ISSUED OCTOBER 31, 2000

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

PALVINDER K. CHIMA dba Plaza Liquor 18545 Roscoe Boulevard Northridge, CA 91324, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7491 File: 21-310858 Reg: 99046405 Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen Date and Place of the Appeals Board Hearing: August 3, 2000 Los Angeles, CA

Palvinder K. Chima, doing business as Plaza Liquor (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked her license, but stayed revocation for a two-year probationary period and imposed a 30-day suspension for appellant's employee or agent selling an item of drug paraphernalia, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Health and Safety Code §11364.7, subdivision (d).

[1]The decision of the Department, dated August 26, 1999, is set forth in the appendix.

Appearances on appeal include appellant Palvinder K. Chima, appearing through her counsel, Joshua Kaplan, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on August 10, 1995. Thereafter, the Department instituted an accusation against appellant charging that, on February 3, 1999, appellant's employee or agent, Hakam Singh, sold an item of drug paraphernalia to Eric Hirata. Hirata was a Department investigator.

An administrative hearing was held on July 8, 1999, at which time oral and documentary evidence was received. At that hearing, appellant requested a continuance to allow her to retain legal counsel [RT 4]. The Administrative Law Judge (ALJ) denied the request [RT 6] and appellant represented herself at the hearing. Testimony was presented by Department investigator Hirata concerning the transaction, and by appellant, who was not present during the transaction.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established.

Appellant thereafter filed a timely notice of appeal. In her appeal, appellant raises the following issues: (1) the procedural context of the hearing deprived appellant of due process; (2) the decision is not supported by its findings and the findings are not supported by substantial evidence in the record; (3) the penalty imposed was excessive and constitutes cruel or unusual punishment.

DISCUSSION

I

Appellant contends she was deprived of due process because the ALJ did not advise her of the potential consequences of proceeding without counsel; she did not knowingly and intelligently waive the presence of counsel to assist her; and she was clearly incompetent to represent herself.

Appellant has couched this issue in terms of a lack of intelligent waiver of the assistance of counsel. That is not the issue. Appellant in no way indicated that she wished to waive the assistance of counsel; her request was for a continuance so that she could obtain counsel. Therefore, no question is presented about whether appellant understood, or should have been advised of, the consequences of not having counsel. She *wanted* to have counsel assist her, but the ALJ refused to delay the hearing when she made her last-minute request. The only due process issue in this regard is whether the ALJ abused his discretion in denying the request for a continuance.

The hearing in this matter took place on July 8, 1999. Appellant was served with a notice of hearing on May 6, 1999, and she returned a signed Notice of Defense on May 20, 1999. The ALJ denied her request for continuance, made at the beginning of the hearing, because she had not obtained counsel in the two months between the notice of hearing and the hearing itself. Appellant said that she thought the matter was closed, apparently because the court case against the clerk had been dismissed.

Counsel for the Department pointed out that two days before the hearing,

he, appellant, and a different ALJ had a conference call regarding appellant's request at that time to continue the hearing so that she could attend an out-of-town wedding. That request was denied. During that conference call, appellant did not request a continuance in order to obtain counsel. Appellant acknowledged the accuracy of Department counsel's description of the conference call.

A party is ordinarily required to apply for the continuance within 10 working days after discovering the good cause for the continuance, unless that party did not cause, and sought to prevent, the condition or event establishing the good cause. (Gov. Code §11524, subd. (b).) Continuances are granted or denied in the discretion of the ALJ for good cause shown. (Gov. Code §11524; Givens v. Department of Alcoholic Beverage Control (1959) 176 Cal.App.2d 529 [1 Cal.Rptr. 446]; Dresser v. Board of Medical Quality Assurance (1982) 130 Cal.App. 3d 506, 518 [181 Cal.Rptr. 797].) "'[T]he factors which influence the granting or denying of a continuance in any particular case are so varied that the trial judge must necessarily exercise a broad discretion.'" (Arnett v. Office of Admin. Hearings (1996) 49 Cal.App. 4th 332, 343 [56 Cal.Rptr.2d 774], quoting 7 Witkin, Cal. Procedure (3d ed. 1985) Trial, §9, p. 26.)

