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

AB-9718
File: 21-548324; Reg: 18086289

UTTAM KUMAR KARKI,
dba Michael Anthony's Buonaroma
3314 Alhambra Avenue,
Martinez, CA 94553-3907,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Alberto Roldan

Appeals Board Hearing: March 1, 2019
Sacramento, CA

ISSUED MARCH 6, 2019

Appearances: *Appellant:* Richard D. Warren, as counsel for Uttam Kumar Karki,

Respondent: Sean Klein, as counsel for the Department of Alcoholic Beverage Control.

OPINION

Uttam Kumar Karki, doing business as Michael Anthony's Buonaroma, appeals from a decision of the Department of Alcoholic Beverage Control[1] revoking his license — with the revocation stayed for a period of three years, provided no further cause for discipline arises during that period — and concurrently suspending his license for 20 days, because his employees sold drug paraphernalia while on the licensed premises,

[1]The decision of the Department, dated June 21, 2018, is set forth in the appendix.

in violation of Health and Safety Code section 11364.7, subdivision (a).

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on August 21, 2014. Appellant was previously a co-licensee at the same premises, from 2008 to 2014. There is no record of prior departmental discipline against the license.

On February 28, 2018, the Department instituted an accusation against appellant charging that, on October 22, 2017, appellant's employees sold drug paraphernalia, as defined in Health and Safety Code section 11014.5, in violation of Health and Safety Code section 11364.7(a).

At the administrative hearing held on April 24, 2018, documentary evidence was received and testimony concerning the violation charged was presented by Stephen Huish, Special Agent with the California Department of Justice; Yangesh KC, one of appellant's employees; and the licensee, Uttam Karki.

Testimony established that on October 22, 2017, Special Agent Huish entered the licensed premises with Department Agent Joel Falcon to conduct a general enforcement inspection. The agents were in plain clothes. Agent Huish spoke to the employee behind the counter, Sarina Taylor, and asked her if the store had any glass pipes he could use for smoking rock.[2] She pointed out a box containing car air fresheners. (Exh. D-3.) Agent Falcon also spoke to her, and asked if the air fresheners could be used to smoke crack cocaine. She said they could. When asked how they could be used for that purpose, she explained that they could pop off or remove the filter from the top of the glass pipe. (RT at pp. 14-18.) Another employee,

[2]Street slang for crack cocaine or freebase cocaine. (RT at p. 16.)

KC, was a few feet away at the cash register during this exchange. Agent Huish purchased the air freshener from KC before exiting the premises.

Shortly thereafter, the agents returned to the licensed premises and detained Ms. Taylor. She stated that KC had chastised her for identifying the air freshener as something that could be used as drug paraphernalia. (RT at pp. 23-24.) Ms. Taylor did not appear or testify at the administrative hearing. KC did testify, and claimed ignorance of the exchange between Ms. Taylor and the agents, but the administrative law judge (ALJ) found his testimony to be "inherently unreliable" (Conclusions of Law, ¶ 13) and not credible —accordingly, it was rejected.

Agent Huish testified extensively about the transaction in the licensed premises, his training and experience regarding drug paraphernalia and narcotics cases, and about how the air freshener sold to him by appellant's employees, and glass tubes containing artificial roses observed in the premises, could be used to smoke crack cocaine. (RT at pp. 19, 29-30, 50-51.) The ALJ found Agent Huish's testimony to be reliable. (Conclusions of Law, ¶ 13.)

On May 10, 2018, the ALJ issued his proposed decision, sustaining the accusation and finding that appellant's employees sold the air freshener to the agent, knowing it was to be used as drug paraphernalia. He recommended revocation of the license — with the revocation stayed for a period of three years, provided no further cause for discipline arises during that time — and a concurrent 20-day suspension. The Department adopted the proposed decision in its entirety on June 4, 2018, and a Certificate of Decision was issued on June 21, 2018.

