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

AB-9511
File: 21-518892; Reg: 14081045

PANIPAT CORPORATION,
dba A-1 Liquor & Food
81 Center Avenue, Pacheco, CA 94553-5607,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Nicholas R. Loehr

Appeals Board Hearing: January 7, 2016
Sacramento, CA

ISSUED MARCH 1, 2016

Appearances: *Appellant*: Richard D. Warren, counsel for Panipat Corporation.
Respondent: Dean Lueders, counsel for the Department of Alcoholic Beverage Control.

OPINION

Panipat Corporation, doing business as A-1 Liquor & Food, appeals from a decision of the Department of Alcoholic Beverage Control revoking its license[1] because appellant's clerk sold "drug paraphernalia" (Health & Saf. Code § 11014.5) to a Department agent in violation of Health and Safety Code section 11364.7, subdivision (a).[2]

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on April 26, 2012. The owner of

[1]The revocation was conditionally stayed subject to appellant's discipline-free operation for one year, and the license concurrently suspended for 10 days.

[2]The decision of the Department, dated April 9, 2015, is set forth in the appendix.

Panipat Corporation, Kuldeep Singh, had operated the licensed premises as a sole proprietor, without Departmental discipline, from 2007 to 2012. He incorporated in 2012. On August 25, 2014, the Department instituted an accusation against appellant charging that, on May 21, 2014, appellant's clerk sold drug paraphernalia to a Department agent in violation of Health and Safety Code section 11364.7, subdivision (a).

At the administrative hearing held on February 5, 2015, documentary evidence and testimony concerning the violation charged was presented by Aaron Adicoff, a Department agent; Jagjit Dhaliwal, appellant's clerk (the clerk); and Kuldeep Singh, the sole officer and shareholder of appellant Panipat Corporation.

Testimony established that on February 17, 2012, shortly before the current license was issued, Mr. Singh acknowledged receiving a packet of documents (Exhibit 3) pertaining to numerous Department laws and rules. Included in this packet of forms was ABC-546-A: Notice to Licensees Concerning Drug Paraphernalia. (Exhibit 2, attachment #5.) The form identifies numerous items commonly sold or marketed as drug paraphernalia.

On May 21, 2014, Agent Adicoff entered the premises on what he described as "a routine enforcement" assignment. (RT at p. 13.) He selected some food items and took them to the sales counter where he observed a display box of air fresheners in glass tubes. He selected one of the tubes and asked the clerk if he had any other "pipes." The clerk, a native of India who spoke Punjabi and only limited English (RT at p. 55) said "no." The agent then asked if he could put "meth" in the pipe and "hit it." While he was asking this question, the agent pantomimed the lighting of a glass pipe and smoking. (See Exhibit A at the 2:32:56-57 time frame — showing the action

without sound — and RT at pp. 19-21.) The clerk said "yes" and nodded his head, although he testified that he did not understand the word methamphetamine, and that he thought the agent had said "matoon" but didn't know what it meant. (Findings of Fact, ¶ 12.) The clerk also testified, consistent with the agent's report (Exhibit 2), that he understood the agent's pantomime of holding the pipe up toward his mouth and asking him about "smoke" to indicate he was "showing him that it smelled good." (RT at p. 26.) The agent also asked if the pipe was glass, and the clerk said "yes." (RT at p. 21.) Finally, the agent asked if the clerk knew where he could purchase some "meth" and the clerk said he did not. (RT at p. 22.) The agent purchased the glass tube and other items, then left the store. The ALJ found in his decision that the clerk was "far from being competent in English" on the date of the incident. (Findings of Fact, ¶ 11.)

Agent Adicoff re-entered the store with Department agent Doermann — both wearing Department-issued tactical ballistic vests with "POLICE" on the front and back. The agents identified themselves, and the clerk was advised that he had sold a methamphetamine pipe to the agent. The clerk replied that he had only sold him an air freshener. (RT at p. 24.) The clerk was then issued a citation.

After the hearing, the Department issued its decision which determined that the charge had been proved and no defense had been established.

