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

AB-9581
File: 20-385486; Reg: 14081683

SUNSHINE VENTURES, LTD,
dba Sunshine Handy Market
227 South Main Street, Porterville, CA 93257,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: David W. Sakamoto

Appeals Board Hearing: April 6, 2017
Sacramento, CA

ISSUED APRIL 20, 2017

Appearances: *Appellant:* Derek P. Wisehart, as counsel for Sunshine Ventures, Ltd., doing business as Sunshine Handy Market,

Respondent: Matthew S. Gaughan, as counsel for Department of Alcoholic Beverage Control.

OPINION

Sunshine Ventures, Ltd, doing business as Sunshine Handy Market, appeals from a decision of the Department of Alcoholic Beverage Control[1] revoking its license because appellant sold or furnished or drug paraphernalia—as defined in Health and Safety Code section 11014.5—in violation of Health and Safety Code section 11364.7, subdivision (a); suspending its license for 5 days—and indefinitely thereafter until compliance is achieved—because appellant improperly displayed adult magazines and

[1]The decision of the Department, dated March 15, 2016, is set forth in the appendix.

videos, in violation of Penal Code 313 and Business and Professions Code section 25612.5, subdivision (c)(9); suspending its licence for 35 days because appellant's agent or employee concealed evidence in violation of Penal Code section 135; and suspending its license for 35 days because appellant's agent or employee resisted, delayed or obstructed peace officers in the discharge of their duties, in violation of Penal Code Section 148, subdivision (a)(1). The suspensions are concurrent.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on April 16, 2002. On November 24, 2014, the Department instituted a four-count accusation against appellant charging that appellant or its agent sold, furnished, or transferred drug paraphernalia (count 1); failed to create an "adults only" area for sales or rentals of adult videos and magazines (count 2); concealed evidence (count 3); and resisted, delayed or obstructed peace officers in the discharge of their duties (count 4). (See: Accusation, Exh. 1.)

At the administrative hearing held on January 5, 2016, documentary evidence was received and testimony concerning the violations charged was presented by Department Agent Isaac Borunda, and by the licensee, Nick Chea, president and sole shareholder of appellant Sunshine Ventures, Ltd.

Testimony established that on September 11, 2014, Agent Borunda entered the licensed premises in an undercover capacity. Nick Chea was working at the sales counter and an employee, Maria Renteria, was also working in the store.

Agent Borunda went to the sales counter to purchase a Gatorade. He asked Chea how he was doing, then asked if he could purchase an "oil burner." (RT at p. 15.) An "oil burner" is a pipe used to ingest methamphetamine. (RT at p. 17.) Chea

said “yes” and asked if he wanted a long or short one. (RT at pp. 18-19.) Borunda indicated a short one, and Chea reached under the sales counter and retrieved a 4" glass pipe, wrapped in a red paper food wrapper. (Exh. 5, Atts. A & B.) Borunda removed the pipe from the wrapper, examined it, then asked if it was made from good quality glass. Chea replied “pretty good.” Borunda also asked if he could get a replacement if the pipe broke while he was using it to “get high.” Chea indicated there were no guarantees. (RT at pp. 22-23.) Borunda purchased the pipe, then asked if he could use the oil burner to get high behind the premises. Chea responded “no” and that Borunda would get in trouble if he did that. (RT at p. 24.)

Borunda testified that he has received more than 100 hours of training in regards to narcotics, including training about the sale, packaging, and consumption of narcotics, and the identification of items which can be considered drug paraphernalia. (RT at pp. 16-17.)

After purchasing the Gatorade and oil burner, Borunda exited the premises and conferred with Department Agent Acosta about what had occurred. The agents then re-entered the premises wearing police apparel. They contacted Chea, and informed him that he would be issued a citation for the sale of drug paraphernalia. Chea told the agents that everyone sells these pipes, and that he did not realize it was illegal to sell them. Borunda then asked why they were located under the counter and wrapped in food wrappers. Chea responded that he didn’t want kids to see drug pipes on display. (RT at pp. 25-26; 90.) During this conversation, Chea’s employee, Maria Renteria, was within earshot of the discussion.

Borunda also discussed with Chea that he had adult magazines and videos which were improperly displayed in racks over an ice cream freezer. These were

readily accessible to the public, rather than being segregated, and the area was not labeled “adults only.” Chea said that the display was set up by a vendor and that he was not aware that it required an “adults only” sign. (RT at p. 37.)