Appellant then filed a timely appeal raising the following issues: (1) there is no

substantial evidence to establish that the air freshener meets the statutory definition of drug paraphernalia, (2) there is no substantial evidence the licensee or his employees intended to sell the air freshener as drug paraphernalia, or that they knew (or had reason to know) the glass tubes would be used as drug paraphernalia, and (3) the penalty is excessive. Issues one and two will be discussed together.

DISCUSSION

I

Appellant contends the violations charged in the accusation are not supported by substantial evidence. Specifically, he maintains it was not established that the air fresheners sold by his employees met the definition of drug paraphernalia, that the employees knew the glass tubes would be used as drug paraphernalia, or that they intended to sell them for that purpose. (AOB at pp. 16-19.)

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].)

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—all conflicts in the evidence must be resolved in favor of the Department's decision. (*Kirby v. Alcoholic Bev. Control Appeals Bd.* (1972) 25 Cal.App.3d 331, 335 [101 Cal.Rptr. 815]; *Harris v. Alcoholic Beverage Control Appeals Board* (1963) 212 Cal.App.2d 106 [28 Cal.Rptr.74].)

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. The Appeals Board cannot disregard or overturn a finding of fact by the Department merely because a contrary finding would be equally or more reasonable. (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.
>>
>> [¶ . . . ¶]

Appellant contends "[t]here is no substantial evidence that Licensee or his sales clerk KC knew or had reason to know the glass tubes would be used as drug paraphernalia." (AOB at p. 17.) He maintains that since Ms. Taylor did not operate the cash register — only KC did — she was not "in control" of the store's merchandise. (*Ibid.*) Appellant argues that the handout entitled Drug Paraphernalia (ABC-546) did not properly put him on notice that the air fresheners could be used as drug paraphernalia. And finally, appellant contends the Department failed to prove that he

or his employee, KC, intended the air freshener to be used as drug paraphernalia. (*Id.* at p. 19.)

What appellant overlooks in these arguments is the evidence showing that Ms. Taylor offered the Agent Huish the air freshener when asked if the store had anything he could use to smoke crack cocaine. (RT at p. 16.) Appellant also omits to mention that when asked by Agent Falcon if he could really use the air freshener to smoke crack cocaine, she said yes. (*Id.* at p. 18.) And, when asked how, she explained how they could remove the top and filter. (*Ibid*.) Finally, appellant ignores testimony establishing that his other employee, KC, was a few feet away at the cash register during this exchange, and that he chastised Mr. Taylor for what she said. (*Id*. at pp. 20, 24.)

The ALJ properly found, based on substantial evidence, that appellant's employees[3] sold the air fresheners to the agent, knowing, or under circumstances where one reasonably should know, that the glass tubes could be used to ingest controlled substances. No further evidence of "intent" is required to establish a violation of Health and Safety Code section 11364.7(a)(1). KC overheard Ms. Taylor's conversation with the agents and still completed the sale. He knew what Ms. Taylor told the agents because he admonished her for doing so. He obviously knew the tubes were being purchased for the purpose of smoking crack cocaine. And, under settled law, the acts and knowledge of an employee are imputed to the employer. (See *Yu v.*

[3]Both KC and Ms. Taylor were proven to be employees — regardless of who manned the cash register or whether Taylor was part-time.

Alcoholic Bev. etc. Appeals Bd. (1992) 3 Cal.App.4th 286, 295 [4 Cal.Rptr.2d 280]; *Laube v. Stroh* (1992) 2 Cal.App.4th 364, 377 [3 Cal.Rptr.2d 779].)

II

Appellant contends the penalty is excessive, and that the ALJ abused his discretion when he ignored evidence of mitigation and incorrectly applied factors in aggravation in determining the penalty. (AOB at pp. 19-21.)

The Board 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].) "Abuse of discretion" in the legal sense is defined as discretion exercised to an end or purpose not justified by and clearly against reason, all of the facts and circumstances being considered. [Citations.] (*Brown v. Gordon*, 240 Cal.App.2d 659, 666-667 (1966) [49 Cal.Rptr. 901].) 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.)

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.

