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

AB-9710
File: 47-466283; Reg: 16084430

WILSON PITRUZZELLI INVESTMENTS, LLC.,
dba Sausage Grill,
800-804 East 3rd Street,
Los Angeles, CA 90013-1820,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley

Appeals Board Hearing: November 1, 2018
Ontario, CA

ISSUED NOVEMBER 21, 2018

Appearances: *Appellant:* Rick A. Blake, as counsel for Wilson Pitruzzelli Investments, LLC.,

Respondent: Jonathan V. Nguyen, as counsel for the Department of Alcoholic Beverage Control.

OPINION

Wilson Pitruzzelli Investments, LLC., doing business as Sausage Grill, appeals from a decision of the Department of Alcoholic Beverage Control,[1] suspending its license for 15 days because its agent or employee sold an alcoholic beverage to a minor, in violation of Business and Professions Code section 25658, subdivision (a),

[1]The decision of the Department under Government Code section 11517, subdivision (c), dated May 23, 2018, is set forth in the appendix, as is the Proposed Decision of the administrative law judge (ALJ), dated November 5, 2017.

and, concurrently, suspending its license for 30 days because its agent or employee obstructed peace officers in the discharge of their duties, in violation of Penal Code section 148, subdivision (a)(1).

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general eating place license was issued on September 30, 2010. There is no record of previous discipline on the license.

On July 5, 2016, the Department instituted a 6-count accusation against appellant charging that, on February 5, 2016, appellant's agent or employee permitted five individuals under the age of 21 to consume alcoholic beverages, in violation of Business and Professions Code section 25658(b) (counts 1-5), and that appellant's agent or employee obstructed a peace officer in the discharge of his duties, in violation of Penal Code section 148(a)(1) (count 6).

A first amendment to the accusation was filed on March 14, 2017 — amending the charges in counts 1 through 5: to violations of section 25658(a), for the sale of alcohol to minors, rather than for the consumption of alcohol by minors, in violation of section 25658(b). A second amended accusation was filed on April 6, 2017: adding count 7 — an additional charge of obstructing a second peace officer. Finally, at the hearing, the accusation was further amended to change the name of appellant's agent or employee to "John Doe" in counts 1 through 5 — rather than a previously-named employee, who, it was determined, did not sell alcohol to the minors.

An initial administrative hearing was held on August 29, 2017. In light of the amendment to the accusation made at the hearing, without prior notice to appellant, the matter was continued to October 6, 2017. At the hearing, documentary evidence was

received and testimony concerning the violation charged was presented by four minors: Connor McCarthy, Herbert Sadler-Wong, Jacky Yeu-Shih Tung, and John Keating; by Department Agents Jason Groff and Joseph Perez, Jr.; by security guard Olasunkanmi Balogun; and by appellant's general manager, Blake Naylor.

Testimony established that on February 5, 2016, the Department conducted an undercover investigation at the licensed premises. Agent Groff entered at 7:35 p.m. and sat at the bar. He ordered and was served a beer. While there, he observed five young men he believed to be minors, sharing two glasses of beer — approximately 5' away from where he was sitting. (RT at p. 56.) By cell phone he notified Supervising Agent Perez and the Supervising Agent in Charge Will Silau. Groff confronted the young men, showed his ID badge, and escorted them outside where he sat them against a wall. He was followed by Agent Perez who carried the two glasses of beer outside. (Exh. 6 and 7.)

The agents were challenged by Olasunkanmi Balogun, a security guard, who said, "you can't bring beer outside." (RT at pp. 80; 132.) The officers testified that they said "police" and told him to get back four times. Balogun testified that he did not hear the agents identify themselves as law enforcement officers and that they displayed no identification. (*Id*. at pp 182-184.) Balogun also testified that an important part of his job is to make sure people don't take alcohol outside the premises. Perez put the beer on the ground, then put Balogun in a wrist lock and handcuffed him. (*Id.* at p. 86.) Agent Groff admitted that his ID was hidden by his shirt (*Id.* at p. 106), and Agent Perez testified that his ID was in his pocket (*Id*. at p. 137.)

