

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

FOOAD LANGHAEI and BEHROOZ	)	AB-7115
PAJOOHESH)	
dba Cole Street Liquors	)	File: 21/42-279016
904-906 Cole Street	)	Reg: 97038754
San Francisco, CA 94117,)	
Appellants/Licensees,	)	Administrative Law Judge
	)	at the Dept. Hearing:
v.	)	Jeevan Ahuja
)	
	)	Date and Place of the
DEPARTMENT OF ALCOHOLIC	)	Appeals Board Hearing:
BEVERAGE CONTROL,	)	May 20, 1999
Respondent.	)	San Francisco, CA
)	

Foad Laghaei (“Laghaei”) and Behrooz Pajoohesh (“Pajoohesh”), doing business as Cole Street Liquors (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their off-sale general and on-sale beer and wine public premises licenses for 45 days, with 15 of those days stayed for a one-year probationary period, for appellant Pajoohesh having sold an alcoholic beverage to a minor; appellant Langhaei having unlawfully obstructed a Department investigator while in the conduct of a premises inspection; appellants Langhaei and Pajoohesh having possessed distilled spirits in an area of the premises not licensed for such; appellants having failed to erect and maintain a permanent sign reading “No Person Under 21 Allowed” at each public entrance and in the interior of the premises; and

¹The decision of the Department, dated April 16, 1998, is set forth in the appendix.

appellants having failed to maintain keg registrations as required by law, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from violations of Business and Professions Code §§25658, subdivision (a), 25607, 25659.5, Penal Code §148, and Department Rule 107 (4 Cal.Code Regs. §107).

Appearances on appeal include appellants Foad Langhaei and Behrooz Pajoohesh, appearing through their counsel, Richard D. Warren, and the Department of Alcoholic Beverage Control, appearing through its counsel, John Peirce.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general/on-sale beer and wine public premises licenses were issued on January 6, 1993. An accusation was filed against appellants on January 24, 1997, and an administrative hearing of the charges of the accusation took place on March 26, June 2, and August 18 and 19, 1997. The decision of the Department rendered April 16, 1998, is the subject of appellants' timely appeal.

Appellants contend that the decision is in error with respect to two of the violations which were found: the sale-to-minor violation, with respect to which appellants claim there was no compliance with the identification requirements of Department Rule 141(b)(5); and the violation of Penal Code §148, with respect to which appellants contend that the statute by its terms is inapplicable on the facts of the case. Since the remaining violations were of much less significance, appellants contend, the penalty

must also be reversed as excessive in light of what remains after the findings relating to the two violations involved in this appeal are set aside.²

DISCUSSION

I

Appellants contend that there was no compliance with the requirement of Rule 141(b)(5) that there be a face to face identification of the seller by the decoy following the sale and prior to the issuance of a citation.

There is more than the usual amount of testimony in the record regarding the identification by the minor of the seller. Indeed, appellants' brief purports to quote all of it. But, appellants contend, none of it establishes that the identification was "face to face."

It is true that no one flatly said the identification was "face to face." However, the testimony as a whole leads us to conclude that the requisite identification could fairly have been inferred to have been face to face. The excerpts of testimony cited by appellants' counsel show that the identification took place while the police, the investigators, the decoy, and the clerk were engaged in what could only have been a face to face dialogue in which the minor's identification and the clerk's claim of false identification were the matters of interest.

The Board is well aware that the decision in Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board (1998) 67 Cal.App.4th 575 [79 Cal.Rptr. 126], made it clear that full and strict compliance with Rule 141 was a must in decoy

² The other violations involved appellants' possession of distilled spirits in an area of the premises not licensed for such; appellants' failure to erect and maintain a permanent sign reading "No Person Under 21 Allowed" at each public entrance and in the interior of the premises; and appellants' failure to maintain keg registrations.

cases. The court did not say that different rules of evidence would apply, or that reasonable and appropriate inferences should not be drawn from the evidence in the record.

