appellant observed the consumption by the three minors.[5]

The Department, in other cases, has contended that it need not base its accusation on §25658, subdivision (d). Instead, it contends that the minor's violation of subdivision (b) was permitted by the licensee, and, under Business and Professions Code §24200, subdivision (b), "the causing or permitting of a violation" is a ground for suspension or revocation.

Appellant contends, in effect, that this is liability without fault.

It is certainly true that Laube v. Stroh (1992) 2 Cal.App.4th 364 [3 Cal.Rptr.2d 779] rejected the concept of strict liability - liability without fault -as well as the notion that a licensee can have permitted something of which he had no

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[5] "The term 'knowingly' means 'with knowledge,' and when used in a prohibitory statute is usually held to refer to a knowledge of the essential facts; and from such knowledge of the facts the law presumes a knowledge of the legal consequences arising from the performance of the prohibited act." (People v. Plumerfelt (1939) 35 Cal.App.2d 495 [96 P.2d 190, 192].)

knowledge.[6] The proof of this is found in such statements as these:

> "The Attorney General contends that knowledge of 'permitted' behavior is not required, and that neither petitioner took sufficient preventive measures because drug transactions did occur. We disagree with both contentions. Having examined in detail the historical antecedents of McFaddin, we respectfully conclude that the the Board's interpretation of McFaddin is incorrect, and leads to unwarranted liability without fault ..." (2 Cal.App.4th at page 371.)
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> "The concept that one may permit something of which he or she is unaware does not withstand analysis." (2 Cal.App.4th at page 373.)
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> "We respectfully differ with the Board's perception of McFaddin and its antecedents, and hold that a licensee must have knowledge, either actual or constructive, before he or she can be found to have 'permitted' unacceptable conduct on a licensed premises. It defies logic to charge someone with permitting conduct of which they are not aware. It also leads to impermissible strict liability of liquor licensees when they enjoy a constitutional standard of good cause before their license - and quite likely their livelihood - may be infringed by the state." (2 Cal.App.4th at page 377.)

But, in holding that there must be "actual or constructive" knowledge before there can be a finding that a licensee permitted unacceptable conduct, the court left room for cases where, although proof of actual knowledge may not be present, circumstances might warrant inferring the existence of such.[7]

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[6] Laube v. Stroh is most frequently cited for the following proposition: "The Marcucci case perhaps states it best. A licensee has a general, affirmative duty to maintain a lawful establishment. Presumably this duty imposes upon the licensee the obligation to be diligent in anticipation of reasonably possible unlawful activity, and to instruct employees accordingly. Once a licensee knows of a particular violation of the law, that duty becomes specific and focuses on the elimination of the violation. Failure to prevent the problem from recurring, once the licensee knows of it, is to 'permit' by a failure to take preventive action."

[7] "Constructive ... Inferred - often used in law of an act or condition assumed from other acts or conditions which are considered by inference or by public policy

This is such a case. Appellant is aware that the problem of minors consuming alcoholic beverages in the premises is an on-going problem: "We have to monitor all the time" [IV RT 106].

Victor Garcia, a security guard, testified that of the five security guards, two are stationed at the door, one searching for weapons, the other checking proof of drinking age. Patrons able to demonstrate that they are over the age of 21 receive a stamp, without which they may not purchase an alcoholic beverage. The remaining two security guards patrol the premises on the lookout for minors who may be drinking.

> Q: And when you're patrolling the inside of the premises, what did Mr. Meza tell you your duties were?
>
> A. Make sure minors are not drinking.
>
> Q. Okay. Is there a problem with minors drinking?
>
> A. Yes, there is.
>
> ...
>
> Q. Now, is there a problem with [minors] inside the premises drinking alcoholic beverages who don't have a hand stamp?
>
> A. Yes. [IV RT 26-27.]

In the six months Garcia had worked at the premises prior to the night in question, he had personally been required on six occasions to remove minors who had been drinking, and had observed other security guards doing so on four or five occasions. [IV RT 28-29.] Joyce Padilla, a waitress, testified that she had observed minors drinking in the premises on three or four occasions during the preceding year,

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as amounting to or involving the act or condition assumed." (Webster's Third New International Dictionary (Unabridged) (1986), p.489.)

but denied any were doing so on the night of the raid. It was her practice to first warn the minor, and remove the alcoholic beverage, and, if the minor again drank, he or she would be banished from the premises.