The minors were cited and released. Balogun was not cited or arrested, and the

officers apologized to him after the incident. (*Id.* at pp. 186; 202; 204.)

Following the hearing, on November 5, 2017, the administrative law judge (ALJ) issued a proposed decision, recommending that only count 5 be sustained, for a single violation of Business and Professions Code section 25658 (a), and that the license be suspended for 15 days. He recommended that the remaining counts be dismissed as follows: count 3, because the minor did not appear at the hearing; counts 1, 2, and 4, because it was not established that those three minors purchased alcoholic beverages; and counts 6 and 7, because he determined that confusion, rather than interference, was the source of the problem — as evidenced by the agents' decision not to cite Balogun, and by the fact that the encounter was so slow that Perez had time to set down the beer he was carrying.

The Department rejected the proposed decision on January 23, 2018. Government Code section 11517, subdivision (c)(2)(E), permits the Department to reject the proposed decision, as it did here, and decide the case upon the record, including the transcript of the hearing. On March 13, 2018, the Department requested further briefing from the parties to address whether the ALJ properly recommended dismissal of the two counts alleging violation of Penal Code section 148(a)(1).[2] Both

[2]Penal Code § 148(a)(1) provides:

> (1) 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, shall be punished by a fine not exceeding one thousand dollars ($1,000), or by imprisonment in a county jail not to exceed one year, or by both that fine and imprisonment.

parties submitted briefs.

On May 23, 2018, the Director issued a decision sustaining the accusation as to counts 5, 6 and 7 — ordering a 15-day suspension for the violation of Business and Professions Code section 25658(a), and ordering a concurrent 30-day suspension for the two counts of violating Penal Code section 148(a)(1).

Appellant then filed a timely appeal raising the following issues: (1) the Department is barred by law from rejecting the ALJ's decision under Government Code section 11517(c)(2)(E), because the deadline had passed for doing so, and (2) counts 6 and 7 are not supported by substantial evidence.

DISCUSSION

I

Appellant contends the Department is barred from rejecting the ALJ's decision under Government Code section 11517, subdivision (c)(2)(E), because the 100-day deadline specified in subdivision (c)(2) had passed before the Department issued its decision, therefore the ALJ's proposed decision should be deemed adopted by the agency. (AOB at pp. 1-2.)

Government Code § 11715, subdivision (c) provides:

> (c) (1) If a contested case is originally heard by an administrative law judge alone, he or she shall prepare within 30 days after the case is submitted to him or her a proposed decision in a form that may be adopted by the agency as the final decision in the case. Failure of the administrative law judge to deliver a proposed decision within the time required does not prejudice the rights of the agency in the case. Thirty days after the receipt by the agency of the proposed decision, a copy of the proposed decision shall be filed by the agency as a public record and a copy shall

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(Cal. Pen. Code, § 148.)

be served by the agency on each party and his or her attorney. The filing and service is not an adoption of a proposed decision by the agency.

(2) Within 100 days of receipt by the agency of the administrative law judge's proposed decision, the agency may act as prescribed in subparagraphs (A) to (E), inclusive. **If the agency fails to act as prescribed in subparagraphs (A) to (E), inclusive, within 100 days of receipt of the proposed decision, the proposed decision shall be deemed adopted by the agency.** The agency may do any of the following:

(A) Adopt the proposed decision in its entirety.

(B) Reduce or otherwise mitigate the proposed penalty and adopt the balance of the proposed decision.

(C) Make technical or other minor changes in the proposed decision and adopt it as the decision. Action by the agency under this paragraph is limited to a clarifying change or a change of a similar nature that does not affect the factual or legal basis of the proposed decision.

