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

AB-9783
File: 48-582812; Reg: 18086872

COSTANZOS GENCO OLIVE OIL COMPANY, INC.,
dba Sidelines Sports Bar
732 9th Street,
Arcata, CA 95521-6206,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Alberto Roldan

Appeals Board Hearing: August 16, 2019
Sacramento, CA

ISSUED AUGUST 26, 2019

Appearances: *Appellant:* Gillian Garrett, of Hinman & Carmichael LLP, as counsel for Costanzos Genco Olive Oil Company, Inc.,

Respondent: Colleen R. Villarreal, as counsel for the Department of Alcoholic Beverage Control.

OPINION

Costanzos Genco Olive Oil Company, Inc., doing business as Sidelines Sports Bar, appeals from a decision of the Department of Alcoholic Beverage Control[1] revoking its license because appellant's employees permitted patrons to possess controlled substances in the licensed premises, and permitted the sale, or negotiation for sale, of

[1]The decision of the Department, dated November 27, 2018, is set forth in the appendix.

controlled substances in the licensed premises, in violation of Business and Professions Code section 24200, subdivisions (a) and (b) and section 24200.5, subdivision (a); as well as Health and Safety Code sections 11350, 11351, and 11352.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on August 8, 2017. One of the principals of the corporation, Salvatore Costanzo, was the owner of the licensed premises as a sole proprietor for 25 years prior to incorporation. There is no record of departmental discipline against the current license.

On May 2, 2018 the Department instituted a 13-count accusation against appellant charging that on three separate occasions — October 6, 2017, November 30, 2017, and January 25, 2018 — appellant's employees permitted patrons to possess controlled substances in the licensed premises, and permitted the sale and/or negotiation for sale of control substances in the licensed premises.

At the administrative hearing held from September 25, 2018 through September 28, 2018, documentary evidence was received and testimony concerning the violations charged was presented by Department Agents Samantha Scott and Chandler Baird; Humboldt County Drug Task Force Investigator Alan Aubuchon; California Highway Patrol Officer Darren Drefke; Eureka Police Department Officer Brian Wilson; Arcata Police Department Officer Luke Scown; Arcata City Manager Karin Diemer; former Arcata Police officer Vincent O'Conner; Humboldt County Supervisor Rex Bohn; Eureka city employee and former Arcata Police officer John Drake Goodale; bartenders Jesus Trejo, and Ashlee Marie Parker; appellant's CEO/President Salvatore Costanzo; former Arcata Police Chief Tom Chapman; and appellant's Vice-President and bar manager Michael Costanzo.

Testimony established that on four separate occasions, Agent Scott went to the licensed premises in an undercover capacity accompanied by one or more Department agents or undercover task force officers. On three of these visits, she observed the activities underlying the accusation.

Counts 1-4:

On October 6, 2017, at approximately 7:30 p.m., Agent Scott entered the licensed premises in an undercover capacity accompanied by two other undercover officers. She sat at the bar and ordered a drink from the bartender, Mykie Rae Bastidas, and began a conversation with a young man sitting next to her at the bar, Ryan Johnston. Scott told Johnston she was having trouble finding "white," a slang term for cocaine. Johnston asked Bastidas for help in finding "white girl," another slang term for cocaine.

Officer Branson sat on the other side of Johnston, ordered a beer from Bastidas, and joined the conversation. They were joined by a patron with the last name King. Branson asked for his help in obtaining cocaine. King said he could find a hookup and sent a text message. Scott, Johnston, King, and Branson posed for a photo. Scott later cropped the photo to remove herself and Branson. (Exh. D-4.) King and Johnston then left the licensed premises.

Another bartender began to tend bar, Jesus Jay Trejo. He asked Scott if she wanted a drink and she told him she and Branson were waiting for someone to connect them with cocaine. Trejo said "be careful." While waiting, Scott spoke to Bastidas about King and asked if she knew him. Bastidas said "he's a regular, he's fine."

King and Johnston returned at approximately 9:40 p.m. and Scott asked them if they "got it." Johnston handed Scott a small square baggie containing a white powdery

substance. Scott took the baggie and asked the price. Initially Johnston offered it for free, then said it cost $80. Scott negotiated a price of $40, which she paid. She took the baggie to the bathroom and took a picture of it. (Exh. D-7.) She then exited via the rear door where she gave the baggie to Agent Miller to be booked into evidence.

No Counts:

Agent Scott returned to the licensed premises on November 8, 2017 and ordered a drink from the bartender, Nicole Taylor Costanzo (N. Costanzo) — an officer and secretary of the appellant corporation, and daughter of Salvatore Costanzo. Scott spoke to a patron next to her at the bar and to N. Costanzo about obtaining cocaine. N. Costanzo told Scott that her guy had just left. Scott departed the licensed premises and no counts arose from this visit.

Counts 5-9:

On November 30, 2017, Scott returned to the licensed premises at approximately 8:45 p.m., accompanied by Agent Bernstein. Scott ordered a drink from bartender Bastidas. She saw an individual in the premise, Elijah Calvin Browning, from whom she had previously purchased narcotics at another premises, and began to talk to him. Bernstein also entered the conversation. Scott observed N. Costanzo and Bastidas talking and Bastidas looking flustered before the two of them went outside. Trejo took over as bartender.

Scott asked Browning if he had cocaine. The conversation moved outside, where they observed Bastidas on her knees, in distress, and appearing to be under the influence. She said to them, "I'm so fucked up." Scott and Browning went back inside where Scott negotiated the purchase of cocaine for $100 per ounce. Browning spoke to another patron in the premises who handed something to him. He returned to Scott

and held out one baggie in each hand. Scott took one and Bernstein took the other and they each paid Browning $100. During this transaction, Bastidas had returned to bartending. Scott and Bernstein exited the premises and the baggies were turned over to Agent Miller to be booked into evidence. (Exh. D-13.)

Counts 10-13:

Scott returned to the premises on January 25, 2018, late in the evening with two other undercover officers. She had previously purchased cocaine from Browning at another establishment, and had agreed to meet at the premises to purchase more. Bastidas was working as the bartender while Scott and Browning met in the premises and she paid him $100 in exchange for a baggie which appeared to contain cocaine. He also invited her to come to the home of Bastidas later to "party." Scott exited the premises and turned the baggie over to Agent Miller to be booked into evidence.

The administrative law judge (ALJ) submitted his proposed decision on November 2, 2018, sustaining all counts of the accusation and recommending that the license be revoked. The Department adopted the proposed decision in its entirety on November 26, 2018, and a Certificate of Decision was issued on November 27, 2018.

Appellant then filed a timely appeal raising the following issues: (1) the decision is not supported by substantial evidence, and the Department failed to meet its burden of proof, (2) the Department erred when it denied the motion to continue the administrative hearing, (3) the Department failed to provide notice and discovery required by law when the ALJ allowed the amendment of the accusation, and (4) the penalty is excessive.

DISCUSSION

I

Appellant contends the decision is not supported by substantial evidence, and that the Department failed to offer sufficient evidence to meet its burden of proof.

This Board is bound by the factual findings in the Department's decision so long as those findings are supported by substantial evidence. The standard of review is as follows:

> 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 [an appellate] 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. [Citations.] The function of an appellate board or Court of Appeal is not to supplant the trial court as the forum for 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.

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

When findings are attacked as being unsupported by the evidence, the power of this Board begins and ends with an inquiry as to whether there is substantial evidence, contradicted or uncontradicted, which will support the findings. When two or more competing inferences of equal persuasion can be reasonably deduced from the facts, the Board is without power to substitute its deductions for those of the Department—all conflicts in the evidence must be resolved in favor of the Department's decision. (*Kirby v. Alcoholic Bev. Control Appeals Bd.* (1972) 25 Cal.App.3d 331, 335 [101 Cal.Rptr. 815]; *Harris v. Alcoholic Beverage Control Appeals Board* (1963) 212 Cal.App.2d 106 [28 Cal.Rptr.74].)

Therefore, the issue of substantial evidence, when raised by an appellant, leads to an examination by the Appeals Board to determine, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. The Appeals Board cannot disregard or overturn a finding of fact by the Department merely because a contrary finding would be equally or more reasonable. (Cal. Const. art. XX, § 22; Bus. & Prof. Code § 23084; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113]; Harris, *supra*, at 114.)

