

ISSUED OCTOBER 8, 1998

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

KDM ENTERTAINMENT, INC.	)	AB-7029
dba Kokomo's)	
17927 MacArthur Boulevard	)	File: 47-185953
Irvine, California 92614,	)	Reg: 97038827
Appellant/Licensee,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Sonny Lo
)	
DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	August 12, 1998
	)	Los Angeles, CA
)	

KDM Entertainment, Inc., doing business as Kokomo's (appellant), appeals from a decision of the Department of Alcoholic Beverage Control under Government Code §11517, subdivision (c),¹ which ordered its license revoked for one of its bouncers, who was also appellant's assistant head of security,² having committed a battery upon a patron, being contrary to the universal and generic public welfare and morals provisions

¹The decision of the Department, dated January 22, 1998, and the proposed decision of the Administrative Law Judge (ALJ), dated June 11, 1997, are set forth in the appendix.

²At the administrative hearing, Jeremy Cripe, then 22 years of age, described his position as head of security [RT 70]. Coincidentally, Oscar Hill, who testified immediately following Cripe, also described himself as head of security [RT 83]. This apparent conflict in testimony was later resolved when Hill explained that he was leaving for employment elsewhere. According to Hill, Cripe, his intended successor, currently shared the position with Hill.

of the California Constitution, article XX, §22, arising from violations of Business and Professions Code §24200, subdivisions (a) and (b), and Penal Code §242, subdivision (a).

Appearances on appeal include appellant KDM Entertainment, Inc., appearing through its counsel, Rick Blake, and the Department of Alcoholic Beverage Control, appearing through its counsel, David B. Wainstein.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on August 21, 1986. On January 31, 1997, the Department filed an accusation against appellant charging that appellant's employee, Jeremy Cripe, used force or violence against the person of Shane Lawson, a patron, a violation of Penal Code §242.³

An administrative hearing was held on June 10, 1997. At that hearing, the Department presented the testimony of two patrons who were involved in an altercation at Kokomo's on September 28, 1996, and the testimony of their two companions, who witnessed the altercation. The two members of appellant's security force who were involved in the incident were called as witnesses for appellant.

There was general agreement among the witnesses that the incident began when patrons Shane Lawson and Luis Toledo, and their two female companions, were asked to leave the premises after one of the females, a minor, was seen drinking from Lawson's beer. There was also general agreement that the incident arose when Lawson's female companion claimed to have seen a lit cigarette thrown at Lawson's

³ The accusation also alleged (count one, subcount 2) a second battery by another employee, but no cause for discipline was established with respect to that subcount.

back, and Lawson's demand to know whether Cripe had thrown it. The incident, like so many barroom incidents, was fueled by alcohol.⁴ However, the apparently gratuitous act of Cripe in flicking his burning cigarette at Lawson was the triggering event in the altercation. Until then, the Lawson group appeared to be leaving the premises without any significant disturbance.

The Administrative Law Judge (ALJ) found that Cripe, in fact, did flick his cigarette onto Lawson's shirt, resulting in a burn to the shirt. Lawson demanded an apology, but Cripe insisted he had not flicked his cigarette. As voices rose, Toledo joined the two, shoving began, and Hill wrestled Toledo to the ground. Lawson went to the aid of his friend Toledo, and Cripe went to the aid of his fellow bouncer.

The ALJ found that while Lawson was attempting to get Hill off Toledo, Cripe placed his arms around Lawson's waist and neck, choking him to the point where Lawson became unconscious. The ALJ further found that, not knowing that Lawson was unconscious, Cripe released him, and Lawson then fell to the ground, resulting in a cut to his head and loss of blood. The choking of Lawson, the ALJ found, was against appellant's policy regarding use of force. The ALJ also found that Cripe had not had any training to be a bouncer.

The ALJ found that while Hill, in light of his size and martial arts training, overreacted when he wrestled Toledo to the ground, his action was not unlawful because Toledo was the instigator.

