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

AB-9402
File: 20-454175 Reg: 13077851

RIDHWAN TAHER HUSSAINMASWARA,
dba Queen of Sheba
710 East Charter Way, Stockton, CA 95206-1538,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: July 10, 2014
San Francisco, CA

ISSUED AUGUST 4, 2014

Ridhwan Taher Hussainmaswara, doing business as Queen of Sheba (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked his license, with revocation conditionally stayed for 180 days to allow a person-to-person transfer, and imposed a concurrent 20-day suspension, for possession of a substance containing cathinone, a violation of Business and Professions Code section Health and Safety Code section 11377.

Appearances on appeal include appellant Ridhwan Taher Hussainmaswara, appearing through his counsel, Bradford J. Dozier, and the Department of Alcoholic Beverage Control, appearing through its counsel, Heather Hoganson.

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[1]The decision of the Department, dated December 13, 2013, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on July 9, 2007. On January 2, 2013, the Department instituted an accusation against appellant charging that appellant's agent and employee, Malek Redhwan Taher Maswara, possessed, within the premises, a controlled substance — to wit, khat and/or cathinone — in violation of Health and Safety Code section 11377.

At the administrative hearing held on October 8, 2013, documentary evidence was received and testimony concerning the violation charged was presented by Anthony Sutter, a criminalist for the Bureau of Forensic Services; by Department Agents John McNamara and Guadalupe Ochoa; by Department District Administrator Joseph McCullough; and by Ridhwan Taher Hussainmaswara, the licensee.

Testimony established that on October 18, 2012, Agents McNamara and Ochoa visited the premises in order to post a Notice of Suspension.

The Notice derived from an earlier decision finding violations of Business and Professions Code section 25607; Penal Code sections 330B, 330A, 330.1, and 330.4; and Health and Safety Code section 11377. This earlier case had been resolved by stipulation and waiver — executed by appellant's son, Malek Redhwan Taher Maswara — on August 31, 2012. The Department accepted Maswara's authority to execute the stipulation and waiver based on a general Power of Attorney (POA), executed by appellant, which Maswara presented to Department Administrator McCullough, as well as previous dealings, including Maswara's payment of a sale-to-minor fine on appellant's behalf. McCullough testified he made multiple attempts to contact appellant directly.

According to McNamara and Ochoa, when a notice of suspension is posted,

agents enter the licensed premises and contact the licensee's agent or employees. The agents carry two Notice of Suspension documents, one of which is posted on the front of the premises, while the other is posted in the area where alcoholic beverages are located. In addition, agents will inspect the premises for weapons for officer safety reasons.

Accordingly, on October 18, 2012, agents Ochoa and McNamara made an unannounced visit to the licensed premises for the purpose of posting the notices of the suspension. Upon encountering Malek Maswara, agent Ochoa asked him if there was a firearm in the store. Maswara replied affirmatively, and indicated it was behind the sales counter. Ochoa asked Maswara to move away from the sales counter. Maswara complied. Ochoa saw the firearm on a shelf behind the counter and retrieved it. The firearm was not in a case or carrier. Ochoa gave the firearm to McNamara, who rendered it safe.

While Agent Ochoa was attempting to locate the firearm, she discovered a black plastic bag behind the counter. It was not hidden or in a cabinet. The bag was opaque, and she could not see the contents, though she felt the outside of the bag and inferred from her manipulation of it that it contained “very light . . . broken-up leafy particles." (RT at p. 65.) There is no evidence in the record that she asked Muswara what was in the bag or for his permission to open it and inspect further. Nor was there any testimony that agent Ochoa smelled the bag or sensed any identifiable odor emanating from it. Nonetheless, Ochoa looked inside the bag and discovered a leafy green substance similar to khat previously found at the premises in June 2012. The total weight of the suspected khat was 30.18 grams — significantly less than what was found during the previous visit.

Agent Ochoa asked Maswara about the bag. Ochoa told Maswara he had been advised not to possess khat. Maswara stated he did not use khat and did not know the bag was there. Maswara suggested it may have been brought in by a friend or a person helping out at the store. Ochoa asked Maswara if there were any additional employees working at the premises. Maswara said there were not.

The bag of suspected khat was later examined by the Department of Justice Bureau of Forensic Services, which determined that the substance contained cathinone, a Schedule II drug, though it was impossible to determine definitively that the plant material was khat.