Appellant argues that the Department did not prove the violations — i.e., that the decision is not supported by substantial evidence and that the Department failed to meet its burden of proof. (AOB at pp. 11-12; 16.) However, these allegations are simply broad assertions — unsupported by specific citations to the record.

To demonstrate error, appellant must present meaningful legal analysis supported by citations to authority and citations to facts in the record that support the claim of error. Where a point is merely asserted without any argument or authority for the proposition, it is deemed to be without foundation and requires no discussion by a reviewing court. (*Atchley v. City of Fresno* (1984) 151 Cal.App.3d 635, 647 [199 Cal.Rptr. 72].) Appellant has provided no support for its argument that the accusation is not supported by substantial evidence.

Section 24200.5, subdivision (a) provides, in relevant part:

> Notwithstanding the provisions of Section 24200, the department shall revoke a license upon any of the following grounds:
>
> (a) If a retail licensee has knowingly permitted the illegal sale, or negotiations for the sales, of controlled substances or dangerous drugs upon his or her licensed premises. *Successive sales, or negotiations for sales, over any continuous period of time shall be deemed evidence of permission.*

(Bus. & Prof. Code § 24200.5(a), emphasis added.)

In *Endo v. State Bd. of Equalization* , the court of appeals interpreted the latter sentence of section 24200.5(a) as a "statutory presumption that [successive] sales over any continuous period of time shall be deemed evidence of such permission" and, therefore, furnished substantial evidence "that the licensee did 'knowingly permit' the illegal sale of narcotics upon her licensed premises." (*Endo v. State Bd. of Equalization* (1956) 143 Cal.App.2d 395, 399 [300 P.2d 366], internal quotations omitted.) In a footnote, it emphasized that section 25200.5(a) "is in form at least a *legislative* mandate," one that the Board may not even have authority to review under the California constitution. (*Id.* at p. 399, fn., emphasis in original.) Ultimately, the court held that a statutory presumption — as opposed to an inference — cannot be "dispelled by evidence produced by the opposite party." (*Id.* at p. 400, citing *Engstrom v. Auburn Auto. Sales Corp.* (1938) 11 Cal.2d 64, 70 [77 P.2d 1059].)

In *Kirchhubel v. Munro*, on the other hand, the court did allow that "[t]he presumption is not made conclusive but merely evidence of permission which may be overcome by a contrary showing." (*Kirchhubel v. Munro* (1957) 149 Cal.App.2d 243, 249 [308 P.2d 432].) Though the petitioners in that case presented evidence which created a conflict with the presumption, "[t]he resolving of that conflict was a matter for the Department of Alcoholic Beverage Control, whose action thereon cannot be upset . . . if there is substantial evidence to support it." (*Ibid.*, citing *Covert v. State Bd. of Equalization* (1946) 29 Cal.2d 125 [173 P.2d 545].)

The *Kirchhubel* court also noted the substantial policy justifications for such a presumption:

> Having in mind that the power to regulate the liquor business is a very broad one, there is a natural and rational evidentiary relationship between

> a showing that there have been successive sales of narcotics over a continuous period on licensed premises and the very natural conclusion that the sales could not have continued without the implied or express consent of the licensee. Moreover, a licensee holds his liquor license with the knowledge that he must effectively police his premises against successive sales of narcotics thereon . . . . Such a situation cannot occur if the licensee is vigilant in protecting his license and is at least as interested in protecting the public welfare and morals as he is in making money.

(*Ibid.*)

In sum, the legislature has provided, in the second sentence of section 24200.5(a), a statutory presumption that successive sales of controlled substances on a licensed premises establishes permission by the licensee. Appellant presented little evidence to counter this presumption. This case is precisely the sort of circumstance the presumption of permission in section 24200.5(a) was intended to remedy — a licensee who takes minimal preventative measures and then defends against repeated narcotics sales on its premises by pleading it was not aware. We must therefore conclude that permission was implicitly given.

As the court of appeals stated in *McFaddin San Diego 1130, Inc. v. Stroh*,

> It is not necessary for a licensee to knowingly allow its premises to be used in a prohibited manner in order to be found to have permitted its use. [Citation.] Further, the word "permit" implies no affirmative act. It involves no intent. It is mere passivity, *abstaining from preventative action*. [Citations.]

(*McFaddin San Diego 1130, Inc. v. Stroh* (1989) 208 Cal.App.3d 1384, 1389-1390 [257 Cal.Rptr. 8], internal quotations omitted, emphasis in original.) The policy reasons for this general rule are evident: otherwise, a licensee could escape discipline simply by absenting himself from the premises and maintaining a practiced state of ignorance. In a case involving after-hours sales, the court of appeals observed:

> The licensee, if he elects to operate his business through employees must be responsible to the licensing authority for their conduct in the exercise of

> his license, else we would have the absurd result that liquor could be sold by employees at forbidden hours in licensed premises and the licensee would be immune to disciplinary action by the board. Such a result cannot have been contemplated by the Legislature.

(*Mantzoros v. State Bd. Of Equalization* (1948) 87 Cal.App.2d 140, 144 [196 P.2d 657].) It would defy reason and the mandate of the state constitution to interpret the law in a manner that rewards licensees for distancing themselves from the operation of their premises.

In *Laube v. Stroh*, the court noted: "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." (*Laube v. Stroh* (1992) 2 Cal.App.4th 364 [3 Cal.Rptr.2d 779].) The court expressly held that "a licensee must have knowledge, either actual or constructive, before he or she can be found to have 'permitted' unacceptable conduct." (*Ibid.*) Notably, this holding does not demand *actual* knowledge on the part of appellant's corporate officers — it explicitly allows for *constructive* knowledge.

It is well-settled in alcoholic beverage case law that an employee's on-premises knowledge and misconduct is imputed to the licensee/employer. (See *Yu v. Alcoholic Bev. Control Appeals Bd.* (1992) 3 Cal.App.4th 286, 295 [4 Cal.Rptr.2d 280]; *Kirby v. Alcoholic Bev. Control Appeals Bd.* (1973) 33 Cal.App.3d 732, 737 [109 Cal.Rptr. 291].) Indeed, earlier in *Laube*, the court observed that the factual discussion not subject to review on appeal included "the element of the licensee's knowledge of illegal and improper activity on his or her premises; this knowledge may be either actual knowledge *or constructive knowledge imputed to the licensee from the knowledge of his or her employees.*" (*Id.* at p. 367, citing *Fromberg v. Dept. of Alcoholic Bev. Control*

(1959) 169 Cal.App.2d 230, 233-234 [337 P.2d 123] and *Endo*, *supra*, 143 Cal.App.2d at pp. 401-402].)

In the instant case, the accusation is supported by substantial evidence. The knowledge and on-premises misconduct of appellant's employees is imputed to the appellant, and constitutes substantial evidence to support the accusation.

II

Appellant contends the Department erred when it denied appellant's motion to continue the administrative hearing until after potential criminal charges against appellant's intended witnesses could be resolved. It maintains it was denied due process and an opportunity to present a defense as a result of being deprived of the testimony of these witnesses. (AOB at pp. 15-16.)

Pursuant to Government Code section 11524, the ALJ may grant a request for continuance for good cause. The party requesting a continuance must show that good cause exists for granting the request. There is no absolute right to a continuance; one is granted or denied at the discretion of the ALJ, and a refusal to grant a continuance will not be disturbed on appeal unless it is shown to be an abuse of discretion. (*Cooper v. Board of Medical Examiners* (1975) 49 Cal.App.3d 931, 944 [123 Cal.Rptr. 563]; *Savoy Club v. Board of Supervisors* (1970) 12 Cal.App.3d 1034, 1038 [91 Cal.Rptr. 198]; *Givens v. Department of Alcoholic Beverage Control* (1959) 176 Cal.App.2d 529, 532 [1 Cal.Rptr. 446].)

