

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

AB-9773

File: 21-404634; Reg: 18086591

HARJAP SINGH,
dba Super Stop
718 4th Street
Rodeo, CA 94572,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: August 16, 2019
Sacramento, CA

ISSUED AUGUST 26, 2019

Appearances: *Appellant:* Dean R. Lueders, as counsel for Harjap Singh,

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

OPINION

Harjap Singh, doing business as Super Stop (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ revoking its 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, in violation of Health and Safety Code section 11364.7, subdivision (a).

¹The decision of the Department, dated November 15, 2018, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on November 5, 2003. There are three prior instances of discipline against the license for selling alcoholic beverages to minors.

On February 28, 2018, the Department instituted an accusation against appellant. At the administrative hearing held on August 8, 2018, documentary evidence was received and testimony concerning the violation charged was presented by Department Agent Joel Thalken. Jagdish Masih, a clerk at the licensed premises, testified on behalf of appellant.

Testimony established that on December 28, 2017, Agent Thalken, along with Department Agent Cynthia Jimenez, drove to the licensed premises and entered in an undercover capacity. Agent Thalken approached the sales counter and asked the store clerk, Jaspreet Singh, if he had any Swisher Sweet cigarillos. Singh retrieved a packet of the cigarillos for Agent Thalken.

Agent Thalken then asked Singh if he could buy a crack pipe for his girlfriend. Singh did not understand, so Agent Thalken repeated his question. However, Agent Thalken still believed Singh did not understand what he was asking for. Singh then called over a second clerk, Jagdish Masih. Agent Thalken asked Masih if he could buy a crack pipe. Masih pointed at or touched a small cardboard display box that held 72 glass tubes purporting to be air fresheners. (Exh. 4C.) The tubes were small and contained a colored liquid with an unspecified aroma. The end of the tube was covered by a removable white cap.

The air freshener glass tubes can be converted to be used to ingest or inhale controlled substances. To convert them, one removes the white plastic cap, filter, and liquid contents. The closed end of the tube is heated to remove that end resulting in a glass tube with two open ends. Next, one inserts a small piece of metal scouring pad or similar material just inside one end of the tube, which acts as a filter. Lastly, the user puts a small piece of crack-cocaine in one end of the tube, heats it, and then smokes the vaporized controlled substance from the opposite end.

After purchasing one of the air fresheners, Agent Thalken left the licensed premises and then re-entered with Agent Jimenez. They identified themselves as Department agents and advised Masih that he sold drug paraphernalia to Agent Thalken. Masih asked Agent Thalken about the court process and the impact of the sale on the store's license. The agents then seized the box of air fresheners along with the tube Masih sold to Agent Thalken.

On September 5, 2018, the administrative law judge (ALJ) submitted his proposed decision sustaining the accusation and recommending that appellant's license be revoked - with the revocation stayed for a period of three years, provided no further cause for discipline arises during that period — and concurrently suspending the license for 20 days. The Department adopted the proposed decision in its entirety on November 13, 2018 and a Certificate of Decision was issued two days later.

Appellant filed a timely appeal contending that 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.

DISCUSSION

ISSUE REGARDING SUBSTANTIAL EVIDENCE

Appellant contends the violations charged in the accusation are not supported by substantial evidence. Specifically, appellant maintains that there is no evidence that his employees knew the glass tubes would be used as drug paraphernalia, or that they intended to sell them for that purpose. (AOB, at pp. 4-6.)