Appellant purchased the premises in 2007. The same year, he returned to Yemen to care for his ailing mother. He left Maswara and another son, Mulaiki, in charge of the premises. Appellant remained in Yemen for five years, until he returned in November of 2012. During his absence, appellant contacted his sons every month to check on the premises and discuss other matters.

In 2007, appellant also held a Department license for a premises in Fresno. He surrendered that license in 2007 because the soil was contaminated, which required closing the business. The Department gave appellant time to sell the Fresno license. In 2010, appellant found a buyer and sold the license for $50,000. Appellant executed the POA in Yemen, making Maswara his attorney-in-fact. The POA was recorded in Fresno County and mailed to Maswara at the licensed premises. Appellant testified that he intended the POA to pertain only to the sale of the Fresno license, and not to any transactions involving the licensed premises at issue in this case.

When appellant returned to the premises in November of 2012, he found the beer coolers locked and darkened. Maswara lied and told appellant the license was

suspended due to a sale-to-minor violation. Appellant questioned him, and ultimately Maswara admitted it was due to the khat found at the premises. Maswara blamed his brother. Apppellant wanted to go to the Department to discuss the matter, but Maswara refused. Appellant himself went to the Department and discovered that khat had, in fact, been found at the premises twice.

Appellant testified that his sons use khat. It is legal in Yemen, but appellant is aware that it is illegal in the United States, and therefore does not condone his sons' use of it here.

Appellant testified that he is very angry with his sons. When he returned to the premises, he found them messy and unkempt. He found the clientele had changed to a "rougher" crowd, and that his sons were using bad language. Appellant was also angry about Maswara lying to him. In addition to the state of the premises and the ABC violations, appellant discovered that the premises owed $117,000 in back taxes. Appellant testified he was so angry he slapped Maswara, and that he wants his sons to go to jail. Both Maswara and Mulaiki have fled. Appellant currently runs the premises with a third son. He has been ill, however, and wishes to sell the business.

After the hearing, the Department issued its decision which determined that appellant's agent or employee, Malek Redhwan Taher Maswara, possessed within the premises a controlled substance — to wit, khat and/or cathinone — in violation of Health and Safety Code section 11377. No defense was established. The ALJ imposed a penalty of revocation, conditionally stayed for 180 days to permit a person-to-person transfer of the license, and a concurrent 20-day suspension.

Appellant filed a timely appeal raising the following issues: (1) the search that led to the discovery of the leafy green matter was illegal, and the evidence should not have

been admitted; and (2) the Power of Attorney was limited and insufficient to permit appellant's son, Malek Redhwan Taher Maswara, to resolve the prior disciplinary matters which led to an aggravated penalty in this case. We shall address the Power of Attorney issue first.

DISCUSSION

I

Appellant contends that the authority granted in the Power of Attorney (Exhibit 5) was insufficient to permit Malek Maswara to resolve two previous disciplinary matters via Stipulation and Waiver. Without that authority, appellant contends, the settlements are invalid.

Both the Civil Code and case law offer guidance on the enforceability of contracts where it is alleged the contract was executed by an unauthorized agent. "Ostensible authority is such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess." (Civ. Code. § 2317.)

> There are two essential features of an authority of this character; viz., the party must believe that the agent had authority, and such belief must be generated by some act or neglect of the person to be held. A belief founded on the agent's statements is not sufficient; for a party has no right to take the agent's word for the existence of his authority.

(*Harris v. San Diego Flume Co.* (1891) 87 Cal. 526, 528 [25 P. 758]; *County First National Bank of Santa Cruz v. Coast Dairies and Land Co.* (1941) 46 Cal.App.2d 355 [115 P.2d 988] ["It is not indispensible that actual authority be shown by an express agreement."].) "[T]he doctrines of ostensible agency or agency by estoppel are not based upon the representations of the agent but upon the representations of the principal." (*Boren v. State Personnel Bd.* (1951) 37 Cal.2d 634, 643 [234 P.2d 981]; see also *Hill v. Citizens National Trust & Savings Bank* (1937) 9 Cal.2d 172, 176 [69

P.2d 853]; *Ernst v. Searle* (1933) 218 Cal. 233, 237 [22 P.2d 715].)

The pertinent question, then, is not solely whether the Power of Attorney appellant granted to his son includes the authority to resolve disciplinary accusations. Instead, this Board must ask whether the Department believed Maswara had authority to act as agent for appellant, and whether the actions of appellant, as principal, justified that belief.

