Issued January 3, 2001

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

YONG JA KIMMIE OLIVER dba Kimmie's Cork N Bottle 210 North Sanborn Road Salinas, CA 93905, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	))))))))))))	AB-7424 File: 21-146939 Reg: 98045215 Administrative Law Judge at the Dept. Hearing: Jeevan S. Ahuja Date and Place of the Appeals Board Hearing: September 21, 2000 San Francisco, CA

Yong Ja Kimmie Oliver, doing business as Kimmie's Cork N Bottle (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked her license, but stayed revocation conditioned upon an actual suspension of 20 days and a one-year period of discipline-free operation, for having possessed drug paraphernalia for sale, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code §24200, subdivisions (a) and (b),

[1] The decision of the Department, dated May 27, 1999, is set forth in the appendix.

in conjunction with Health and Safety Code §11364.7, subdivision (a).[2]

Appearances on appeal include appellant Yong Ja Kimmie Oliver, appearing through her counsel, Joseph A. Cisneros, and the Department of Alcoholic Beverage Control, appearing through its counsel, John Peirce.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on January 3, 1984. An accusation against appellant charging the sale of drug paraphernalia was filed December 7, 1998.

An administrative hearing was held on February 26, 1999. At that hearing, testimony was presented by Department investigator Eulalio Villegas regarding his visits to appellant's premises and the circumstances surrounding his purchase of the materials found to be drug paraphernalia; by David Raymond, another Department investigator, who photographed and seized various items in the premises alleged to constitute drug paraphernalia; by Susie Hinojosa, a clerk employed by appellant, who testified that she had been instructed that the pipes in question were to be sold only for use with tobacco; by Maria Monsivais, the clerk

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[2] Health and Safety Code §11364.7, subdivision (a), provides, in pertinent part:

> "Except as authorized by law, it is a misdemeanor for any person to deliver, furnish, or transfer, or to possess with intent to deliver, furnish or transfer, or to manufacture with intent to deliver, furnish or transfer, drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this division."

who made the sale to investigator Villegas; and by appellant.

Subsequent to the hearing, the Department issued its decision which sustained the charge of the accusation and imposed the disciplinary order from which this appeal is taken.

Appellant thereafter filed a timely notice of appeal. In her appeal, appellant raises the following issues: (1) the finding of the Administrative Law Judge (ALJ) regarding Health and Safety Code §11364.7, subdivision (a), is not supported by the evidence or the applicable law; (2) the ALJ relied on impermissible hearsay evidence in reaching his decision; and (3) the ALJ relied upon impermissible facts or factors in determining the credibility of witnesses.

DISCUSSION

I

Appellant contends that the decision is not supported by the evidence or by the law, and lists five separate grounds in support of this general assertion.[3]

Appellant first asserts that the products in question could be used for legal purposes as well as for illegal drug use. This may well be true as to some of the items in question.[4] The real issue, however, is whether the products were marketed for use with illegal drugs.

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[3] Appellant has indicated her agreement with the findings I through VII of the decision, disagreeing with the conclusions to be drawn from those findings.

[4] It was the opinion of investigator Villegas, who testified against a background of 40 hours of classroom training and an equal amount of training in the field, as well as having made arrests and seizures in other cases, that the glass pipe and screens he purchased had only one purpose, that being for smoking rock cocaine [RT 18].

Appellant next asserts that the products were marketed while appellant was away from the store, that the clerks had been trained not to market the products for drug use, and that both clerks confirmed in their testimony that they had been given such training. Once again, these assertions may well be true, and, again, the issue is how the products were, in fact, marketed. It is no defense if the clerks failed to follow the instructions which may have been given them.

Appellant sets forth the provisions of Health and Safety Code §11014.4, which spell out a number of factors to be considered in determining whether something is being marketed for an unlawful purpose, and contends that the testimony of the clerks that they did not market the products in question for illegal purposes should be deemed credible. One of the factors listed, statements by an owner or by a person in charge, is found here. The actions of the clerk, in suggesting the products the investigator might use, were the equivalent of statements by her that the product was being marketed for use with drugs. The fact that the glass pipe and screens were kept under the counter, concealed from view, accompanied by other products identified with drug usage,[5] tends to confirm the finding of the requisite intent to market the product for illegal drug usage.

Appellant also claims the investigators entrapped the employees, by specifically asking for products for the purpose of using them for illegal drug use.

