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

AB-7579

MEHRET GHIRMAI dba Liquor to Go
5901 Hollywood Blvd., Los Angeles, CA 90028,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

File: 21-253124 Reg: 99046747

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: December 12, 2000
Los Angeles, CA

ISSUED: MARCH 23, 2001

Mehret Ghirmai, doing business as Liquor to Go (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked her license, but stayed revocation for two years upon condition of discipline-free operation during that time and the serving of a 20-day suspension, for appellant's clerk selling items of drug paraphernalia, 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, subdivision (a), and Health and Safety Code §11364.7, subdivision (a).

Appearances on appeal include appellant Mehret Ghirmai, appearing through her counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of

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[1]The decision of the Department, dated January 13, 2000, is set forth in the appendix.

Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on October 22, 1990. Thereafter, the Department instituted an accusation against appellant charging that on April 15, 1999, appellant's clerk, Berhane Michael, sold items of drug paraphernalia knowing, or under circumstances where one reasonably should know, that they would be used to ingest or inhale a controlled substance.

An administrative hearing was held on December 8, 1999, at which time documentary evidence was received and testimony was presented concerning the transaction. Department investigator Eric Hirata; the clerk, Michael; and appellant Mehret Ghirmai testified.

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 her appeal, appellant raises the following issues: (1) Michael lacked the scienter necessary for a violation of Health and Safety Code §11364.7, subdivision (a); and (2) the ALJ erroneously failed to use expert testimony regarding the use of the items as drug paraphernalia.

DISCUSSION

I

Appellant contends that case law and this Board's decisions require a showing that the seller of the alleged drug paraphernalia had scienter, or knowledge, that the items would be used as drug paraphernalia when he sold the items, and there was no such showing in this case.

The testimony of Hirata was very different from that of Michael. The ALJ based his findings of the facts "on the credible testimony of the investigator [Hirata]." (Finding II. B.) He specifically rejected the clerk's testimony denying the conversation described by Hirata and denying knowledge that "coke" and "rock" meant cocaine. (Findings IV. and V.)

The credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. (Brice v. Department of Alcoholic Beverage Control (1957) 153 Cal.2d 315 [314 P.2d 807, 812] and Lorimore v. State Personnel Board (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640, 644].) The Board, with only the cold record to review, is not in a position to second-guess the credibility determination of the ALJ, who actually saw and heard the witnesses.

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].)

The ALJ found the following to have transpired (Finding II. A.):

> "On April 15, 1999, two Department investigators entered [appellant's] store. [Appellant's] clerk (Michael) was working behind the counter. One of the investigators (Hirata) asked the clerk if he sold pipes. The clerk replied 'You

mean flowers.' The investigator then stated that he needed something with which to smoke coke. He also asked the clerk if he, the clerk, sold rock pipes. The clerk replied that he did.

"The clerk kneeled down and took out two glass tubes from the area below the counter. Each glass tube had a flower in it. The clerk informed the investigator that people usually use the smaller tube, and handed it to the investigator. The investigator then asked if he would need a filter or a screen. The clerk pointed to some scouring pads behind the counter and took one. He then placed the tube and the scouring pad in a bag, and the investigator paid for them.

"Before the investigator exited the store, the clerk stated that the did not know how the tube and scouring pad are used with drugs, but that he knew those were the items. When the investigator returned to the store, the clerk stated that he knew the tube was used with drugs, and that he knew the tube and the scouring pad should be sold together."

This case presents an issue which the Board has considered in earlier cases, and that is whether the item in question, one which may have both legitimate uses and illegitimate uses, was marketed as narcotics paraphernalia. Two of those earlier cases (Mbarkeh (1998) AB-6882 and Harper (1998) AB-6984)) concluded that the charged violation could not be sustained in the absence of proof of a pre-existing intent to market the item or items in question for narcotics usage, despite knowledge of the buyer's intended use. Those cases, in turn, followed the holding to that effect in People v. Nelson (1985) 171 Cal.App.3d Supp. 1 [218 Cal.Rptr. 279].

What distinguishes this case from Mbarkeh and Harper, supra, in which the Board felt compelled to reverse the Department's decisions, is that here the evidence is clear that the items in question were selected by the clerk without any prompting or suggestion from the investigator that he wanted that specific item. This is not a case where the seller's intent was unknown; it is, instead, a case where the seller already intended that the object be sold for drug use. His selection of the glass pipe and the

scouring pad in response to the investigator's request demonstrates that intent. The facts in this case are very similar to those in the Appeals Board's decision of The Southland Corporation (Assefa and Woldermariam) (1999) AB-7176, where we affirmed the Department's finding of a violation of Health and Safety Code §11364.7, subdivision (a). We reach the same result here.

II

Appellant contends that investigator Hirata was not qualified as an expert witness and the ALJ's reliance on Hirata's testimony as to use of the glass tube and scouring pad as drug paraphernalia was therefore erroneous.

Hirata was undoubtedly competent to testify that, based on his experience and his training, the vials could be used to smoke rock cocaine. The ALJ, while stating that he was not sure Hirata would qualify as an expert witness, since he had not done research on the subject and was not a published and noted authority on it, concluded that "He [Hirata] is experienced and he has had training, and I think I'll take this opinion based on his experience and training, and I'm going to dispense with the word 'expert.'" [RT 33.]

Appellant's counsel had a full opportunity to cross-examine Hirata as to the basis for his conclusion, and in fact elicited from Hirata that the items might or might not be drug paraphernalia, depending on the circumstances [RT 35]. The ALJ clearly understood that when he stated, in Finding VII, that the tube and scouring pad "*may* be used" to smoke cocaine, and "*If* used as such, they are drug paraphernalia . . . ." (Emphasis added.) It appears that the ALJ had a reasonable basis for accepting Hirata's conclusion as to the use of the items as drug paraphernalia.

The fact that the items also had other, legitimate, uses does not affect the result in this case. The items do not need to have obvious objective features, such as a "bong" does, that identify them as drug paraphernalia. For items that can be used for legitimate purposes as well as for drug paraphernalia, it is the seller's intent to market the items as drug paraphernalia that takes them out of their legitimate categories of decorative or cleaning items. Here, Michael possessed the requisite intent to sell the items for use with a controlled substance, since, as discussed above, he selected them in response to Hirata's non-specific request.

ORDER

The decision of the Department is affirmed.[2]

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

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[2]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.