ISSUED AUGUST 22, 2000

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

JARNAIL S. CHHINA dba John's Beer & Wine Market 15770-A Mojave Drive Victorville, CA 92392, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7502 File: 20-333441 Reg: 99046156 Administrative Law Judge at the Dept. Hearing: John P. McCarthy Date and Place of the Appeals Board Hearing: July 6, 2000 Los Angeles, CA

Jarnail S. Chhina, doing business as John's Beer & Wine Market (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked his license, with the revocation stayed for a 24-month probationary period, and suspended his license for 20 days, for appellant's employee selling drug paraphernalia, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, and Business and Professions Code §24200, subdivision (a), arising from a violation of Health and Safety Code §11364.7, subdivisions (a) and (c).

[1]The decision of the Department, dated September 9, 1999, is set forth in the appendix.

Appearances on appeal include appellant Jarnail S. Chhina, appearing through his counsel, Joshua Kaplan, and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on December 9, 1997. Thereafter, the Department instituted an accusation against appellant charging that, on December 18, 1998, appellant's clerk, Patik Dubey, sold a small glass pipe and a baggie containing small metal screens as drug paraphernalia to Department investigator Matthew Harris.

An administrative hearing was held on July 29, 1999, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the transaction.

Department investigator Matthew Harris testified that he entered appellant's premises and asked the clerk for a pipe. The clerk asked what kind of pipe he wanted, and Harris responded that he wanted a pipe he could "smoke [his] shit in." [RT 6-9.] The clerk said they were all sold out of pipes, and Harris started to leave. Before Harris left, the clerk stopped him and said he did have a pipe. Harris returned to the counter, where the clerk took a pipe from the top shelf behind the counter and said "We have these." [RT 11-12.] Harris examined the object and said "Yeah, this is it. This will work." [RT 13.] The clerk asked Harris to go to the end of the counter, away from a person cutting up boxes. There, Harris asked the clerk how to use the thing, to which the clerk replied that he didn't smoke it, just sold it. Harris then asked for a screen to put inside the pipe.

The clerk said yes, and took a plastic bag from a cardboard display behind the counter. The bag contained small, round wire screens. [RT 14.] Harris told the clerk, "I guess I'll have to rock it up so my rock doesn't fall through." According to Harris this meant that he would form cocaine into a small rock. [RT 15.] The clerk made no reply, but rang up the sale, which totaled $12.91. After paying, Harris left the store. [RT 16.] When he returned with other investigators, he informed the clerk of the violation and issued a citation to him. [RT 17, 19.]

Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred as charged.

Appellant thereafter filed a timely notice of appeal. In his appeal, appellant raises the following issues: (1) the decision is not supported by the findings and the findings are not supported by substantial evidence, and (2) the penalty imposed constitutes cruel and unusual punishment.

DISCUSSION

I

Appellant contends there is not sufficient evidence showing that the clerk had the knowledge or scienter required by the statute to constitute a violation.

Health and Safety Code §11364.7, subdivision (a), provides that a misdemeanor is committed when anyone "delivers, furnishes, or transfers, or possesses with intent to deliver, furnish, or transfer, . . . drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to . . . ingest, inhale, or otherwise introduce into the human body a controlled substance . . . ." Subdivision (d) states that any business or liquor

license may be revoked if the preceding subdivisions of §11364.7 are violated in the course of a licensee's business.

Health and Safety Code §11014.5, subdivision (a), defines "drug paraphernalia" as items "which are designed for use or marketed for use, in [among other things] injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance . . . ." There follows a non-exclusive list of items that could be drug paraphernalia, if, in each case, the item is "designed for use or marketed for use" in connection with a controlled substance.

Subdivision (c) lists things that may be considered, "in addition to all other logically relevant factors," in determining whether an item is drug paraphernalia, including statements, instructions, or advertising concerning the item's use; how and by whom it is displayed for sale; and expert testimony concerning its use.

Objects can be classified as drug paraphernalia under §11014.5 if they are either designed for use or marketed for use with controlled substances. The phrase "designed for use," "encompasses at least an item that is principally used with illegal drugs by virtue of its objective features, i.e., features designed by the manufacturer." (Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc. (1982) 455 U.S. 489, 501-502 [102 S.Ct. 1186, 1195].)