The Power of Attorney is certainly relevant. The document includes language:

> GIVING AND GRANTING unto my said Attorney *full power and authority to do and perform all and every act and thing whatsoever requisite, necessary and appropriate to be done in and about the premises* as fully to all intents and purposes as I might or could do if personally present, hereby ratifying all that my said Attorney shall lawfully do or cause to be done by virtue of these presents. The powers and authority hereby conferred upon my said Attorney *shall be applicable to all real and personal property or interest therein now owned or hereafter acquired by me and wherever situate*.

(Exhibit 5, emphasis added.)

There is no question that the Department relied on Malek Maswara's ostensible agency when he signed the stipulation and waiver.

Appellant argues that the Power of Attorney granted only limited authority "and bore indicia on its face of its intended usage with respect to a transaction taken in 2010 in Fresno County and had no reference within it to any property of any nature within San Joaquin County." (App.Br. at p. 21.) The "indicia" to which appellant refers, however, are not part of the body of the POA, but simply the stamp showing that the document was filed at the Fresno County Recorder on June 9, 2010. While the POA does refer to "the premises," there is nothing within the actual document purporting to define that term. Moreover, there is no expiration date for the POA. It would not be unreasonable to read the POA as granting Maswara authority to transact all business

"requisite, necessary and appropriate" with regard to the premises at issue in this case.

However, we need not hold that the POA did in fact grant Maswara authority to execute the present stipulation and waiver. Appellant's conduct generally tends to support the Department's belief that Maswara was appellant's agent and authorized to negotiate on his behalf. It is undisputed that appellant was outside the country and not directly operating the premises, and that he left his sons, including Malek Maswara, in charge of running the premises as paid employees. (Findings of Fact ¶ 11; RT at pp. 116-117, 120.) Appellant indicated his sons retained the profits of the premises to "pay [his] bills, [his] credit card, [his] taxes, income taxes, state taxes, license, credit cards, all the bills." (RT at p. 121.) They were authorized to sign checks on behalf of the business. (*Ibid.*) They set up an ATM client at the premises. (RT at p. 141.) If problems arose at the premises, appellant's sons would relate them by phone. (RT at p. 129.) Appellant, in fact, testified that his sons were "supposed to" pay ABC fines, because he wasn't present. (RT at p. 157.)

In fact, appellant's only contact with his sons during this time was when they called him in Yemen "[a]t least monthly." (RT at p. 128.) He testified that when he returned to the premises in 2012, he was surprised at how the clientele — and his sons — had changed and had become "very rough." (RT at p. 134.)

Based on this and other testimony, and on the documentary evidence presented by both parties, the ALJ found:

> The licensee voluntarily absented himself from the United States almost simultaneously with his licensure in 2007. [He] provided Department officials no contact information or location of his whereabouts, except by way of his sons who were left in charge of the premises.
>
> All alcoholic beverage transactions, including, but not limited to, sales, purchases from distributors, license renewals, and potential disciplinary

issues were relegated to the licensee's sons.

> Thus, it was entirely reasonable for District Administrator McCullough to rely on Malek Maswara's assertion that he had the authority to transact business on behalf of his father. Indeed, prior to the June 2012 incident that resulted in the Stipulation and Waiver and Decision of September 2012 (State's Exhibit 3), District Administrator McCullough settled a sale to minor case with Malek Maswara. (State's Exhibit 2) Malek Maswara paid the fine for the 2011 violation. (*Id.*) Prior to the execution of the September 2012 Stipulation and Waiver (State's Exhibit 3), District Administrator McCullough believes he attempted to contact the licensee via the mail and he asked Malek if there was any way he could speak with the licensee. (Findings of Fact, ¶ 5.)

(Determination of Issues ¶ 7.)

Appellant now argues that the Department ought to have simply sent the accusation to the premises and awaited a response. Yet, according to appellant's own testimony, he was never at the premises to receive such a communication, and relied entirely on his sons to forward the information. Appellant voluntarily absented himself from the country and handed his sons total control of the premises. Under the circumstances, the POA merely serves as one piece of evidence among many supporting the Department's justifiable reliance on Malek Maswara's ostensible authority to resolve disciplinary actions on appellant's behalf.

II

Appellant contends that the discovery of the leafy material determined to contain cathinone should not have been admitted in support of the accusation. Appellant argues that the Department exceeded its authority to conduct an administrative search of the premises. Appellant points out that Department agents visited the premises solely to post a suspension notice, but nevertheless proceeded to search the area behind the counter.