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, 112 [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:

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 evidence that the clerk, Mr. Masih, knew that the air freshener would be used as drug paraphernalia nor is there any evidence that he was aware of the facts and circumstances from which he should have reasonably concluded there was a high probability the air freshener would be used as drug paraphernalia.” (AOB, at p. 5.) Appellant maintains that since the agent did not ask for the crack pipe in Punjabi (the language primarily spoken by Masih), there is no evidence that the clerk understood its intended use. (*Ibid.*)

In the Proposed Decision, the Administrative Law Judge (ALJ) concluded:

5. In this instance, Agent Thalken simply and clearly asked clerk Masih for a “crack-pipe”, a common piece of drug-paraphernalia. He did not use any words or make any gestures that, in any way, suggested, intimated, or expressed he only wanted a product that emitted some kind of perfumed or scented aroma i.e. an air freshener. That would have made no sense whatsoever in this type of investigation focusing on drug paraphernalia. In response to Agent Thalken’s request, clerk Masih immediately pointed directly to, and possibly even touched, the display of air freshener tubes located in a small cardboard box on the sales counter. Clerk Masih

neither told Agent Thalken he did not understand what he requested nor conveyed that the store had no such product available to sell. The item clerk Masih pointed out to Agent Thalken was, in fact, an item commonly converted into an instrument used to ingest a controlled substance, i.e. a “crack-pipe”, exactly what Agent Thalken asked clerk Masih for. Clerk Masih did not point out any other type of item, including any conventional smoking device or instrument.

(Conclusions of Law, ¶ 5.)

Based on the above, there is substantial evidence to support the Department’s decision that appellant’s employee² sold the air freshener to Agent Thalken, knowing, or under circumstances where one reasonably should know, that the glass tubes could be used to ingest controlled substances. Agent Thalken asked Masih if he could buy a crack-pipe, and Masih pointed to (and ultimately sold) a product that is commonly converted into a crack-pipe. Such evidence supports that ALJ’s conclusion that Masih knew the tubes were being purchased for the purpose of smoking crack cocaine.

ORDER

The decision of the Department is affirmed.³

SUSAN A. BONILLA, CHAIR
MEGAN MCGINNESS, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

²Under settled law, the acts and knowledge of an employee are imputed to the employer. (See *Yu v. 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].)

³ This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7 of said code.

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

APPENDIX

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

**IN THE MATTER OF THE ACCUSATION
AGAINST:**

HARJAP SINGH
SUPER STOP
718 4TH STREET
RODEO, CA 94572

OFF-SALE GENERAL - LICENSE

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

CONCORD DISTRICT OFFICE

File: 21-404634

Reg: 18086591

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 November 13, 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 December 26, 2018, a representative of the Department will contact you to arrange to pick-up the license certificate.

Sacramento, California

Dated: November 15, 2018



Matthew D. Botting
General Counsel

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**Alcoholic Beverage Control
Office of Legal Services**

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

IN THE MATTER OF THE ACCUSATION AGAINST;

Harjap Singh
Dba: Super Stop
718 4th Street
Rodeo, CA 94572

Respondent

} File: 21-404634
}
} Reg.: 18086591
}
} License Type: 21
}
} Word Count: 13,607
}
} Reporter: Amber Emerick,
} CSR-13546
} Emerick and Finch Reporters
}
}

Regarding His Type-21 Off-Sale General License
Under the State Constitution and Alcoholic Beverage
Control Act.

PROPOSED DECISION

Administrative Law Judge David W. Sakamoto, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Martinez, California, on August 8, 2018.

Sean Klein, Attorney III, Office of Legal Services, Department of Alcoholic Beverage Control, represented the Department of Alcoholic Beverage Control. (Hereafter the Department)

Dean Lueders, Esq., represented licensee Harjap Singh. (Hereafter Respondent)

The Department seeks to discipline Respondent's license on the grounds that on or about December 28, 2017, Respondent's employee or agent, Jagdish Masih, sold, furnished, or transferred drug paraphernalia and/or 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 1: Prehearing pleadings)

Oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the hearing. The matter was argued by the parties and submitted for decision on August 8, 2018.

FINDINGS OF FACT

1. The Department filed the accusation on February 28, 2018. The Department received Respondent's Notice of Defense on March 13, 2018, and the matter was set for a hearing. (Exhibit 1 :Pre-hearing pleadings)

2. On November 5, 2003, the Department issued Respondent a type-21 off-sale general license for his premises known as Super Stop, located at 718 4th Street, Rodeo, California. (Hereafter the Licensed Premises) Respondent's type-21 license permitted him to retail in beer, wine, and distilled spirits for consumption off the Licensed Premises.