Agent Borunda, Agent Acosta, and Chea then moved their conversation to a back office for some privacy, and Renteria was left in charge of the sales counter.

After further discussion, Chea revealed that there were additional pipes under the sales counter. Agent Acosta went to locate them but was unable to do so. Acosta, Borunda, and Chea returned to the front so that Chea could show the agents where the pipes were located—on a shelf beneath the cash register—but the pipes were not there. Renteria told the agents that there were no more. (RT at pp. 28-29.)

After additional questioning, Renteria indicated that the pipes were outside. A search ensued, and the pipes were located in two plastic bags (exh. 5, att. E) in the trash can next to the gas pumps. (RT at pp. 29-30.) The bags contained 62 paper-wrapped glass pipes. (RT at p. 32.) Renteria admitted that she gave the bags to a customer and asked him to get rid of them so that Chea would not get into more trouble. (RT at p. 31.)

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

Appellant then filed a timely appeal raising the following issues: (1) the decision is not supported by substantial evidence because the Department failed to meet its burden of establishing scienter; (2) the requirements of due process were not met; (3) the acts of appellant’s employee should not be imputed to appellant; (4) chain of custody was not established for the evidence seized by the Department; and (5) the penalty is excessive.

DISCUSSION

I

Appellant contends the decision is not supported by substantial evidence because the Department failed to meet its burden of establishing scienter.[2] (App.Op.Br. at p. 7.)

This Board is bound by the factual findings in the Department's decision so long as those findings are supported by substantial evidence. The standard of review is as follows:

> We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. [Citations.] We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor [an appellate] court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. [Citations.] The function of an appellate board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

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[2]Scienter [Latin "knowingly"]: A degree of knowledge that makes a person legally responsible for the consequences of his or her act. (Black's Law Dict. (10th ed. 2014) p. 1547.)

When findings are attacked as being unsupported by the evidence, the power of this Board begins and ends with an inquiry as to whether there is substantial evidence, contradicted or uncontradicted, which will support the findings. When two or more competing inferences of equal persuasion can be reasonably deduced from the facts, the Board is without power to substitute its deductions for those of the Department. (*Kirby v. Alcoholic Bev. Control Appeals Bd.* (1972) 25 Cal.App.3d 331, 335 [101 Cal.Rptr. 815]. Therefore the issue of substantial evidence, when raised by an appellant, leads to an examination by the Appeals Board to determine, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. (Cal. Const. Art. XX, § 22; Bus. & Prof. Code § 23084; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113].)

The accusation charges that appellant 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.

Appellant contends "[s]ubstantial evidence is lacking to establish that Chea intended the glass pipes to be used to ingest a controlled substance or that the glass pipes were marketed for use as drug paraphernalia." (App.Op.Br. at p. 7.) Appellant maintains that the pipes were not advertised, they were not displayed for sale, and no instructions accompanied the pipes concerning their use for ingesting drugs—therefore, they were not marketed for use as drug paraphernalia. In addition, he asserts, appellant is a legitimate seller of tobacco products and did not know the pipes were illegal to sell. (*Id.* at p. 9.) These factors, however, as noted in section 11014.5(c),

are simply elements to be considered in addition to all other logically relevant factors. These facts are not determinative on the issue of scienter or knowledge.

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. [This] requires a supplier of potential paraphernalia to exercise a reasonable amount of care. He need not undertake an investigation into the intentions of every buyer, but he is not free to ignore the circumstances of a transaction. Suppliers of objects capable of use as paraphernalia may not deliver them indiscriminately.

(*People v. Nelson* (1985) 171 Cal.App.3d Supp. 1, 17 [218 Cal.Rptr 279].)

Appellant contends that a glass pipe is not drug paraphernalia per se. But in this case, the facts indicate that appellant knew its intended use was something with which to inhale drugs. Without the agent having said anything other than "do you have any oil burners?" appellant sold him the glass pipe—which he told the agent he kept under the counter, rather than in plain view, *because he didn't want kids to see drug pipes*. When the agent asked if he could use the pipe to "get high" out back, appellant said no—that could get you in trouble. In other words, appellant knew the pipe could be used to smoke drugs, knew or reasonably should have known from the agent's request for an "oil burner"—and his inquiry about using it to get high behind the store—of its intended use with drugs, and offered it to the agent believing that to be its intended use. By so doing, he brought himself squarely within the prohibitions of the cited sections of the Health and Safety Code, and scienter was established.