Under the circumstances of this case, the ALJ did not abuse his discretion in denying the request for continuance. At the close of testimony, after appellant indicated that there was a witness to the transaction but she had not asked him to attend the hearing, the ALJ said [RT 61]:

> "If you have been in business for seven years, I think you're a smart lady and you know how to run your affairs. For me to believe that you suddenly lost all your judgment and you didn't know what to do about

> something – you are probably not familiar how these cases go. I understand. But when people are not familiar with what is happening and they are intelligent people, they go find out. They try and get some advice.
>
> "You had two months to do that before coming here, so it is hard to really accept your argument that your are totally defenseless. You could have had somebody take the case, or you could have made preparations before you came here today."

We believe this states a reasonable basis for denial of the request for continuance.

II

Appellant contends that violation of Health and Safety Code §11304.7 requires a certain state of mind or knowledge, and there is no evidence that appellant possessed the requisite state of mind. Appellant argues that the person who sold the item was not her employee or agent, and she cannot be found liable based on any of his conduct. In addition, appellant relies on the case of Santa Ana Food Market, Inc. v. Alcoholic Beverage Control Appeals Board (1999) 76 Cal. App. 4th 570, 576 [90 Cal.Rptr. 2d 523].

The appellant's state of mind or knowledge is irrelevant; it is knowledge of the seller of the drug paraphernalia that matters. There is clearly substantial evidence to support a finding that the seller, Singh, knew the item was drug paraphernalia and offered it for sale to Hirata under circumstances in which Singh knew, or should reasonably have known, that Hirata intended to use it to ingest a controlled substance.

Health and Safety Code §11364.7, subdivision (a), provides that a misdemeanor is committed when anyone "delivers, furnishes, or transfers, or possesses with intent to deliver, furnish, or transfer, . . . drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be

used to . . . ingest, inhale, or otherwise introduce into the human body a controlled substance . . . ." Subdivision (d) states that any business or liquor license may be revoked if the preceding subdivisions of §11364.7 are violated in the course of a licensee's business.

Health and Safety Code §11014.5, subdivision (a), defines "drug paraphernalia" as items "which are designed for use or marketed for use, in [among other things] injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance . . . ." There follows a non-exclusive list of items that could be drug paraphernalia, if, in each case, the item is "designed for use or marketed for use" in connection with a controlled substance.

In subdivision (c) is a list of things that may be considered, "in addition to all other logically relevant factors," in determining whether an item is drug paraphernalia, including statements, instructions, or advertising concerning the item's use; how and by whom the item is displayed for sale; and expert testimony concerning its use.

Objects are classified as drug paraphernalia under §11014.5 if they are either designed for use or marketed for use with controlled substances. The phrase "designed for use," "encompasses at least an item that is principally used with illegal drugs by virtue of its objective features, i.e., features designed by the manufacturer." (Hoffman Estates, supra, 455 U.S. at 501-502.)

In the last paragraph of his findings, the ALJ in the present case stated: "Based on the totality of the evidence including expert testimony, it is found that the glass tubes were drug paraphernalia within the meaning of Health and Safety

Code Section 11014.5 . . . ." (Finding V.) This is, in essence, a finding that the pipe was "designed for use" with controlled substances within the meaning of Health and Safety Code §11014.5. The testimony of the officer constitutes substantial evidence that supports that finding.

This does not end the inquiry, however, because violation of Health and Safety Code §11364.7 can only occur if the clerk knew or, under the circumstances reasonably should have known, that the item he sold to Hirata would be used to ingest a controlled substance.