(*Ibid.*)

In the decision, the ALJ addresses the issue of penalty and explains the factors considered in determining the penalty:

> The Department requested that the Respondent’s license be revoked, with

> the revocation stayed for a period of three years on the condition that the license is suspended for a period of 20 days. This is the standard penalty for possessing paraphernalia for sale, absent mitigating or aggravating circumstances. The Respondent did not comment on penalty in the event that a violation was sustained given their assertion that no violation occurred.
>
> Section 24200.5(b) mandates revocation for a violation of its provisions, although this has been construed to allow a stayed revocation. This is the Respondent's first violation of any sort since his initial licensure in 2008. This is a significant factor in mitigation.
>
> In aggravation is the factual nature of the violation in this matter. The actions of the Respondent did not involve isolated behavior. Two different products that could easily be modified into paraphernalia were being sold in the Licensed Premises. Both employees present were actively aware of what they were being displayed for. Despite being explicitly told by the undercover agent that he was going to use the device as a drug pipe, they went through with the transaction and one employee even gave him modification guidance to accomplish the expressed purpose.
>
> The Respondent and his agents and employees have been shown to be involved in an ongoing destructive scheme to profit off of drug users that frequented the Licensed Premises. This aggravation negates the mitigation and any support for a reduced penalty in this matter. In balance, the standard penalty with a stayed revocation is appropriate, under the circumstances, combined with an actual suspension. The penalty recommended herein complies with section 144.[fn.]

(Decision, at p. 9.)[4]

Appellant argues that the ALJ gave insufficient weight to his length of licensure. He also argues that the ALJ erred by using the employees' actions as factors in

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[4]Business and Professions Code section 24200(b) provides that a licensee's violation of any penal provision of California law prohibiting or regulating the sale of alcoholic beverages is also a basis for the suspension or revocation of the license.

Earlier in the decision, ALJ refers to section 24200(b) in Conclusions of Law ¶ 2, and we assume he intended to refer to that same section here — not 24200.5(b) which concerns drink solicitation, and which appears to be a typographical error.

aggravation. We agree. We question how the basic facts of a case can be used simultaneously to both sustain the accusation and to aggravate the penalty. While we have said many times that our review of a penalty looks only to see whether it can be considered reasonable, and, if it is reasonable, our inquiry ends. However, in the instant case, the ALJ's rationale for the penalty seems entirely unreasonable and an abuse of discretion. The ALJ ignored evidence of mitigation and incorrectly applied factors in aggravation. There was simply no evidence presented to support a contention that the employees in the matter were involved in "an ongoing destructive scheme to profit off drug users." Accordingly, we believe it was an abuse of discretion to use this a factor in aggravation to negate the licensee's ten years of discipline-free licensure, which should have been considered to afford substantial mitigation of the standard penalty.

ORDER

The underlying decision of the Department is affirmed. As to the penalty, the decision of the Department is reversed, and the matter remanded to the Department for reconsideration of the penalty in light of the above discussion.[5]

BAXTER RICE, CHAIRMAN
MEGAN McGUINNESS, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[5]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.

APPENDIX

BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA

IN THE MATTER OF THE ACCUSATION AGAINST:

UTTAM KUMAR KARKI
MICHAEL ANTHONY'S BUONAROMA
3314 ALHAMBRA AVENUE
MARTINEZ, CA 94553-3907

OFF-SALE GENERAL - LICENSE

Respondent(s)/Licensee(s)
Under the Alcoholic Beverage Control Act

CONCORD DISTRICT OFFICE

File: 21-548324

Reg: 18086289

CERTIFICATE OF DECISION

It is hereby certified that, having reviewed the findings of fact, determination of issues, and recommendation in the attached proposed decision, the Department of Alcoholic Beverage Control adopted said proposed decision as its decision in the case on June 11, 2018. Pursuant to Government Code section 11519, this decision shall become effective 30 days after it is delivered or mailed.

Any party may petition for reconsideration of this decision. Pursuant to Government Code section 11521(a), the Department's power to order reconsideration expires 30 days after the delivery or mailing of this decision, or if an earlier effective date is stated above, upon such earlier effective date of the decision.

