ISSUED JUNE 30, 1998

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

6259 INC. dba Candy Canyon 6259 Topanga Canyon Blvd. Woodland Hills, CA 91367, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6934 File: 48-015534 Reg: 97039066 Administrative Law Judge at the Dept. Hearing: Sonny Lo Date and Place of the Appeals Board Hearing: May 6, 1998 Los Angeles, CA

6259 Inc., doing business as Candy Canyon (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 30 days, with 25 days thereof stayed for a probationary period of one year, for having possessed marijuana in an unlocked office safe, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code §24200, subdivision (a).

[1]The decision of the Department, dated August 7, 1997, is set forth in the appendix.

Appearances on appeal include appellant 6259 Inc., appearing through its counsel, Robert D. Coppola, Jr., and the Department of Alcoholic Beverage Control, appearing through its counsel, John Lewis and Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on January 6, 1975. The Department instituted an accusation against appellant on February 24, 1997, charging that on September 27, 1996, a Department investigator found a baggie containing a small amount of marijuana in an unlocked safe while searching the office of the licensed premises in connection with an investigation into possible retail-to-retail sales.

An administrative hearing was held on May 16, 1997, at which time oral and documentary evidence was received. At that hearing, Department investigator Jim Biscailluz described his finding of a small baggie which contained what to him looked and smelled like marijuana. He seized the baggie, and ultimately caused it to be submitted to the Sheriff's Department laboratory for analysis. Biscailluz was questioned extensively regarding the chain of custody of the baggie and its contents from the time of his initial seizure until its return to him. Appellant's argument that the evidence should have been excluded because of a broken chain of custody was rejected by the Administrative Law Judge (ALJ), who ultimately issued a proposed decision which determined the marijuana had been placed in the safe by a present or former employee. Because of his belief that a lengthy suspension would unfairly punish a large number of employees, the ALJ departed from the Department's recommendation of a 30-day suspension, with 15 days thereof stayed, instead staying all but five days of the recommended penalty.

The Department adopted the proposed decision, and appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) the pleadings did not give fair notice; (2) the evidence is insufficient to establish possession of marijuana; (3) the Department erred in its application of strict liability; (4) the search exceeded the scope permitted under Government Code §25755; and (5) a violation of Health and Safety Code §11357 is not contrary to public welfare and morals.

DISCUSSION

I

Appellant contends that the accusation was deficient under Government Code §11503, in that it failed to give appellant fair notice of the violation charged. Appellant contends that by alleging that it possessed marijuana by and through its corporate president, Frank Sardo, it was forced to defend against a charge that Sardo himself possessed the marijuana in question.

The Department argues that it was not crucial that Sardo's name was included in the accusation, since the accusation was filed against the corporation, and only alleged that the marijuana was found in an office safe. The Department contends that what is important is that appellant was able to prepare a defense.

A straightforward reading of the accusation does leave one with the impression that Sardo was the person accused of being in possession of the contraband marijuana. However, as the Department contends, the accusation charged the corporation with the violation, and whether the corporation possessed the marijuana through Sardo or through someone else, the critical issue was

whether the corporate licensee was responsible for marijuana found on the premises.

There is nothing to indicate appellant was handicapped in any way in defending against the charge. Appellant claims that the way the accusation was drafted permitted the Department to proceed on a theory of strict liability, an issue appellant has raised separately, and which is discussed later herein.

Appellant cites Smith v. State Board of Pharmacy (1995) 37 Cal.App.4th 229 [43 Cal.Rptr.2d 532], a case which is readily distinguishable. In Smith, the accusation charged Smith personally with having dispensed excessive prescription drugs, when, in fact, the drugs were dispensed by people under his supervision. Smith was prejudiced because he thought he had to prepare a defense of his personal conduct. In the instant case, the corporation was charged with possession of contraband. That the accusation referred to its president did not change the fact that there was no dispute that the suspected contraband was found in the corporate office, could not have been placed there by the inanimate corporate entity, and necessarily involved conduct by some human person who had access to the private office.