The "power to determine when a continuance should be granted is within the discretion of the court, and there is no right to a continuance as a matter of law. [Citation.]" (*Mahoney v. Southland Mental Health Associates Medical Group* (1990) 223 Cal.App.3d 167, 170 [272 Cal.Rptr. 602].) One court offered the following guidance:

> In exercising the power to grant continuances in an administrative proceeding, an administrative law judge must be guided by the same principles applicable to continuances generally in adjudicative settings: continuances should be granted sparingly, nay grudgingly, and then only on a proper and adequate showing of good cause. In general, a continuance for a short and certain time is less objectionable than a continuance for a long and uncertain time, and there must be a substantial showing of necessity to support a continuance into the indefinite future. But the factors that influence the granting or denying of a continuance in any particular case are so varied that the judge must necessarily exercise a broad discretion. Since it is impossible to foresee or predict all of the vicissitudes that may occur in the course of a contested proceeding, the determination of a request for a continuance must be based upon the facts and circumstances of the case as they exist at the time of the determination.

(*Arnett v. Office of Admin. Hearings* (1996) 49 Cal.App4th 332 [56 Cal.Rptr.2d 774].)

In the instant case, appellant maintains it was "deprived of crucial witness testimony because key witnesses . . . whose testimony was not available from other sources, asserted their Fifth Amendment rights." (AOB at p. 15.) Appellant contends that the denial of its request to continue the hearing until after the criminal matters were resolved deprived it of due process and the opportunity to defend itself. (*Id.* at p. 16.)

While we sympathize with appellant's dilemma — namely, that its employees did not wish to incriminate themselves prior to their criminal trials, and therefore asserted their fifth amendment rights — this does not constitute good cause for a continuance. An administrative hearing is not automatically continued or abated when a criminal action involving the same transaction is pending against the same party. (*Savoy Club v. Board of Supervisors* (1970) 12 Cal.App.3d 1034, 1037, [91 Cal.Rptr. 198].) Specifically, when an administrative case is heard prior to a trial or completion of criminal charges arising from the same occurrence, this has been found not to infringe on the constitutional rights of the accused. (*Id.* at p. 1038.)

We find no error.

III

Appellant contends the Department failed to provide notice and discovery required by law when the ALJ allowed the accusation to be amended. (AOB at pp. 17-18.)

The amendment that the ALJ permitted was the correction of an incorrect date in the accusation. (RT at p. 7.) The ALJ remarked that it was clear to him that the charges were grouped by date, and that this one was clearly out of place. [See Count 7 of the accusation: "October 6" changed to "November 30." Counts 6 and 8 refer to November 30.]

As the Department notes in its reply brief, appellant was not prejudiced in any way by this amendment, since it merely corrected the accusation to conform to the data included in the police report which was provided to appellant prior to the hearing. (RRB at p. 16.)

The burden is on the party seeking reversal of an administrative agency's decision to affirmatively show that the alleged error was prejudicial, i.e., that it is reasonably probable he or she would have received a more favorable result at trial had the error not occurred. (*Citizens for Open Government v. City of Lodi* (2012) 205 Cal.App.4th 296, 308 [140 Cal.Rptr.3d 459].)

Appellant has not shown how it was prejudiced by the amendment of the accusation to correct a scrivener's error. We do not find the correction to be an error at all, since appellant suffered no prejudice as a result.

IV

Appellant contends the penalty is excessive. (AOB at p. 20.)

This Board may examine the issue of excessive penalty if it is raised by an

appellant (*Joseph's of Cal. v. Alcoholic Bev. Control Appeals Bd.* (1971) 19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183]), but will not disturb the Department's penalty order in the absence of an abuse of discretion. (*Martin v. Alcoholic Bev. Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) If the penalty imposed is reasonable, the Board must uphold it even if another penalty would be equally, or even more, reasonable. "If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within its discretion." (*Harris v. Alcoholic Bev. Control Appeals Bd.* (1965) 62 Cal.2d 589, 594 [43 Cal.Rptr. 633].)

Rule 144 provides that "[d]eviation from [the Penalty Guidelines] is appropriate where the Department *in its sole discretion* determines that the facts of the particular case warrant such deviation — such as where facts in aggravation or mitigation exist." (Cal. Code Regs., tit. 4, § 144, emphasis added.)

Moreover, the Penalty Policy Guidelines further address the discretion necessarily involved in an ALJ's recognition of aggravating or mitigating evidence:

> **Penalty Policy Guidelines:**
>
> The California Constitution authorizes the Department, in its discretion[,] to suspend or revoke any license to sell alcoholic beverages if it shall determine for good cause that the continuance of such license would be contrary to the public welfare or morals. The Department may use a range of progressive and proportional penalties. This range will typically extend from Letters of Warning to Revocation. These guidelines contain a schedule of penalties that the Department usually imposes for the first offense of the law listed (except as otherwise indicated). These guidelines are not intended to be an exhaustive, comprehensive or complete list of all bases upon which disciplinary action may be taken against a license or licensee; nor are these guidelines intended to preclude, prevent, or impede the seeking, recommendation, or imposition of discipline greater than or less than those listed herein, in the proper exercise of the Department's discretion.

The ALJ devotes several paragraphs to a discussion of the penalty:

> PENALTY
>
> The Department requested that the Respondent's license be revoked given the severity of the violations and the statutory requirement set forth in section 24200.5. The Respondent primarily argued that the evidence was insufficient to sustain the accusations. If the narcotics related counts were sustained, the Respondent argued for the court to consider the mitigating circumstances of the Respondent's efforts to avoid the conduct alleged.
>
> Section 24200.5 provides that "the [D]epartment shall revoke a license" for any violation thereof. The Department has consistently construed this section as requiring some form of revocation although not necessarily outright revocation.[fn.] Outright revocation[fn.] or stayed revocation[fn.] can be appropriate depending upon the circumstances.
>
> In the present case, outright revocation is warranted. The Respondent had an affirmative obligation to ensure that the Licensed Premises was operated in full compliance with the law. The Respondent did not. The illegal activity at issue here—repeated drug sale negotiations resulting in repeated sales of cocaine to undercover officers with the knowledge and permission of employees clearly warrants revocation given the lax approach to management of the Licensed Premises evinced in this case. There is no indication that the Respondent took the appropriate steps to prevent such activity even after being put on repeated notice that there were severe problems with drug activity in the Licensed Premises.
>
> The penalty recommended herein complies with rule 144.[fn.]

(Decision, at p. 17.)

The Board may not disturb a penalty order unless it is so clearly excessive that any reasonable person would find it to be an abuse of discretion in light of all the circumstances. While the penalty here is technically within the bounds of the Department's discretion, we note that it is exceptionally harsh — given the Department's position that the licensee is not permitted to sell the business and transfer the license, and in light of the ALJ's failure to acknowledge numerous factors in mitigation. Accordingly, we believe it is so clearly excessive that any reasonable person would find it to be an abuse of discretion in light of all the circumstances.

Although the Department's discretion with respect to the penalty is broad, it does not have absolute and unlimited power. It is bound to exercise legal discretion, which is, in the circumstances, judicial discretion. (*Martin, supra* at p. 875.) In *Martin* this court stated, "The term 'judicial discretion' was defined in *Bailey v. Taaffe* (1866) 29 Cal. 422, 424, as follows: 'The discretion intended, however, is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised ex gratia, but a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice.'"
(*Harris, supra* at pp. 594-595.)

This Board's review of a penalty looks to see whether the penalty can be considered reasonable, and, if it is reasonable, the Board's inquiry ends there. In the instant case, however, we do not believe the penalty is reasonable, particularly in light of a very substantial factor in mitigation — namely, length of licensure — which the ALJ ignores entirely.

While revocation may ultimately be required by statute, we believe it constitutes an abuse of discretion for a licensee with such a long history of licensure — 25 years as a sole proprietor, prior to incorporating under the current license in 2017 — to be entirely deprived of the opportunity to sell the business and transfer the license. We believe it constitutes an abuse of discretion to disregard this substantial mitigating factor and other efforts undertaken by appellant (see AOB at p. 20) such as: terminating the offending employees, removing Ms. Costanzos as an officer of the corporation, increasing training for employees, increasing security measures, and installing surveillance cameras.

We believe that fundamental fairness and the ends of substantial justice require that the Department reconsider the penalty imposed in this matter in order to consider why these factors should not have afforded appellant some measure of mitigation — at a minimum, the ability to sell the business and transfer the license.

