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

AB-9323
File: 47-433052 Reg: 11076170

MAINSTREET ENTERPRISES, dba Killarney
209 Main Street, Huntington Beach, CA 92648,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: November 7, 2013
Los Angeles, CA

ISSUED DECEMBER 18, 2013

Mainstreet Enterprises, doing business as Killarney (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked its on-sale general public eating place license, with the order of revocation conditionally stayed subject to one year of discipline-free operation, and suspended appellant's license for 30 days, for an employee having aided and abetted narcotics transactions, three of which occurred within the premises, constituting violations of Health and Safety Code sections 11351 and 11352, in conjunction with Business and Professions Code sections 24200, subdivision (a), and 24200.5, subdivision (a).

Appearances on appeal include appellant Mainstreet Enterprises, appearing through its counsel, Michael L. Schack, and the Department of Alcoholic Beverage

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[1]The decision of the Department, dated October 22, 2012, is set forth in the appendix.

Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on February 15, 2006. The Department instituted an accusation against appellant on December 16, 2011, charging illegal drug sales on the licensed premises. The accusation charged that appellant's employee, Brynn Boucher, permitted the possession of cocaine on the licensed premises, aided and abetted sales of cocaine, and that appellant permitted the sale and negotiations for the sale of cocaine to undercover Department agents.

An administrative hearing was held on August 21 and 22, 2012. Testimony concerning the violations charged was presented by Department undercover agents Dolisa Perez and Vic Duong, and Huntington Beach undercover police officers Jaime Lopez and Brian Jones. Their testimony concerned the actions taken by Boucher to facilitate narcotics sales to one of them while they, unknown to her, were engaged in an investigation of possible sales of narcotics. Their testimony established that single sales of cocaine took place in the premises on March 25, April 13, and May 11, 2011. The seller in the sales which occurred in the premises was Victor Davis. Another sale to the agents, arranged by Davis, occurred elsewhere on May 11, 2011, by an individual named Miguel. Boucher provided Davis' phone number to the agents who asked her for it and later saw Davis on the premises drinking and conversing with the agents.

Appellant's bartenders, Erin Neel and Cameron Magallanes, and its president, secretary and treasurer, Craig Glatzhofer, testified on behalf of appellant. All three testified that appellant had a zero-tolerance policy with respect to drugs or drug transactions on the premises, and about enforcement steps taken in furtherance of that

policy, including the firing of Boucher upon learning of her arrest. No evidence was presented indicating that any employee other than Boucher was involved in the transactions that gave rise to the accusation or that any employee was aware of what Boucher was doing.

The evidence established that appellant's servers on the premises are sent to the Department's LEAD training, that the security guards must obtain a guard card, that security guards are sent to the guard card training, and that appellant pays its employees to attend the LEAD and guard card classes.

Subsequent to the hearing, the Department issued its decision which determined that the charges of the accusation had been established.

Appellant filed a timely notice of appeal which raises the following issues: (1) appellant was denied due process by the Department's failure to identify its witnesses as required by Government Code section 11507.6; (2) the decision is based on an improper legal standard of strict liability; and (3) there is not substantial evidence to support a finding that respondent knowingly permitted drug sales in the licensed premises.

BACKGROUND

This appeal presents an issue similar to that recently addressed by this Board in *Zartosht, Inc*. (July 31, 2013) AB-9295, petition for writ of review denied October 10, 2013, dealing with whether a licensee may suffer a suspension based on the unlawful conduct of an employee committed on the premises but without the knowledge of the licensee. The factual setting in this case, a police narcotics sting, is quite different from

that in *Zartosht, Inc*., so the answer to the question of whether or not imputation of the employee's conduct to the licensee was reasonable and legal is not necessarily the same as it was in *Zartosht, Inc*.

The nine-count accusation alleges that, on three separate dates, appellant's employee, Brynn Boucher, permitted a patron, Victor Davis, to possess a controlled substance, cocaine, on the premises (counts 1, 4, and 7); that Boucher was an aider or abettor in the selling or furnishing, or the offering to sell or furnish a controlled substance, cocaine (counts 2, 5, and 8); and appellant knowingly permitted the illegal sale or negotiations for sales of controlled substances or dangerous drugs upon the licensed premises (counts 3, 6, and 9).