Any appeal of this decision must be made in accordance with Business and Professions Code sections 23080-23089. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005, or mail your written appeal to the Alcoholic Beverage Control Appeals Board, 1325 J Street, Suite 1560, Sacramento, CA 95814.

On or after August 1, 2018, a representative of the department will contact you to arrange to pick-up the license certificate.

RECEIVED
JUN 21 2018
Alcoholic Beverage Control
Office of Legal Services

Sacramento, California

Dated: June 21, 2018

Matthew D. Botting
General Counsel

BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA

IN THE MATTER OF THE ACCUSATION AGAINST:

Uttam Kumar Karki dba Michael Anthony's Buonaroma 3314 Alhambra Avenue Martinez, California 94553-3907 Respondents Off-Sale General License	File: 21-548324 Reg.: 18086289 License Type: 21 Word Count: 27,200 Reporter: Lisa Loundagin CSR# 9213 Emerick and Finch **PROPOSED DECISION**

Administrative Law Judge Alberto Roldan, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Martinez, California, on April 24, 2018.

Sean Klein, Attorney, represented the Department of Alcoholic Beverage Control.

Richard D. Warren, Attorney, represented the Respondent, Uttam Kumar Karki (Karki) who was also present and testified.

The Department seeks to discipline the Respondents' license on the grounds that, on or about October 22, 2017, and while upon the licensed premises, the Respondent-Licensee's agent or employee, Sarina Taylor, possessed with intent to deliver, furnish, or transfer, drug paraphernalia, as defined in Health and Safety Code section 11014.5, in violation of Health and Safety Code section 11364.7(a). (Exhibit D-l) The Department further alleged that, on or about October 22, 2017, the Respondent-Licensee held Alcoholic Beverage Control License #21-548324 within the meaning of Health and Safety Code section 11364.7(d).

In the above count alleged in the Accusation, the Department further alleged that there is cause for suspension or revocation of the license of the Respondent in accordance with section 24200 and sections 24200(a) and (b). The Department further alleged that the continuance of the license of the Respondent would be contrary to public welfare and/or morals as set forth in Article XX, Section 22 of the California State Constitution and sections 24200(a) and (b).

Oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the hearing. The matter was argued and submitted for decision on April 24, 2018.

FINDINGS OF FACT

1. The Department filed the accusation on February 28, 2018.

2. The Department issued a type 21, off-sale general license to the Respondent for the above-described location on August 21, 2014 (the Licensed Premises).

3. There is no record of prior departmental discipline against the Respondents' license.

4. On October 22, 2017 California Department of Justice (CDOJ) Special Agent Stephen Huish (Huish) was working as a Department agent on a general enforcement assignment. Huish was a Department agent for approximately two years prior to leaving for his current position with CDOJ. In addition, Huish was a Sacramento County probation officer prior to his assignment at the Department. Huish had a total of approximately 4 ½ years' experience as a peace officer at the time of the investigation.

5. His specific training regarding narcotics enforcement included 12 hours during the academy, and an additional 82 hours of training during his various assignments. Under the supervision of a more experienced field training officer, Huish also had previous experience as a case agent during undercover narcotics buys prior to this matter. From his training, Huish has become familiar with how crack cocaine users ingest this controlled substance and what devices are used for ingestion. One device commonly used is a glass pipe for users who inhale cocaine in crack form.

6. Huish was in plain clothes during the investigation that took place at the Licensed Premises. The location contained a liquor store that also sold convenience products and had a deli. Along with Agent Joel Falcon (Falcon), Huish went into the Licensed Premises at approximately 12:50 in the afternoon after he determined it was open for business. Huish and Falcon went to the customer side of the register area where customers normally interact with clerks. (Exhibit L-1) Huish noticed two employees working on the other side of the counter. One was a male to the right at the register and the other was a female to the left of where he stood.