Appellant maintains it did not know it was illegal to sell these pipes, but this

Board has, in the past, dealt with appellants pleading ignorance of the state's alcoholic beverage laws and has firmly rejected that defense. In *Dhillon*, for instance, appellants argued they were ignorant of the fact that a third sale-to-minor violation could trigger revocation of their license. (*Dhillon* (2001) AB-7434, at p. 3.) The Board rejected that defense and relied on strong policy reasons for doing so: "[t]his argument, if validated, could cause licensees to feign some ignorance of the law, thereby closing their eyes to the realities of strictly obeying the law." (*Ibid.*) Similarly, in *Song*, the appellant argued that she could not "knowingly" have permitted solicitation activity in her licensed premises because she did not fully understand what "B-girl problems" were. (*Song* (1996) AB-6657, at p. 6.) The Board rejected appellant's plea of ignorance and emphasized, "[i]gnorance of the law is never an excuse." (*Id.* at p. 7.)

In the context of alcoholic beverage licensing, there is little room for flexibility. Both the courts and this Board have repeated, many times over, that licensees have an affirmative duty to maintain and operate their premises in accordance with law. "A licensee has a general, affirmative duty to maintain a lawful establishment. Presumably this duty imposes upon the licensee the obligation to be diligent in anticipation of reasonably possible unlawful activity, and to instruct employees accordingly." (*Laube v. Stroh* (1992) 2 Cal.App.4th 364, 379 [3 Cal.Rptr.2d 779].

We believe count 1 is supported by substantial evidence because appellant knew or should have known that the sale of oil burner pipes was in violation of Health and Safety Code section 11364.7, subdivision (a).

II

Appellant contends the requirements of due process were not met because it

was not given notice that it was illegal to sell glass pipes—asserting that it did not receive a written notice of this fact with its most recent license renewal. (RT at p. 98.) Appellant maintains it had no reason to believe that glass pipes were considered drug paraphernalia. (App.Op.Br. at p. 11.)

As the ALJ notes, "[p]rior actual notice to the Respondent of the illegality of selling drug paraphernalia is not an element of violating Health and Safety Code section 11364.7." (Conclusions of Law, ¶ 19.) As noted in the previous section, that code section states in pertinent part:

> any person who delivers . . . 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 . . . is guilty of a misdemeanor.

(Health &Safety Code ¶11364.7.) Notice is not an element of this statute—knowledge is.

In a recent case involving drug paraphernalia, *Panipat Corporation* (2016) AB-9511, the Board reversed the decision of the Department because the element of scienter was not established. The clerk in that case was confused by an attempt by an investigator to pantomime drug use and was unable to understand what the investigator was saying, so scienter—or knowledge— was *not* established. Furthermore, the Board found that the notice provided that case was insufficient—in and of itself—to establish that the licensee knew or should have known the glass tube was drug paraphernalia.

In the instant case by contrast, as discussed in section I, the interaction between the agent and licensee established appellant's knowledge of the purpose for which the pipe was being purchased. Therefore, appellant knew or should have known that the sale of such pipes was contrary to statute—notwithstanding the claim that no notice

regarding drug paraphernalia was received in appellant's most-recent license renewal package.

Appellant cites Business and Professions Code section 24200.6 (App.Cl.Br. at p. 3) for the proposition that written notice from the Department is required before a licensee can be charged with a violation of Health and Safety Code section 11364.7:

> The department may revoke or suspend any license if the licensee or the agent or employee of the licensee violates any provision of Section 11364.7 of the Health and Safety Code. For purposes of this provision, a licensee, or the agent or employee of the licensee, is deemed to have knowledge that the item or items delivered, furnished, transferred, or possessed 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, if the department or any other state or local law enforcement agency notifies the licensee in writing that the items, individually or in combination, are commonly sold or marketed for that purpose.

Appellant contends it did not receive such a notice with its most recent license renewal.

Section 24200.6 provides that, if the licensee is notified in writing that an item or combination of items are used as drug paraphernalia, it is deemed to have knowledge that the item or combination of items is drug paraphernalia. The section creates a rebuttable presumption of knowledge, dependent upon written notice.