In Stearns v. Fair Employment Practice Com. (1971) 6 Cal.3d 205 [98 Cal.Rptr. 467], a case cited and distinguished in Smith, supra, the California Supreme Court pointed out:

> "[Administrative] proceedings are not bound by strict rules of pleading. [Citation.] So long as respondent is informed of the substance of the charge and afforded the basic, appropriate elements of procedural due process, he cannot complain of a variance between pleadings and proof."

II

Appellant contends that there is insufficient evidence to support the finding of possession, arguing that there is no evidence that either appellant's president or any employee knew of the presence of the marijuana or was in a position to exercise dominion or control over it.[2] Alternatively, appellant argues that the marijuana offered in evidence at the hearing was not the substance discovered by the investigator - this latter contention being an attack on the chain of custody.

The first part of appellant's argument is easily addressed. The ALJ found that only employees had access to the office area. He concluded, therefore, that the substance in question could only have been placed in the safe by someone who was an employee at the time it was placed there. Since the agent's knowledge and conduct are imputed to the principal, it follows that the corporation is charged with the requisite knowledge and control.

The chain of custody question is more complex. This issue emerged at the administrative hearing when it became apparent that appellant's counsel refused to stipulate that what was tested and determined to be marijuana was the substance

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[2] Appellant asserts at the top of page 2 of its closing brief that the Department's characterization of the location where the contraband was found as a 'safe' is not consistent with the testimony and facts adduced at the hearing. It then goes on to recite that "the evidence adduced at this hearing is clear, that the safe was not locked ..."

The ALJ found that "inside the office was a safe whose lock is broken. The safe is not used to store anything valuable."

It is apparent that appellant's argument, by its reference to the dictionary definition of a safe as "a strong metal receptacle for protecting valuables" or "any place for safe storage" confuses the object with its intended function, a mistake the ALJ did not make.

which was found in the unlocked safe [RT 17-18]. Appellant's objections to the evidence were stated in various ways at various times, but there is no question that the issue was preserved and must be addressed.

Both the Department and appellant rely on People v. Riser (1956) 47 Cal.2d 566, 581 [305 P.2d 1, 10], where the court addressed the chain of custody issue:

> "The burden on the party offering the evidence is to show to the satisfaction of the trial court that, taking all the circumstances into account including the ease or difficulty with which the particular evidence could have been altered, it is reasonably certain that there was no alteration. The requirement of reasonable certainty is not met when some vital link in the chain of possession is not accounted for, because then it is as likely as not that the evidence analyzed was not the evidence originally received. Left to such speculation, the court must exclude the evidence."

It follows that the handling of the baggie and its contents from the time of its seizure to its offer in evidence must be examined to determine whether a "vital link in the chain of possession" is missing. This, in turn, requires a careful examination of the testimony of investigator Biscailluz.

Investigator Biscailluz testified that he left the premises with the baggie in his possession, returned to the district office, and logged it as evidence, assigning it an evidence number [RT 15]: "It was logged into the Van Nuys district evidence locker and the log book and secured by lock and key" [RT 15].

Biscailluz identified Exhibit 2 as the envelope in which he placed the baggie that same day, sealing the envelope with tape and his initials. He testified that, on some unspecified date, he removed the envelope from the evidence locker and personally transported it to the Sheriff's Department laboratory for analysis; at some later date he picked Exhibit 2 up from the laboratory and returned it to the district office [RT 19-21].

While still on direct examination, Biscailluz testified that from the point he removed the baggie from the safe, no one else had custody of it except for the Sheriff's Department laboratory [RT 20-21]. On cross-examination, Biscailluz recalled the events relating to custody only slightly differently. He testified that he and Dale Rasmussen, the district administrator, jointly secured the envelope in the evidence locker on September 30, the day he wrote his report, three days after the seizure [RT 49-50]. (The report (Exhibit F) indicates the baggie was secured in a state vehicle during the intervening period. It also discloses that the envelope was transported to the laboratory on October 2 and retrieved on November 12.)