As noted above, the ALJ found that the glass tubes were items of drug paraphernalia. He went on to find that the tubes "were being marketed for use with a controlled substance," and Hirata's testimony is substantial evidence that supports that finding. The evidence is clear that the glass tube was selected by Singh in response to Hirata's request for something in which to smoke marijuana without any prompting or suggestion from Hirata that he wanted that specific item. The glass tubes were not even visible to customers, so Hirata could not have pointed them out to Singh. 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. Singh clearly had the "state-of-mind" required by Health and Safety Code §11304.7.

Appellant states that Singh was "merely asked . . . to momentarily watch the store while [appellant] left to purchase groceries for herself," and concludes that Singh was not her agent or representative. Appellant is wrong. Regardless of Singh's relationship to appellant, he clearly was clothed with ostensible authority.

Civil Code §2298 states: "An agency is either actual or ostensible." Civil Code §2300 states: "An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him." (See also 2 Summary of California Law, Witkin, §§40, 93-95, and 125.)

In Abdu Ahmed Almahen (1999) AB-7278, the licensee allowed a guest to stand behind the counter at the premises and sell malt liquor, thereby clothing the guest with ostensible authority. Therefore, the guest was considered to be an agent of the licensee, for whose acts the licensee was vicariously liable. Other appeals in which ostensible agency was found under similar circumstances are Shin (1994) AB-6320 [licensee's visiting daughter, told not to sell anything, but to watch for thieves while licensee was busy, sold an alcoholic beverage to a minor] and Houston (1996) AB-6594 [Bauder, who frequented the premises and had at times cleared tables, stocked the bar area, and served beverages to patrons, sold and served beer to an obviously intoxicated patron, despite having been told by licensee not to work as a bartender].

Singh was behind the counter, waited on Hirata, took payment for the glass tube, and gave change, all ordinary acts one would expect of a clerk in a store. He is properly considered to be appellant's agent and his act of selling drug paraphernalia is imputed to appellant.

Santa Ana Food Market, supra, which appellant equates with her case, is clearly distinguishable. In Santa Ana Food Market, an employee, at great pains to hide the transaction from the licensee, surreptitiously, and for her own personal

gain, committed food stamp fraud. The licensee had taken substantial measures to prevent such criminal activity by its employees. The court said that "where a licensee's employee commits a single criminal act unrelated to the sale of alcohol, the licensee has taken strong steps to prevent and deter such crime and is unaware of it before the fact, suspension of the license simply has no rational effect on public welfare and morals."

In the present case, the illegal act was neither surreptitious nor unrelated to the sale of alcohol. Singh openly sold an item of drug paraphernalia to Hirata, and this act fits in the category of "adjuncts of alcohol sales, such as gambling, prostitution, and drug use." (Santa Ana Food Market, Inc. v. Alcoholic Beverage Control Appeals Board., supra, 76 Cal.App. 4th at 575.)

III

Appellant contends the penalty constitutes cruel and unusual punishment. However, appellant relies on constitutional provisions that apply to criminal, not administrative, proceedings. While punishment of an offender is an aim in a criminal proceeding, a disciplinary proceeding is for the protection of the public. (Yapp v. State Bar (1965) 62 Cal.2d 809 [44 Cal.Rptr. 593, 597].)

The Appeals Board will not disturb the Department's penalty orders in the absence of an abuse of the Department's discretion. (Martin v. Alcoholic Beverage Control Appeals Board & Haley (1959) 52 Cal.2d 287 [341 P.2d 296].) However, where an appellant raises the issue of an excessive penalty, the Appeals Board will examine that issue. (Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183].)

Health and Safety Code §11364.7, subdivision (d), provides:

> "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 the license."

The ALJ made a specific determination that a basis for revocation pursuant to this subdivision had been established. He also found appellant to be "untruthful in her testimony denying the presence of the glass tubes at the store, and denying knowledge of their contraband use." (Penultimate paragraph of Findings.) A stayed revocation with a 30-day suspension is not a light penalty, but, under the circumstances, it cannot be said that it is unreasonable.

ORDER

The decision of the Department is affirmed.[2]

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[2]This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this order as provided by §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 §23090 et seq.