There was no testimony that any minor had been ejected from the premises on the night in question.

The awareness of appellant and his security personnel that consumption by minors was an on-going problem would appear to invoke the language of Laube v. Stroh to the effect that its recurrence can be said to been the result of a failure to take preventive action.

With as many as 80 minors immersed in a crowd of 300 to 400 patrons, and drinks of all varieties being served, the circumstances are ripe for minors to gain access to alcoholic beverages, either from servers who fail to check for the hand stamp, or adult patrons who furnish the alcoholic beverage to the minor. With only two security guards patrolling the interior of the premises, it is understandable that such conduct could escape their notice.

This does not mean there is no role in the Department's enforcement scheme for §25658, subdivision (d), and its requirement of knowing permission. That section is more like an arrow pointed at a specific target, while the more general combination of §24200, subdivision (b), and §25658, subdivision (b), can be directed at cases such as this, where public policy demands a higher level of vigilance when an on-sale general licensee caters to a clientele heavily made up of minor patrons.[8]

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[8] It is noteworthy that the ALJ found that "nowhere in the evidence during the transactions set forth in the accusation is there anything to indicate that the waitresses paid the slightest attention to whether the ordering or consuming patron

For these reasons, we believe that the Department's decision as to these counts must be sustained.

Count 11 (Sale, service or furnishing to a minor)

Maria Rodriguez, 20 years of age on the night in question, testified that she and three other friends, who were over the age of 21, were asked to present identification before being admitted to the premises. She stated that the identification she provided showed her true birth date and contained a red stripe that said "21 in 1999." Nevertheless, her hand was stamped to indicate she was over 21 years of age. [I RT 89.] She said her friends ordered Corona beer, but she ordered water, and she denied consuming any beer. She explained the presence of a bottle of Corona beer placed in front of her as belonging to her dance partner, who left it there when they went to dance.

The ALJ deemed her testimony lacking of credibility, finding that she had made conflicting statements to a police officer (to whom she said she did not have any identification) and a security guard (that she did), and whether she was 21 (said to the security guard) or 20 (said to the officer.)[9]

Appellant contends it is the testimony of the police officer which is unreliable,

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appeared to be a minor either by appearance of by the absence of a hand stamp." (Finding of Fact 4.)

[9] Police officer Edwin Dominguez testified that he observed Rodriguez and a male companion seated together at a table. He heard each of them order a Corona beer from waitress Patricia Munoz, and saw Rodriguez consume some of the beer. He seized both bottles when the uniformed officers came in, and retained Rodriguez's bottle after she admitted to him she was not 21, and told him she had no identification. [I RT 165-169.]

pointing to discrepancies in his testimony regarding such things as whether he was wearing his glasses on the night in question, and the brand of beer he was drinking, or where he might have been sitting at some time during the evening. Appellant also claims that since officer Dominguez did not have control over the bottle seized from Rodriguez, the chain of custody is not reliable.

The ALJ, who saw and heard the witnesses, deemed the officer's testimony credible. It is not the Board's province to substitute its judgment of credibility for that of the trier of fact.

The ALJ also found that the systemized handling of the bottles and glasses which were seized and marked satisfied the requirements of a chain of custody. Also, the fact that officer Dominguez heard Rodriguez order a Corona beer, and be served a bottle of Corona beer, is sufficient to establish that she was served an alcoholic beverage. (See Mercurio v. Department of Alcoholic Beverage Control (1956) 144 Cal.App.2d 626 [301 P.2d 474, 481].)

II

Appellant contends, as to one of the counts charging service of an alcoholic beverage to an obviously intoxicated patron, that the waitress who served one of the patrons had no opportunity to observe the symptoms of intoxication observed by the police officer. As to the other count, appellant also contends the bartender had no opportunity to observe the symptoms of intoxication described by officer Vargas.