All nine counts were sustained by the Department.

Appellant raises three issues: (1) appellant was denied due process by the Department's failure to identify its witnesses as required by Government Code section 11507.6; (2) the decision is based on an improper legal standard of strict liability; and (3) there is not substantial evidence to support a finding that respondent knowingly permitted drug sales in the licensed premises.

Standard of Review.

We pattern our review on the standards employed by the court of appeals:

> Our review "is limited to a determination of whether the Department has proceeded without or in excess of its jurisdiction; whether the Department has proceeded in the manner required by law; whether the Department's decision is supported by its findings; whether those findings are supported by substantial evidence; or whether there is relevant evidence which, in the exercise of reasonable diligence could not have been produced or was improperly excluded at the hearing before the Department." [Citations.]

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

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

DISCUSSION

I

Appellant contends that the Department failed to identify its witnesses as required by Government Code section 11507.6.[2]

Appellant's brief asserts that the Department produced documents in response to its 11507.6 request, but did not identify any witnesses. (App.Br. at p. 7.) In subsequent productions the Department produced two crime lab reports. One day before the commencement of the hearing, the Department transmitted a letter stating it intended to call as a witness Officer D. Kosky of the Huntington Beach Police

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[2]Section 11507.6 states, in pertinent part:

> After initiation of a proceeding in which a respondent or other party is entitled to a hearing on the merits, a party, upon written request made to another party, prior to the hearing and within 30 days after service by the agency of the initial pleading or within 15 days after the service of an additional pleading, is entitled to (1) obtain the names and addresses of witnesses to the extent known to the other party, including, but not limited to, those intended to be called to testify at the hearing . . . .

Department. Appellants moved to exclude all witnesses the Department intended to call on the ground that their names had not been furnished.

The ALJ refused to exclude any Department witnesses on two grounds; first, by custom and practice, the production of documents containing the names of those persons participating or involved in the investigation was sufficient compliance with section 11507.6, and those documents were produced; and second, appellant could have filed a motion to compel production of the names of witnesses, but made a decision not to do so. The ALJ also offered to entertain a motion for a continuance if, after the Department presented its evidence, appellant's counsel felt it needed time to prepare. No motion for continuance was made.

While the ALJ's remarks concerning a "custom and practice" sounds like it could be an underground regulation, we do not believe appellant can claim it was prejudiced by it. Had it filed a motion to compel an actual list of names, the motion might well have been granted. Indeed, a simple phone call to the Department might have resulted in a list of names. There was no contention that the pertinent names were not readily available from the documents which were produced.

Based on his remarks at the hearing, it would appear that appellant's counsel made a strategic decision to hold his silence until the commencement of the hearing, and then move, as he did, to exclude all the Department's witnesses:

> THE COURT: Okay. Now, first of all, there are rules for discovery. And if, in fact, you're not satisfied with the -- either party is not satisfied with the responses to a request to produce, then there's a procedure whereby you file a motion to compel answers.
>
> And there's certain times when you can do that. Did you file a motion to compel? Because that's supposed to be done prior to the Hearing, not wait until the Hearing.

> Mr. SCHACK: I was satisfied with his answers, which included no witnesses.
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> THE COURT: Okay.
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> Mr. SCHACK: I figured if he wasn't intending on producing witnesses, that made my job easier.
>
> THE COURT: Okay.
>
> Mr. SCHACK: That's not my responsibility to tell him he needs to produce the names of witnesses.

[RT 14-15.]

Aside from some criticism of the way the first names of some of the witnesses were abbreviated, appellant has not demonstrated anything to suggest its ability to defend was prejudiced by its having to cull the names of witnesses from the documents it was given. The names of the four witnesses the Department called were in the agents' and police officers' reports. It is much more likely that, if appellant did feel it might be prejudiced, it would have addressed that concern. We think appellant waived any claim of prejudice by its inaction.