Appellant then filed a timely appeal raising the following issues: (1) the Department's notice did not satisfy the requirements of due process, and (2) the penalty is arbitrary and excessive.

DISCUSSION

Appellant contends that the content and manner of providing notice to appellant — that glass tubes labeled air freshener were drug paraphernalia, via form ABC-546-A

— does not satisfy due process. (App.Br. at p. 5.) Appellant claims the use of this form was insufficient to convey notice that the sale of such items was a statutory crime, and insufficient to draw appellant's attention to that fact. (*Id*. at pp. 6-7.)

Appellant does not maintain that it failed to receive form ABC-546-A, or a copy of the accusation, but rather that notice by this means was inadequate to satisfy due process. Form ABC-546-A: Notice to Licensees Concerning Drug Paraphernalia (Exhibit 2, attachment #5)[3] was provided to appellant on February 17, 2012 as one of a packet of 10 forms, consisting of 25 pages total. (App.Br. at p. 7.) Appellant did not recall reading it in its entirety. (RT at pp. 81-82; 89.)

Appellant contends the content of form ABC-546-A — presented in a large packet with other forms — does not satisfy due process because it is accompanied by other voluminous information, is densely worded and confusing in that it lists as "drug paraphernalia" approximately 37 everyday household items commonly sold or marketed for indisputably legitimate purposes, ranging from "scouring pads" and "wiry sponges" to "blenders," "bowls," "balloons," and "colorful marking pens." (App.Br. at p. 6.) Appellant complains that the only mention of glass tubes is in two lines on page one of form ABC-546-A, and in the last paragraph of page two, and that the accompanying photocopied picture of the prohibited "glass tubes" is so fuzzy and unclear as to be uninformative and unintelligible. (App.Br. at p. 4.) Even the Department agent testified that he couldn't tell what he was looking at in the purported photo of the glass tubes, because it was illegible. (RT at p. 37.)

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[3]Exhibit 2, attachment #5 is not a copy of the actual form from the licensee's file, but rather a copy of the standard form sent to all licensees. (RT at p. 93.) Appellant has asked the Board to take official notice of Form ABC-546, which we do along with related Form 546-A.

Appellant's description of the form — as inadequate to inform him of the prohibited activity — is borne out by an examination of its contents. Altogether, the form contains 13 bullet points, outlining approximately 37 "prohibited items," and two illegible photographs. (See Exhibit 2, attachment #5.) The "prohibited items" include, as mentioned, such ordinary items as blenders, bowls, balloons, envelopes, plastic baggies, colorful marking pens, scouring pads, and — as is the case here — glass tubes marketed as bud vases or air fresheners. As appellant points out, the notice makes "criminal the act of selling the items listed regardless of the actual knowledge or intent of Mr. Singh or his employees." (App.Br. at p. 6.) Indeed, when asked by the Board during oral argument whether the Department could ban the sale of ordinary items such as scouring pads and marking pens, counsel for the Department answered, "yes, if someone has an ABC license."

The ALJ addressed the notice issue as follows:

> 8. The Respondent was put on notice that "glass tubes commonly marketed as a bud vase or air freshener" are frequently sold as drug paraphernalia, and Kuldeep Singh acknowledged receipt of said notice. The Respondent failed to remove the "air freshener" glass tubes from the licensed premises until this violation occurred. Compounding this oversight, Mr. Singh did not have adequate oversight of A-1 Liquor & Food and permitted an inexperienced and inadequately trained employee to oversee the sale's [*sic*] counter.
>
> The clerk's sale of drug paraphernalia could have been completely avoided if Kuldeep Singh would have removed the "air fresheners" from the store upon receiving notice of their potential illegality. The clerk's failure to understand what he was selling does not obviate the offense because Kuldeep Singh was put on notice in accordance with Business & Professions Code Section 24200.6 of the "air fresheners" frequent sale for use as drug paraphernalia.

(Determination of Issues, ¶ 8.) Notably, the ALJ fails to make any findings that the clerk understood whether the agent intended to use the glass tube to ingest a controlled substance, a crucial element when it comes to the necessary scienter or mens rea

element of the offense charged.