ORDER

The decision of the Department is hereby remanded for reconsideration of the penalty in light of the above discussion.[2]

SUSAN A. BONILLA, CHAIR
MEGAN McGUINNESS, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[2]This order of remand is filed in accordance with Business and Professions Code section 23085, and does not constitute a final order within the meaning of Business and Professions Code section 23089.

APPENDIX

BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA

IN THE MATTER OF THE ACCUSATION AGAINST: COSTANZOS GENCO OLIVE OIL COMPANY, INC. SIDELINES SPORTS BAR 732 9TH STREET ARCATA, CA 95521-6206 ON-SALE GENERAL PUBLIC PREMISES LICENSE	EUREKA DISTRICT OFFICE File: 48-582812 Reg: 18086872 **CERTIFICATE OF DECISION**

Respondent(s)/Licensee(s)
Under the Alcoholic Beverage Control Act

It is hereby certified that, having reviewed the findings of fact, determination of issues, and recommendation in the attached proposed decision, the Department of Alcoholic Beverage Control adopted said proposed decision as its decision in the case on November 26, 2018. Pursuant to Government Code section 11519, this decision shall become effective 30 days after it is delivered or mailed.

Any party may petition for reconsideration of this decision. Pursuant to Government Code section 11521(a), the Department's power to order reconsideration expires 30 days after the delivery or mailing of this decision, or if an earlier effective date is stated above, upon such earlier effective date of the decision.

Any appeal of this decision must be made in accordance with Business and Professions Code sections 23080-23089. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005, or mail your written appeal to the Alcoholic Beverage Control Appeals Board, 1325 J Street, Suite 1560, Sacramento, CA 95814.

On or after January 7, 2019, a representative of the Department will contact you to arrange to pick up the license certificate.

Sacramento, California

Dated: November 27, 2018

RECEIVED
NOV 27 2018
Alcoholic Beverage Control
Office of Legal Services

Matthew D. Botting
General Counsel

BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA

IN THE MATTER OF THE ACCUSATION AGAINST:

Costanzos Genco Olive Oil Company, Inc. DBA Sidelines Sports Bar 732 9th Street Arcata, California 95521-6206 Respondent	File: 48-582812 Reg.: 18086872 License Type: 48 Page Count: 455 Reporter: Carli McKenny-CSR #14086 Atkinson Baker
On-Sale General Public Premises License	**PROPOSED DECISION**

Administrative Law Judge Alberto Roldan, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Eureka, California from September 25, 2018 through September 28, 2018.

Colleen Villarreal, Attorney, represented the Department of Alcoholic Beverage Control (Department).

Patrick Griego, Attorney, represented Respondent Costanzos Genco Olive Oil Company, Inc., a corporation (Respondent).

The Department seeks to discipline Respondent's license pursuant to thirteen allegations in the accusation on the grounds that:

(1) On or about October 6, 2017 Respondent-Licensee's agent or employee Mykie Bastidas permitted patron(s) to possess, within the premises, a controlled substance, to-wit: cocaine, in violation of California Health and Safety Code section 11350;
(2) On or about October 6, 2017 Respondent-Licensee's agent or employee Mykie Bastidas permitted Ryan Johnston aka "RJ", to possess, within said premises, a controlled substance, to-wit: cocaine, for purposes of sale, in violation of California Health and Safety Code section 11351;

(3) On or about October 6, 2017 Respondent-Licensee(s) knowingly permitted the illegal sale, or negotiations for the sale, of controlled substances or dangerous drugs upon the licensed premises in violation of California Business and Professions Code section 24200.5(a);

(4) On or about October 6, 2017 Respondent-Licensee's agent or employee Mykie Bastidas permitted Ryan Johnston, aka "RJ", to sell, furnish, or offer to sell or furnish, within the premises, a controlled substance, to-wit: cocaine, in violation of California Health and Safety Code section 11352;

(5) On or about November 30, 2017 Respondent-Licensee's agent or employee Mykie Bastidas permitted patron(s) to possess, within the premises, a controlled substance, to-wit: cocaine, in violation of California Health and Safety Code section 11350;

(6) On or about November 30, 2017 Respondent-Licensee's agent or employee Mykie Bastidas permitted Elijah Calvin Browning to possess, within said premises, a controlled substance, to-wit: cocaine, for purposes of sale, in violation of California Health and Safety Code section 11351;

(7) On or about November 30, 2017 Respondent-Licensee(s) knowingly permitted the illegal sale, or negotiations for the sale, of controlled substances or dangerous drugs upon the licensed premises in violation of California Business and Professions Code section 24200.5(a);

(8) On or about November 30, 2017 Respondent-Licensee's agent or employee Mykie Bastidas permitted Elijah Calvin Browning to sell, furnish, or offer to sell or furnish, to Agent Scott, within the premises, a controlled substance, to-wit: cocaine, in violation of California Health and Safety Code section 11352;

(9) On or about November 30, 2017 Respondent-Licensee's agent or employee Mykie Bastidas permitted Elijah Calvin Browning to sell, furnish, or offer to sell or furnish, to Agent Bernstein, within the premises, a controlled substance, to-wit: cocaine, in violation of California Health and Safety Code section 11352;

(10) On or about January 25, 2018 Respondent-Licensee's agent or employee Mykie Bastidas permitted patron(s) to possess, within the premises, a controlled substance, to-wit: cocaine, in violation of California Health and Safety Code section 11350;

(11) On or about January 25, 2018 Respondent-Licensee's agent or employee Mykie Bastidas permitted Elijah Calvin Browning to possess within said premises, a controlled substance, to-wit: cocaine, for purposes of sale, in violation of California Health and Safety Code section 11351;

(12) On or about January 25, 2018 Respondent-Licensee(s) knowingly permitted the illegal sale, or negotiations for the sale, of controlled substances or dangerous drugs upon the licensed premises in violation of California Business and Professions Code section 24200.5(a); and

(13) On or about January 25, 2018 Respondent-Licensee's agent or employee Mykie Bastidas permitted Elijah Calvin Browning to sell, furnish, or offer to sell or furnish, to Agent Scott, within the premises, a controlled substance, to-wit: cocaine, in violation of California Health and Safety Code section 11352.

In each of the above thirteen allegations in the accusation, the Department further alleged that there is cause for suspension or revocation of the license of the Respondent in accordance with section 24200 and sections 24200(a) and (b) of the Business and Professions Code and that the continuance of the license of the Respondent would be contrary to public welfare and/or morals as set forth in Article XX, Section 22 of the California State Constitution and sections 24200(a) and (b) of the Business and Professions Code. (Exhibit D-1)

Oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the hearing. The matter was argued and submitted for decision on September 28, 2018.

FINDINGS OF FACT

1. The Department filed the accusation on May 2, 2018. (Exhibit D-1)

2. The current configuration of the license for the Licensed Premises as a corporation has been in place since August 8, 2017 but the Licensed Premises was previously owned by Salvatore Costanzo (S. Costanzo) for many years prior to the change to a corporation. S. Costanzo is one of the principals of the corporation. The Respondent also holds a type 48 license for Toby and Jacks, a type 48 establishment located two businesses to the left of the Licensed Premises at 764 9th Street in Arcata, California. (Exhibit D-2) There is no record of prior departmental discipline against the Licensed Premises.

3. In September 2017, Department Agent Samantha Scott (Scott) began an assignment as part of a team investigating complaints of narcotics activity made against the Licensed Premises. As part of this investigation, a decision was made to utilize Scott and other undercover officers working as part of the Humboldt County Narcotics Task Force to investigate these allegations. Scott had been a Department agent for 1½ years and had prior experience as a Placer County Sheriff's deputy and correctional officer before joining the Department as an agent.

4. During her academy training, Scott received narcotics training. In addition, she received approximately 100 hours of field and course work related to narcotics investigations. From this training, Scott learned to recognize how illicit drug transactions

occurred and became familiar with the appearance and packaging of various controlled substances sold in face to face transactions and the common jargon used to describe controlled substances in street transactions.