7. Huish spoke with the female employee, who appeared to be in the process of preparing produce for deli items when he first spoke to her. Huish asked for a pipe to smoke "rock", a term Huish had learned was commonly used for "crack" or "freebase"

cocaine. The female clerk pointed to a box that was labeled as air freshener with 10 upright glass tubes each containing a colored liquid. (Exhibit D-3) The box was openly displayed at the counter area adjacent to the register where customers would typically place items they sought to purchase. In Huish's presence, Falcon asked the female employee if they could be used to smoke "crack" cocaine. She responded in the affirmative. She subsequently stated that there was a smoke shop up the road. The female employee was asked how the tube could be used. She responded that you could unscrew the cap and pop off the top filter.

8. Huish was familiar with these items and the process by which they were easily modified for the purpose of smoking narcotic substances. The individual items in the box (Exhibit D-3) were clear glass tubes containing a liquid and a filter. The white plastic top and contents were removable. The bottom of the tube had a clear cap that would separate with the application of heat from a lighter leaving the tube open ended on both sides. (Exhibit D-4) An individual using the tube as a "crack" pipe would insert a piece of steel wool or screen into one end of the tube to arrest the movement of the narcotic as a flame is applied to vaporize the solid for ingestion through the tube as smoke. This was the only device pointed to by the female employee after Huish's request and Falcon's questions.

9. After the interaction with the female employee, Huish selected one of the tubes and interacted with the male at the register. Huish was charged for the item he presented for purchase. Huish paid cash and was given change from the register for his purchase. Huish then left the Licensed Premises with the purchase. (Exhibit D-4) The device was secured and later booked into evidence along with other items that were seized later in the investigation. A photograph of the purchased device was also taken by and included in the report of the investigation.

10. Huish and Falcon returned to the Licensed Premises shortly after they stepped out after the purchase. Upon reentering, they identified themselves as law enforcement and produced their badges since they were in plain clothes. Huish obtained the identification of the female employee who spoke with him and Falcon prior to the purchase. She identified herself as Sarina Taylor (Taylor) and this identification was confirmed with her driver's license during the citation process. The female employee was also photographed. (Exhibit D-2) The male employee was present in the immediate area that they were speaking with Taylor. During the hearing in this matter, Yangesh KC (KC) identified himself as the male clerk at the register who was present during the investigation.

11. Huish informed her of the crime that she had committed. Taylor then spontaneously said KC had chastised her for describing the item that was purchased as drug paraphernalia. Huish had little interaction with KC other than observing that he was upset and hearing him state that Taylor was not an employee. Taylor was an employee who

worked the deli counter on a part-time basis. She did not work the register according to the testimony of Karki, the owner and licensee of the Licensed Premises but was employed for stocking, cleaning and deli work.

12. After reentering the Licensed Premises, Huish also noticed that in the register area, there was a separate box on display for customers containing additional items that were also easily modified to be used for smoking narcotic substances. (Exhibit L-7) The individual contents of this box contained long, open-ended glass tubes, with an artificial rose loosely affixed in the tubes with a foil cap that could be peeled off by hand. Huish learned in his training that these items were commonly converted into narcotic pipes by poking out the loosely affixed rose and inserting a piece of steel wool or screen into one end of the tube to arrest the movement of a narcotic as a flame is applied to vaporize the solid for ingestion through the tube as smoke. (Exhibit L-6)

13. Huish reviewed the licensing information in the Department license file for the Licensed Premises and determined that it had an active Type 21 license at the time of the investigation on October 22, 2017. In addition, Huish found that the licensee had acknowledged receiving the packet containing the laws, rules and regulations pertaining to enforcement of the Act; commonly known as an ABC-203. Karki was the specific signatory of the acknowledgement in August 2008[1]. (Exhibit D-5) The packet that Karki received during his original licensing included an Impact Drug Paraphernalia form known as an ABC-546. This document referenced the specific California Health and Safety Code statutes that made the sale of drug paraphernalia illegal. It went on to describe, in detail, items that merchants were to refrain from selling with the intent that they be used for ingesting narcotics. The items seized during the investigation on October 22, 2017 (Exhibits D-3 and L-7) fell within the description of items that could be used for inhaling narcotic substances.