The accusation charges that appellant's clerk sold, furnished or transferred drug paraphernalia, as defined in Health and Safety Code section 11014.5, in violation of Health and Safety Code section 11364.7(a), which provides:

> (a) Except as authorized by law, any person who delivers, furnishes, or transfers, possesses with intent to deliver, furnish, or transfer, or manufactures with the 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, 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, except as provided in subdivision (b), in violation of this division, is guilty of a misdemeanor.

(Emphasis added.) Health and Safety Code section 11014.5, provides, in pertinent part:

> (a) "Drug paraphernalia" means all equipment, products and materials of any kind which are designed for use or marketed for use, in . . . ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of this division. . . .
>
> [¶ . . . ¶]
>
> (b) For the purposes of this section, the phrase "marketed for use" means advertising, distributing, offering for sale, displaying for sale, or selling in a manner which promotes the use of equipment, products, or materials with controlled substances.
>
> (c) In determining whether an object is drug paraphernalia, a court or other authority may consider, in addition to all other logically relevant factors, the following:
>
> > (1) Statements by an owner or by anyone in control of the object concerning its use.
> >
> > (2) Instructions, oral or written, provided with the object concerning its use for ingesting, inhaling, or otherwise introducing a controlled substance into the human body.
> >
> > (3) Descriptive materials accompanying the object which explain or depict its use.

(4) National and local advertising concerning its use.

(5) The manner in which the object is displayed for sale.

(6) Whether the owner, or anyone in control of the object, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products.
(7) Expert testimony concerning its use.

The due process issue is brigaded with service on appellant of Form ABC-546-A, developed and used by the Department to apprise licensees of the offenses prohibited that underlie and inform accusations. In fact, the Department stated that appellant, by acknowledging receipt of this form, was put on notice that "'glass tubes commonly marketed as a bud vase or air freshener' are frequently sold as drug paraphernalia . . . [Appellant] failed to remove the 'air freshener' glass tubes from the licensed premises until this violation occurred." (Determination of Issues, ¶ 8.)

"[Constitutionally sufficient] notice must be of such nature as reasonably to convey the required information." (*Mullane v. Cent. Hanover Bank & Trust Co*. (1950) 339 U.S. 306, 314 [70 S. Ct. 652].) "[W]hen notice is a person's due, process which is a mere gesture is not due process . . . the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected." (*Id*. at p. 315.) The means employed must be "reasonably certain" to "actually inform" the party (*id*.), and in choosing the means, one must take account of the "capacities and circumstances" of the parties to whom the notice is addressed. (*Goldberg v. Kelly* (1970) 397 U.S. 254, 268-269 [90 S.Ct. 1011] [superceded by statute on other grounds]; *Memphis Light, Gas & Water Division v. Craft* (1978) 436 U.S. 1, 14, fn. 15.)

Here, the notice delivered by the Department does not "reasonably . . . convey [to appellant] the required information" essential to satisfy due process. (*Mullane*,

supra, 339 U.S. at p. 314.) For starters, Forms ABC-546 and ABC-546-A appear at odds with most of the criteria listed in Health and Safety Code § 11014.5 (c)(1-7) for ascertaining whether a product qualifies as forbidden "drug paraphernalia." The pertinent portion of the form describing what is prohibited for sale under the category of "pipes" mentions "glass tubes commonly marketed as a bud vase or air freshener" (Dept.Br. at p. 4), yet the statutory criteria for determining whether objects are "drug paraphernalia" strongly suggests that, in this case, the glass tube air fresheners are not. There is, for instance, no evidence in the record of "instructions" "concerning its use for ingesting, inhaling, or otherwise introducing a controlled substance into the human body"; no "descriptive materials accompanying the object which explain or depict its use" for anything other than as "air fresheners"; and no "[n]ational and local advertising concerning its use" as anything but an air freshener. (§ 11014.5(c)(2-4).) The manner in which the glass tube air fresheners were displayed was not indicative of anything improper — they were openly displayed in front of the counter along with other types and styles of air fresheners, and the licensee is indisputably an otherwise "legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products." (*Id*. at subd. (c)(5-6).) All the Department decision rests on, then, for its determination that the "glass tube air freshener in question" is "drug paraphernalia" is its agent's interpretation of what he believed was communicated to him largely through pantomime with a clerk who spoke Punjabi but only limited English (*id*. at subd. (c)(1)), and that same agent's "expert" testimony about how, with considerable modification, the glass tube could be converted into a pipe for smoking unlawful substances such as methamphetamine. (*Id*. at subd. (c)(7).)