II and III

Appellant contends the record lacks substantial evidence of "good cause" supporting the ALJ's decision to revoke (stayed for three years) and suspend (for 30 days) its license. "Good cause," appellant contends, requires evidence that it "knew" or had "knowledge" of the acts charged — i.e., "aiding and abetting" by its employee waitress of the sale of cocaine by a non-employee acquaintance of hers to undercover officers acting as patrons in a "sting" operation — and this was not shown. The Department argues, consistent with the ALJ's decision, that "substantial evidence" exists to support violations of Business & Professions Code sections 24200 and 24200.5 (a)

because the illegal acts of the employee waitress "can be imputed" to the licensee "and were properly attributed to [it] in this instance." The ALJ found that "since...the waitress was appellant's employee, the waitress' on-premises knowledge and misconduct are imputed to the [appellant]." (FF 22

Both parties cite and rely upon *Laube v. Stroh* (1992) 2 Cal.App.4th 364 [3 Cal.Rptr.2d 779], emphasizing different parts of that opinion. We find *Laube* instructive because it deals with facts analogous to those presented here and analyzes legal and public policy reasons underlying application of the pertinent provision of the California Constitution and governing statutes.[3]

In *Laube*, *supra*, 2 Cal.App.4th at pp. 367-368, the Department sought to yank the liquor license of a hotel because, as here, sales of illegal drugs by a patron and an off-duty employee on the licensee's premises to undercover officers in a sting operation were proven. The Department's theory there was that the hotel had "permitted" the on-premises sale of narcotics on more than one occasion in violation of section 24200 because it did not take sufficient measures to prevent them, including, in the opinion's view, "Orwellian schemes of customer surveillance inconsistent with contemporary societal values." (*Id.* at p. 371.) The appellate court found the evidence in *Laube* "failed to establish that either the licensee's management or its employees knew" of the drug transactions, and "[n]o evidence was presented that there was ever any other drug activity on the premises or that [the licensee was] aware of any; the sole evidence of

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[3]The Department's ultimate authority derives from article XX, section 22 of the California Constitution, which provides, in part, that "[t]he department shall have the power, in its discretion, to . . . suspend . . . any specific alcoholic beverages license if it shall determine for *good cause* that the granting or continuance of such license would be contrary to public welfare or morals. . . ." (Emphasis added). The "good cause" requirement carries over into proceedings under sections 24200 and 24200.5.

narcotics activity . . . involv[ed] the undercover officers and [the seller of the cocaine]." (*Id.* at p. 368.) Significantly, in *Laube*, the licensee's employees "received no special training regarding drugs or preventative measures to control illegal transactions." (*Ibid.*)

On these facts, *Laube* reversed the Department's license suspension and this Board's affirmance thereof, holding 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.

(*Id*. at p. 377.)

Here, other than the waitress who, when asked, provided a phone number for the cocaine dealer to the undercover officers posing as patrons, there was no evidence that the licensee or any of its other employees were aware of any sales or use or possession of drugs on its premises, nor that any agent or employee ever possessed or sold any narcotics or knew that the waitress had given out the phone number of a person who sold drugs to a purported patron. In fact, the uncontradicted evidence is that the licensee here, as in *Laube*, has no record of previous disciplinary action and no alleged violations since the one at issue occurred.

In contrast to the licensee in *Laube*, however, who took no preventative measures to control illegal conduct on the premises, it is difficult to imagine what precautions the licensee here might have taken that it did not take to prevent the on-premise sale of drugs. It is undisputed that appellant had an "established policy" of "zero tolerance" toward the presence, use or sale of drugs on its premises, that he sent, at his own

expense, all his employees to the Department's Licensee Education on Alcohol and Drugs (LEAD) program for training, and that he maintains a video surveillance system of activities on the premises that he regularly monitors and reviews.

Before this incident, the video surveillance program detected an employee "acting suspiciously" respecting a possible, single drug transaction, who was then immediately fired, as was the waitress here when the licensee was first notified of her conduct by service of the accusation. Further, the uncontroverted testimony in this case is that if there is a reasonable suspicion by the licensee's trained security personnel that any potential patron is in possession of drugs, that person is not allowed on the premises or is promptly ejected therefrom. When a potential patron was refused admission onto the premises because the licensee's security personnel suspected him of drug possession, security contacted police who shortly afterwards arrested that person at nearby establishment.