This does not mean, however, that licensees are immune from prosecution until they receive written notice. Health and Safety Code sections 11014.5 and 11364.7 have been in effect since the early 1980's. Prior to section 24200.6 becoming effective in 2003, the Department was required to prove the licensee *knew* that an item was usable as drug paraphernalia and that it had been marketed as such in order to sustain an accusation. Section 24200.6 did not make any change in the law except to create a presumption in certain situations, thus relieving the Department from having to

prove in every case that the licensee knew the item was used as drug paraphernalia and marketed it as such.

In this case, the Department has established that the licensee knew or should have known that the pipes were being purchased to ingest drugs—therefore the written notice contemplated by section 24200.6 is irrelevant. There is no due process violation.

III

Appellant contends there is not "good cause" to hold appellant responsible for the acts of its employee. Appellant maintains that the acts of concealing of evidence (count 3) and obstructing the investigation (count 4) should not have been imputed to appellant because these actions were the unforeseeable and unilateral acts of an employee with no prior history of such actions. (App.Op.Br. at pp. 12-13.)

Article XX, section 22 of the California Constitution authorizes the Department to take disciplinary action to protect the public:

> The department shall have the power, in its discretion, to deny, suspend, or revoke any specific alcoholic beverage license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals.

Case law provides that in order to establish good cause for suspension or revocation of an alcoholic beverage license, due to violations of law that do not involve moral turpitude, there must be a rational relationship between the offense and the operation of the licensed business in a manner consistent with public welfare and morals or there must be evidence that the offense had an actual effect on the conduct of the licensed business. (*H.D. Wallace & Associates, Inc. v. Dept. of Alcoholic Bev. Control* (1969) 271 Cal.App.2d 589, 593-594 [76 Cal.Rptr. 749].)

The licensee in this matter is being disciplined for its employee having concealed evidence, by giving two bags of glass pipes to a customer and asking that customer to dispose of them, in violation of Penal Code section 135 which provides:

> A person who, knowing that any . . . matter or thing, is about to be produced in evidence upon a trial, inquiry, or investigation, authorized by law, willfully destroys, erases, or conceals the same, with the intent to prevent it or its content from being produced, is guilty of a misdemeanor.

In addition, the licensee is being disciplined for its employee having resisted, obstructed, or delayed the agents' investigation in violation of Penal Code section 148, subdivision (a)(1) which provides a fine and/or imprisonment for: "[e]very person who willfully resists, delays, or obstructs any public officer . . . in the discharge or attempt to discharge any duty of his or her office or employment. . . ."

Appellant maintains "the ALJ has misinterpreted the law surrounding 'good cause' and the standards for imputation." (App.Op.Br. at p. 13.) It contends the acts of its employee were not foreseeable, and that her actions were not ones that the appellant had an obligation to anticipate, much less prevent. (*Ibid*.) We agree.

The ALJ reached the following conclusions on this issue:

> 17. In this instance, there is good cause to impose accountability upon the Respondent for the acts of Ms. Renteria for her actions in concealing of the drug paraphernalia and resisting, delaying, or obstructing the investigation. While the transaction at hand did not directly involve alcoholic beverages, the legislature, under Health and Safety Code Section 11364.7(d), has specifically stated that the illegal trafficking in drug paraphernalia by the holder of a liquor license is subject to having that license revoked.
>
> Therefore, selling drug paraphernalia is an independent ground to revoke an alcoholic beverage license. The statute itself has obviated the need for the involvement of alcoholic beverages in the underlying violation to justify revoking the license. It logically follows that any intentional action taken by a licensee's employee in furtherance of the commission of that specific offense, or in an effort to cover it up, or hide evidence, or resist, obstruct, or delay the investigation should also be a proper basis for

disciplinary action.

This should be so even if the actions of the Respondent's agents were not necessarily the result of a formal conspiracy or coordinated plan, as long as their individual actions were reasonably connected to the commission of illegal drug paraphernalia trafficking.

Here, Respondent's president, Chea, sold illegal drug paraphernalia, and Respondent's employee, Renteria, intentionally tried to conceal the added inventory to protect Respondent's president, which would have been to the advantage of the Respondent. In this circumstance, the Respondent must be held responsible for her conduct, as well as that of its president.