Form ABC-546-A, then, appears in conflict with Health and Safety Code section

11014.5 and is therefore void. "[A]gencies do not have discretion to promulgate regulations that are inconsistent with the governing statute, or that alter or amend the statute or enlarge its scope. [Citation.]" (*Slocum v. State Bd. of Equalization* (2005) 134 Cal.App.4th 969, 974 [36 Cal.Rptr.3d 627].) Of course, Form ABC-546-A does not rise to the level of an official regulation even though that is how it is sought by the Department to be used in this case, and that is how we treat it in reviewing the decision below. Perhaps the Department's two related forms are based on statutory authorization other than Health and Safety Code section 11014.5, but because they were never vetted under the Administrative Procedure Act, we do not know. The Department's use of these particular forms in this case, however, bears all the earmarks of "underground regulations."

> An underground regulation is a regulation that a court may determine to be invalid because it was not adopted in substantial compliance with the procedures of the Administrative Procedure Act (Gov. Code, § 11340 *et seq*.) (APA). (*California Advocates for Nursing Home Reform v. Bontá* (2003) 106 Cal.App.4th 498, 506 [130 Cal.Rptr.2d 823].) To be deemed an underground regulation, [the questioned regulation] must meet two requirements: (1) the agency must intend it to apply generally rather than in a specific case; and (2) the agency must adopt it to implement, interpret, or make specific the law enforced by the agency. (*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 571 [59 Cal.Rptr.2d 186, 927 P.2d 296] (*Tidewater*).)

(*Modesto City Schools v. Ed. Audits App. Panel* (2004) 123 Cal.App.4th 1365, 1381 [20 Cal.Rptr.3d 831].)

> Government Code section 11340.5(a) provides, in pertinent part:
>
> No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation.

Government Code section 11342.600 defines "regulation" as "every rule, regulation,

order, or standard of general application . . . adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure."

> "'If a rule constitutes a "regulation" within the meaning of the APA (other than an "emergency regulation" . . .) it may not be adopted, amended, or repealed except in conformity with "basic minimum procedural requirements,"'" which include public notice, opportunity for comment, agency response to comment, and review by the state Office of Administrative Law. (*Morning Star Co. v. State Bd. of Equalization* (2006) 38 Cal.4th 324, 333 [42 Cal.Rptr. 3d 47, 132 P.3d 249] (*Morning Star*).) "These requirements promote the APA's goals of bureaucratic responsiveness and public engagement in agency rulemaking." (*Ibid*.)

(*Clovis Unified School Dist. v. Chiang* (2010) 188 Cal.App.4th 794, 799 [116 Cal.Rptr.3d. 33].)

Service by the Department of "underground regulations" that materially conflict with a pertinent statute setting forth criteria for ascertaining what constitutes "drug paraphernalia" — that are buried in a packet of 10 other forms comprising 25 pages in total — can hardly satisfy the requisites of "due process" notice. By using these forms in this case, the Department "either forbids or requires the doing of an act in terms so vague that [people] of common intelligence must necessarily guess at [their] meaning." (*Connally v. Gen. Constr. Co*. (1926) 269 U.S. 385, 391 [46 S.Ct. 126].) As such, the prohibitions in these forms cannot help but lend themselves to arbitrary and discriminatory enforcement, the very vice the guarantee of due process exists to prevent. (See, e.g., *Village of Hoffman Estates v. Flipside* (1982) 455 U.S. 489, [102 S.Ct. 1186].)