Finally, and of significance to the Department's decision pursuant to Government

⁴ Toledo estimated he and Lawson were in the bar probably less than an hour [RT 55]. Lawson testified [RT 41] that he had three or four beers during the time he was in the bar.

Code §11517, subdivision (c), the ALJ ruled that, since Penal Code §242 defines “battery” as “wilful and unlawful’ use of force or violence on the person of another,” the mere use of force and violence against the person of another did not always constitute a battery. Therefore, he concluded, since the accusation did not allege that the force and violence used by Cripe or Hill was “wilful or unlawful,” the accusation did not allege sufficient facts to constitute a violation of Penal Code §242, and dismissed the accusation.

The Department, acting in accordance with the power given it in §11517, subdivision (c), of the Government Code, elected not to accept the proposed decision, and to decide the case itself. In so doing, the Department adopted certain of the ALJ’s findings without change, added an incident of prior discipline which occurred in 1992, rewrote other findings with minor change, and made additional findings to the effect that Cripe overreacted in response to his belief that Lawson intended to harm Hill, and, by placing Lawson in a choke hold that rendered Lawson unconscious, exceeded the force necessary to control the situation. Therefore, the Department concluded, Cripe was not acting in self-defense, the only legal justification for battery.

The Department adopted only one of the ALJ’s determinations of issues, that being the determination that Business and Professions Code §24200, subdivision (a), and the California Constitution, article XX, §22, provide that a license to sell alcoholic beverages may be suspended or revoked if its continuation would be contrary to public welfare and morals.

The Department made an additional determination that the failure of the accusation to allege that Hill or Cripe used “wilful and unlawful” use of force was a technicality which did not render the pleadings deficient, since administrative

proceedings are not bound by the strict technical rules of criminal proceedings, and an administrative proceeding is sufficient when it provides a licensee with enough notice of the charge to permit him to defend. The Department also determined that appellant's failure to object to the form of the accusation was a waiver of the issue.

The Department concluded that cause for disciplinary action existed with respect to Cripe's conduct, and ordered appellant's license revoked.

Appellant's timely appeal raises the following issues: (1) Cripe used reasonable force while acting in self-defense; (2) the accusation failed to allege that the force and violence used was willful and unlawful; and (3) the penalty of revocation is excessive.

DISCUSSION

I

Appellant contends that the security persons used reasonable force to control a disturbance and altercation precipitated by Lawson, one of the patrons asked to leave after a minor was observed consuming an alcoholic beverage. Appellant argues that while the use of physical force by security might have been excessive, it was not willful and unlawful.

The problem with appellant's argument is, in part, rooted in its apparent concession that Cripe's use of force was excessive: "While the use of the physical force by security may have to some extent been excessive, it would not appear to be both "willful" and "unlawful" [App.Br., p.3].

An elementary principle in the law of self-defense is that no more force may be used than reasonably appears necessary under the circumstances presented. The test of reasonableness is whether the force used would have been deemed necessary by a reasonable person in a similar situation. (See People v. Blackshear (1960) 182

Cal.App.2d 71 [5 Cal.Rptr. 618, 619], and cases cited therein.) We know from general experience that a choke hold can have serious consequences, even to the point of death. Here, Lawson suffered a head injury when, while in an unconscious state, he was released and allowed to fall to the ground.

In our opinion, it cannot be said that the Department erred in finding that excessive force was used. There was sufficient testimony from which the Department could reasonably have concluded that Cripe's use of the choke hold, if not excessive initially, certainly became so when it was held to the point where Lawson became unconscious. The testimony was conflicting, and it was the Department's right, as the ultimate trier of fact to sort out what happened.

Hill testified that KDM's bouncers were not allowed to strike or choke a customer. Thus, Cripe's use of a choke hold was excessive even as measured by KDM's business policy as described by Hill.

Therefore, KDM's contention that Cripe was not shown to have acted willfully and unlawfully must be rejected.

II

Appellant contends that the failure of the accusation to allege that Cripe acted "willfully" and "unlawfully" rendered it fatally deficient, a position the ALJ had adopted, but which the Department rejected.