Given the aforementioned evidence, it is unfair and unreasonable to "impute to the licensee" the conduct of its waitress employee in "aiding and abetting" the transaction between the undercover officers and the cocaine dealer by providing them, at their request, his telephone number. Court decisions considering whether to impute to the employer actions of employees in other contexts are instructive in this regard. Here the waitress's illegal conduct was in direct contravention of her express conditions of employment. "[T]he normal rules regarding imputation of agent behavior to the principal would probably not allow imputation when the conduct falls outside the agent's scope of employment." (V.S. Khanna, *Corporate Criminal Liability: What Purpose Does it Serve?* (1996) 109 Harv. L.Rev. 1477, 1484 fn. 37; see also, *Bouton v. BMW of N. Am., Inc*. (3d Cir. 1994) 29 F.3d 103, 108 [refusing to hold employer liable for supervisor's actions

because they were outside the cloak of the employee's authority].) Nor was the waitress either a "supervising" or "managerial" employee of the licensee, so it is especially troublesome to infer constructive knowledge on the part of the employer-licensee for this employee's wrongful conduct. (See, e.g., *Faragher v. Boca Raton* (1998) 524 U.S. 775, 802 [118 S.Ct. 2275, 2290] ["[I] makes sense to hold an employer vicariously liable for . . . conduct of a supervisor . . . ."]; *Karibian v. Columbia Univ*. (2d Cir. 1994) 14 F.3d 773, 779 [finding that the correct standard of employer liability for employee misconduct under Title VII depends upon the supervisory level of the alleged harasser].) Neither is imputation to the employer warranted on the ground that illegal drug transactions on the premises were "pervasive," as the licensee's unblemished record up to the time of this incident shows. (See, e.g., *Robinson v. Jacksonville Shipyards, Inc.* (M.D. Fla. 1991) 760 F. Supp. 1486, 1531 [determining that sexually harassing behavior was "too pervasive to have escaped the notice of a reasonably alert management"]; see also Jeannie Sclafani Rhee, *Redressing for Success: The Liability of Hooters Restaurant for Customer Harassment of Waitresses* (1998) 20 Harv. Women's L.J. 163, 173, fn. 51 [citing *Robinson* and advising that "[g]enerally, if harassment is pervasive, courts find that the employer has the requisite knowledge"].)

Imputation of licensee knowledge under the circumstances of this case does not comport with the required element of "good cause" the Department must meet before it can revoke or suspend a liquor license. (Cf. *King Stop, Inc.* (2000) AB-7520 and *Zartosht* (2013) AB-9295.) "The term 'good cause' is not susceptible of precise definition. In fact, its definition varies with the context in which it is used. Very broadly, it means a legally sufficient ground or reason for a certain action." (*Zorrero v. Unemployment Ins. Appeals*

Bd. (1975) 47 Cal.App.3d 434, 439 [120 Cal.Rptr. 855].) Whether there is "good cause" within the context of sections 24200 and 24200.5 is a question of law and the answer is found in the facts of each case, not in the abstract. (*Ibid*; *MacGregor v. Unemployment Ins. Appeals Bd.* (1984) 37 Cal.3d 205, 209 [207 Cal.Rptr. 823].) One court has stated that the phrase "good cause," "as used in a variety of contexts, . . . [has] been found to be difficult to define with precision and to be largely relative in [its] connotation, depending upon the particular circumstances of each case. [Citations.]" (*R.J. Cardinal Co. v. Ritchie* (1963) 218 Cal.App.2d 124, 144 [32 Cal.Rptr. 545].) "[T]he essential ingredients of ['good cause' are] reasonable grounds and good faith." (*Id.* at p. 145.)