As an initial matter, the Department inexplicably characterizes the search and

seizure issue as a question of fact properly resolved in the decision below. (Reply Br. at p. 6.) The Department is incorrect: whether a warrantless administrative search was proper is a question of law decided on the basis of the facts in the record. (See *New York v. Burger* (1987) 482 U.S. 691 [96 L.Ed.2d 601].) It is well within this Board's constitutional authority to decide whether the Department proceeded in the manner required by law. (See Cal. Const., art. XX, § 22.)

This Board reviews questions of law de novo.

> "It is well settled that the interpretation and application of a statutory scheme to an undisputed set of facts is a question of law [citation] which is subject to de novo review on appeal. [Citation.] Accordingly, we are not bound by the trial court's interpretation. [Citation.]" (*Rudd v. California Casualty Gen. Ins. Co.* (1990) 219 Cal.App.3d 948, 951-952 [268 Cal.Rptr. 624].) An appellate court is free to draw its own conclusions of law from the undisputed facts presented on appeal.

(*Pueblos Del Rio South v. City of San Diego* (1989) 209 Cal.App.3d 893, 899 [257 Cal.Rptr. 578].) Typically, on appeal of a denial of a motion to suppress, a court will "defer to the trial court's factual findings where supported by substantial evidence, but [will] exercise [its] independent judgment to determine whether, on the facts found, the search and seizure was reasonable under the Fourth Amendment." (*People v. Thurman* (1989) 209 Cal.App.3d 817, 821 [257 Cal.Rptr. 517], citing *People v. Leyba* (1981) 29 Cal.3d 591, 596-597 [174 Cal.Rptr. 867].)

Business and Professions Code section 25753 provides: "The department may make any examination of the books and records of any licensee or other person and may visit and inspect the premises of any licensee it may deem necessary to perform its duties under this division." Section 25755 elaborates on the department's authority:

> (a) The director and the persons employed by the department for the administration and enforcement of this division are peace officers in

> the enforcement of the penal provisions of this division, the rules of the department adopted under the provisions of this division, and any other penal provisions of law of this state prohibiting or regulating the sale, exposing for sale, use, possession, giving away, adulteration, dilution, misbranding, or mislabeling of alcoholic beverages or intoxicating liquors, and these persons are authorized, while acting as peace officers, to enforce any penal provisions of law while in the course of their employment.
>
> (b) The director, the persons employed by the department for the administration and enforcement of this division, peace officers listed in Section 830.1 of the Penal Code, and those officers listed in Section 830.6 of the Penal Code while acting in the course and scope of their employment as peace officers may, in enforcing the provisions of this division, visit and inspect the premises of any licensee at any time during which the licensee is exercising the privileges authorized by his or her license of the premises.

The statutes thus permit the warrantless administrative search of licensed premises for the purposes of enforcing either "this division" — that is, the Alcoholic Beverage Act — or provisions of the Penal Code.

The United States Supreme Court provided guidance on the interaction between the Fourth Amendment and administrative searches of commercial premises. In *Burger*, the Court observed that it has

> long recognized that the Fourth Amendment's prohibition on unreasonable searches and seizures is applicable to commercial premises, as well as to private homes. [Citation.] An owner or operator of a business thus has an expectation of privacy in commercial property, which society is prepared to consider to be reasonable. [Citation.] This expectation exists not only with respect to traditional police searches conducted for the gathering of criminal evidence but also with respect to administrative inspections designed to enforce regulatory statutes. [Citation.] An expectation of privacy in commercial premises, however, is different from, and indeed less than, a similar expectation in an individual's home. [Citation.] This expectation is particularly attenuated in commercial property employed in "closely regulated" industries. The Court observed in *Marshall v. Barlow's, Inc.*: "Certain industries have such a history of government oversight that no reasonable expectation of privacy, [citation], could exist for a proprietor over the stock of such an enterprise."

(*Burger*, *supra*, 482 U.S. at pp. 699-700, citing *Marshall v. Barlow's, Inc.* (1978) 436

U.S. 307, 313 [56 L.Ed.2d 305].)