We are strongly tempted to describe appellants' argument as frivolous. Appellants are asking the Board to ignore the testimony of three witnesses that the minor identified the seller simply because nowhere in the testimony do the magic words "face to face" appear.

The facts of this case satisfy the requirements of the Rule as well as the standards imposed by the decision in Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board (1998) 67 Cal.App.4th 575 [76 Cal.Rptr.2d 126].

II

Appellants contend that Penal Code §148 is, by its terms, inapplicable.

Penal Code §148 provides, in pertinent part:

"Every person who willfully resists, delays, or obstructs any public officer, peace officer, or an emergency medical technician ... in the discharge or attempt to discharge any duty of his or her office or employment, when no other punishment is prescribed, is punishable by a fine not exceeding one thousand dollars (\$1,000), or by imprisonment in a county jail not exceeding one year, or by both such fine and imprisonment."

Appellants argue that the conduct of appellant Laghaei which was found to violate Penal Code §148 was his interference or obstruction of Department investigator Rewerts in his inspection of the premises authorized under Business and Professions Code §§25753 and 25755. That conduct, according to appellants, is also punished by Business and Professions Code §25616, which provides:

"... [A]ny person who refuses to permit the department or any of its representatives to make any inspection or examination for which provision is made in this division [which includes §25753 and 25755], or who fails to keep books of account as prescribed by the department, or who fails to preserve such books for the inspection of the department for such time as the department

deems necessary, or who alters, cancels, or obliterates entries in such books of account for purposes of falsifying the records of sales of alcoholic beverages made under this division is guilty of a misdemeanor and shall be punished by a fine of not less than one hundred dollars (\$100) nor more than one thousand dollars (\$1,000), or by imprisonment in the county jail for not less than one month nor more than six months, or by both such fine and imprisonment.”

Appellants cite the court’s decision in In re Bacon (1966) 240 Cal.App.2d 34 [49 Cal.Rptr. 322], where the court said, with respect to §148:

“No case has come to our attention which defines the meaning of the language ‘when no other punishment is prescribed’ contained in §148. The reasonable interpretation of that language is, however, that where no other punishment is otherwise provided for by statute for conduct which amounts to willfully resisting, delaying, or obstructing a public officer in the discharge of his duties, such conduct is to be punished as provided in section 148.”

There was more involved in appellant Laghaei’s conduct than a mere refusal to permit Department investigator Rewerts to make an inspection or examination. Laghaei physically interfered with Rewerts’ attempt to retrieve a receipt from a cash register, first by brushing Rewerts’ hand away from the register with his hand, and then using his body to push Rewerts away from his objective, the cash register receipt. (See Finding of Fact IV.) Appellant concedes this was interference, but argues it is conduct covered by §25616.

There is nothing in §25616 that addresses the use of physical force to prevent an inspection. The language of that section that relates to inspection or examination suggests that it is focused on a mere refusal to make records available, conduct passive in nature, rather than some affirmative physical effort to prevent an investigator from seizing records relevant to a possible violation. Even though appellant Laghaei’s attempts to prevent Rewerts’ access to the cash register were somewhat restrained, they still had the effect, as the Administrative Law Judge found, of obstruction of Rewerts while he was attempting to perform his duty.

Penal Code §148, on the other hand, appears more to be aimed at overt, affirmative behavior that generates resistance, delay or obstruction. We do not read People v. Bacon as holding to the contrary.

III

Appellants' contention with regard to the penalty was premised on their assumption that, since their appeal with respect to the sale-to-minor and obstruction violations was meritorious, the 45-day suspension with 15 of those days stayed, was excessive for the three remaining violations. While we have rejected those contentions, we are, nonetheless, concerned that the 45-day suspension is too severe, given our reading of the record. We therefore, reverse the penalty.

ORDER

The decision of the Department is affirmed except as to penalty, and the and the case is remanded to the Department for reconsideration of the penalty in light of the comments expressed herein.³

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

³ 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.