Laube and its progeny teach that the determination of "good cause" for the revocation or suspension of a liquor license requires more than an automatic, mechanical extrapolation of wrongful employee conduct onto the employer; it requires some evidence of the employer's *knowledge* of the wrongful conduct before that imputation can reasonably be made. Based on the undisputed evidence here, there is no sound reason to apply the rule of imputed or constructive knowledge, especially when doing so would produce the very end *Laube* countenances against: application of a rule of strict liability on the licensee for employee wrongdoing.[4]

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[4]We recognize that *Laube* involved an "off-duty" employee engaged in illegal drug transactions on the premises, but here the waitress who "aided and abetted" the on premises drug transaction did so "on-duty." While being an "off-duty" employee may arguably defeat any extrapolation of "imputed knowledge" on the part of the licensee-employer and with it vicarious liability, the mere fact of illegal conduct on premises by an "on-duty" employee does not by itself constitute imputed knowledge to the employer-licensee. Otherwise, as *Santa Ana Food Market, Inc.*, *supra*, 76 Cal.App.4th at p. 575 explained, making

> "the single criminal act [by the employee] . . . sufficient to justify the suspension [of the license] because [the employee's] knowledge of her own criminal act [would be] imputed to the [employer-licensee,] . . .

(continued...)

The "constructive knowledge" rule for liquor licensees apparently arose to prevent them from staying away from the premises to avoid responsibility for wrongful acts occurring there. (See *Mantzoros v. State Bd. of Equalization* (1948) 87 Cal.App.2d 140, 144 [196 P.2d 657] [contrary rule would allow owner to avoid responsibility for alcohol sales made after closing time].) It also may exist to encourage licensees to monitor their employees and patrons and to relieve the ABC from proof problems. And it may, as we have seen, be employed when there is evidence of "pervasive" illegal actions on the premises. But these purposes are not served where, as shown by the evidence here, the licensee was regularly on (and supervised) the premises, took great measures to deter criminal activity (particularly with respect to drugs) by employees through education and video surveillance, was unaware of the employee's wrongful act until after the fact, and, until this incident, had an unblemished record with respect to Departmental discipline. (See *Santa Ana Food Market, Inc. v. ABC Appeals Bd*. (1999) 76 Cal.App.4th 570, 575-576 [90 Cal.Rptr.2d 523] [act by an on-duty employee of liquor licensee of illegally purchasing food stamps at half their face value did not warrant suspension of liquor license where licensee had taken strong steps to prevent and deter such crime and was unaware of employee's action before the fact].)

That the evidence here militates against an imputation of (constructive)

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[4](...continued)
border[s] on the kafkaesque. Using the same reasoning, the [employer's] license would be suspended if [the employee] had robbed it or embezzled from it. Although protection of the public, not punishment, is the goal of constitutional and statutory provisions, the [employer] would suffer a de facto punishment for being a victim. The [employer] was not a direct victim of the [drug] sale, but it neither benefitted in any way from the crime nor had any knowledge of the act. The [employer] took strong measures to prevent the act, and [the employee] was terminated immediately after it occurred."

knowledge by the licensee based upon the wrongful conduct of its employee is also buttressed by section 24200 itself. This statutory provision must be read in its entirety in context with the "good cause" requirement of Cal. Const., art. XX, § 22,[5] and all its sections harmonized with each other[6] and with other statutes in *pari materia*[7] with it to avoid absurd results in its application.[8] Subdivisions (a) through (f) of section 24200 provide "the grounds that constitute a basis for the suspension or revocation of a license." Subsections (e) and (f) specify that these "grounds" include the "[f]ailure to take reasonable steps to correct objectionable conditions on the licensed premises," should a public enforcement officer or attorney elect to proceed against the licensee for maintaining a "public nuisance" in violation of Penal Code § 373a. Subdivision (f)(2) specifies that an "objectionable condition means . . . drug trafficking" and subsection (f)(3)(A) and (B) that "reasonable steps means . . . [c]alling the local law enforcement agency . . . [and] [r]equesting those persons engaging in activities causing objectionable conditions to cease those activities . . . ."[9] Obviously, the Department and

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[5]"[W]e look first to the words of the statute, giving them their ordinary meaning and *construing them in context*." (*Fitch v. Select Products Co.* (2005) 36 Cal.4th 812, 818 [115 P.3d 1233], emphasis added.)

[6]Every "statute should be construed with reference to the whole system of law of which it is a part so that all may be harmonized and have effect." (*Stafford v. Los Angeles County Employees' Retirement Bd.* (1954) 42 Cal.2d 795, 799 [270 P.2d 12].)