18. In *Zartosht, Inc.* (2013) AB-9295 the ABC Appeals Board also expressed concern there was no reason for the Respondent to have specifically foreseen the actions of its sales clerk in cutting up the decoy's license and engaging in an altercation with the agents. However, the Board also noted that there were some types of illegal conduct that have been historically imputed to the licensee in the operation of licensed premises. One of the traditional grounds was the illegal sale of drugs. In this matter, though it did not involve a sale of illegal drugs, it involved the actual sale of illegal drug paraphernalia by the Respondent's president under circumstances that he knew, or should have known, the item sold would be used in ingest controlled substances. It is again a reasonable and logical extension to impose discipline when the offense at issue concerned the intentional effort by Respondent's clerk to conceal the remaining cache of drug paraphernalia being sold by Respondent's president.

(Conclusions of Law, ¶¶ 17-18.)

While the Board must accept as conclusive the Department's findings of fact (*Masani, supra* at 118 Cal.App.4th 1429, 1437), this case does not present a factual dispute, but rather a significant question of law: specifically, what constitutes "good cause," and what standard applies for imputing an employee's criminal acts to his employer, the licensee?

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 a 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.2d 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].)

In his decision, the ALJ imputes the employee's conduct to the appellant via a strict liability standard. The Department, in its reply brief, asserts that a licensee is vicariously responsible for the unlawful on-premises acts of its employees—essentially confirming this strict liability standard. (Dept.Br. at p. 11, citing *Morell v. Dept. of Alcoholic Bev. Control* (1962) 204 Cal.App.2d 504 [22 Cal.Rptr. 405].) The Department argues that the employee's actions were in service to appellant's sale of illegal drug paraphernalia—thereby providing a benefit to the appellant—and that therefore the actions of the employee should be imputed to the appellant. (*Id.* at p. 10.)

Both parties cite and rely upon *Laube v. Stroh* (1992) 2 Cal.App.4th 364 [3 Cal.Rptr.2d 779], emphasizing different parts of that opinion. In that case, the Department sought to suspend the liquor license of a hotel when sales of illegal drugs on the premises—by a patron and an off-duty employee—to undercover officers in a sting operation were proven. The Department's theory there was that the hotel had _permitted_ the on-premises sale of narcotics on more than one occasion because it did not take sufficient measures to prevent them. (*Id.* at p. 371.) The appellate court found the evidence in *Laube* _failed to establish that either the licensee's management or its employees knew_ of the drug transactions, and "[n]o evidence was presented that there was ever any other drug activity on the premises or that [the licensee was] aware

of any; the sole evidence of narcotics activity . . . involv[ed] the undercover officers and [the seller of the cocaine]." (*Id.* at p. 368.)

On these facts, *Laube* reversed the Department's license suspension and this Board's affirmance thereof, holding that:

> [A] licensee must have knowledge, either actual or constructive, before he or she can be found to have _permitted_ unacceptable conduct on a licensed premises. It defies logic to charge someone with permitting conduct of which they are not aware. It also leads to impermissible strict liability of liquor licensees when they enjoy a constitutional standard of good cause before their license_and quite likely their livelihood_may be infringed by the state.

(*Id*. at p. 377.)

The Department maintains it

> was completely foreseeable that if appellant kept illegal paraphernalia within arm's reach of any employee working the cash register, the employee may interact with those items in a way contrary to the law. It is as equally foreseeable that an employee may seek to evade penalty for herself or her employer by disposing of these illegal items.

(Dept.Br. at p. 11.) Appellant, on the other hand, contends the actions charged in counts 3 and 4 are the unforeseeable and unilateral acts of an employee, rather than conduct "permitted" by the appellant, and that the holding in *Laube* dictates reversal on these counts. (App.Op.Br. at p. 12.) Furthermore, appellant maintains the Department failed to acknowledge its cooperation with the agents—by immediately instructing its employee to tell the officers where the pipes were—as a factor in mitigation. (App.Cl.Br. at p. 5.)

We agree that it is unfair and unreasonable to "impute to the licensee" the conduct of its employee in trying to dispose of evidence and impede the investigation. Even if appellant knew the pipes were being used to ingest controlled substances, it

was *not* foreseeable that its employee would ask a customer to dispose of them in order to try to hide them from the investigating agents. The clerk did not testify, so it is unknown whether she even knew the pipes were illegal—prior to overhearing the conversation between the agents and appellant.

Court decisions considering whether to impute to the employer actions of employees in other contexts are instructive in this regard. The doctrine of *respondeat superior* provides that an employer or principal is vicariously liable for the wrongful conduct of his or her employees or agents committed within the scope of the employment or agency. (*Perez v. Van Groningen & Sons, Inc.* (1986) 41 Cal.3d 962, 967 [227 Cal.Rptr. 106].) Here, it would be difficult to say the clerk's actions—in trying to conceal evidence—were within the scope of her employment simply because the items being concealed happened to be store merchandise.

