ISSUED DECEMBER 30, 1998

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

ASSAD ALABOODY and MOSAFER AL-YASERI dba 3rd and Balboa Market 200 Balboa Street San Francisco, California 94118, Appellants/Licensees, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7003 File: 21-316759 Reg: 97040327 Administrative Law Judge at the Dept. Hearing: Sonny Lo Date and Place of the Appeals Board Hearing: September 2, 1998 San Francisco, CA

Assad Alaboody and Mosafer Al-Yaseri, doing business as 3rd and Balboa Market (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which revoked their license for appellant Alaboody having sold an alcoholic beverage (St. Ides Malt Liquor) to Gregory Springston, a minor, for having willfully obstructed a police officer in the performance of his duty, and for having exhibited a deadly weapon in a threatening manner (a wine bottle raised over his head), such conduct being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from violations of

[1]The decision of the Department, dated December 18, 1997, is set forth in the appendix.

Business and Professions Code §25658, subdivision (a), and Penal Code §148, subdivision (a), and §417, subdivision (a)(1) .

Appearances on appeal include appellants Assad Alaboody and Mosafer Al-Yaseri, appearing through their counsel, David A. Blair and Alan Forester, and the Department of Alcoholic Beverage Control, appearing through its counsel, Nicholas Loehr.

FACTS AND PROCEDURAL HISTORY

The accusation which was filed in this case charged that appellant Alaboody sold an alcoholic beverage to a minor, willfully obstructed a police officer in the performance of his duty, falsely identified himself upon a lawful detention or arrest, exhibited a deadly weapon in a threatening manner, and committed a battery upon a police officer. The testimony from the minor, two plainclothes police officers, appellant Alaboody, and a clerk in appellant's employ, portrayed, from various perspectives, a situation that got out of hand when the two officers attempted to cite Alaboody for a sale-to-minor violation.[2] After two days of hearing, and much conflicting testimony, the Administrative Law Judge (ALJ) issued a proposed decision sustaining the sale-to minor charge, the willful obstruction charge, and the charge of exhibiting a deadly weapon in a threatening manner, and dismissing the charges of false identification and battery. Because appellants' license was in a probationary status of stayed revocation at the time of the offenses, the ALJ ordered the license revoked. This appeal followed.

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[2] The altercation which erupted between Alaboody and the two San Francisco police officers subsided when additional officers responded to a 911 call placed by Alaboody after the melee had reached a point where there had been unsuccessful attempts to handcuff Alaboody, wine bottles had been knocked from shelves and broken, and one of the officers had drawn his weapon.

Appellants raise the following issues: (1) the decision regarding the sale-to-minor violation was tainted by the admission of hearsay evidence and by the refusal of the ALJ to permit impeachment of the minor regarding his arrest record; and (2) the charges of exhibiting a deadly weapon in a threatening manner (Penal Code §417, subdivision (a)), and resisting arrest (Penal Code §148), were not supported by substantial evidence.

DISCUSSION

I

Appellants contend that erroneous evidentiary rulings by the ALJ taint that part of the decision finding that appellant Alaboody sold the malt liquor to Springston.

(a) The hearsay contention.

Appellants contend that the ALJ erroneously overruled their objection to the testimony by Springston that he told Alaboody "I know you sell to other kids," and testimony that the other clerk told Alaboody not to make the sale.

The statements at issue were made during the witness's description of the conversation that took place when he purchased the bottle of St. Ides malt liquor [I RT 14-16]:

"Q. Was Mr. Alaboody there?

A. Yes.

Q. What happened when you attempted to buy alcohol?

A. He asked me for an ID. I told him that I didn't have one, and he said that he couldn't sell me alcohol, and I said, come on, because I know you sell to other kids.

Mr. Blair: Let me strike that as hearsay, your Honor. We don't have any -- unless he wants to get into that, who the others are, framework, as --it's just unreliable hearsay.

> The Court: Well, is this witness's testimony being used to prove the truth of the statements?
>
> Mr. Loehr: Well, first of all, let's break it down. What he's saying what he told Mr. Alaboody is not hearsay. I mean –
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> The Court: Hold on. Hold on. It is an out-of-court statement, and I want to know if you want to prove the truth of the statement.
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> Mr. Loehr: No, sir. It's used to prove knowledge and aggravation.
>
> Mr. Blair: Well, to the extent that it's being used to prove aggravation, it's being entered in for the truth of the statement.
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> The Court: Mr. Loehr.
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> Mr. Loehr: Again, the other problem is knowledge, and it goes to whether or not Mr. Alaboody knew if this person was of age to buy alcohol.
>
> The Court: All right. The objection is overruled.
>
> Mr. Blair: Well, your honor, then to follow up to the objection, there was a second portion of that objection and that was in response to the witness' testimony regarding what others had told him, and I'm objecting together that not only is that hearsay, but that's unreliable hearsay, absent some kind of foundation.
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> Mr. Loehr: Your Honor, that is not proving to use the truth of the matter.
>
> The Court: I understand that. The objection is overruled. Please proceed."