The test for an entrapment defense is whether the conduct of the public

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[5] Along with other glass pipes and bongs, investigators seized pocket scales designed to weigh amounts up to seven grams. According to Villegas, the only practical use for such scales is the weighing of small quantities of drugs.

agent was such that a normally law-abiding person would be induced to commit the prohibited act. Official conduct that does no more than offer an opportunity to act unlawfully is permissible. (People v. Barraza (1979) 23 Cal.3d 675 [153 Cal.Rptr. 459].) It is readily apparent from the record that the investigators did no more than offer the clerk the opportunity to act unlawfully.

Finally, appellant contends that the penalty is too harsh, in light of appellant's disciplinary history (two sales to minors since being licensed in 1984), the fact she had instructed her employees on how to sell the products, and the fact she has ceased selling the products in question and has no intent to sell them in the future.

The Appeals Board will not disturb the Department's penalty orders in the absence of an abuse of the Department's discretion. (Martin v. Alcoholic Beverage Control Appeals Board & Haley (1959) 52 Cal.2d 287 [341 P.2d 296].) However, where an appellant raises the issue of an excessive penalty, the Appeals Board will examine that issue. (Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183].)

Of the mitigating factors claimed by appellant, only that involving her disciplinary history would seem to carry any weight.

If, as appellant claims, she will no longer carry the products in question, the stayed revocation portion of the penalty will hold no threat to her, since the stay order is expressly conditioned upon a "similar" violation. That being so, we do not believe a 20-day suspension can be considered an abuse of the Department's discretion.

II

Appellant contends that investigator Villegas should not have been permitted to testify concerning the statements made to him by appellant's clerks. Claiming they were hearsay, she argues that the decision necessarily relied upon them in finding that the pipe and screens Villegas purchased were marketed for an illegal purpose.

Our analysis of the decision and the record leads us to believe that the statements of the clerks were not essential to the finding that appellant violated Health and Safety Code §11364.7, subdivision (a). Although he referred to the statements in his decision, the Administrative Law Judge, in Finding of Fact IV, found that Ms. Monsivais, when asked for a crack pipe and screens, reached under the counter and produced both items. It would seem apparent that she already knew the products could be used with drugs, and intended to satisfy the customer's needs by offering him those products. To this extent, her conduct amounted to a verbal act, and is imputed to her employer.

Additionally, as pointed out earlier herein, the assortment of products kept below the counter included at least two, the glass pipes and the scales, which, according to investigator Villegas, had no legitimate uses.

In any event, the statements of the clerks were admissible as an exception to the hearsay rule pursuant to Evidence Code §1222. Both clerks, charged with the operation of appellant's business in her absence, clearly had the requisite authority to make statements concerning the products the business offered for sale.

The Department was not obligated to subpoena either of the clerks, nor was

it required to wait until the clerks testified for appellant and then offer the statements as impeachment. Under Evidence Code §1222, the Department was entitled to offer evidence of the statements through the person to whom they were made.

III

Appellant contends that the ALJ, in determining that investigator Villegas' testimony was more credible than that of appellant's clerks, failed to comply with Government Code §11425.50, subdivision (b). That code section provides, in pertinent part:

> "If the factual basis for the decision includes a determination based substantially on the credibility of a witness, the statement shall identify any specific evidence of the observed demeanor, manner, or attitude of the witness that supports the determination, and on judicial review the court shall give great weight to the determination to the extent the determination identifies the observed demeanor, manner, or attitude of the witness which supports it."

The code section in question is silent as to the consequences which flow from a failure of an ALJ to articulate the factors mentioned.[6]

However, we do not think it follows, as appellant's reliance upon the ALJ's failure to mention the demeanor, manner or attitude displayed by Villegas seems to say, that the decision must be reversed.

It is just as reasonable to construe this provision as saying that without such

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[6] The Law Revision Comments which accompany this section state that it adopts the rule of Universal Camera Corp. v. National Labor Relations Board (1951) 340 U.S. 474 [71 S.Ct. 456], requiring that the reviewing court weigh more heavily findings by the trier of fact (here, the administrative law judge) based upon observation of witnesses than findings based on other evidence.

factors being discussed, a reviewing court need not give any greater weight to such testimony than to any other of the evidence in the case. We are not inclined to think it means the determination is entitled to no weight at all.

In any event, we have reviewed the testimony of investigator Villegas and that of Ms. Monsivais, and, based upon that review, are of the belief that the ALJ's decision to accept the testimony of the investigator and not that of appellant's clerks cannot be said to have been unreasonable.

ORDER

The decision of the Department is affirmed.[7]

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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

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