14. KC testified in this matter. During his testimony, he confirmed that he had worked for the Licensed Premises since approximately January 2016. KC was fluent in English during his testimony and stated that he was a student in college, in addition to working at the Licensed Premises as a cashier. KC was working with Taylor on October 22, 2017 when Huish and Falcon entered. KC testified that Huish interacted with him when he first entered by saying "Hi, how's it going?" to him in a loud voice. KC testified that Huish then said, "Me and my girlfriend want to smoke some crack. Do you sell something to smoke with?" KC testified that he did not know what "crack" was. KC testified that he responded "I have no idea what you are talking about; we don't sell anything like that in the store."

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[1] At the time of the original licensure in August 2008, the Licensed Premises had two licensees, Karki and Israr Hussain. The license was modified effective August 24, 2014 to remove Israr Hussain leaving Karki as the sole licensee.

15. KC testified that Huish approached the counter, lifted up a tube from the air freshener box, and said, "What is this?" KC testified that he responded, "That is air freshener." KC testified that he saw Huish interact with Taylor at the deli counter area while displaying and asking her about the air freshener tube. KC testified that Taylor responded at one point by saying, "I don't know what people use it for." KC testified that he thought the interaction was unusual and at one point he told Taylor to get back to work and to let him talk with Huish. KC testified that Huish then came back to the counter and picked up one of the artificial roses from the box on the counter (Exhibit L-7) and asked, "What's this?" KC testified that he said it was a rose.

16. KC then testified that Huish asked to buy the air freshener tube. (Exhibit D-4) KC testified that he told Huish that he would only sell it if Huish was using it as an air freshener. KC testified that he went on to say, "Are you sure you are using it as an air freshener?" to which Huish responded, "Yes." KC completed the transaction at this time with Huish. Huish and the other person he was with then departed. KC testified that the other person was not near Huish until they departed and that the other person did not interact with Taylor.

17. KC testified that Huish and the other person returned about 3-4 minutes later and approached Taylor at the deli counter. While they were interacting with Taylor, KC learned they were law enforcement and were in the process of citing Taylor. KC contacted Karki through his wife and informed him of what was occurring. Karki arrived at the Licensed Premises while the officers were still interacting with Taylor.

18. Karki testified in this matter. He testified that the box with the artificial roses was not in the inventory of customer displays when he left. His wife found them on a shelf left over from inherited inventory and put the items on display for sale without his knowledge. Karki confirmed that he has been one of the licensees since 2008 and that he became the sole licensee effective August 21, 2014.

19. Except as set forth in this decision, all other allegations in the accusation and all other contentions of the parties lack merit.

CONCLUSIONS OF LAW

1. Article XX, section 22 of the California Constitution and section 24200(a) provide that a license to sell alcoholic beverages may be suspended or revoked if continuation of the license would be contrary to public welfare or morals.

2. Section 24200(b) provides that a licensee's violation, or causing or permitting of a violation, of any penal provision of California law prohibiting or regulating the sale of alcoholic beverages is also a basis for the suspension or revocation of the license.

3. Health and Safety Code section 11364.7(a) provides, in part, that "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 . . . in violation of this division, is guilty of a misdemeanor."

4. Business and Professions Code section 24200.6 provides that "[t]he 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."

5. Health and Safety Code section 11364.7(d) provides that "[t]he violation, or the causing or the permitting of a violation, of subdivision (a), (b), or (c) by a holder of a business or liquor license issued by a city, county, or city and county, or by the State of California, and in the course of the licensee's business shall be grounds for the revocation of that license."