The accusation alleged that appellant, through Cripe, used force and violence against the person of Shane Lawson, in violation of Penal Code §242. Section 242 defines battery as the "willful and unlawful" use of force or violence against the person of another. The combination of the charge in the accusation and the language of Penal Code §242 clearly put appellant on notice of the charge.

As noted in the Department's decision under Business and Professions Code §11517, subdivision (c), administrative pleading practice is not bound by the strict technical rules of criminal proceedings. An administrative pleading is sufficient when it provides the licensee with enough notice of the charge to enable him or her to provide a defense. Appellant was able to do so in this case, albeit unsuccessfully.

III

Appellant contends that a realistic look at the penalty, in light of what occurred, demonstrates that it is excessive, and inconsistent with any reasonable standard.

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 Department defends its penalty determination, arguing that it was based upon KDM's disciplinary history. KDM's track record contributes to its undoing.

The Department recited four instances of prior discipline: a 1992 incident where KDM paid a fine in lieu of suspension for free goods and lewd conduct violations;⁵ a 35-day suspension in 1994 in connection with violations of Business and Professions Code §§23038 and 23396 (obligation of public eating house licensee to serve meals

⁵ In his proposed decision, the ALJ had excluded the 1992 discipline, apparently because it was more than five years old.

during normal dining hours);⁶ a 30-day suspension in 1994 for serving two minors, in violation of Business and Professions Code §25658, subdivision (a);⁷ and a stayed revocation, two years probation and 30-day suspension for a conspiracy among an employee and two patrons to commit battery on a third patron.⁸

One of the prior KDM cases relied upon by the Department involved conduct strikingly similar to that involved in this case - that being the conspiracy to commit battery on a patron, in that, like the present case, it involved physical violence on the part of, or inspired by, KDM bouncers or security personnel, directed against patrons.

There is no serious dispute that, assuming Cripe's use of force was excessive and that he was not acting in self-defense, his acts constituted a battery. (See, e.g.,

⁶This matter was heard and affirmed by the Appeals Board in KDM Entertainment, Inc. (1996), AB-6606.

⁷This matter was heard and, except as to the penalty order of revocation, affirmed, by the Appeals Board in KDM Entertainment, Inc. (1996) AB-6531.

⁸This matter was heard and affirmed by the Appeals Board in KDM Entertainment, Inc. (1997) AB-6647.

In addition, in KDM Entertainment, Inc. (1997) AB-6683, the Appeals Board affirmed those parts of a Department decision involving the action of a security guard in breaking into a customer's vehicle and appellant's possession of unlabeled bottles containing distilled spirits, and remanded the matter to the Department for imposition of some penalty short of revocation. The Board is unaware of what subsequent action was taken in this matter by the Department, if any.

Also, the Fourth District Court of Appeal, in an unpublished decision, affirmed part and reversed part of a decision of the Department which had been the subject of Board review and affirmance in KDM Entertainment, Inc. (1997) AB-6587, and remanded the matter to the Department for careful reconsideration of its original penalty order of revocation. Again, the Board is unaware of any action which may have been taken by the Department following remand.

It is assumed that the matters summarized in the two preceding paragraphs are the matters which were referred to in the Department's current decision as pending.

People v. Davis (1995) 10 Cal.4th 463, 541-542 [41 Cal.Rptr.2d 826].)

Therefore, the Department is able to point to two matters involving battery or a conspiracy to commit battery against patrons within a span of a little over two years.

The ultimate question is whether the Appeals Board can say that the Department abused its discretion by revoking KDM's license. There is no definite standard to which we can point, but this Board is comfortable in its belief that the Department acted within the broad powers vested in it with respect to discipline.

KDM has displayed a history of employing aggressive, untrained or inadequately trained, security personnel who have engaged in unlawful acts involving physical assaults on members of the public. Although the decision may be harsh, we cannot say it is an abuse of discretion on the part of the Department.

CONCLUSION

The decision of the Department is affirmed.⁹

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

⁹ 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, before this final decision becomes effective, may 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.