Finally, we do not believe the evidence established that appellant knew or reasonably should have known that the glass tubes were drug paraphernalia. Testimony established the clerk believed the agent, who pantomimed what he thought

signified drug use while uttering a few words in street slang that the clerk did not understand, was interested in buying an air freshener. (RT at p. 74.) Substantial evidence is lacking to support the finding that the glass tubes in appellant's store were marketed for use as drug paraphernalia.

In order for something to be "marketed for use as drug paraphernalia," the court imposes a requirement of knowledge:

> The knowledge requirement . . . is satisfied when a supplier: (i) has actual knowledge an object will be used as drug paraphernalia; (ii) is aware of a high probability an object will be used as drug paraphernalia; or (iii) is aware of facts and circumstances from which he should reasonably conclude there is a high probability an object will be used as drug paraphernalia.

(*People v. Nelson* (1985) 171 Cal.App.3d Supp. 1, 17 [218 Cal.Rptr 279].)[4] None of the knowledge requirements enumerated by the court have been established here. The clerk did not have actual knowledge that the tube would be used to ingest drugs; he was not aware of a high probability the tube would be used to ingest drugs; and he was not aware of facts or circumstances from which he should reasonably conclude there was a high probability the tube would be used to ingest drugs. This clerk thought he was selling an air freshener.

The *Nelson* court also clarified the difference between the phrases "designed for use" and "marketed for use" in regards to drug parapernalia:

> [W]e conclude that the "designed for use or marketed for use" language in section 11014.5's definition of "drug paraphernalia" reflects the Legislature's attempt to assign the appropriate scienter to each category of offender within that section's ambit. [Citation.] In other words, the

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[4]Similarly, *Posters 'N' Things, Ltd. v. United States* (1994) 511 U.S. 513 [114 S.Ct. 1747] holds that government prosecutors of a federal law prohibiting the sale of drug paraphernalia in interstate commerce that is silent about the mens rea required to commit the offense must prove that a defendant is "aware customers in general are likely to use the merchandise with drugs." (*Id*. at pp. 522-524.)

> "designed for use" phrase pertains to the state of mind of the manufacturer of an item, while the "marketed for use" phrase refers to the seller, including distributor, of the item. The common denominator in both instances is that the requisite state of mind belongs to the person in control of the item at the time the item is manufactured, or delivered, furnished or transferred, etc.

(*Id.* at p. 9.) Under the facts presented here, the Department has not established that appellant marketed the glass tube for use as drug paraphrenalia.

> As pointed out in *Levas & Levas v. Village of Antioch, Illinois*, 684 F.2d 446, 453 (7th Cir. 1982), . . . the scienter requirement determines what *is* classifiable as drug paraphernalia: the violator must design the item for drug use, intend it for drug use, or actually employ it for drug use. Since very few of the items a paraphernalia ordinance seeks to reach are single-purpose items, scienter is the only practical way of defining when a multi-purpose object becomes paraphernalia. So long as a violation of the ordinance cannot be made out on the basis of someone other than the violator's knowledge, or on the basis of knowledge the violator ought to have had but did not, this sort of intent will suffice to distinguish "the paper clip which holds the pages of this memorandum of opinion from an identical clip which is used to hold a marijuana cigarette."

(*Id*. at p. 13, fn. 12, quoting *Murphy v. Matheson* (1984) 742 F.2d 564, 573, emphasis in original.)

Substantial evidence is lacking to establish that appellant intended the glass tube to be used to ingest a controlled substance, or to establish that the clerk knew the agent intended to use the glass tube to ingest a controlled substance. Accordingly, a violation of Health and Safety Code section 11364.7, subdivision (a) cannot be established under the facts of this case. The requisite knowledge and intent required to establish a violation of Health and Safety Code section 11364.7(a) — *i.e.*, to establish that the glass tubes were being marketed or sold by appellant as drug paraphrenalia — is absent, and therefore the decision is not supported by substantial evidence.

ORDER

The decision of the Department is reversed.[5]

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

PETER J. RODDY, MEMBER, listened to oral argument of this case by telephone, but did not participate in this decision, because the Board did not provide sufficient advance notice to all parties of this fact pursuant to Government Code section 11123, subdivision (b)(1)(C).

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

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