3. Since being licensed, Respondent suffered the following disciplinary action:

Date of Violation	Violation	Reg, Date.	Reg. Number	Penalty Imposed
4-28-2005	Bus. & Prof. §25658(a)and §24200(a & b)	6-14-2005	05059898	25 day suspension with fine paid in lieu thereof under Bus. & Prof. §23095.
2-26-2004	Bus. & Prof. §25658(a) and §24200(a & b)	6-17-2004	04057467	15 day suspension with fine paid in lieu thereof under Bus. & Prof. §23095
1-17-2013	Bus. & Prof. §25658(a) and §24200(a & b)	7-18-2013	13078918	16 day suspension with all 10 days stayed

All of the above captioned disciplinary actions are final.

4. On December 28, 2017, Alcoholic Beverage Control Agents Joel Thalken (Hereafter Agent Thalken) and Cynthia Jimenez (Hereafter Agent Jimenez) drove to the Licensed Premises, a small convenience store and gas station.

5. Agent Thalken entered the Licensed Premises in an undercover capacity. After he viewed its interior, he went to the sales counter as asked the store clerk, Jaspreet Singh, (Hereafter clerk Singh) if he had any Swisher Sweet cigarillos. Clerk Singh obtained a packet of that tobacco product.

Agent Thalken then asked clerk Singh if he could get “a crack-pipe for my girlfriend.” Clerk Singh did not understand what Agent Thalken was asking for. Agent Thalken repeated his request to clerk Singh. However, he believed clerk-Singh still did not comprehend what he was asking for.

6. Clerk Singh motioned over a second clerk, Jagdish Masih. (Hereafter clerk Masih) Agent Thalken asked clerk Masih if he could purchase a “crack-pipe”. Clerk Masih pointed at or touched a small cardboard display box that held 72 glass tubes purporting to be air-fresheners. The box was in public view on the sales counter near the cash register. Agent Thalken selected one tube from that display box. The glass tube he selected was approximately 2 1/2” tall by 1/2” in diameter containing a colored liquid. The colored liquid had an unspecified aroma. One end of the tube was closed ended, just like a typical laboratory test tube. The open end of the glass tube had a filter inserted just below the lip of the tube to contain the liquid contents yet permit its odor to escape. The very end was capped with removable white plastic cap. All of the tubes displayed in the box appeared identical in size, construction, and contents except labeling on the tubes indicated they carried specific varying aromas. (Exhibit 4B: photo of tube Agent Thalken purchased) The display box had the words “Air Freshener” on the front of it. On another side of the box were the words “Since 1959 For Home and Auto Use. On a third side of the box were the words “Eliminates Stale Odors”. The box also indicated the product was manufactured by “Sprig USA, Riverside, CA 92508”. (Exhibit 3: Display box containing 71 glass tubes and Exhibit 4C: photo of display box with tubes) Agent Thalken purchased one tube for approximately \$3.99 and a package of the Swisher Sweet tobacco-cigarillos from clerk Masih. Agent Thalken then met with Agent Jimenez outside the Licensed Premises.

7. Approximately two minutes after Agent Thalken left the Licensed Premises, he re-entered with Agent Jimenez. They identified themselves as ABC agents to clerks Singh and Masih. Agent Thalken told clerk Masih that he sold drug paraphernalia to Agent Thalken because the air freshener could be used to smoke crack-cocaine. Clerk Masih asked Agent Thalken about the court process that would be involved and this transaction’s impact on the store’s license. The agents seized the box of air fresheners from the sales counter along with the tube clerk Masih sold to Agent Thalken.