The Court outlined a three-part test to determine whether a warrantless inspection is reasonable in the context of a pervasively regulated business:

> First, there must be a "substantial" government interest that informs the regulatory scheme pursuant to which the inspection is made. *See Donovan v. Dewey* [(1980)] 452 U.S. [594,] 602 [69 L.Ed.2d 262] ("substantial federal interest in improving the health and safety conditions in the Nation's underground and surface mines"); *United States v. Biswell* [(1972)] 406 U.S. [311,] 315 [32 L.Ed.2d 87] (regulation of firearms is "of central importance to federal efforts to prevent violent crime and to assist the States in regulating the firearms traffic within their borders"); *Colonnade Corp. v. United States* [(1970)] 397 U.S. [72,] 75 [25 L.Ed.2d 60] (federal interest "in protecting the revenue against various types of fraud").
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> Second, the warrantless inspections must be "necessary to further [the] regulatory scheme." *Donovan v. Dewey*, 452 U.S., at 600. For example, in *Dewey* we recognized that forcing mine inspectors to obtain a warrant before every inspection might alert mine owners or operators to the impending inspection, thereby frustrating the purposes of the Mine Safety and Health Act — to detect and thus deter safety and health violations. *Id.*, at 603.
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> Finally, "the statute's inspection program, in terms of the certainty and regularity of its application [must] provid[e] a constitutionally adequate substitute for a warrant. *Ibid.* In other words, the regulatory statute must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers. See *Marshall v. Barlow's, Inc.*, 436 U.S., at 323; see also *id.*, at 332 (STEVENS, J., dissenting). To perform this first function, the statute must be "sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes." *Donovan v. Dewey*, 452 U.S., at 600. In addition, in defining how a statute limits the discretion of the inspectors, we have observed that it must be "carefully limited in time, place, and scope." *United States v. Biswell*, 406 U.S., at 315.

(*New York v. Burger*, *supra*, 482 U.S. at pp. 702-703.)

In *Paulson*, the California court of appeals addressed the scope of an

administrative search conducted under Business and Professions Code sections 25753 and 25755. (*Paulson*, *supra*, 216 Cal.App.3d 1480.) A Department investigator, acting on a tip, requested access to a safe behind the bar at a licensed premises. The licensee opened the safe, and the investigator discovered a significant quantity of cocaine. The court evaluated the reasonableness of the search by applying three-factor test outlined in *Burger*:

> The warrantless inspection of closely regulated business premises will be deemed unreasonable unless three criteria are met. "First there must be a substantial government interest that informs [the] regulatory scheme pursuant to which the inspection is made. (*New York v. Burger*, *supra*, 482 U.S. 691, 702 [96 L.Ed.2d at p. 614].) . . . "Second, the warrantless inspections must be necessary to further [the] regulatory scheme." (*New York v. Burger*, *supra*, 482 U.S. 691, 702 [96 L.Ed.2d 601, 614], quoting *Donovan v. Dewey*, 425 U.S., at p. 600 [69 L.Ed.2d at p. 270].) "Finally, the statute's inspection program, in terms of the certainty and regularity of its application, *[must] provid[e] a constitutionally adequate substitute for a warrant*." [*Donovan v. Dewey*, 452 U.S., at p. 603.]

(*Paulson*, *supra*, 216 Cal.App.3d at p. 1485, emphasis in original.)

The licensee argued the search was unreasonable under the *Burger* factors and could not be upheld:

> [T]he search exceeded the scope of the officer's statutory authority. According to appellant, section 25755 would be constitutionally overbroad if construed to permit persons employed by the Department to make inspections of licensed premises for the enforcement of penal laws unrelated to the central purpose of the Alcoholic Beverage Control Act. The purpose of the act, appellant emphasizes, is regulation of the sale of alcoholic beverages, not controlled substances and dangerous drugs. Appellant also contends that the statutory proscription on "any public offense involving moral turpitude" does not limit the discretion of suspecting officers, as the Supreme Court has required (*New York v. Burger* [(1987)] 482 U.S. 691,] 703 [96 L.Ed.2d [601,] 614]) because the concept of moral turpitude "defies any attempt at a uniform and precise definition." (*Rice v. Alcoholic Beverage etc. Appeals Bd.* (1979) 89 Cal.App.3d 30, 36 [152 Cal.Rptr. 285].) Permitting employees of the Department to conduct warrantless searches of licensed premises for evidence of any public offense they believe involves moral turpitude,

> appellant argues, "devolves almost unbridled discretion upon executive and administrative officers, particularly those in the field, as to when to search and whom to search." (*Marshall v. Barlow's Inc.* [(1978)] 436 U.S. [307,] 323 [56 L.Ed.2d [305,] 317-318].)

(*Id.* at pp. 1487-1488.) The court disagreed, and held that the search satisfied all three factors. (*Id.* at pp. 1488-1490.)