(D) Reject the proposed decision and refer the case to the same administrative law judge if reasonably available, otherwise to another administrative law judge, to take additional evidence. If the case is referred to an administrative law judge pursuant to this subparagraph, he or she shall prepare a revised proposed decision, as provided in paragraph (1), based upon the additional evidence and the transcript and other papers that are part of the record of the prior hearing. A copy of the revised proposed decision shall be furnished to each party and his or her attorney as prescribed in this subdivision.

(E) Reject the proposed decision, and decide the case upon the record, including the transcript, or upon an agreed statement of the parties, with or without taking additional evidence. By stipulation of the parties, the agency may decide the case upon the record without including the transcript. If the agency acts pursuant to this subparagraph, all of the following provisions apply:

(I) A copy of the record shall be made available to the parties. The agency may require payment of fees covering direct costs of making the copy.

(ii) The agency itself shall not decide any case provided for in this subdivision without affording the parties the opportunity to present either oral or written argument before

> the agency itself. If additional oral evidence is introduced before the agency itself, no agency member may vote unless the member heard the additional oral evidence.
>
> (iii) The authority of the agency itself to decide the case under this subdivision includes authority to decide some but not all issues in the case.
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> (iv) If the agency elects to proceed under this subparagraph, the agency shall issue its final decision not later than 100 days after rejection of the proposed decision. **If the agency elects to proceed under this subparagraph, and has ordered a transcript of the proceedings before the administrative law judge, the agency shall issue its final decision not later than 100 days after receipt of the transcript.** If the agency finds that a further delay is required by special circumstance, it shall issue an order delaying the decision for no more than 30 days and specifying the reasons therefor. The order shall be subject to judicial review pursuant to Section 11523.

(Cal. Gov. Code, §11517(c), emphasis added.)

Appellant is incorrect in its application of subdivision (c)(2) and its assertion that the ALJ's proposed decision should be deemed adopted by the agency because more than 100 days had passed before the Department issued its decision. The relevant dates are as follows:

November 5, 2017 — ALJ submits proposed decision;

January 23, 2018 — Director notifies parties of rejection & ordering of transcript;

February 21, 2018 — Vol. I & II of reporter's transcript received by Department;

May 23, 2018 — Decision issued.

Under subdivision (c)(2)(E), the Director rejected the proposed decision and notified the parties that the transcript had been ordered on January 23, 2018 — 79 days after the ALJ submitted his proposed decision on November 5, 2017, and well within the

100 days for taking action under this provision. Then, proceeding under subdivision (c)(2)(E)(iv), the agency was mandated to issue its final decision not later than 100 days after receipt of the transcript. It did, and the final decision was issued on May 23, 2018 — 91 days after the Department received the transcript, on February 21, 2018. This was well within the 100 days allowed.

Appellant's contention is incorrect because it fails to allow for the additional time allowed by statute for ordering the reporter's transcript. Appellant counted from November 5, 2017 to May 23, 2018 and arrived at a figure of 169 days total, when, in fact, the statute anticipates the possibility of two 100-day periods as we had here — one beginning November 5, 2017 during which the Department could accept or reject the proposed decision, and a second beginning February 21, 2018, following the preparation of the transcripts, during which the Department could issue its final decision under Government Code section 11517(c).

The Department's decision was issued within the statutorily-prescribed time limits.

II

Appellant contends counts 6 and 7 — for willfully resisting, delaying, or obstructing peace officers in the performance of their duties — are not supported by substantial evidence. (AOB at pp. 2-5.)

To establish a violation of Penal Code section 148(a), the following elements must be proven:

(1) the person willfully resisted, delayed, or obstructed a peace officer;

(2) when the officer was engaged in the performance of his or her duties;

and

(3) the person knew or reasonably should have known that the other person was a peace officer engaged in the performance of his or her duties.