We do not believe imputation of licensee knowledge under the circumstances of this case comports with the required element of "good cause" the Department must meet before it can revoke or suspend a liquor license. (Cf. *King Stop, Inc.* (2000) AB-7520 and *Zartosht* (2013) AB-9295.) _The term _good cause_ is not susceptible of precise definition. In fact, its definition varies with the context in which it is used. Very broadly, it means a legally sufficient ground or reason for a certain action._ (*Zorrero v. Unemployment Ins. Appeals Bd.* (1975) 47 Cal.App.3d 434, 439 [120 Cal.Rptr. 855].) One court has stated that the phrase _good cause,_ _as used in a variety of contexts, . . . [has] been found to be difficult to define with precision and to be largely relative in [its] connotation, depending upon the particular circumstances of each case. [Citations.]_ (*R.J. Cardinal Co. v. Ritchie* (1963) 218 Cal.App.2d 124, 144 [32 Cal.Rptr.

545].) _[T]he essential ingredients of [‘good cause’ are] reasonable grounds and good faith._ (*Id.* at p. 145.)

Laube and its progeny teach that the determination of “good cause” for the revocation or suspension of a liquor license requires more than an automatic, mechanical extrapolation of wrongful employee conduct onto the employer; it requires some evidence of the employer’s *knowledge* of the wrongful conduct before that imputation can reasonably be made. Based on the evidence here, there is no sound reason to apply the rule of imputed or constructive knowledge, especially when doing so would produce the very end *Laube* countenances against: application of a rule of strict liability on the licensee for employee wrongdoing.

The types of misconduct which have been historically imputed to the licensee are those that are foreseeable in the operation of a licensed premises. For example, when a clerk sells alcohol to a minor, even though the licensee is not present, he or she is liable for that sale as if he or she had made the sale themselves. The conduct is imputed to the licensee because it is foreseeable, and is therefore the type of conduct the licensee has an obligation to prevent. It is not clear, however that asking a customer to dispose of merchandise a clerk has just overheard is illegal to sell is the type of conduct that a licensee has an obligation to anticipate, much less prevent. Without some minimal element of foreseeability, it is unfair to expect a licensee to take preventative action. (See *Laube, supra* at pp. 377-378.)

We do not believe there is good cause for imposing discipline on this licensee for the conduct of appellant’s employee as charged in counts 3 and 4. The ALJ has misinterpreted the law surrounding "good cause" and the standards for imputation, and

these misinterpretations are sufficient to merit reversal of these two counts by this Board.

IV

Appellant contends the record improperly includes photographs and physical evidence admitted by the ALJ. (App.Op.Br. at p. 13.) Appellant maintains this evidence should have been excluded from the record based on a lack of chain of custody, and that its introduction constitutes an abuse of discretion. (*Ibid.*)

The California supreme court has noted,

> [c]hain of custody is indeed a necessary showing for physical evidence to be admitted. But the trial court decides the admissibility of physical evidence based on challenges to the chain of custody, and, once admitted, any minor defects in the chain of custody go to its weight.

(*People v. Lucas* (2014) 60 Cal.4th 153, 285 [177 Cal.Rptr.3d 378], citing *People v. Diaz* (1992) 3 Cal.4th 495, 559 [11 Cal.Rptr.2d 353].)

In *People v. Wallace*, the supreme court addressed a criminal matter in which the chain of custody for a pair of socks was "far from perfect," but "disagree[d] with the defendant that these shortcomings rendered the admission of the socks an abuse of the trial court's discretion." (*People v. Wallace* (2008) 44 Cal.4th 1032, 1061 [81 Cal.Rptr.3d 651], citing *People v Williams* (1997) 16 Cal.4th 153, 196 [66 Cal.Rptr.2d 123].) The court went on to quote *People v. Diaz*:

> The burden is on the party offering the evidence to show to the satisfaction of the trial court that, taking all the circumstances into account including the ease or difficulty with which the particular evidence could have been altered, it is reasonably certain that there was no alteration. . . . The requirement of reasonable certainty is not met when some vital link in the chain of possession is not accounted for, because then it is as likely as not that the evidence analyzed was not the evidence originally received. Left to such speculation the court must exclude the evidence. . . . Conversely, when it is the barest speculation that there

> was tampering, it is proper to admit the evidence and let what doubt remains go to its weight.