Regarding the first factor, *Paulson* held the warrantless inspection of the premises advanced a substantial government interest — namely, preventing the sale of controlled substances on the licensed premises. (*Id.* at p. 1488-1489.) The decision, however, focused on the *sale* of controlled substances and the specificity of section 24200.5. The court noted that "[p]ermitting the sale of controlled substances or dangerous drugs on licensed premises . . . is the only public offense not itself involving alcoholic beverages requiring license revocation." (*Id.* at 1488.) The court expressly declined to "address appellant's challenge to the use of section 24200, because the Department does not attempt to justify the warrantless search on the basis of the broad language of that statute." (*Id.* at p. 1488.)

With regard to the second factor, the court held that "[t]he warrantless inspection . . . meets the second criterion because, as the United States Supreme Court has pointed out, violations of that can be quickly concealed, such as the sale of contraband, can only be deterred by frequent and unannounced inspections." (*Id.* at p. 1489.)

Lastly, "[t]he inspection satisfied the final criterion because it was authorized by statutes — sections 24200.5, 25753 and 25755 — which collectively provide a 'constitutionally adequate substitute for a warrant.'" (*Ibid*.) Because section 24200.5 explicitly informs a licensee that the sale of controlled substances on the licensed premises is illegal, and because sections 25753 and 25755 permit searches in order to

enforce the statutory scheme in which section 24200.5 appears, the licensee "cannot help but be aware that his property will be subject to periodic inspections during business hours for the specific purpose of determining whether he is permitting the sale of controlled substances . . . on his premises." (*Id.* at p. 1490.) Again, the specificity of section 24200.5 was significant.

Notably, *Paulson* closed its analysis with an observation that "this is not case in which, as a condition of doing business, the state has required a blanket submission to warrantless searches at any time or for any purpose." (*Ibid.*) Sections 25753 and 25755, under both *Burger* and *Paulson*, do not grant the Department *carte blanche* to inspect licensed premises at will.

Paulson, however, is not the final word on administrative searches conducted under section 25755. In *Castilllo*, an officer repeatedly visited a licensed premises in order to conduct a "'bar check' which he described as '. . . showing police presence. . . . We're looking for minors drinking, any other violation of the Business and Professions Code.'" (*People v. Castillo* (1992) 7 Cal.App.4th 836, 837 [9 Cal.Rptr.2d 696].) During a visit to verify possession of an "entertainment or dance permit," the officer followed the licensee into a back office area. (*Ibid.*) There, he observed narcotics paraphernalia in plain sight, and arrested the licensee for possession. (*Ibid*.) The trial court declined to suppress the narcotics. (*Id.* at pp. 837-838.) On appeal — and with little analysis — the court affirmed: "Given the factual determination that [the officer] was wearing two hats, one of which was his 'bar check' hat, the rules which allow for an administrative search . . . made it objectively reasonable for him to be at any location in the bar, including the office/storage room." (*Id.* at pp. 839-840; see also *id.* at fn. 1 [declining to

"reexamine the legal analysis of administrative search rules"].) Once he was inside the office, the plain view doctrine permitted him to seize the cocaine. (*Id.* at p. 839, citing *People v. Renteria* (1992) 2 Cal.App.4th 44, 444 [2 Cal.Rptr.2d 925].) *Castillo* thus overlooks the closing comment in *Paulson* and grants officers *carte blanche* to conduct "bar checks" in any part of a licensed premises, pursuant to section 25755. (See *id.* at pp. 839-840, fn. 2.)

The ALJ, though never referring to *Burger*, *Paulson*, or *Castillo*, supplies reasoning largely in line with the *Castillo* decision, with additional reference to non-statutory policy concerns over officer safety:

> Department Agents Ochoa and McNamara visited the Respondent's premises to post a Notice of Suspension of the license in accordance with their duties and responsibilities. (Findings of Fact, ¶¶ 3 & 6) The store's employee, Malek Maswara, confirmed there was a weapon (handgun) behind the sales counter when Agent Ochoa asked him if one was in the store. She inquired about the presence of weapons for officer safety reasons, a legitimate and reasonable precaution given the potential for serious injury or death in such circumstances. While she was attempting to locate the weapon, Agent Ochoa found the black plastic baggy containing the suspected Khat. (Findings of Fact, ¶ 8.)
>
> Agent Ochoa's discovery of the suspected Khat, under the facts and circumstances, are in accordance with her inherent authority given by Business and Professions Code sections 25753 and 25755.

(Determination of Issues ¶ 5.) Neither the ALJ nor the Department cite any provision of either the Business and Professions Code or the Penal Code which allows a search solely for reasons of officer safety.