(*In re Muhammed C.* (2002) 95 Cal.App.4th 1325, 1329 [116 Cal.Rptr.2d 21]; *People v. Simons* (1996) 42 Cal.App.4th 1100, 1108-1109 [50 Cal.Rptr.2d 351]; *People v. Lopez* (1986) 188 Cal.App.3d 592, 599 [233 Cal.Rptr. 207].)

In his proposed decision, the ALJ dismissed counts 6 and 7 because he found there was no evidence that Balogun intended to interfere with the agents' investigation. His conclusions about the incident are as follows:

17. The facts in this case establish that, during a two to three minute period, there was confusion. From the agents' perspective, an unidentified man approached them while they were in the middle of an investigation. This man refused to stop even though they yelled that they were police and yelled at him to get back. From the security guard's point of view, two unidentified men carrying alcoholic beverages as they left the Licensed Premises, a violation of the conditions attached to the license. [*sic*.] He stepped forward and told them that they could not do so. When one of the men held out his badge, he directed his attention to the other man—the one holding the alcoholic beverages—and insisted that he take the alcoholic beverages back inside. As he did so, he stated that he did not know who this man was. Both agents testified that they yelled out that they were police, the security guard testified that he did not hear them do so.

18. Ultimately, things came to a head. Supv. Agent Joseph Perez, concerned that Olasunkanmi Balogun continued to approach, moved toward Balogun and restrained him. It is worth noting that Balogun's approach was slow enough that Supv. Agent Perez had the time to bend over and set both beers down. It is also worth noting that, after the confusion ended, the agents decided **not** to cite Balogun for interfering with their investigation.

19. The Department, in its closing argument, emphasized that Penal Code section 148(a)(1) uses the word "delay" and argued that Balogun's actions had delayed the agents' investigation. Accordingly, in the Department's opinion, Balogun's action violated section 148(a)(1). The

Department did not cite any authority in support of its argument. Taking the Department's argument to its illogical extreme, if a mere delay constituted a violation of this section, any person who asked an officer why he was arresting someone, forcing the officer to stop mid-arrest to talk to said person, could be considered to have delayed the arrest and therefore violated section 148(a)(1).

20. There is no evidence that Balogun intended to interfere with the agents' investigation. Rather, unaware of the agents' identities, Balogun was simply trying to keep them from taking the two beers outside. Once he saw Agent Groff's badge, he changed his focus to Supv. Agent Perez, who had no visible badge. Conversely, since the agents were unaware that Balogun was a security guard, they viewed him as a threat as he approached. Had the two sides known the truth, the situation would not have escalated the way it did. The agents' decision not to cite Balogun once the truth was known further indicates that confusion—not interference—was the source of the problem.

(ALJ's Proposed Decision, Conclusions of Law, ¶¶ 17-20.)

The Director rejected these conclusions and substituted his own as follows:

18. Balogun testified that he did not hear anyone say "police" and did not see any badges on display. However, upon cross-examination, Balogun testified that he could not recall the whole situation and was unable to recall many aspects of the interaction between himself and the agents. For example, despite both agents testifying that they yelled "police" and told Balogun to stay back, Balogun asserts simply that he did not hear anything and that it all happened too fast. Further, Balogun testified that the only thing he said was that they could not take the beers outside. Yet both agents testified consistently that Balogun stated that Agent Groff was "doing it the right way" and that he didn't know what Supv. Agent Perez was doing.

19. Here, the evidence supports a determination that Balogun violated Penal Code section 148(a)(1). The testimony of both Agent Groff and Supv. Agent Perez is consistent that they stated that they were police officers involved in an investigation, that Balogun should stay back, and that Balogun responded in a manner that indicated he understood that they were law enforcement officers. That Mr. Balogun testified that he did not hear the agents say anything, and that it all happened "so fast," is not credible and does not overcome the evidence that he knew or should reasonably have known under the circumstances that they were police officers and were engaged in an investigation. Further, **the act of Mr. Balogun tensing up while being placed in a compliance hold is**