5. On October 6, 2017 at approximately 7:30 p.m., Scott entered the Licensed Premises in an undercover capacity. Another undercover officer from the task force accompanied her and a separate officer had previously entered to act in an internal rescue capacity if there was a need. Scott sat at the fixed bar on a barstool. The Licensed Premises was not crowded and Scott was able to select a seat. A bartender who was later identified as Mykie Rae Bastidas (Bastidas) took a drink order from Scott. (Exhibit D-3) Bastidas interacted with various patrons in a bartender capacity while Scott sat at the bar. A youthful looking white male entered the Licensed Premises and sat next to Scott at the bar. Bastidas and the youthful looking male interacted at the bar. Scott and the male, who was later identified as Ryan Johnston (Johnston) began a conversation while Scott was seated at the bar and in the immediate presence of Bastidas.

6. Scott was making small talk with Johnston and they began to discuss marijuana. Scott then mentioned that she had trouble finding "white" which was a slang term for cocaine. Johnston agreed with what Scott said and then said they should find some. Johnston asked Bastidas for help in obtaining "white girl" which was another slang term used for cocaine. Bastidas responded to Johnston that the person she knew was out of town. During this time, Officer Branson (Branson) from the Humboldt County task force sat on the other side of Johnston and ordered a beer from Bastidas. Scott and Johnston began to interact with Branson. A Hispanic looking person with the last name of King (King) entered the Licensed Premises and came over to the area where Scott, Johnston and Branson were at the bar. Branson and King spoke and Branson asked King for help in obtaining cocaine. King said he could find a "hookup" and that he could also provide "acid" and marijuana that he had at his residence. The conversations among Scott, Branson, Johnston and King all occurred in normal conversational tones. Bastidas continued to tend bar in the area while they were speaking. After the request for cocaine by Branson, Scott saw King using his phone to send a text message. Scott remarked to the group that she wanted to take a selfie before "we get high." Scott, Johnston, King and Branson posed for the photo. Scott later cropped the photo to remove herself and Branson from it. (Exhibit D-4)

7. King and Johnston left the Licensed Premises. Scott and Branson remained seated at the fixed bar with the understanding that King and Johnston would return with cocaine. Scott saw another bartender enter the fixed bar area and began to tend bar. The bartender was later identified as Jesus Jay Trejo (Trejo). Trejo asked Scott if she wanted a drink. During this conversation, Scott remarked to Trejo that she was waiting for someone to connect her and Branson with cocaine. Trejo responded "be careful" to this remark.

While waiting for King and Johnston to return, Scott spoke with Bastidas about King and asked her if she knew him. Bastidas called him "Jorge" and then said "He's a regular. He's fine."

8. King and Johnston returned to the Licensed Premises at approximately 9:40 p.m. and approached Scott and Branson at the fixed bar. Bastidas was tending bar on the other side when they approached. Scott asked King and Johnston if they "got it." Johnston handed Scott a small, square baggie with a white, powdery substance in it. Scott took the baggie from Johnston and asked him for the cost. Johnston remarked that it cost $80. Johnston initially tried to offer the baggie to Scott for free. Scott negotiated a price of $40 which she paid to Johnston. Johnston told Scott to go use some of the baggie in the bathroom of the Licensed Premises. Scott took the baggie into the bathroom and took a picture of it. (Exhibit D-7) Scott notified the safety team that she had completed a transaction. Scott then left the Licensed Premises by the rear door. She met with Department Agent David Miller (Miller) and handed him the baggie to book into evidence. Scott then departed. Miller had been the team member tasked with receiving and booking evidence during the investigation. Miller booked the baggie and its contents into evidence.

9. Scott returned to the Licensed Premises on November 8, 2017. When Scott approached the fixed bar area, she recognized the bartender on duty as Nicole Taylor Costanzo (N. Costanzo) from a review of the Respondent's Department file and from Department of Motor Vehicle records. (Exhibit D-8) The Department records of the Licensed Premises identified N. Costanzo as an officer and the Secretary of the corporation that held the license of the Licensed Premises. Scott ordered a drink from N. Costanzo. A male at the bar identified himself as "Dylan" (Dylan) to Scott. Dylan spoke with Scott about marijuana. During this conversation Scott remarked that she had trouble finding cocaine. Dylan responded that he could get "pure white" for Scott. Scott noticed that N. Costanzo seemed to be aware of their conversation. Scott said to N. Costanzo that Dylan said he could get "pure white." N. Costanzo asked "white what?" to which Scott stated "cocaine." N. Costanzo nodded in response and then told Scott that her guy just left. N. Costanzo made this remark in reference to a person that supplied her with cocaine. Scott and Costanzo then planned on meeting again at the Licensed Premises. N. Costanzo provided Scott with information about her work schedule. During this discussion, N. Costanzo joked about knowing the boss. N. Costanzo is the daughter of Salvatore Costanzo (S. Costanzo) and sister of Michael Costanzo (M. Costanzo), two of the other principals in the corporation that owns the Licensed Premises and Toby and Jacks. Scott departed the Licensed Premises shortly after this conversation.

10. Scott returned to the Licensed Premises on November 30, 2017 at approximately 8:45 in the evening. She was accompanied by Department Agent Bernstein (Bernstein) and

both were in an undercover capacity. Bastidas was again bartending. Scott ordered an alcoholic beverage from Bastidas. Scott saw a person she had previously identified as Elijah Calvin Browning (Browning) in the Licensed Premises. (Exhibit D-9) N. Costanzo had previously introduced Scott to Browning at Toby and Jacks. That previous introduction had led to Scott purchasing narcotics from Browning. Scott and Browning began to talk. During this conversation, Scott saw N. Costanzo talking with Bastidas. Bastidas appeared flustered and went outside with N. Costanzo.

11. Bernstein entered the conversation with Browning and Scott while they were at the fixed bar. Trejo then began to bartend at the fixed bar after Bastidas went outside with N. Costanzo. Scott asked Browning if he had cocaine. During Scott's interaction with Browning, the discussion about purchasing cocaine dropped off when they moved outside of the Licensed Premises for a short period. They wound up finding Bastidas outside of the Licensed Premises on her knees appearing to be in distress and under the influence. Bastidas remarked "I am so fucked up" during this event. After seeing Bastidas, Browning called her "Mykie" in a conversation with Scott. The conversation about the purchase later began again. Inside of the Licensed Premises, Bernstein and Scott negotiated the purchase of one gram of cocaine each for $100 a gram after Scott asked if it was still $100. Browning responded to this, "Of course."

12. Scott saw Browning interact with another patron in the Licensed Premises. Scott saw this individual hand something to Browning. Browning and this patron then approached Scott and Bernstein at the fixed bar. Trejo was working at the bar and Bastidas returned from outside and began working again when this occurred. Browning pulled out two baggies and held out the baggies with one in each outstretched hand. Scott then remarked in a joking way, "Does it matter which one I take?" Browning then laughed. Scott took one of the baggies and held it up. Bernstein took the other baggie from Browning. Scott remarked to Browning, "You're the best. Thanks a million." Scott and Bernstein paid Browning $100 each for the two baggies that were provided by Browning. During the transaction for the baggies, Bastidas had returned to working just on the other side of the fixed bar. Scott and Bernstein departed the Licensed Premises at approximately 10 p.m. on November 30, 2017. The baggie that Scott received was turned over to and booked into evidence by Miller. (Exhibit D-11) The baggie that Bernstein received was also given to Miller and booked into evidence by Miller. (Exhibit D-13)

13. Scott reentered the Licensed Premises on January 25, 2017 in the late evening. She was with two other officers who were acting in an undercover capacity. She had earlier negotiated a purchase of cocaine from Browning and had planned to meet him at the Licensed Premises. Scott observed that Bastidas was one of the bartenders working in the Licensed Premises that evening. Scott and Browning met to complete their transaction in

the middle of the Licensed Premises. Scott paid Browning $100 in cash. Browning handed Scott a baggie in exchange for the $100. Scott and Browning made small talk during the transaction. During this conversation, Browning invited Scott and her companions to Bastidas' home later that evening to "party". At one point during the drug transaction, a security guard for the Licensed Premises bumped into and past Scott. The guard had no further interaction with Scott or Browning. Scott, during her multiple visits to the Licensed Premises, regularly saw guards carding patrons upon entry and providing security for the Licensed Premises. Scott was never approached by security for the Licensed Premises during any of the transactions that occurred from the start of the investigation through the January 25, 2018 transaction. Scott departed the Licensed Premises with the baggie just after midnight. Scott turned the baggie over to Miller for booking. Based on her training and experience, Scott believed that this baggie and the ones purchased on October 6, 2017 and November 30, 2017 all appeared consistent with cocaine hydrochloride which is what she had negotiated for in each of the transactions.