8. The air freshener glass tubes can be converted to be used to ingest or inhale controlled substances. To convert them to drug paraphernalia, one removes the white plastic cap, filter, and liquid contents. The closed end of the tube is heated to remove that end resulting in a glass tube with two open ends. Next, one inserts a small piece of a “Chor-Boy” metal scouring pad or similar material just inside one end of the tube. This acts as a filter. Lastly, the user puts a small piece of “rock” or “crack-cocaine” in one end of the tube. That end is heated by flame to vaporize the rock-cocaine. The user then smokes

the vaporized controlled substance from the opposite end of the glass tube through the filter, akin to smoking a cigarette.¹

9. When Respondent was issued his license in 2003, an ABC-203 form signed by Respondent indicated the Department provided him certain information sheets regarding the illegality of retailing in drug paraphernalia at the Licensed Premises. (Exhibit A, Attachment 3: ABC-203, Acknowledgment of ABC Laws, Rules and/or Regulations.) He was also provided a copy of Department's form ABC-546(12/98) that was a recitation of Health and Safety Code section 11364.7 that bans the delivering, furnishing, possessing or manufacturing of drug paraphernalia. (Exhibit A, Attachment 4: ABC-546 form) Respondent was also provided a copy of ABC Form 546-A which also addressed drug paraphernalia, including a specific reference to items sold in glass tubes convertible to crack cocaine pipes. However, it appeared Respondent was sent a form 546-A that was then last revised in Feb. 2003. The ABC 546-A form presented at the hearing indicated it was revised in September 2015, (Exhibit A, attachment 5, 2 pgs.) Agent Thalken testified he thought all Department licensees were sent the most current ABC-546-A forms upon paying their annual license renewals, but he was not positive of that procedure and no other evidence was presented confirming if Respondent was ever sent the most recent ABC-546-A form presented at the hearing. No evidence was presented what, if any, information on the latest ABC-546-A form, revised in September 2015, was the same or different than the 2003 version of the ABC-546-A form given to Respondent when he was first licensed in 2003.

10. Respondent's clerk Masih worked at the Licensed Premises since 2008. He still worked there as of the date of the hearing. He testified he did not recall Agent Thalken asking him any questions and also denied he had any conversation with him.² Clerk Masih testified clerk Singh actually sold the air-freshener tube to Agent Thalken. Clerk Masih denied he knew the air freshener was a piece of drug paraphernalia and denied he knew what "crack-cocaine" was. He testified he was from India and primarily spoke Punjabi. He testified clerk Singh told him Agent Thalken was trying to buy a "scent-pipe" for his girl-friend and clerk Singh did not know what that was. Clerk Masih pointed out the air fresheners to Agent Thalken as that was the only scent tube/pipe type product they carried.

¹ Agent Thalken testified regarding use of the glass tube as drug paraphernalia based on his training and experience from approximately 12 investigations he participated in involving drug paraphernalia.

² Mr. Masih testified through a Punjabi interpreter at the hearing.

LEGAL BASIS OF DECISION

1. Article XX, section 22 of the California Constitution and California Business and Professions 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. California Business and Professions Code section 24200(b) generally provides that a licensee's violation, or causing or permitting of a violation, of any provision of the Alcoholic Beverage Control Act, any of the Department's rules, and 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. Business and Professions code section 24200.6 states: "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."

4. California Health and Safety Code section 11364.7(a) states, "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."

5. California Health and Safety Code section 11364.7(d) states, "The 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-exhaustive 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.”