The ALJ in the present case found that "The pipe, by itself, is drug paraphernalia. Its only common use is to ingest controlled substances." (Finding V.) This is a finding that the pipe was "designed for use" with controlled substances within the meaning of Health and Safety Code §11014.5. The testimony of the officer constitutes substantial evidence supporting that finding.

This does not end the inquiry, however, because violation of Health and Safety Code §11364.7 can only occur if the clerk knew or, under the circumstances reasonably should have known, that the item he sold to Harris would be used to ingest a controlled substance.

Appellant argues that the clerk could not have had the required scienter, or knowledge, because he did not understand what the officer was asking for. Appellant states it "is undisputed" that the clerk could hardly speak or understand English, or at least there is no evidence in the record that the clerk understood that "shit" or "rock" referred to controlled substances.

The clerk did not testify, so it is impossible to say definitely that he could or could not understand what Harris was asking for. In his Determination of Issues, the ALJ rejected appellant's contention that the clerk did not understand English well, since the clerk had worked 30-40 hours per week for at least three years in appellant's store where English was the predominant language used, and Harris did not perceive that the clerk had any difficulty understanding him.

Since the clerk worked for several years in the store where many tobacco products were sold, it would not be unreasonable to infer that he knew something about smoking implements, such as the unsuitability of the pipe he sold to Harris for smoking tobacco. It would also not be unreasonable to infer that the clerk, who had lived in the United States for several years and worked in appellant's store where he would be exposed to many different people, would understand Harris to be referring to some kind of controlled substance when he indicated he needed something in which to smoke his "shit." It is highly unlikely that the clerk

would understand “shit” in this context to mean excrement.

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. The Appeals Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing.[2]

"Substantial evidence" is relevant evidence which reasonable minds would accept as a reasonable support for a conclusion. (Universal Camera Corporation v. National Labor Relations Board (1950) 340 US 474, 477 [95 L.Ed. 456, 71 S.Ct. 456] and Toyota Motor Sales USA, Inc. v. Superior Court (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].)

When, as in the instant matter, the findings are attacked on the ground that there is a lack of substantial evidence, the Appeals Board, after considering the entire record, must determine whether there is substantial evidence, even if contradicted, to reasonably support the findings in dispute. (Bowers v. Bernards (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925].)

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

Appellate review does not "resolve conflicts in the evidence, or between inferences reasonably deducible from the evidence." (Brookhouser v. State of California (1992) 10 Cal.App.4th 1665, 1678 [13 Cal.Rptr.2d 658].) Where there are conflicts in the evidence, the Appeals Board is bound to resolve them in favor of the Department's decision, and must accept all reasonable inferences which support the Department's findings. (Kirby v. Alcoholic Beverage Control Appeals Board (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857] (in which the positions of both the Department and the license-applicant were supported by substantial evidence); Kruse v. Bank of America (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 271]; Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control (1968) 261 Cal.App.2d 181 [67 Cal.Rptr. 734, 737]; and Gore v. Harris (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

It would certainly be possible for a difference of opinion to exist regarding the resolution of this appeal. However, resolving all conflicts in favor of the Department's decision, and accepting all reasonable inferences which support the Department's findings, as this Board must, it cannot be said that the Department's decision is an abuse of discretion.

II

Appellant contends the penalty constitutes cruel and unusual punishment. However, the constitutional provisions cited by appellant apply to criminal, not administrative, proceedings. As explained in Yapp v. State Bar (1965) 62 Cal.2d 809 [44 Cal.Rptr. 593, 597], the purpose of a criminal proceeding is to punish a wrongdoer, while a disciplinary proceeding is for the protection of the public.

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].)

Health and Safety Code §11364.7, subdivision (d), provides:

> "The violation, or the causing or the permitting of a violation, of subdivision (a), (b), or (c) by a holder of a business or liquor license issued by a city, county, or city and county, or by the State of California, and in the course of the licensee's business shall be grounds for the revocation of the license."

The Department decision determined that appellant had permitted the violation of Health and Safety Code §11364.7, subdivision (a). Under the circumstances, we do not find the 20-day suspension with a stayed revocation at all shocking or even suggestive of an abuse of discretion.

ORDER

The decision of the Department is affirmed.[3]

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

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

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

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