Alonzo Rodriguez

Officer Ruiz testified that while talking with his partners, and looking in the

direction of the dance floor, he observed Rodriguez "dancing in a quite particular, wild manner." Rodriguez's dancing was very different from that of the other dancers, and he was constantly losing his balance, using his dance partner to regain his balance. After a minute or two, Rodriguez sat down at a table, and Ruiz sat down next to him. According to Ruiz, Rodriguez displayed symptoms of intoxication, including slurred speech, red and watery eyes, and carrying on a loud and boisterous conversation. At about the time Ruiz began to form his opinion as to the state of Rodriguez's intoxication, Rodriguez stood up, lost his balance, and had to use the table to steady himself. At this point, Ruiz concluded that Rodriguez was intoxicated.

Ruiz testified further that a waitress, identified as Joyce Padilla, was standing about five feet away, monitoring tables in the area. Ruiz observed no reaction from Padilla when Rodriguez had attempted to stand. Rodriguez then called her over and ordered a beer, which she served to him.

Joyce Padilla, the waitress, testified that she was told by a police officer that she was charged with serving liquor to a person who was already intoxicated. She denied any recollection of having done so, and demonstrated her awareness of some of the symptoms of intoxication she had been trained to be alert to. Padilla also claimed that when she asked who it was she had served, the officer pointed to a table where no one was sitting. She was then told it was a man being escorted from the premises in handcuffs, but she could see only his back.

Daniel Araconez

Officer Vargas testified that his attention was drawn to Araconez, described by Vargas as a male Hispanic, short in stature, when he heard him talking to the bartender

in a very loud and slurred voice, while holding a beer in his hand. Araconez would turn to the dance floor and back to the bartender while talking, and swayed from side to side. It was this swaying which caught Vargas' attention. When Vargas approached Araconez, Araconez greeted him with "all right, brother," or "don't worry, brother,"and attempted to shake his hand but missed the first time, then completed a handshake. Vargas said Araconez's eyes were red and bloodshot and his voice slurred. At this point, Vargas concluded that Araconez was intoxicated and should not be served any more drinks.

However, according to Vargas, when Araconez finished the beer he was holding, he ordered, and was served another, by the same bartender to whom he had been speaking when Vargas observed the symptoms of intoxication to which he testified.

The bartender, Sergio Fernandez, testified that he had no recollection of serving anyone who was drunk, and claimed the police officer who told him he had done so refused to point out the intoxicated person he allegedly had served. Vargas, on the other hand, claimed that he did. In fact, according to Vargas, Araconez resisted the officers and was handcuffed.[10]

The law demands that a licensee use substantial efforts in maintaining a lawfully-conducted business. (Givens v. Department of Alcoholic Beverage Control (1959) 176 Cal.App.2d 529 [1 Cal.Rptr. 446, 450].)

The term "obviously" denotes circumstances "easily discovered, plain, and evident" which place upon the seller of an alcoholic beverage the duty to see what

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[10] Appellant's brief set forth as an issue that Araconez was not intoxicated, but did not discuss the point thereafter.

is easily visible under the circumstances. (People v. Johnson (1947) 81 Cal.App.2d Supp. 973 [185 P.2d 105].) Such signs of intoxication may include bloodshot or glassy eyes, flushed face, alcoholic breath, loud or boisterous conduct, slurred speech, unsteady walking, or an unkempt appearance. (Jones v. Toyota Motor Co. (1988) 198 Cal.App.3d 364, 370 [243 Cal.Rptr. 611].)

Based upon the testimony of officer Vargas, the bartender, who remained behind the bar the whole time, was in a position to see what was easily visible, and should have been aware of Araconez's intoxicated state. Although appellant claims Fernandez was busy serving other patrons, neither Fernandez nor Vargas so testified.

Similarly, from where the waitress was standing, Rodriguez's "wild" dancing and his near fall when attempting to stand should have alerted her to the fact that he was intoxicated, had she been as observant as the law requires,

The intoxication counts must be sustained.

ORDER

The decision of the Department is affirmed.[11]

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

Board Member Ray T. Blair, Jr., did not participate in the deliberation of this appeal.

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

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