

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

SALIM P. TALIA	)	AB-6524
dba La Jolla Liquor & Deli)	
7402 La Jolla Boulevard	)	File: 21-239750
La Jolla, CA 92037,	)	Reg: 94031341
Licensee/Appellant)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Greer D. Knopf
THE DEPARTMENT OF ALCOHOLIC)	
BEVERAGE CONTROL,	)	Date and Place of the
Respondent.	)	Appeals Board Hearing:
	)	April 3, 1996
	)	Los Angeles, CA

Salim P. Talia, doing business as La Jolla Liquor & Deli (appellant), appealed from a decision of the Department of Alcoholic Beverage Control¹ which suspended appellant's off-sale general license for 45 days, with 15 days stayed, for appellant's employee committing a battery on a department investigator, and another employee willfully and unlawfully obstructing and delaying the department investigator from conducting an investigation within the course and scope of his official duties, in violation of Penal Code §§148 and 243(b).

¹The decision of the department dated April 20, 1995 is set forth in the appendix.

Appearances on appeal included appellant Salim P. Talia, appearing through his counsel, John J. McCabe, Jr.; and the Department of Alcoholic Beverage Control, appearing through its counsel, David Wainstein.

FACTS AND PROCEDURAL HISTORY

Appellant's license was issued on December 7, 1989. Thereafter, the department instituted an accusation against appellant on November 8, 1994, alleging that appellant's employees interfered with an on-going investigation concerning the sales of alcoholic beverages to minors.

An administrative hearing was held on March 9, 1995, at which time oral and documentary evidence was received. At that hearing, it was determined that the facts of the accusation were true. Subsequent to the hearing, the department issued its decision, which was adverse to appellant.

In his appeal, appellant raised the following issues: (1) appellant was not allowed to offer evidence at the hearing with his son acting as his interpreter; (2) the finding concerning the battery was not proven by substantial evidence; (3) the finding concerning the unlawful obstruction of the investigation was not proven by substantial evidence; and (3) the penalty was excessive.

DISCUSSION

I

Appellant contended that he was not allowed to offer evidence at the hearing

with his son acting as his interpreter.

Government Code §11501.5 lists agencies that must provide an interpreter for assistance in language. The department is not one of those agencies.

In the notice of hearing which was mailed to appellant and his counsel on January 18, 1995, language assistance or an interpreter were offered if appellant requested the assistance. There is no record of appellant requesting the assistance, except at the hearing.

Government Code §11513(k) allows the department, or in this matter, the administrative law judge (ALJ), to accept an interpreter other than a certified interpreter. The section also states that parties are encouraged to give timely notice of the need for assistance.

The ALJ committed error in that the record shows that he thought that non-certified interpreters were prohibited [R.T. 127].² Additionally, we view that appellant waived any error committed by the ALJ by his counsel's change of tactics and by failing to make a motion for a continuance as offered by the ALJ:

"THE COURT: I don't want to deny you evidence of mitigation, if you need an interpreter, you need to--need to make that request.

"MR. MC CABE [counsel for appellant]: May I recall the agent Bowser for three

²We do not view the determination of the ALJ as prejudicial error, in that apparently the need for an interpreter was to authenticate a letter of apology from appellant to the peace officers concerned in the incident. The letter was meant for the purposes of mitigation and was only marginally relevant. The matter concerning this contention will not be reversed (Miller v. Eisenhower Medical Center (1980) 27 Cal.3d 614, 166 Cal.Rptr. 826).

questions?

"THE COURT: So you're not resting?

"MR. MC CABE: That's the way I can solve the problem, if I may.

"THE COURT: All right. You may do so." [R.T. 142.]

II

Appellant contended that the finding concerning the battery was not proven by substantial evidence.

Penal Code §242 defines a battery: "A battery is any willful and unlawful use of force or violence upon the person of another."³

The record shows that Farid Moshi, a clerk, was arrested in the premises by Timothy John Saelens, a police officer for the City of San Diego. Department investigator Brent Christopher Bowser thereafter attempted to place Farid into the police car. Farid was struggling during the period while he was being placed in the car and yelling at his brother, Salem Moshi, the other clerk, not to let the minors leave. With the assistance of police officer Saelens, the investigator was able to get Farid into the police car. Then Farid began kicking the door of the car in such a violent manner

³Webster's Third New International Dictionary, page 2617, defines the word "willful" as "...governed by will without yielding to reason or without regard to reason."

that the upper window and its frame were bent out. When Investigator Bowser opened the door, the clerk kicked him twice [R.T. 20-21, 55-57, 59-60].

Appellant argued that Farid did not intend to kick the department's investigator, apparently relying on the clerk's testimony that he did not remember kicking the investigator [R.T. 110].

Farid Moshi's conduct was unlawful and comes within the definition of a "battery."