It thus appears that at all relevant times, the substance in question, the baggie in which it resided, and the envelope in which both were placed by the investigator, were handled in such a manner as to eliminate any reasonable possibility of tampering. Although these materials were later transported to another laboratory and then returned to the Department, the analysis which determined that the contents of the baggie consisted of marijuana had already been completed.

Consequently, the assertion that what was analyzed was marijuana [RT 58] is consistent with an unbroken chain of custody.

The only place where there might be a gap in possession is when the envelope and its contents were in the custody of the Sheriff's Department laboratory, but there is nothing to indicate that anything untoward took place at that location. It was not incumbent upon the Department to negate all possibility of tampering or substitution. (People v. Lozano (1976) 57 Cal.App.3d 490, 495

[127 Cal.Rptr. 204; People v. Lewis (1987) 191 Cal.App.3d 1288, 1298-1299 [237 Cal.Rptr. 64].)

In our view, the Department clearly met its burden of showing to a reasonable certainty that there was no likelihood of tampering. Moreover, appellant has made the assertion that "no evidence of the chain of custody was presented," when that is clearly not the case, and has failed to suggest where, if anywhere, tampering may have occurred.

III

Appellant contends that the Department erred in applying a theory of strict liability to the presence of the marijuana in the unlocked office safe. Appellant cites its strict policy prohibiting the presence, use, sale, or even discussion of drugs on the premises, and argues that since it had no knowledge of the presence of the marijuana, it should not be disciplined.

Appellant has not challenged the ALJ's finding that an employee, past or present, placed the marijuana in the safe, or the finding that all employees were allowed access to the office. There is nothing unusual in a licensee being disciplined for its employee possessing a controlled substance on the licensed premises, as can fairly be inferred here.

IV

Appellant contends that the search which turned up the marijuana exceeded the scope permitted by Business and Professions Code §25755,[3] the provision

[3] Appellant's brief erroneously refers to this section as a "Government Code" provision.

which permits Department personnel and peace officers to visit and inspect licensed premises. Appellant argues that the Department investigator went too far when he opened a closed compartment in the unlocked safe, and there found the baggie containing what was ultimately found to be marijuana.

The investigation, according to investigator Biscailluz, extended to possible retail-to-retail sales, prohibited by the Alcoholic Beverage Control Act. Since it was necessary for the investigators to review invoices relating to purchases of alcoholic beverages in order to satisfy themselves whether or not such violations had occurred, they would have been entitled, pursuant to Business and Professions Code §25755, to search areas where records might be hidden, which would include closed compartments in an office safe. Under these circumstances, it cannot be said that the search was unreasonable. (See People v. Paulson (1990) 216 Cal.App.3d 1480, 1487-1490 [265 Cal.Rptr. 579].)

The discovery of the marijuana was, therefore, incidental to a lawful search. The conflict between the investigator's testimony that the baggie was in plain sight and Sardo's testimony that it was concealed by two old money bags is inconsequential, since any reasonable search would have justified removing the money bags to see if materials being sought might be hidden behind them.

V

Appellant contends that since there is no evidence of knowledge of the presence of marijuana on the premises on the part of any of the current ownership or management, and no evidence of narcotics trafficking, there is no basis for

finding that the presence of the marijuana was contrary to the public welfare and morals. Appellant reasons that since the medicinal use of marijuana is now legal in this state, that negates any claim the Department may make with respect to public morals.

The Department correctly points out that there was no evidence or suggestion at the administrative hearing that the marijuana was intended for medicinal purposes. Absent that exception, the bounds of which are still in the process of being resolved by the courts, possession of marijuana remains unlawful in the State of California, and its presence in a licensed premises is clearly contrary to the public welfare and morals.

CONCLUSION

The decision of the Department is affirmed.[4]

RAY T. BLAIR, JR., CHAIRMAN
JOHN B. TSU, MEMBER
BEN DAVIDIAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[4] 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 decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate 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.