The Department, not surprisingly, cites *Castillo*. Moreover, it argues that *Paulson* supports its case, because "sections 25753[fn] and 25755[fn] provide authorization for peace officers to inspect [a] business using the privilege of an alcoholic beverage license." (Reply Br. at p. 6.) Moreover, contends the Department,

"[t]he compliance found by the court in *Paulson* applies even more to this matter because in *Paulson* the threat [of finding contraband] was possible; here it was probable." (*Id.* at p. 7.)

The Department's brief provides no authority for the relevance of possibility versus probability in determining the reasonableness of an administrative search, nor does it refer to the facts to explain its conclusion. (See *ibid.*) More importantly, the Department never applies the test outlined in *Burger* and *Paulson*, nor does it cite statutory authority, beyond sections 25753 and 25755, to justify the agents' search of the register area and the contents of the closed bag that its agent obviously knew, from manipulating the non-visible contents, did not include a weapon or pose a danger to the agents. The Department does argue, however, that

> the Department agents were told that there was a firearm present and were on notice that a stolen revolver had been located before. With such knowledge of actual prior illegal activity and a current safety hazard, the agents were acting in the proper scope of authority to search the area completely.

(*Ibid.*) In fact, the stolen revolver charge appears only in the accusation, and was brought under Penal Code section 496a, which is not a firearms statute, but rather restricts the purchase of secondhand metals.[2] (See Accusation, File No. 20-454175, Exhibit 3.) The charge was dropped from the stipulated decision. (See Decision, File No. 20-454175, Exhibit 3.)

Beyond that, both the Department and the ALJ appear to assume that sections 25753 and 25755 — bolstered by generalized concerns about officer safety — constitute a blanket grant of power of precisely the sort *Burger* and *Paulson* refuse.

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[2]In California, it is legal to possess a concealed firearm, without a permit, at one's place of business. (See Penal Code § 25605.)

Burger is precedential. We therefore follow the reasoning in *Paulson* and apply the three-part test to the facts of this case.

First, there must be a substantial government interest that informs the regulatory scheme pursuant to which the inspection is made. According to the ALJ, the search here was informed by concerns for officer safety.[3] (Determination of Issues ¶ 5.) While officer safety may certainly be a substantial government interest, it appears to be an unspoken one — neither the ALJ nor the Department cite any statute permitting generalized warrantless searches in order to guarantee officer safety. More importantly, accepting "officer safety" as a legitimate reason for feeling or manipulating the contents of the closed bag, once agent Ochoa determined that its contents were "light in weight" and appeared to be a "leafy substance," any concerns about its contents imperiling officer safety disappeared.

Without reference to a specific provision of the Alcoholic Beverage Act, the Penal Code, or other relevant source of law informed by a substantial government interest, the Department cannot show this search was authorized under the first portion of the *Burger* test.

Second, the warrantless inspection must be necessary to further the regulatory scheme. *Paulson* held that the warrantless search was necessary to further the goal of section 24200.5 because acquiring a warrant might allow for the destruction of

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[3]We note that the ALJ's conclusion in this point conflicts with the agents' own explanation of the search. On cross-examination, Agent McNamara was asked if "there was any reason to be going behind the counter other than to secure the firearm," to which he replied, "Yes. It's not uncommon for — while we are at a premises to conduct an inspection. It's just a basic type of thing." (RT at p. 55.) Agent McNamara went so far as to state "[t]here was no rhyme or reason" as to why the agents chose to search the counter area. (RT at p. 56.)

contraband.[4] Here, the Department argues officer safety — a concern which might in fact be better served by the presentation of a warrant, as a licensee is less likely to react with surprise or defensiveness.

At the minimum, as above, the Department has failed to show what provision of the regulatory scheme it sought to enforce by engaging in a warrantless search of the register area. Without statutory authority evincing a legislative intent to address a substantial government interest, authorizing a search under such a broad and vague concept would erase any limits to administrative searches and seizures, as any part of any premises could reasonably be searched for vague threats to officer safety.

Even if we assume officer safety was sufficient justification without reference to statute, the facts do not establish that the agents had authority to continue searching the register area or to open the plastic bag they discovered. It is not clear from the factual findings which the agents discovered first, the firearm or the bag:

> *While Agent Ochoa was attempting to find the firearm*, she located a black plastic bag behind the counter area. The black plastic bag was opaque and she could not see the contents.
>
> The bag was not hidden or in a cabinet. Agent Ochoa looked in the bag to determine if there was *any contraband like additional weapons*, drugs, or drug paraphernalia.