DETERMINATION OF ISSUES

1. As to Count 1 of the Accusation, cause for suspension or revocation of Respondent’s license exists under Article XX, section 22 of the California State Constitution and Business and Professions Code sections 24200(a) and/or 24200(b) because on December 28, 2017, Respondent’s agent or employee, Jagdish Masih, possessed, with intent to deliver, furnish, or transfer drug paraphernalia on the licensed premises in violation of Health and Safety Code section 11364.7(a). (Findings of Fact ¶¶ 5-9)

2. As to Count 2 of the Accusation, cause for suspension or revocation of Respondent’s license exists under Article XX, section 22 of the California State Constitution and Business and Professions Code sections 24200(a) and/or 24200(b) because on December 28, 2017, Respondent’s agent or employee, Jagdish Masih, delivered, furnished, or transferred drug paraphernalia on the licensed premises in violation of Health and Safety Code section 11364.7(a). (Findings of Fact ¶¶ 5-9)

3. The Department argued Agent Thalken clearly asked clerk Masih for a “crack-pipe”, a common piece of drug paraphernalia. It also argued clerk Masih was not a credible witness in his denial of knowingly selling drug paraphernalia to Agent Thalken. It also contended Respondent had three prior disciplinary actions and therefore no mitigation of penalty was warranted. The Department recommended the appropriate penalty was license revocation, stayed for three years, including a 20-day license suspension.

4. Respondent argued the evidence did not warrant disciplinary action. Respondent attributed any inconsistency in clerk Masih’s testimony as only reflective of his weakness in the English language compared to his native Punjabi. Respondent observed that Agent Thalken did not ask clerk Masih for a pipe “... to smoke cocaine or rock...” with, thus it was not proven that when clerk Masih pointed to the air fresheners he knew or should have known Agent Thalken was going to somehow use the air freshener to smoke or ingest a controlled substance. Respondent argued Agent Thalken only asked clerk Masih for a “crack-pipe” and clerk Masih believed through clerk Singh that Agent Thalken was only interested in a “scent” or “perfume” pipe or some equivalent product, i.e. a product that gave off a scent or odor, not something used to ingest a controlled substance.

5. In this instance, Agent Thalken simply and clearly asked clerk Masih for a “crack-pipe”, a common piece of drug-paraphernalia. He did not use any words or make any gestures that, in any way, suggested, intimated, or expressed he only wanted a product that emitted some kind of perfumed or scented aroma i.e. an air freshener. That would have made no sense whatsoever in this type of investigation focusing on drug paraphernalia. In response to Agent Thalken’s request, clerk Masih immediately pointed directly to, and possibly even touched, the display of air freshener tubes located in a small cardboard box on the sales counter. Clerk Masih neither told Agent Thalken he did not understand what he requested nor conveyed that the store had no such product available to sell. The item clerk Masih pointed out to Agent Thalken was, in fact, an item commonly converted into an instrument used to ingest a controlled substance, i.e. a “crack-pipe”, exactly what Agent Thalken asked clerk Masih for. Clerk Masih did not point out any other type of item, including any conventional smoking device or instrument.

6. Clerk Masih’s claim he believed Agent Thalken was only asking for some type of “scent-pipe”, “scent-tube” or perfume was not credible and appeared to be a contrived after-thought excuse. Clerk Masih’s demeanor while testifying was not very convincing. Further, he is still employed by Respondent so he would have a natural bias to protect his employer, and even more so to protect his own interest and reputation with his employer. On the date of the investigation, he even inquired of Agent Thalken regarding the effect of the transaction on the license, even though he was not the named licensee.³

³ Under Evidence Code section 780, various factors, including a witness’ demeanor, bias, and attitude toward the action in which he testifies are factors that can be assessed when evaluating the credibility of a witness.

It also seemed if clerk Masih understood well enough what Agent Thalken discussed with him after Agent Thalken reentered the premises and notified him of the violation, clerk Masih certainly understood what Agent Thalken was asking for in the first place.⁴ There was sufficient evidence to sustain Count 1 and Count 2 in the accusation.

7. Except as set forth in the decision, all other contentions raised by the Department in the accusation and those raised by Respondent in defense thereto lack merit.

PENALTY

1. In assessing an appropriate measure of discipline, the Department's penalty guidelines are in California Code of Regulations, Title 4, Division 1, Article 22, section 144, commonly referred to as "rule 144". Under rule 144, the presumptive penalty for a first violation for possession for sale of drug paraphernalia is license revocation, stayed for three years, and a 20 day license suspension.