14. Department Agent Alan Aubuchon (Aubuchon) testified regarding the chain of custody in this matter because Miller was medically unavailable as a witness. Aubuchon is an experienced peace officer from his time as a Department agent and Eureka Police Department officer dating back to 2007. Miller was the designated receiving agent for the evidence seized during this investigation and the related investigation that occurred at Toby and Jacks during the same time period. Aubuchon was the designated second witness. Miller prepared the property receipts for the seized evidence when it was booked into the secure facility of the Eureka Police Department (EPD) that was provided for the Humboldt County Drug Task Force. (Exhibits D-19, D-20, D-21, and D-22) These receipts documented the evidence seized by Scott and Bernstein during the transactions in this matter that was subsequently booked by Miller. Aubuchon reviewed them at the time they were prepared and checked their accuracy before cosigning the property receipts. Jeremy Hunter, the EPD Property Evidence Technician, acknowledged receiving the evidence from Miller for safekeeping.

15. The narcotics that were booked in this case by Miller from the sales that occurred on October 6, 2017, November 30, 2017 and January 25, 2018 were weighed and photographically documented during the course of the investigation to enable the correlation of booked evidence with the transactions that occurred. (Exhibits D-14, D-15, D-16, D-25, D-26, D-28, and D-29) The seized narcotics were also tested by Miller using a TruNarc testing device. Because of the unavailability of Miller, Department Agent Chandler Baird (Baird) reviewed the TruNarc Scan reports that were generated by Miller and correlated them with the evidence booked. Scott also documented on January 27, 2018, via photograph, the screen from the TruNarc device Scan 291showing the test result from the test conducted by Miller that day. (Exhibit D-17)

16. The evidence established that there were four scan reports from tests conducted by Miller that corresponded with the evidence seized by Scott and Bernstein during the investigation.

- TruNarc Scan Report 241 (Exhibit D-23) corresponded with the suspected narcotics received by Scott on October 6, 2017 from Johnston. (Exhibits D-26 and D-19)
- TruNarc Scan Reports 246 and 247 (Exhibits D-30 and D-24) corresponded with the suspected narcotics received by Scott and Bernstein on November 30, 2017 from Browning. (Exhibits D-19, D-22, D-25 and D-28)
- TruNarc Scan Report 291 (Exhibit D-18 and D-17) corresponded with the suspected narcotics received by Scott on January 25, 2018 from Browning. (Exhibits D-20 and D-29)

17. California Highway Patrol Officer Darron Drefke (Drefke) testified regarding the general operation and efficacy of the TruNarc device in this matter because Miller was medically unavailable as a witness. Drefke was one of the law enforcement officers on the Humboldt County Narcotics Task Force trained and qualified to use the TruNarc device. Drefke was aware that Miller was one of the other officers on the task force trained and qualified to use the TruNarc device. Drefke explained that in his training, he learned that the TruNarc device was designed to be able to deliver lab quality test results in field applications. Drefke explained that the TruNarc device is a Raman spectroscope[1] that is capable of identifying molecules contained in a library of known samples after a laser is applied to an unknown sample. The TruNarc device is hand held and has a cone where a laser is emitted after the device is activated. The cone is placed over the sample prior to the laser being activated. The refraction from the laser applied to the sample is then automatically checked against a library of known substances. The device will report if the wavelengths refracted back from the sample match substances that have previously been documented in the device's known substances library. Common street drugs are contained in the known substances database. The device is regularly connected to a network for software updates that also update the known substances library but the device does not otherwise allow for much interaction or discretion on the part of the user. The sample that is tested is unaffected by the use of the TruNarc device. The TruNarc device

[1] Raman spectroscopy (/ˈrɑːmən/; named after Indian physicist Sir C. V. Raman) is a spectroscopic technique used to observe vibrational, rotational, and other low-frequency modes in a system. Raman spectroscopy is commonly used in chemistry to provide a structural fingerprint by which molecules can be identified. Raman spectroscopy was discovered by Sir C.V. Raman in 1928, for which he received the Nobel Prize in Physics in 1930. (http://en.wikipedia.org/wiki/Raman spectroscopy)

has a screen that shows scan results and also stores the results so that more comprehensive reports can be printed to document any field testing performed. Drefke identified Exhibit D-23 as an example of a TruNarc Scan Report that would result from a test being conducted.

18. The four TruNarc Scan Reports received in this matter had the following results:

- TruNarc Scan Report 241 (Exhibit D-23) which corresponded with the suspected narcotics received by Scott on October 6, 2017 from Johnston showed that it contained cocaine hydrochloride.
- TruNarc Scan Reports 246 and 247 (Exhibits D-30 and D-24) which corresponded with the suspected narcotics received by Scott and Bernstein on November 30, 2017 from Browning showed that they both contained cocaine hydrochloride.
- TruNarc Scan Report 291 (Exhibit D-18 and D-17) which corresponded with the suspected narcotics received by Scott on January 25, 2018 from Browning showed that it contained cocaine hydrochloride.

During the investigation, the above substances were weighed prior to their testing. Each individual sample returned a weight of at least one gram.

19. S. Costanzo testified in this matter. He testified that he was unaware of narcotics activity taking place at the Licensed Premises and that he did not condone this behavior. Because of his age and extensive health issues, (Exhibit L-3) S. Costanzo was having his son, M. Costanzo handle more of the day to day operations. The Licensed Premises and Toby and Jacks were incorporated in January 2017 and at that time N. Costanzo and M. Costanzo were added as principals in the corporation. Employees were not allowed to drink or use drugs when they were on duty. All employees who were involved in the incidents that were investigated at the Licensed Premises were terminated if they did not previously resign. S. Costanzo has removed N. Costanzo from the corporation and is in the process of trying to have her removed from the license issued by the Department.

20. Former Arcata Police Chief Tom Chapman (Chapman) was called by the Respondents as a witness. He testified to his contacts with M. and S. Costanzo as being positive and that they were responsive to concerns. Chapman testified to his impression that the Licensed Premises and Toby and Jacks were not particular problems that stood out to him.

21. M. Costanzo testified that he managed the day to day of the Licensed Premises and Toby and Jacks. Drug use or sales have never been tolerated by the Respondent. He has participated in Department LEAD training and shares those materials with employees.

(Exhibit L-5) M. Costanzo also encourages employees to participate in LEAD training when it is offered. The Licensed Premises maintains signage to remind patrons of applicable alcohol and drug laws, in particular, in relation to marijuana use. (Exhibit L-6) M. Costanzo testified to being completely blindsided by the allegations. Subsequent to the allegations in this matter and the related Toby and Jacks case, the Respondent had cameras installed at the Licensed Premises.

22. Brian Wilson (Wilson) was called by the Respondent. He is currently a police officer with the Eureka Police Department but previously served as a security officer and the head of security at the Licensed Premises and for Toby and Jacks between 2008 and 2016. He testified that the Licensed Premises had a policy of no tolerance of drug use or sales during his tenure. Persons were regularly kicked out of the Licensed Premises and Toby and Jack and not allowed back in if they were observed engaging in narcotics activity in either bar. He described seeing drug incidents "more than I could count" when asked about occurrences involving drug activity at either bar. Bartenders had the ability to ask the bouncers to remove people for drug activity. During his tenure, Wilson described having to apply Vaseline to the toilet seat covers in the bathroom to prevent people from using them to snort cocaine. Wilson regularly talked with M. Costanzo and S. Costanzo about security concerns during his tenure.