(*Wallace*, *supra*, at p. 1061, citing *Diaz*, *supra*, at p. 559.)

Appellant cites no authority to support the claim that it was an abuse of discretion for the ALJ to admit the photographs and other evidence seized by Agent Borunda. Appellant's argument appears to rely on the fact that Borunda was unaware of how the evidence arrived at the administrative hearing, and the fact that Borunda could not recollect some details about the photographs. However, appellant cites no statutory or case law requiring that the chain of custody be established solely through one individual. To demonstrate error, appellant must present meaningful legal analysis supported by citations to authority. (*City of Lincoln v. Barringer* (2002) 102 Cal.App.4th 1211, 1239, fn. 16 [126 Cal.Rptr.2d 178]; *Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979 [21 Cal.Rptr.2d 834] [reviewing court may disregard contentions unsupported by citation to the record].)

Appellant omits the fact that Borunda laid a sufficient foundation for each piece of evidence. He testified that the pipe admitted as evidence (exh. 4) was the same pipe he observed on the day of the investigation. He testified that he filled out and affixed an evidence label to the pipe, and, at the hearing, he identified and authenticated the label as the same one he filled out at the premises. Similarly, he identified the magazines (exh. 6) taken from the premises, and identified the photographs (exh. 5) as the ones he took, what they represented, and their orientation within the store. No evidence was submitted that these items were tampered with, substituted, or somehow altered in any material way—appellant has simply raised the "barest speculation" that anything untoward occurred.

The Department—through witness testimony—established a chain of custody sufficient to justify the ALJ's admission of photographs and evidence under the standard articulated by the supreme court in *Lucas, Wallace* and *Diaz*, *supra*.

V

Appellant contends the penalty is excessive and not consistent with the discipline imposed in previous cases. (App.Op.Br. at p. 17.) The standard penalty for the sale of drug paraphernalia as set forth in the Penalty Guidelines Appendix to rule 144 (4 Cal. Code Regs. §144), is revocation stayed for three years and a 20-day suspension.

This Board may examine the issue of excessive penalty if it is raised by an appellant (*Joseph's of Cal. v. Alcoholic Bev. Control Appeals Bd.* (1971) 19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183]), but will not disturb the Department's penalty order in the absence of an abuse of discretion. (*Martin v. Alcoholic Bev. Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) If the penalty imposed is reasonable, the Board must uphold it even if another penalty would be equally, or even more, reasonable. "If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within its discretion." (*Harris v. Alcoholic Bev. Control Appeals Bd.* (1965) 62 Cal.2d 589, 594 [43 Cal.Rptr. 633].)

Rule 144 provides:

> In reaching a decision on a disciplinary action under the Alcoholic Beverage Control Act (Bus. and Prof. Code Sections 23000,et seq.), and the Administrative Procedures Act (Govt. Code Sections 11400, *et seq*.), the Department shall consider the disciplinary guidelines entitled "Penalty Guidelines" (dated 12/17/2003) which are hereby incorporated by reference. *Deviation from these guidelines is appropriate where the Department in its sole discretion determines that the facts of the particular case warrant such a deviation* - such as where facts in aggravation or

mitigation exist.

(Cal. Code Regs., tit. 4, § 144, emphasis added.) Among the mitigating factors provided by the rule are the length of licensure without prior discipline, positive actions taken by the licensee to correct the problem, cooperation by the licensee in the investigation, and documented training of the licensee and employees. Aggravating factors include, *inter alia*, prior disciplinary history, licensee involvement, lack of cooperation by the licensee in the investigation, and a continuing course or pattern of conduct. (*Ibid*.)

The Penalty Policy Guidelines further address the discretion necessarily involved in an ALJ's recognition of aggravating or mitigating evidence:

> **Penalty Policy Guidelines:**
>
> The California Constitution authorizes the Department, in its discretion[,] to suspend or revoke any license to sell alcoholic beverages if it shall determine for good cause that the continuance of such license would be contrary to the public welfare or morals. The Department may use a range of progressive and proportional penalties. This range will typically extend from Letters of Warning to Revocation. These guidelines contain a schedule of penalties that the Department usually imposes for the first offense of the law listed (except as otherwise indicated). These guidelines are not intended to be an exhaustive, comprehensive or complete list of all bases upon which disciplinary action may be taken against a license or licensee; nor are these guidelines intended to preclude, prevent, or impede the seeking, recommendation, or imposition of discipline greater than or less than those listed herein, in the proper exercise of the Department's discretion.

