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

**AB-8664**
File: 20-371635 Reg: 06062440

7-ELEVEN, INC., BILL BINDAL, and ANJU BINDAL, dba 7-Eleven Store 2232-25482C
1895 Farm Bureau Road, Concord, CA 94519,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Stewart A. Judson

Appeals Board Hearing: January 15, 2009
San Francisco, CA

**ISSUED JUNE 2, 2009**

7-Eleven, Inc., Bill Bindal, and Anju Bindal, doing business as 7-Eleven Store 2232-25482C (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which revoked their license, stayed the order of revocation for a three-year probationary period, and ordered a 20-day suspension, for their clerk having sold drug paraphernalia to a Department investigator, a violation of Health and Safety Code section 11364.7.

Appearances on appeal include appellants 7-Eleven, Inc., Bill Bindal, and Anju Bindal, appearing through co-licensee Bill Bindal, and the Department of Alcoholic Beverage Control, appearing through its counsel, Gary Agerbek.

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[1]The decision of the Department, dated November 14, 2006, is set forth in the appendix.

PROCEDURAL HISTORY

Appellants' license was issued on December 5, 2000. On March 29, 2006, the Department instituted an accusation against appellants charging a violation of Health and Safety Code section 11364.7 as a result of a sale of drug paraphernalia as defined in Health and Safety Code section 11014.5.

At the administrative hearing held on October 6, 2006, documentary evidence was received and testimony concerning the violation charged was presented by Jaime Taylor, the investigator who purchased the air freshener item said to have been marketed as drug paraphernalia. Bill Brindal testified on behalf of appellants.

Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred as alleged. The Department ordered appellants' license revoked, but conditionally stayed its order of revocation, subject to a 20-day suspension and a three-year probationary period.

Appellants have filed an appeal making the following contentions: (1) the investigator gave contradictory answers as to whether the store had been the subject of a complaint; (2) the clerk's statement to the investigator that pipes were illegal to sell is conclusive evidence that the store was not in the business of selling drug paraphernalia; (3) appellants were not permitted to display a video tape to impeach the investigator's testimony as to the length of time the transaction took; (4) the fact that the clerk was not present at the hearing was improperly considered to have a negative impact on the outcome of the case; (4) the Department failed to provide a valid reason for the visit to the store at 11:40 p.m.; (5) the district attorney's failure to pursue charges against the clerk is proof that the case has no merit; and (6) remedial actions have been taken which warrant a lenient view of the matter.

DISCUSSION

I

Appellants argue that because the investigator testified that the Department had received a complaint but that she had not received a complaint, her answers were contradictory. We do not read them as contradictory at all. The investigator was simply saying that she was assigned the matter after the Department received a complaint.

The argument on this issue was typical of appellants' arguments on all of the issues raised - appellants disagreed with the administrative law judge's (ALJ's) factual determinations.

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. The Appeals Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing.[2]

II

Appellants make much of the fact that the clerk initially told the investigator that it would be illegal to sell pipes for use with drugs. Had everything stopped in its tracks when the clerk voiced that opinion, there would be no case. However, when the clerk

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[2]The California Constitution, article XX, section 22; Business and Professions Code sections 23084 and 23085; and *Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

volunteered to the investigator that other customers bought the air fresheners to use as pipes to smoke "the other stuff," pointed to the counter display, and explained how the item could be used, it could reasonably be inferred that, by advising the investigator about such uses, he was marketing the air fresheners for an illegal purpose.

Health and Safety Code section 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 section 11364.7 are violated in the course of a licensee’ s business.

Health and Safety Code section 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. Subdivision (c) lists 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 it is displayed for sale; and expert testimony concerning its use. Objects can be classified as drug paraphernalia under section 11014.5 if they are either designed for use or marketed for use with cont rolled 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." (*Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc*. (1982) 455 U.S. 489, 501-502 [102 S.Ct. 1186, 1195].)

The administrative law judge ALJ in the present case found that the pipe became drug paraphernalia when the clerk became aware of the purpose of the transaction. This is essentially a finding that the pipe was " marketed for use" with controlled substances within the meaning of Health and Safety Code section 11014.5. The testimony of the investigator constitutes substantial evidence supporting that finding.

This does not end the inquiry, however, because violation of Health and Safety Code section 11364.7 can only occur if the clerk knew or, under the circumstances reasonably should have known, that the item he sold would be used to ingest a controlled substance. Once again, the testimony of the investigator concerning the information volunteered by the clerk is substantial evidence that the clerk possessed the requisite knowledge.

III

Appellants argue that the investigator's estimate that the entire transaction lasted approximately 20 minutes could not be true because the discussion with the clerk would have consumed barely two minutes. Appellants are mistaken, and have confused two different references to time intervals.

The only time the investigator made reference to a 20-minute time interval, she was referring to the length of time it took Mr. Bindal to come to the premises after he was called. She described her discussion with the clerk as lasting "less than five minutes," which corresponds with appellants' contention that her conversation with the clerk lasted only two minutes.

IV

Appellants suggest that it was unfair to treat the clerk's non-appearance as

having a "negative impact" on the case because he was present and prepared to testify at the first hearing, which was continued.

It is undoubtedly true that the clerk's decision not to attend the continued hearing had a detrimental effect on appellants' case. The investigator's testimony about what transpired during her conversation with the clerk stood unrefuted.

It was within appellants' power to compel the clerk's attendance by way of subpoena, and they chose not to. If appellants expected him to refute the investigator's testimony, they should have taken appropriate steps to ensure his attendance. That they did not do so effectively waived any claim of prejudice flowing from the clerk's absence at the hearing.

V

Appellants complain that the Department did not offer a satisfactory explanation why the investigator visited the store at 11:40 p.m., since there was no complaint directed at any individual.

We fail to see any reason why the Department had to provide any reason for the visit other than that it had been prompted by a complaint. That the Department did not proceed against the clerk is irrelevant.

VI

The fact that a city or county prosecutor chose not to bring a criminal complaint against appellants is irrelevant. A prosecutor has discretion whether or not to proceed, and many things other than whether there had been a criminal violation could have influenced his decision. Moreover, even if charges had been filed and dismissed, the Department would still have been free to pursue its disciplinary action. (See *Cornell v. Reilly* (1954) 127 Cal.App.2d 178 [273 P.2d. 572, 578 ]:

The somewhat related argument that Andrews' acquittal in the criminal action

constitutes a conclusive determination, binding in this proceeding, that such offenses had not been committed, is equally without merit. Even if appellant had been charged criminally and acquitted, such acquittal would be no bar in a disciplinary action based on the same facts looking towards the revocation of a license. (Citations omitted.) Quite clearly, if the principle of *res judicata* is rejected where the defending party is identical in the two actions, it necessarily follows that it is not *res judicata* when the prior acquittal is of a different party.

VII

Appellants assert that they have fired the clerk and discontinued the sale of air fresheners , and ask the Board to take a "lenient view" of the matter.

Our review of appellants' contentions satisfies us that the Department exercised its discretion properly in this case. Unless the Department has abused its discretion in its choice of penalty, the Board is powerless to act. Given the facts of this case, we cannot say the Department has abused its discretion. The penalty was that prescribed in the Department's published penalty schedule. (See Department Rule 144) (4 Cal. Code Regs., §144)).

ORDER

The decision of the Department is affirmed.[3]

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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

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