6. Health and Safety Code section 11014.5(a) contains a broad definition of drug paraphernalia as "all equipment, products and materials of any kind which are designed for use or marketed for use, in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of this division." A non-exclusive list of items is set forth immediately after this definition

7. Health and Safety Code section 11014.5(b) provides that "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."

8. Health and Safety Code section 11014.5(c) provides that, "[i]n 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.

9. Cause for suspension or revocation of the Respondent's license has been established for the violation of section 11364.7(a) alleged in count 1 of the accusation. (Findings of Fact ¶¶ 2 & 4-18)

10. As required by section 11364.7(d), the evidence established that the violation of section 11364.7(a) was committed "in the course of the licensee's business" by the holder of a liquor license. It is undisputed that the items were being actively sold in the course of the Respondent's operation of the Licensed Premises. The Licensee had constructive notice that the items at issue were drug paraphernalia hidden behind the thin subterfuge of being air fresheners or artificial roses. The Licensed Premises has held a Type 21 license since well before the date of the investigation on October 22, 2017 and the Licensed Premises was open during its normal operating hours at the time of Huish and Falcon interacting with Taylor and KC. (Findings of Fact ¶¶ 2 & 4-18)

11. In addition to the persuasive direct and circumstantial evidence that the licensee's agents and employees possessed the overall inventory with intent to furnish the individual items as drug paraphernalia, there is persuasive direct evidence that the transaction started by Taylor and completed by KC on October 22, 2017 was an actual furnishing of drug paraphernalia in violation of Health and Safely Code section 11364.7(a). According to Huish's credible testimony, he entered the Licensed Premises and asked employee Taylor if he could buy a "crack pipe" to smoke "rock". Taylor understood what was being asked and directed him to the purported air fresheners while giving him some guidance as to how to modify the item into a pipe. This occurred in KC's direct presence and with his knowledge as evidenced by his close proximity and his later admonishment of Taylor prior to the return of the officers. KC then completed the transaction with actual knowledge of Huish's expressed, intended use. (Findings of Fact ¶¶ 4-12)

12. The evidence also sufficiently established that the devices seized were for the expressed purpose of ingesting "''rock" cocaine by smoking, consistent with Health and Safety Code section 11014.5, and that the Respondent's agents and employees were aware of this. Huish testified that his training and experience led him to conclude that the devices seized, including the one sold to him by Taylor and KC, were thinly veiled pipes that could be used to smoke "rock" cocaine. Huish specifically asked for and described a "crack pipe" to smoke "rock" and the device that Taylor directed him to in order to comply with his request was easily modified for smoking "rock" cocaine despite the subterfuge of being branded as an "air freshener". The knowledge of its specific use as drug paraphernalia was reinforced by the description of some of the modifications needed to make it into a "crack" pipe. When the agents identified themselves, Taylor spontaneously referenced KC's admonishment of her for openly talking about the "air freshener" inventory as drug paraphernalia. (Findings of Fact ¶¶ 4-11)

13. The above findings require that the testimony of Huish be accepted as a reliable version of the events and the rejection of the testimony of KC as unreliable. The disparate version of events described by these two witnesses cannot be reconciled as the product of innocent misrecollection by either or both witnesses. The testimony of KC is found to be inherently unreliable and is rejected. The only challenge to the testimony of Huish was based on the testimony of KC. His testimony was otherwise unremarkable and was not otherwise shown to be unreliable other than its contrast with the testimony of KC. Taylor was not called as a witness in this matter despite the ability of the Respondent to do so. (Findings of Fact ¶¶ 4-17)

14. Major portions of KC's testimony were inconsistent with other matters he testified to during the same proceeding. KC testified to not even knowing what "crack" was prior to the transaction but then later testified to only allowing Huish to purchase Exhibit D-4 if he was only going to use it as air freshener. The line of questioning KC purportedly engaged in would only have been meaningful if he had a prior awareness of the potential use of Exhibit D-4 as drug paraphernalia. (Findings of Fact ¶¶ 14-17)

15. This would require a prior awareness of things like "crack" which KC flatly denied , under oath. It is highly improbable that a college aged man, fluent in English, living in the United States for an extended period, attending college, and working in a liquor store for multiple years in an urban city would have no knowledge of drug use and related slang terminology like "crack". The subsequent assertions of KC challenging Huish's version of the events suffer under the strain of this incredulous assertion and are rejected as inherently ridiculous and not reliable. (Findings of Fact ¶¶ 14-17)

PENALTY

The Department requested that the Respondent's license be revoked, with the revocation stayed for a period of three years on the condition that the license is suspended for a period of 20 days. This is the standard penalty for possessing paraphernalia for sale, absent mitigating or aggravating circumstances. The Respondent did not comment on penalty in the event that a violation was sustained given their assertion that no violation occurred.