2. Rule 144 also permits imposition of a revised penalty based on the presence of aggravating or mitigating factors. Length of licensure free of disciplinary action or problems is specifically noted as a factor in mitigation.

3. The Department contended the penalty set out in rule 144 was appropriate. Although Respondent was licensed in 2003, he had three prior sale-to-minor violations, the last one being in 2013. Therefore, no mitigation from the recommended penalty was warranted.

4. Respondent did not recommend any specific penalty in the event the accusation was sustained.

5. While the length of discipline free licensure or problem is a mitigating factor under rule 144, Respondent had three prior accusations, the most recent of which occurred in 2013. As such, it did not appear mitigation was warranted. As there were no particularly aggravating factors or other mitigating factors involved in this matter, the standard penalty specified in rule 144 is appropriate.

6. Except as set forth in this decision, all other contentions raised by the parties with respect to the penalty lack merit.

⁴ Certainly, were there some added conversation or interaction between Agent Thalken and clerk Masih that further confirmed clerk Masih knew he was selling an item that was going to be used to ingest a controlled substance, the case against Respondent would have been even more persuasive.

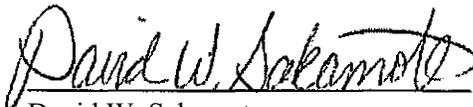
ORDER

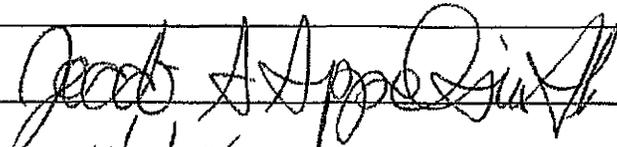
Count 1 and Count 2 of the Accusation are sustained.

As to each count, Respondent's off-sale general license is revoked, with revocation stayed for a period of thirty-six (36) months commencing on the date the decision in this matter becomes final, upon the condition that no subsequent final determination is made, after hearing or upon stipulation and waiver, that cause for disciplinary action occurred during the period of the stay. Should such a 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 and revoke Respondent's license, and should no such determination be made, the stay shall become permanent. In addition, Respondent's license is suspended for twenty (20) days.

As Count 1 and Count 2 are essentially based on the same set of operative facts and based on the same statute, their respective penalty shall run concurrently.

Dated: September 5, 2018


David W. Sakamoto
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By: 
Date: <u>11/13/18</u>

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

IN THE MATTER OF THE ACCUSATION AGAINST: HARJAP SINGH SUPER STOP 718 4 TH STREET RODEO, CA 94572 OFF-SALE GENERAL - LICENSE under the Alcoholic Beverage Control Act.	File: 21-404634 Reg: 18086591 DECLARATION OF SERVICE BY MAIL
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The undersigned declares:

I am employed at the Department of Alcoholic Beverage Control, I am over 18 years of age and not a party to this action. My business address is 3927 Lennane Drive, Suite 100, Sacramento, California 95834. On November 15, 2018, I served, by CERTIFIED mail (unless otherwise indicated) a true copy of the following documents:

DECISION AND CERTIFICATE OF DECISION

on each of the following, by placing them in an envelope(s) or package(s) addressed as follows:

HARJAP SINGH
SUPER STOP
718 4TH STREET
RODEO, CA 94572

DEAN LUEDERS
ACTLEGALLY
P.O. BOX 254491
SACRAMENTO, CA 95865-4491

Office of Legal Services
Headquarters, Inter Office Mail

and placing said envelope or package for collection and mailing, following our ordinary business practices. I am readily familiar with this department's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, County of Sacramento, State of California, in an envelope with the postage fully prepaid. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on November 15, 2018 at Sacramento, California.


Mark Kinyon

CONCORD DISTRICT OFFICE (INTEROFFICE MAIL)
 DIVISION OFFICE (INTEROFFICE MAIL)