A licensee is vicariously responsible for the unlawful on-premises acts of his employees. Such vicarious responsibility is well settled by case law (Harris v. Alcoholic Beverage Control Appeals Board (1962) 197 Cal.App.2d 172, 17 Cal.Rptr. 315, 320; Morell v. Department of Alcoholic Beverage Control (1962) 204 Cal.App.2d 504, 22 Cal.Rptr. 405, 411; and Mack v. Department of Alcoholic Beverage Control (1960) 178 Cal.App.2d 149, 2 Cal.Rptr. 629, 633. We conclude that Farid Moshi's unlawful conduct commenced inside the premises and continued outside the premises, and appellant would therefore be responsible for it.

III

Appellant contended that the finding concerning unlawful obstruction of the investigation was not proven by substantial evidence.⁴

⁴Count 2 of the accusation states in pertinent part: "On or about September 17, 1994, and in said premises, respondent-licensee, by his...clerk, Salem Moshi, did willfully and unlawfully resist, delay, or obstruct...Investigator B. Bowser from conducting an investigation within the course and scope of his official duties. Said Salem Moshi did physically grab Department Investigator B. Bowser in an attempt

The record shows that the investigator heard Farid yelling at his brother to stop the minors. The investigator, while continuing to push Farid into the police car, felt someone pulling on his back. Then, with the assistance of Officer Saelens, Farid was placed in the police car. The investigator saw Salem walk across the street and then //

return with the two minors and two females. The females alleged that Salem had taken their keys [R.T. 57-58].

Officer Saelens testified that while Investigator Bowser was attempting to put Farid in the police car, Salem grabbed the investigator's jacket and started to pull the investigator away. The officer then pulled Salem Moshi away from Bowser [R.T. 17].

While appellant argues that count 2 of the accusation concerns only conduct inside the premises, Government Code §11503 states that: "...The accusation shall be a written statement of charges which shall set forth in ordinary and concise language the acts or omissions with which the respondent is charged, to the end that the respondent will be able to prepare his defense...."

The language of the accusation is somewhat ambiguous. There should be no question, however, after a careful reading of the accusation, that the acts were committed outside the premises during the car incident. While the act of obstructing was only pulling the investigator's jacket, it took the police officer's assistance to stop the interference--an act which cannot be condoned.

to stop him from placing the arrestee, Farid Moshi, in the back seat of a police vehicle, in violation of Section 148 of the Penal Code."

IV

Appellant contended that the penalty was excessive. 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).

Appellant argued that the closing of appellant's premises (as to the selling of alcoholic beverages) would be a severe measure. Also, appellant complains that the ALJ disregarded the testimony of the clerks.

There were conflicts in the evidence concerning testimony about the investigation by the officers and by the clerks. The appeals board is bound to resolve conflicts of evidence in favor of the department's decision, and must accept all reasonable inferences which support the department's findings (Gore v. Harris (1964) 29 Cal.App.2d 821, 40 Cal.Rptr. 666). See Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control (1968) 261 Cal.App.2d 181, 67 Cal.Rptr. 734, 737; Kirby v. Alcoholic Beverage Control Appeals Board (1972) 7 Cal.3d 433, 439, 102 Cal.Rptr. 857--a case where there was substantial evidence supporting the department's as well as the license-applicant's position; and Kruse v. Bank of America (1988) 202 Cal.App.3d 38, 248 Cal.Rptr. 271. The credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact

(the ALJ). See Brice v. Department of Alcoholic Beverage Control (1957) 153 Cal.2d 315, 314 P.2d 807, 812, and Lorimore v. State Personnel Board (1965) 232 Cal.App.2d 183, 42 Cal.Rptr. 640, 644. The ALJ disbelieved the testimony of Farid, as found in finding IV.

The department had the following factors to consider: (1) the police officer and the department investigator were investigating a sale of alcoholic beverages to two minors by one of the clerks (Farid); (2) the peace officers' badges were shown to both clerks; (3) after the officers requested identification from Farid, Farid refused and became excited in that he ordered the officers from the premises; (3) when under arrest, Farid severely damaged the police car and kicked the investigator; (4) Salem attempted to pull the investigator away from his brother, Farid; and (5) the ALJ made the observation that Farid was not a credible witness and that his testimony that he was not excited at the incident and he did not struggle with the officers was not consistent with his conduct at the administrative hearing (apparently Farid got a little "hot" at the administrative hearing).

The department having exercised its discretion reasonably, the appeals board will not disturb the penalty.

CONCLUSION

The decision of the department is affirmed.⁵

⁵This final order is filed as provided by Business and Professions Code §23088, and shall become effective 30 days following the date of this filing of the final order as provided by §23090.7 of said statute for the purposes of any review

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

pursuant to §23090 of said statute.