Appellant maintains the penalty imposed in this matter is excessive, and not in line with the penalties imposed in other cases. Appellant cites several cases in which undercover agents purchased drug paraphernalia from licensees. In one, *Bedi* (2011) AB-8896, a penalty of revocation—stayed for three years—and a 15-day suspension

was imposed. In another, *Darghalli* (2008) AB-8710, a penalty of revocation—stayed for one year—and a 20-day suspension was imposed, while in *7-Eleven/Bindal* (2009) AB-8664, a penalty of revocation—stayed for three years—and a 20-day suspension was imposed. The Appeals Board affirmed the penalty imposed by the Department in each of these cases. Finally, in *Panipat Corp.* (2016) AB-9511, the penalty of revocation was reversed after an appeal to this Board. However, reversal was not predicated on the penalty being excessive, but on due process grounds.

The cases cited by appellant illustrate the discretion afforded the ALJ in making his or her penalty determination. For example, in *Darghalli*, the period of stayed revocation was shortened from three years to one year because of factors in mitigation. There is simply no "one size fits all" penalty no matter how similar the facts of some cases may appear—although we note that the vast majority of drug paraphernalia cases impose a stayed, rather than outright, revocation.

In his proposed decision, the ALJ devotes a separate section to the discussion of the penalty in which he explains:

> 3. In assessing an appropriate measure of discipline, the Department's penalty guidelines are set forth in California Code of Regulations, Title 4, Division 1, Article 22, section 144, commonly referred to as rule 144. Rule 144 recommends a revocation, stated for three years, including a 20 day suspension, for possession for sale of drug paraphernalia. It recommends a five day suspension and indefinitely thereafter until compliance for improper harmful matter displays as specified in section 25612.5(c)(9). It recommends a minimum 35 day suspension up to revocation for interfering with an investigation in violation of Penal Code section 148. A violation of Penal Code section 135 for destroying or concealing evidence is not specifically mentioned in the rule, but as it is similar in nature to Penal Code 148, a similar penalty would probably be appropriate to impose. Rule 144 also permits consideration of factors in aggravation and mitigation in assessing the appropriate level of discipline, including the presence or absence of prior disciplinary action.

> 4. In assessing the penalties ordered below, various factors in aggravation are present, while those in mitigation are sparse. While there was evidence that the oil burners are a common form of drug paraphernalia used to ingest methamphetamine, Respondent presented no evidence showing they were used for any lawful purpose. There were more than 60 oil burners, individually wrapped up in opaque paper food wrappers, and stored out of public view, yet within easy reach of the Respondent's president for sale. This demonstrates an element of stealth and under-cuts the Respondent's position that it did not know they were illegal to sell as drug paraphernalia. Respondent's clerk, Maria Renteria, deliberately and intentionally tried to dispose of the unsold oil burner inventory after she saw the agents confronting Respondent's president about them. If she thought they were legal to carry and sell in the store, why would she have risked disposing of them while the agents were in the back room with Chea? Further, the display of harmful matter materials were found with the "adults only" warning sign in display racks immediately above a waist high ice cream freezer, a place where minors and children would likely frequent. Lastly, although Respondent has been licensed since 2002, it has two prior disciplinary actions, both of which imposed stayed revocation penalties. Based upon the weighing of the respective factors in aggravation and mitigation, the penalties ordered below comply with Rule 144.

(Penalty, ¶¶ 3-4.)

This Board's review of the penalty looks only to see whether it can be considered reasonable. In light of our reversal of counts 3 and 4—counts which were noted by the ALJ as factors in aggravation—and in light of the mitigating factor of appellant's cooperation with the agents' investigation—a factor *not* noted in the decision—we cannot say the penalties imposed in this matter are reasonable. In light of these factors, the penalty must be reconsidered.

ORDER

We hereby affirm counts 1 and 2 and reverse counts 3 and 4 of the Department's decision. The matter is remanded to the Department for reconsideration

of the penalty in light of the foregoing discussion.[3]

BAXTER RICE, CHAIRMAN
PETER J. RODDY, MEMBER
JUAN PEDRO GAFFNEY RIVERA, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[3]This order of remand is filed in accordance with Business and Professions Code section 23085, and does not constitute a final order within the meaning of Business and Professions Code section 23089.