Appellant argues, incorrectly, that in order to support a finding of knowledge and aggravation, the testimony regarding sales to "other kids" necessarily assumes the truth of the matter asserted. It does not. Instead, what it shows is that, once the minor was asked for, and was unable to produce, identification which would show him to be 21, he simply asked to be treated in the same manner as he believed other "kids," meaning minors, were treated by appellant. Whether or not appellant sold to other minors, he

sold to Springston after Springston put himself in a class with other minors. Such evidence easily supports an inference that appellant made a knowing sale of alcohol to a minor.

Springston's testimony about the statement attributed to the second clerk, advising Alaboody not to make the sale, and not wanting him to sell to teens any more, was also offered to show knowledge, and not for the truth, i.e., that Alaboody had previously sold to minors.[3] Moreover, the statement explains the significance of Alaboody's response, according to Springston, that this would be the last time he would do so [I RT 22-23].

(b) The impeachment issue.

Appellants contend that they were improperly prevented from questioning Springston regarding Springston's prior arrest record. They argue that, since his testimony regarding the purchase of alcohol was directly contradicted by appellant Alaboody and Khalil, the clerk, impeachment was critical.

Whether appellants would have gained anything from exploring Springston's arrest record is speculative. Appellant was permitted to inquire whether Springston had been arrested for shoplifting, and was told no. Appellant made no offer of proof as to what such an inquiry might disclose.

In any event, it is not at all clear that, had appellant attempted to explore the issue, he would have been prevented from doing so. The record is ambiguous at best on this point. After Springston answered in a manner that suggested he might have

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[3] Department counsel did not contend, as he might have, that the statement of the clerk was admissible for all purposes as an admission by an agent of appellants. Since it was not offered, or received, on that basis, we do not rule on that aspect of its possible admissibility.

had a previous arrest record - he was only upset, while his friend "was scared, though, because he had never been arrested before", the following transpired [I RT 39-40]:

"Q. Have you been arrested before

Mr. Loehr: Objection, your Honor. Relevance.

The Court: Looks like the witness is not concerned about answering, so objection overruled.

Q. By Mr. Blair: What have you been arrested for?

The Court: We're going beyond the issues that I need to decide."

Q. By Mr. Blair: Let me ask you this. Have you ever been arrested for shoplifting?

A. No."

It would appear that appellants' counsel voluntarily abandoned his interest in Springston's arrest record after the ALJ's comment that it went beyond the issues he needed to decide, and learning that shoplifting was not the subject of a prior arrest.

Given the record as reflected in the transcript, we could only speculate as to whether further cross-examination might have developed impeachment material sufficient to sway the trier of fact. Appellant simply failed to pursue the issue after having been given a green light by the ALJ.

II

Appellants contend that the charges of exhibiting a deadly weapon in a threatening manner (Penal Code §417, subdivision (a)), and resisting arrest (Penal Code §148), are not supported by substantial evidence. They premise their argument as to each of these Penal Code provisions on the assumption that the ALJ was required to find from the evidence that appellant Alaboody was acting in self defense.

The scope of the Appeals Board's review is limited by the California Constitution,

by statute, and by case law. In reviewing the Department's decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. The Appeals Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing.[4]

"Substantial evidence" is relevant evidence which reasonable minds would accept as a reasonable support for a conclusion. (Universal Camera Corporation v. National Labor Relations Board (1950) 340 US 474, 477 [95 L.Ed. 456, 71 S.Ct. 456] and Toyota Motor Sales USA, Inc. v. Superior Court (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].)

When, as in the instant matter, the findings are attacked on the ground that there is a lack of substantial evidence, the Appeals Board, after considering the entire record, must determine whether there is substantial evidence, even if contradicted, to reasonably support the findings in dispute. (Bowers v. Bernards (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925].)

Appellate review does not "resolve conflicts in the evidence, or between inferences reasonably deducible from the evidence." (Brookhouser v. State of California (1992) 10 Cal.App.4th 1665, 1678 [13 Cal.Rptr.2d 658].)

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[4]The California Constitution, Article XX, Section 22; Business and Professions Code §§23084 and 23085; and Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

The credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. (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].)

It is clear from his proposed decision that the ALJ accepted the testimony of the police officers as to their having made known to Alaboody that they were police officers, and that he was to be placed under arrest for having sold an alcoholic beverage to a minor. Consequently, their testimony regarding Alaboody's resistance to their efforts first to confirm his identity, his resistance to their efforts to restrain him once he refused to identify himself, and his brandishing of the wine bottle after his struggle with the officers, clearly suffices to support the Penal Code charges.

Our review has satisfied us that, despite the inconsistencies in testimony to be expected from participants in a melee lasting only seconds or minutes, there is nothing in the testimony of the arresting officers which could be said to be so inherently incredible that the Board would be justified in substituting its own view of the evidence for that of the ALJ.

The ALJ did not attempt to explain Alaboody's reason for the 911 call. We might speculate that he thought he needed help after the situation had turned violent - in no small part as a result of his own belligerent attitude - and not because he thought he was being robbed. Whatever his reasons, it does not undo the fact that there was ample evidence for the ALJ to find that he was guilty of the conduct charged by the Department.

ORDER

The decision of the Department is affirmed.[5]

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

JOHN B. TSU, MEMBER, did not participate in the oral argument or decision in this matter.

[5] 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.