

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS

BOARD OF THE STATE OF CALIFORNIA

KHALED W. and MEDHAT W.	)	AB-7211
ZAKHER	)	
dba Wine and Liquor Basket	)	File: 21-274132
4454 Van Nuys Blvd., #A	)	Reg: 97042108
Sherman Oaks, CA 91403,	)	
Appellants/Licensees,	)	Administrative Law Judge
	)	at the Dept. Hearing:
v.	)	Sonny Lo
	)	
	)	Date and Place of the
DEPARTMENT OF	)	Appeals Board Hearing:
ALCOHOLIC BEVERAGE	)	September 2, 1999
CONTROL Respondent.	)	Los Angeles, CA
_____	)	

Khaled W. and Medhat W. Zakher, doing business as Wine and Liquor Basket (appellants), appeal from a decision of the Department of Alcoholic Beverage Control<sup>1</sup> which conditionally revoked their off-sale general license, subject to an actual suspension of 25 days and a two-year period of probation, for co-appellant Khaled Zakher having sold an item of drug paraphernalia, being contrary to the universal and generic public welfare and morals provisions of the California

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<sup>1</sup>The decision of the Department, dated August 13, 1998, is set forth in the appendix.

Constitution, article XX, §22, arising from a violation of Health and Safety Code §11364.7, subdivision (a).

Appearances on appeal include appellants Khaled W. and Medhat W. Zakher, appearing through their counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, John Lewis.

#### FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on September 25, 1992. Thereafter, the Department instituted an accusation against appellants charging the sale by Khaled W. Zakher ("Zakher") of drug paraphernalia consisting of a four-inch glass pipe corked on both ends and containing a flower, in violation of Health and Safety Code §11364.7, subdivision (a).

An administrative hearing was held on June 18, 1998, at which time oral and documentary evidence was received. At that hearing, Los Angeles police officer Alex Vargas ("Vargas") testified that he purchased the glass pipe which is at the heart of this controversy. According to Vargas, he asked Zakher "for something to smoke rock cocaine in" [RT 8, 10], in response to which Zakher reached behind the counter, brought out the glass tube with the flower, and asked Vargas if that was what he wanted [RT 8]. Vargas said he would take it, Zakher told him the price, and Vargas paid for it with a \$20 bill. Vargas said both he and Zakher were speaking in English, and had no difficulty understanding each other.

Vargas testified that the glass tube was not "visual" to him anywhere on the

counter; Zakher reached behind the counter for the glass tube [RT 11].

Vargas also testified that he has received narcotics training for the sale of narcotics and paraphernalia in the police academy and “roll-call training,” and, in addition, attended a 48-hour narcotics school. Based upon that training, he considers the glass tube to be narcotics paraphernalia.

Vargas’ testimony that the glass tube was not “visual” was disputed by Zakher and his niece, Navenee Hanna. Each claimed the glass pipe was part of a display on the counter, not behind it.<sup>2</sup> Nor did either recall having been part of any conversation in which rock cocaine was mentioned [RT 28, 53], and both claimed they did not know what rock cocaine is [RT 20, 56].

Although his testimony is less than clear, Zakher appears to claim that the police officer asked for something by name, and looked around until he found the Flower Glass display [37-38].

Subsequent to the hearing, the Department issued its decision which determined that the glass tube was an item of drug paraphernalia and that Zakher knew when he sold it to Vargas that it was to be used to smoke rock cocaine.

Appellants thereafter filed a timely notice of appeal. In their appeal, appellants raise the following issues: (1) the glass pipe was not marketed for use as narcotics paraphernalia; and (2) the penalty is excessive.

## DISCUSSION

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<sup>2</sup> Exhibits A and B depict the location of the display according to Khaled (Exhibit A) and Hanna (Exhibit B). It is notable that they disagree as to where the display was in relation to the cash register.

## I

This case presents an issue which the Board has considered in several earlier cases, and that is whether the item in question, one which may have both legitimate and illegitimate uses, was marketed as narcotics paraphernalia. Those earlier cases (Mbarkeh (1998) AB-6882 and Harper (1998) AB-6984) concluded that the charged violation could not be sustained in the absence of proof of a pre-existing intent to market the item or items in question for narcotics usage, despite knowledge of the buyer's intended use. These cases, in turn, followed the holding to that effect in People v. Nelson (1985) 171 Cal.App.3d Supp. 1 [218 Cal.Rptr. 279].

What distinguishes this case from those earlier cases in which the Board felt compelled to reverse decisions of the Department where other, similar, items with both legitimate and illegitimate uses, were sold, is that here the evidence is clear that the item in question, at least the glass vial, was selected by Zakher without any prompting or suggestion from Vargas that he wanted that specific item. 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.

The Administrative Law Judge's resolution of this dispute in favor of Vargas' testimony that the glass tube was not in sight when he asked for something in which to smoke rock cocaine is determinative of the outcome.

## II

Appellants contend the penalty is excessive and an abuse of discretion.

They question the ALJ's finding that Zakher knew of the unlawful use of the item and what he intended when he sold the item to Vargas.

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].)

The penalty may seem harsh, but, given that the violation has to do with drug paraphernalia, it does not appear to be out of line. The Department has wide discretion in determining an appropriate penalty, and does not appear to have abused that discretion in this case.

#### ORDER

The decision of the Department is affirmed.<sup>3</sup>

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

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<sup>3</sup> 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.