23. Arcata Police Department Officer Luke Scown (Scown) was called in rebuttal by the Department. Scown testified to having patrolled the Arcata Plaza from 2015-2017. The plaza is where both the Licensed Premises and Toby and Jacks are located. Scown testified to extensive narcotics activity occurring on the plaza and that the Licensed Premises and Toby and Jacks were a disproportionately large source of the calls for service as compared to other bars in the immediate area. In 2016 and 2017, approximately 25% of the calls to these locations referenced drug or narcotics activity. Scown himself has warned the Costanzos to keep certain people out of their locations. Scown did notice a slight downturn in calls for service when the Licensed Premises started hiring private security. Scown elevated his concerns regarding narcotics activity on the plaza to the chief of police level during his tenure in that assignment.

24. Karen Diemer, Arcata's City Manager (Diemer) also testified to her concerns about narcotics activity on the Arcata Plaza and her impression that the Licensed Premises and Toby and Jacks were significant contributors to the problem activity that occurred there. Diemer testified that the Licensed Premises and Toby and Jacks generated approximately 40% of calls for service on the plaza and that in a four year period ending in 2018 there were approximately 1300 calls for service to the Licensed Premises and Toby and Jacks. She testified there was a meeting with business owners on the north side of the plaza, including M. and S. Costanzo, in January 2018, where these concerns were generally

raised with the hope that solutions could be developed with the business owners like the Costanzos.

25. Except as set forth in this decision, all other allegations in the accusation and all other contentions of the parties lack merit.

CONCLUSIONS OF LAW

1. Article XX, section 22 of the California Constitution and section 24200(a) provide that a license to sell alcoholic beverages may be suspended or revoked if continuation of the license would be contrary to public welfare or morals.

2. Business and Professions Code section 24200(b) provides that a licensee's violation, or causing or permitting of a violation, of any penal provision of California law prohibiting or regulating the sale of alcoholic beverages is also a basis for the suspension or revocation of the license.

3. Business and Professions Code section 24200.5(a) provides that notwithstanding the provisions of Section 24200, the department shall revoke a license upon any of the following grounds:

> (a) If a retail licensee has knowingly permitted the illegal sale, or negotiations for the sales, of controlled substances or dangerous drugs upon his or her licensed premises. Successive sales, or negotiations for sales, over any continuous period of time shall be deemed evidence of permission. As used in this section, "controlled substances" shall have the same meaning as is given that term in Article 1 (commencing with Section 11000) of Chapter 1 of Division 10 of the Health and Safety Code, and "dangerous drugs" shall have the same meaning as is given that term in Article 2 (commencing with Section 4015) of Chapter 9 of Division 2 of this code.

4. Health & Safety Code section 11350 (a) states that, except as otherwise provided in this division, every person who possesses (1) any controlled substance specified in subdivision (b), (c), (e), or paragraph (1) of subdivision (f) of Section 11054, specified in paragraph (14), (15), or (20) of subdivision (d) of Section 11054, or specified in subdivision (b) or (c) of Section 11055, or specified in subdivision (h) of Section 11056, or (2) any controlled substance classified in Schedule III, IV, or V which is a narcotic drug, unless upon the written prescription of a physician, dentist, podiatrist, or veterinarian licensed to practice in this state, shall be punished by imprisonment in a county jail for not more than one year, except that such person shall instead be punished pursuant to subdivision (h) of Section 1170 of the Penal Code if that person has one or

more prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 of the Penal Code or for an offense requiring registration pursuant to subdivision (c) of Section 290 of the Penal Code.

5. Health & Safety Code section 11351 states that except as otherwise provided in this division, every person who possesses for sale or purchases for purposes of sale (1) any controlled substance specified in subdivision (b), (c), or (e) of Section 11054, specified in paragraph (14), (15), or (20) of subdivision (d) of Section 11054, or specified in subdivision (b) or (c) of Section 11055, or specified in subdivision (h) of Section 11056, or (2) any controlled substance classified in Schedule III, IV, or V which is a narcotic drug, shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code for two, three, or four years.

6. Health & Safety Code section 11352(a) states that, except as otherwise provided in this division, every person who transports, imports into this state, sells, furnishes, administers, or gives away, or offers to transport, import into this state, sell, furnish, administer, or give away, or attempts to import into this state or transport (1) any controlled substance specified in subdivision (b), (c), or (e), or paragraph (1) of subdivision (f) of Section 11054, specified in paragraph (14), (15), or (20) of subdivision (d) of Section 11054, or specified in subdivision (b) or (c) of Section 11055, or specified in subdivision (h) of Section 11056, or (2) any controlled substance classified in Schedule III, IV, or V which is a narcotic drug, unless upon the written prescription of a physician, dentist, podiatrist, or veterinarian licensed to practice in this state, shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code for three, four, or five years.

7. With respect to counts 1-4, cause for suspension or revocation of the Respondent's license exists under Article XX, section 22 of the California State Constitution and sections 24200(a) and (b). These counts relate to Scott's October 6, 2017 encounter with Johnston and King at the Licensed Premises in the presence of Bastidas, the Respondent's agent or employee. The evidence established that Bastidas was already familiar with Johnston and King. Scott spoke with Johnston and King, in the immediate presence of Bastidas, about purchasing cocaine from them. The conversation was extended and it occurred out in the open while they were being served by Bastidas at the fixed bar. While Scott waited for Johnston and King to return with the cocaine, Scott spoke with Bastidas and she vouched for King and called him by a familiar name. Bastidas had a duty to not allow the possession or sale of controlled substances in the Licensed Premises. Under the circumstances of this case, when Johnston returned with the baggie for Scott, Bastidas was permitting him to possess cocaine within the Licensed Premises in violation of Health and Safety Code section 11350. The circumstances also conveyed to Bastidas that

he possessed it for the specific purpose of selling it to Scott in violation of Health and Safety Code section 11351. The sales transaction that then occurred was also permitted by Bastidas in violation of Health and Safety Code section 11352. As an agent or employee, her actions and knowledge, under the circumstances of this case, are imputed to the Respondent and establish a violation of Business and Professions Code section 24200.5(a). Even though this was the first sales incident documented by Scott during her undercover investigation, the overall evidence established that a pervasive drug culture had already established itself at the Licensed Premises prior to October 6, 2017. (Findings of Fact ¶¶ 2-24)

8. With respect to counts 5-9, cause for suspension or revocation of the Respondent's license exists under Article XX, section 22 of the California State Constitution and sections 24200(a) and (b). These counts relate to the November 30, 2017 encounter with Browning at the Licensed Premises where Scott and Bernstein negotiated the purchase of cocaine from Browning in the presence of Bastidas and actually received baggies of the controlled substance in her presence in exchange for money. The evidence established that both Bastidas and S. Costanzo were already familiar with Browning. S. Costanzo had previously assisted Scott in purchasing narcotics from Browning at Toby and Jacks. Browning was on a first name basis with Bastidas. Scott and Bernstein spoke with Browning, in the immediate presence of Bastidas, about buying cocaine from him. The conversation was extended and it occurred out in the open while they were being served by Bastidas and another employee, Trejo, at the fixed bar. Bastidas had a duty to not allow the possession or sale of controlled substances in the Licensed Premises. Under the circumstances of this case, when Browning offered the baggies to Scott and Bernstein, Bastidas was permitting him to possess cocaine within the Licensed Premises in violation of Health and Safety Code section 11350. The circumstances also conveyed to Bastidas that Browning possessed the baggies for the specific purpose of selling them to Scott and Bernstein in violation of Health and Safety Code section 11351. The two sales transactions that then occurred at the fixed bar in the Licensed Premises were also permitted by Bastidas in violation of Health and Safety Code section 11352. As an agent or employee, her actions and knowledge, under the circumstances of this case, are imputed to the Respondent and establish a violation of Business and Professions Code section 24200.5(a). These were the second and third sales incidents documented by Scott during her undercover investigation in addition to the overall evidence establishing a pervasive drug culture that had already established itself at the Licensed Premises even prior to the first documented sale on October 6, 2017. (Findings of Fact ¶¶ 2-24)

9. With respect to counts 10-13, cause for suspension or revocation of the Respondent's license exists under Article XX, section 22 of the California State Constitution and sections 24200(a) and (b). These counts relate to the January 25, 2018 encounter with

