

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

THE SOUTHLAND CORPORATION,	)	AB-7176
FASIL ASSEFA and DESS)	
WOLDERMARIAM	)	File: 20-283554
dba 7-Eleven Store #2132	)	Reg: 97041892
5791 Rodeo Road)	
Los Angeles, CA 90016,	)	Administrative Law Judge
Appellants/Licensees,	)	at the Dept. Hearing:
	)	Ronald M. Gruen
v.)	
	)	Date and Place of the
	)	Appeals Board Hearing:
DEPARTMENT OF ALCOHOLIC)	
BEVERAGE CONTROL,	)	September 2, 1999
Respondent.	)	Los Angeles, CA

The Southland Corporation, Fasil Assefa and Dess Woldermariam, doing business as 7-Eleven Store #2132 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which revoked their off-sale beer and wine license, with revocation stayed subject to a three-year discipline-free period and an actual suspension of 20 days, for possession for sale of drug paraphernalia, and ordered an additional suspension of 25 days,² with 10 days thereof stayed for a one-year discipline-free period, for violation of a license condition, being contrary to the universal and generic public welfare and morals provisions of the California

¹The decision of the Department, dated June 18, 1998, is set forth in the appendix.

² The suspensions were to run concurrently.

Constitution, article XX, §22, arising from violations of Health and Safety Code §11364.7, subdivisions (a) and (d), and Business and Professions Code §23804.

Appearances on appeal include appellants The Southland Corporation, Fasil Assefa and Dess Woldermariam, appearing through their counsel, Steven Solomon and Ralph Barat Saltsman, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on December 3, 1993. Thereafter, the Department instituted an accusation against appellants charging them with possession for sale of drug paraphernalia (count 1) and the violation of a condition requiring the posting of a security guard during designated time periods (count 2).

A hearing on the charges of the accusation was held on April 3, 1998. Subsequent to the hearing, the Department entered its decision and order, sustaining both charges of the accusation. Appellant filed a timely notice of appeal, and now raises the following contentions: (1) the item in question was not marketed for use as narcotics paraphernalia; and (2) the penalty for the condition violation is so excessive as to constitute an abuse of discretion.

DISCUSSION

I

Appellants contend that the accusation must fail because there was no proof of any pre-existing intent to market the glass vial in question as drug paraphernalia. They argue that communication between the seller and the undercover officer, critical to determining the intent of the seller, was impaired because of Assefa's hearing difficulty, infirm grasp of the English language, the soft voice of the police officer, and the presence of radio music in the background. This, appellants claim, prevented any

meaningful communication between Assefa and the officer, such that the exchange which did occur is an insufficient basis for determining the requisite intent.

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

Los Angeles police officer Ivana Ford testified that she asked Yosef Assefa, an employee, and co-appellant Fasil Assefa's brother, if he had anything with which she could smoke rock cocaine. According to Officer Ford, he pointed to a small glass vial about the size of a cigarette, which contained a small flower, in a display box on the counter. Officer Ford testified that Assefa selected a vial from the display, and demonstrated to her how it could be used [RT 26]. Yosef Assefa also testified at the hearing, and denied that he selected the glass vial, or demonstrated how it could be used, claiming it was Officer Ford who pointed to the display box which contained the glass vials, and who removed the vial from the display. He denied any knowledge that the glass vial could be used for such purpose. Appellants also challenge the police officer's view that the glass vials had no legitimate purpose, and suggest that a rational seller would not have illicit drug paraphernalia openly displayed.

The Administrative Law Judge (ALJ) found from the totality of the evidence that appellants intended the sale of the glass vials in question for use as drug paraphernalia, and that there was a high probability that the vials would be used as

such. He explained:

“Short of an admission on the part of the respondents, the circumstances and inferences from the evidence are one way to establish intent to sell such items for drug use. The language and conduct on the part of Yosef in demonstrating how the vials could be used to smoke rock cocaine imply knowledge of [or?] prior experience in the sale and/or use of said items for such illicit purposes.”

The ALJ also adverted to the fact that the vials, despite being slow sellers, remained on the counter four months after Valentine’s Day, the event for which the items were claimed to have been purchased.

It is obvious from his conclusions that the ALJ chose to believe the testimony of Officer Ford and not that of appellants’ witnesses, most particularly Yosef Assefa. That being the case, the Appeals Board may not look behind his factual determinations, provided there is factual support for them. Here, the police officer’s testimony provides such support.

The credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. (Brice v. Department of Alcoholic Beverage Control (1957) 153 Cal.2d 315 [314 P.2d 807, 812] and Lorimore v. State Personnel Board (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640, 644].)

Where there are conflicts in the evidence, the Appeals Board is bound to resolve them in favor of the Department's decision, and must accept all reasonable inferences which support the Department's findings. (Kirby v. Alcoholic Beverage Control Appeals Board (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857] (in which the positions of both the Department and the license-applicant were supported by substantial evidence); Kruse v. Bank of America (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 271]; Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control (1968) 261 Cal.App.2d 181 [67 Cal.Rptr. 734, 737]; and Gore v. Harris

(1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings.

The police officer was undoubtedly competent to testify that the vials could be used to smoke rock, or crack, cocaine. Whether she was qualified to render an expert opinion that the glass vials had no legitimate usage is questionable, but irrelevant in the circumstances of this case. We note, however, that the Department seems to concede the vials, with their small fabric flower, have a legitimate usage when sold as a Valentine's Day promotional item.

What distinguishes this case from earlier cases in which the Board felt compelled to reverse decisions of the Department where other, similar, items with both legitimate and illegitimate uses, were sold,³ is that here the evidence is clear that the item in question, at least the glass vial, was selected by the clerk without any prompting or suggestion from the buyer that he wanted that specific item. This is not a case where the seller's intent was unknown; it is, instead, a case where the seller already intended that the object be sold for drug use. His selection of the glass pipe in response to the police officer's request demonstrates that intent.

³ See Elias Mbarkeh and Rafee Mbarkeh (1998) AB-6882; Gertrude S. Harper (1998) AB-6894.

II

Appellants challenge, as excessive, the suspension imposed for violation of the condition requiring the posting of a security guard. Appellants concede the violation, which resulted from appellants' unilateral decision that a different schedule for the security guard's services than the schedule set out in the license condition better fit the hours of operation and the hours of summer daylight.

Appellants suggest that their admission at the hearing that they had unilaterally changed the hours during which a security guard would be on duty should be considered in mitigation.

The penalty, a 25-day suspension, with 10 of those days stayed, appears to be within the normal range of discipline administered by the Department for a condition violation. It is not of such magnitude as to appear excessive or abusive.

As noted by the ALJ, the conventional remedy for a licensee who believes a license condition does not fit the circumstances of his or her business is to seek its modification, and not take matters into his or her own hands. Conditions are vital to a licensing process, and the Department is entitled to assume the licensees will comply with them, and to be stern with those who do not.

In any event, the penalty for the condition violation (a net 15-day suspension) runs concurrently with the 20-day suspension under count 1. Reducing the penalty would have no discernible effect.

ORDER

The decision of the Department is affirmed.⁴

⁴ This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
JOHN B. TSU, MEMBER
ALCOHOLIC BNEVERAGE CONTROL
APPEALS BOARD

this final decision as provided by §23090.7 of said code.

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