[7]"It is a basic canon of statutory construction that statutes in *pari materia* should be construed together so that all parts of the statutory scheme are given effect." (*LEXIN v. Superior Court* (2010) 47 Cal.4th 1050, 1090 [222 P.3d 214].)

[8]"Rules of statutory construction require courts to construe a statute to promote its purpose, render it reasonable, and *avoid absurd consequences*." (*Ford v. Gouin* (1992) 3 Cal.4th 339, 348 [11 Cal. Rptr.2d 30], emphasis added.)

[9]Only subsection (f), which applies to "objectionable conditions that occur during

(continued...)

local law enforcement elected not to proceed with a "public nuisance" notice to the licensee under Penal Code § 373a, but to instead proceed against it by "accusation." Nonetheless, under well-established canons of statutory construction, the factors pertinent to determining whether grounds exist for suspension or revocation of a license in a "public nuisance" proceeding are relevant in determining whether to do the same when proceeding by accusation.

Reading section 24200 in its entirety and harmonizing it with the "good cause" requirement applicable to all suspension and revocation proceedings, it is germane to the licensee's defense that he called local law enforcement when aware of drugs on his premises and promptly terminated an employee suspected of engaging in or furthering such behavior.

At oral argument the Department claimed all the above mentioned evidence is only relevant to mitigation of the penalty, not the violation itself. We disagree. Evidence of a licensee's knowledge, whether actual or constructive, of illegal conduct on its premises goes both to proof of the substantive violations alleged and whether

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[9](...continued)
business hours on any public sidewalk abutting a licensed premises," defines "objectionable conditions" and "reasonable steps." Nonetheless, the language of that section echoes that of subsection (e), which applies to "objectionable conditions on the licensed premises, including the immediately adjacent areas . . . owned, leased, or rented by the licensee." Thus the definitions in subsection (f) for identical words and phrases used in subsection (e), which applies to the licensee herein, govern. The rule of *ejusdem generis* instructs that "when a statute contains a list or catalogue of items, a court should determine the meaning of each by reference to the others, giving preference to an interpretation that uniformly treats items similar in nature and scope." (*Bernard v. Foley* (2006) 39 Cal.4th 794, 806–807 [139 P.3d 1196].) This canon "applies whether the specific words follow general words in a statute or vice versa. In either event, the general term or category is "restricted to those things that are similar to those which are enumerated specifically. [Citation.]" (*International Federation of Professional and Technical Engineers, Local 21, AFL–CIO v. Superior Court* (2007) 42 Cal.4th 319, 342 [165 P.3d 488].)

"good cause" has been shown for suspension or revocation, as well as to mitigation of the penalty. *Laube* and other authorities we have cited herein underscore the principle that evidence is not hermetically cabined in these kinds of cases, that it can and often does have bearing on both the accusation of substantive violations and the penalties sought. Assume *arguendo*, however, that the Department is correct in its contention that the factors we have discussed apply solely to mitigation of the penalty. The facts of this case, then, call for the stay applied in *Joseph's of Calif. v. Alcoholic Bev. etc. Appeals Bd.* (1971) 19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183]: "On the facts as found, a 100 percent stay of the suspension order should be enough to insure that the licensee maintains a strict control over future employees; actual suspension was neither necessary nor proper." We note that the purpose of a penalty in these cases is to ensure future compliance with applicable law, not to place a business in financial jeopardy for an isolated transgression.

Lastly, *cui bono*? The record, taken as a whole, does not reveal for whose benefit the entire matter was conducted. Certainly, not the licensee, the waitress, or the general public. The licensee (though he prevails) bore the onerous burden and cost of defense. The waitress lost her job. And the general public does not appear to have gained when the Huntington Beach Police Department used "at least" ten (10) uniformed officers to arrest and take into custody an unarmed waitress for "aiding and abetting" an illegal transaction by providing undercover officers the phone number of the person who then arranged to sell them cocaine. This seems not only an excessive use of force but a misallocation of public funds.

For these reasons we reverse and annul the decision of the Department and the

ALJ and order that the matter not be remanded to the Department for further proceedings.

ORDER

The decision of the Department is reversed.[10]

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

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

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