(Findings of Fact ¶ 8, emphasis added.) The reference to "additional firearms" makes no sense unless the agents had already discovered at least one firearm — which

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[4]The Department argues, in a footnote, that section 24200.5 "provides dangerous drugs as a basis for revocation of a license." (Reply Br. at fn. 3.) If we accepted the Department's interpretation of that provision, we might find that the reasoning in *Paulson* applies here. However, section 24200.5 deals only with the *sale* of dangerous drugs, not mere possession. Thus, section 24200.5 — and, by extension, the reasoning of *Paulson* with regard to the second element of the test — does not apply to this case.

contradicts the earlier portion of the finding. (See *ibid.*) Moreover, the agents' testimony on this point is ambiguous. (See RT at pp. 53-55, 64-65, 72, 76-77, 80.) If the agents located the firearm first, then they have no justification for any further search of the register area.

However, even if the agents discovered the bag before the firearm, the Department has failed to justify the agents' search of the bag. In the context of non-administrative searches,

> Items in plain view, but not described in the warrant, may be seized when their incriminating character is immediately apparent (*Horton v. California* [(1990) 496 U.S. 128,] 136.) The incriminating character of evidence in plain view is not immediately apparent if "some further search of the object" is required. (See *Minnesota v. Dickerson* (1993) 508 U.S. 366, 375 [124 L.Ed.2d 334, 113 S.Ct. 2130].)

(*People v. Lenart* (2004) 32 Cal. 4th 1107, 1118-1119 [12 Cal.Rptr.3d 592].) The Department cites no authority for applying a more lax interpretation of plain view doctrine simply because this was an administrative search. Here, the bag was opaque, and according to Agent Ochoa, "very light in weight." It could not reasonably be suspected of containing a concealed weapon, and there was nothing about the unopened bag that was sufficiently suspicious to warrant opening it for further inspection. Moreover, the mere possession of drugs is not prohibited under the ABC Act or the Penal Code — the *only* provisions of law the agents were entitled to enforce under sections 25753 and 25755.[5] The agents therefore had no authority to open the bag.

Finally, the statute's inspection program, in terms of the certainty and regularity

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[5]The charges in both this case and appellant's prior disciplinary matter were brought under the Health and Safety Code, section 11377, which prohibits possession of controlled substances.

of its application, must provide a constitutionally adequate substitute for a warrant. While it is true that Maswara was aware the Department would be visiting the premises in order to post a suspension notice, the Department has not shown any provision of either the Alcoholic Beverage Act or the Penal Code which could have put Maswara on sufficient notice of the possibility that the Department agents would search the register area, and open and look into any closed bags and containers it may find there regardless of their size, weight, feel, and unlikely propensity to contain anything that could endanger the safety of the officers undertaking the search. The statute upon which the Department relies for authorization to open the bag in question here (or apparently anything else its agents want to examine), provides that it "may visit and *inspect* the premises of any licensee it may deem necessary to perform its duties under this division." (Bus. & Prof. Code § 25753, emphasis added). "Inspect" is not defined in the statute, but when it comes to the licensee's rights to be secure from overly broad invasions of his privacy, our High Court makes clear that such inspections must be "carefully limited in time, place and *scope*." (*Burger*, *supra*, 482 U.S. at p. 703, emphasis added.)

Where, as here, an inspection is undertaken that cannot serve the administrative purpose — either because the threat necessitating the administrative search has been dismissed, or because the action is simply unrelated to the administrative goal — the action clearly exceeds the scope of the permissible search. (Cf. *United States v. Miles* (9th Cir. 2001) 247 F.3d 1009, 1014-15 [police officer exceeded scope of permissible frisk where he continued to manipulate a box in a defendant's pocket after having concluded that the box could not possibly be a weapon, as "[h]e had no cause to shake or manipulate the tiny box on the pretext that he was still looking for a weapon"]; *United*

States v. $557,933.89 (2d Cir. 2002) 287 F.3d 66, 82 [suggesting that airport security personnel would exceed permissible search scope if they "looked into areas or opened packages which could not possibly contain weapons or explosives"].)

The Department's argument thus fails the test set forth in *Burger* and *Paulson*. As a matter of law, the facts do not establish that the search was reasonable.

ORDER

The decision of the Department is reversed.[6]

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
PETER J. RODDY, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[6]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 final order in accordance with Business and Professions Code section 23090 et seq.