Browning at the Licensed Premises where Scott negotiated the purchase of cocaine from Browning in the presence of Bastidas and actually received a baggie of the controlled substance in the Licensed Premises in exchange for money. The evidence established that Bastidas was already familiar with Browning and that he was actively engaged in the sale of controlled substances at the Licensed Premises on prior occasions. Scott spoke with Browning about buying cocaine from him under circumstances where Bastidas would be aware of his presence and what he was doing. Browning invited Scott over to Bastidas' residence to "party" later in the evening which further established that Bastidas was more than passingly familiar with Browning and his actions. This also established that Bastidas knew Browning was in the Licensed Premises that evening even though it was a busy night. Bastidas had a duty to not allow the possession or sale of controlled substances in the Licensed Premises. Under the circumstances of this case, when Browning possessed the baggie to sell to Scott, Bastidas was permitting him to possess cocaine within the Licensed Premises in violation of Health and Safety Code section 11350. The circumstances also conveyed to Bastidas that Browning possessed the baggie for the specific purpose of selling it to Scott in violation of Health and Safety Code section 11351. The actual sales transaction that then occurred in the middle of the Licensed Premises was also permitted by Bastidas in violation of Health and Safety Code section 11352. As an agent or employee, her actions and knowledge, under the circumstances of this case, are imputed to the Respondent and establish a violation of Business and Professions Code section 24200.5(a). This was now the fourth sales incident documented by Scott during her undercover investigation. This was in addition to the overall evidence establishing a pervasive drug culture that had already established itself at the Licensed Premises even prior to October 6, 2017. (Findings of Fact ¶¶ 2-24)

10. The Respondent has challenged the chain of custody and sufficiency of the evidence regarding the suspected narcotics seized in this investigation. Though Miller did not testify in this matter, other testimony and documents were received that established that the substances that were tested were the baggies received by Scott and Bernstein during their investigations. Further, the TruNarc device used by Miller to test the four baggies of suspected cocaine was established through the testimony of Drefke as being a sufficiently reliable source of testing, in combination with the overall evidence, to establish that the baggies contained cocaine hydrochloride by a preponderance of evidence. Drefke was trained and qualified in the use of the TruNarc device and he also testified that Miller was trained and qualified to use the TruNarc device. The device used Raman spectroscopy to test substances in the field against an existing library of controlled substance profiles. While the application to controlled substance testing in the field appeared novel, Raman spectroscopy itself is not new and novel and has been an applied testing procedure for many decades. Drefke's testimony credibly established that the TruNarc device was designed to be easy to use and that the device did not allow for much discretion or

interaction. Scott testified, based on her training and experience, that the contents of the baggies were consistent with cocaine. The sellers, in each instance, represented that the contents of the baggies were cocaine. Miller tested the baggies and in each instance, the TruNarc device concluded that the baggies contained cocaine hydrochloride. Miller knew how to use the device, and Drefke credibly testified to the device's reliability and efficacy. While it would have been a far better practice for the Department to have the substances conclusively tested, the question before this court is whether the Department has established, by a preponderance of the evidence, that the baggies contained cocaine. It has. (Findings of Fact ¶¶ 2-24)

11. In this matter, Respondent has argued that the Department's reliance upon Business and Professions Code section 24200.5(a) is misplaced because there was insufficient evidence that the Respondent knew, or should have known of the drug transactions at issue. *McFaddin San Diego 1130 Inc. v. Stroh* (1989) 208 Cal.App.3d 1384 is instructive regarding the issue of whether constructive knowledge can be imputed to a license holder. In *McFaddin*, the Court of Appeal granted the petition of the license holder and reversed the order of the Board and the decision of the Department, based on facts found by the Department that the licensee did not know of the drug transactions at issue, and further had taken extensive preventive measures against them. It held that such evidence did not support a determination that the licensee "permitted" the illicit activity.

12. The Respondent's circumstances are very different than the license holder in *McFaddin* and Business and Professions Code section 24200.5(a) is directly applicable to the circumstances in this case. A pattern of illegal sales of controlled substances, to wit, cocaine, was established. Imputed knowledge of this pattern of drug sales was established by the four instances of sales that occurred at the Licensed Premises over three separate days stretching from October 2017 through January 2018. Multiple employees of the Licensed Premises, including one of the principals, N. Costanzo, had relationships with and were aware of the drug activities being perpetrated by the sellers inside of the Licensed Premises over the course of several months. (Findings of Fact ¶¶ 2-24)

13. Beyond the sales in this case, the Respondent was on more broad notice of an epidemic of drug activity taking place at the Licensed Premises and in the immediate area surrounding the Licensed Premises and at its adjacent business, Toby and Jacks. There were extensive and disproportionate calls for service to both of the Respondent's establishments during the four years leading up to the January 25, 2018 date where Scott made her last purchase. Many of these calls involved complaints of drug activity and the Respondent was aware of this. Local law enforcement and the city manager had directly communicated with the Respondent regarding its concerns in this area. The Respondent's own security manager between 2008 and 2016 testified to the epidemic of drug activity in

the Licensed Premises and taking drastic measures like smearing Vaseline on toilet seat covers to prevent people from snorting cocaine off of them. (Findings of Fact ¶¶ 2-24)

14. Despite this mountain of evidence that the Licensed Premises had grown into a problem location for narcotics activity, there was lax oversight by the Respondent regarding the actions of employees and agents of the Licensed Premises. The Respondent did not install cameras until after this case came to their attention through the filing of an accusation. The Respondent did not have written policies compelling employees to enforce the rules that the Respondent suggested were in place at the Licensed Premises. The Respondent's own employees and at least one principal in the corporation actively interacted with persons who were actively selling narcotics in the Licensed Premises. All four sales occurred, either in whole or in part, within the Licensed Premises. Scott had little difficulty in openly arranging the transactions that occurred between October 2017 and January 2018. (Findings of Fact ¶¶ 2-24)

M. Costanzo and S. Costanzo have both asserted that they were unaware of the circumstances that had taken hold at the Licensed Premises. This testimony is found not to be credible given the above. While there is no evidence that the Respondent was actively engaged in the sale of narcotics at the Licensed Premises, it is clear that the Respondent knowingly permitted the conduct that was alleged in this accusation and conduct beyond the allegations involving illicit narcotic activity.

PENALTY

The Department requested that the Respondent's license be revoked given the severity of the violations and the statutory requirement set forth in section 24200.5. The Respondent primarily argued that the evidence was insufficient to sustain the accusations. If the narcotics related counts were sustained, the Respondent argued for the court to consider the mitigating circumstances of the Respondent's efforts to avoid the conduct alleged.

Section 24200.5 provides that "the [D]epartment shall revoke a license" for any violation thereof. The Department has consistently construed this section as requiring some form of revocation although not necessarily outright revocation.[2] Outright revocation[3] or stayed revocation[4] can be appropriate depending upon the circumstances.

In the present case, outright revocation is warranted. The Respondent had an affirmative obligation to ensure that the Licensed Premises was operated in full compliance with the law. The Respondent did not. The illegal activity at issue here—repeated drug sale negotiations resulting in repeated sales of cocaine to undercover officers with the knowledge and permission of employees clearly warrants revocation given the lax approach to management of the Licensed Premises evinced in this case. There is no indication that the Respondent took the appropriate steps to prevent such activity even after being put on repeated notice that there were severe problems with drug activity in the Licensed Premises.

The penalty recommended herein complies with rule 144.[5]

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[2] Cal. Code of Regs., tit. 4, §144.
[3] See, e.g., *Greenblatt v. Martin*, 177 Cal. App. 2d 738, 2 Cal. Rptr. 508 (1960) (outright revocation imposed for violations of section 24200.5).
[4] See, e.g., *Harris v. Alcoholic Beverage Control Appeals Board*, 244 Cal. App. 2d 468, 36 Cal. Rptr. 697 (1964) (revocation stayed coupled with suspension imposed for violations of section 24200.5).
[5] All rules referred to herein are contained in title 4 of the California Code of Regulations unless otherwise noted.

ORDER

The Respondent's on-sale general public premises license is hereby revoked.

Dated: November 2, 2018

Alberto Roldan
Administrative Law Judge

☑ Adopt

☐ Non-Adopt: _____

By: Jacob A Hoppe-Smith

Date: 11/26/18