Section 24200.5(b) mandates revocation for a violation of its provisions, although this has been construed to allow a stayed revocation. This is the Respondent's first violation of any sort since his initial licensure in 2008. This is a significant factor in mitigation.

In aggravation is the factual nature of the violation in this matter. The actions of the Respondent did not involve isolated behavior. Two different products that could easily be modified into paraphernalia were being sold in the Licensed Premises. Both employees present were actively aware of what they were being displayed for. Despite being explicitly told by the undercover agent that he was going to use the device as a drug pipe, they went through with the transaction and one employee even gave him modification guidance to accomplish the expressed purpose.

The Respondent and his agents and employees have been shown to be involved in an ongoing and destructive scheme to profit off of drug users that frequented the Licensed Premises. This aggravation negates the mitigation and any support for a reduced penalty in this matter. In balance, the standard penalty with a stayed revocation is appropriate, under the circumstances, combined with an actual suspension. The penalty recommended herein complies with section 144[2].

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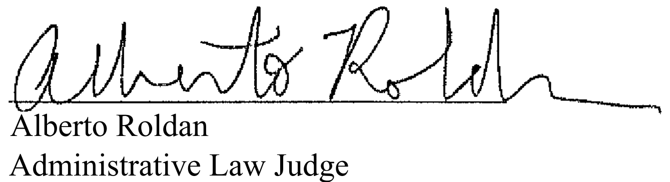
[2] The rule referred to herein is contained in title 4 of the California Code of Regulations.

ORDER

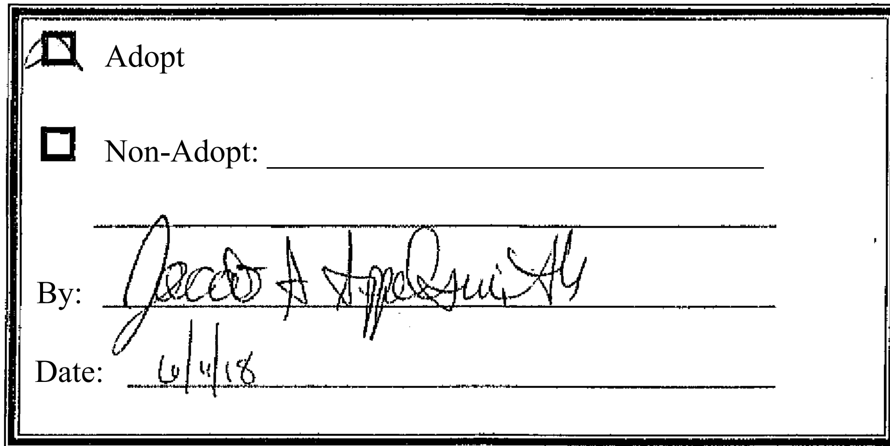
The Accusation alleged in Count 1 is sustained. In light of this violation, the Respondent's off-sale general license is hereby revoked, with the revocation stayed for a period of three years upon the condition that no subsequent final determination be made, after hearing or upon stipulation and waiver, that cause for disciplinary action occurred within three years from the effective date of this decision; that should such determination be made, the Director of the Department of Alcoholic Beverage Control may, in the Director's discretion and without further hearing, vacate this stay order and reimpose the stayed penalty; and that should no such determination be made, the stay shall become permanent.

In addition, the Respondent's off-sale general license is suspended for a period of 20 days.

Dated: May 10, 2018



Alberto Roldan
Administrative Law Judge



☒ Adopt

☐ Non-Adopt: ______________________

By: ______________________

Date: 6/4/18