> **sufficient resistance to constituted a violation. Regardless of whether he "intended" to resist, delay, or obstruct, the fact is that he did so.** Although the physical resistance may appear to be on the low end of the scale does not mean it did not occur. The fact that the delay was for only a relatively short time is irrelevant. Indeed, much could have occurred in the two to three minutes that the agents were required to divert their attention from the investigation they were conducting, such as allowing an opportunity for the suspects to flee the scene or to engage in other mischief. Likewise the fact that the agents exercised their discretion to not cite Balogun for a violation is of little probative value.
>
> 20. It is noted, however, that Balogun was endeavoring to do the right thing to the extent he was trying to prevent alcoholic beverages from being removed from the licensed premises; and Respondent was acting responsibly in retaining licensed security personnel. While these factors do not absolve Respondent or Balogun of responsibility, they are mitigating factors that may be taken into consideration in assessing the appropriate level of discipline.

(Decision Under Government Code Section 11517(c), Conclusions of Law, ¶¶ 18-20, emphasis added.)

As an initial matter it should be noted that the Appeals Board reviews only the Department's decision, *not* the ALJ's proposed decision. Government Code section 11517, subdivision (c), provides that the Department may adopt a proposed decision in its entirety, adopt it with some modification, or reject it as it did here. If the Department rejects the decision, it may refer the matter back to the ALJ to take additional evidence or it may decide the matter itself, making its own findings, determinations, and order as it did here. If the Department issues its own decision, the rejected proposed decision "serves no identifiable function in the administrative adjudication process or, for that matter, in connection with the judicial review thereof." (*Compton v. Bd. of Trustees* (1975) 49 Cal.App.3d 150, 158 [122 Cal.Rptr. 493].) Therefore, the Board does not ask whether the Department's decision is a better decision than the ALJ's, but rather,

whether the Department's inferences and conclusions, standing alone, are reasonable, and whether its findings are supported by substantial evidence. The existence of a proposed but rejected decision reaching a different conclusion does not function as a evidentiary presumption bolstering appellant's case.

Notwithstanding the above observations, we do not believe the Department's inferences and conclusions regarding counts 6 and 7 — standing alone and without comparison to the ALJ's proposed decision — are reasonable. We find that the Department's inferences and conclusions regarding counts 6 and 7 are **not** reasonable, and are not supported by substantial evidence.

The standard of review is as follows:

> We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. [Citations.] We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor [an appellate] court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. [Citations.] The function of an appellate board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

When findings are questioned as being unsupported by the evidence, the power of this Board begins and ends with an inquiry as to whether there is substantial evidence, contradicted or uncontradicted, which will support the findings. When two or more competing inferences of equal persuasion can be reasonably deduced from the facts, the Board is without power to substitute its deductions for those of the

Department—all conflicts in the evidence must be resolved in favor of the Department's decision. (*Kirby v. Alcoholic Bev. Control Appeals Bd.* (1972) 25 Cal.App.3d 331, 335 [101 Cal.Rptr. 815]; *Harris v. Alcoholic Beverage Control Appeals Board* (1963) 212 Cal.App.2d 106 [28 Cal.Rptr.74].)

Therefore the issue of substantial evidence, when raised by an appellant, leads to an examination by the Appeals Board to determine, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. The Appeals Board cannot disregard or overturn a finding of fact by the Department merely because a contrary finding would be equally or more reasonable. (Cal. Const. Art. XX, § 22; Bus. & Prof. Code § 23084; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113]; Harris, *supra*, at 114.)

"Substantial evidence" is relevant evidence which reasonable minds would accept as reasonable support for a conclusion. (*Universal Camera Corp. v. Labor Bd.* (1951) 340 U.S. 474, 477 [71 S.Ct. 456]; *Toyota Motor Sales U.S.A., Inc. v. Superior Ct.* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].) "Trial court findings must be supported by substantial evidence on the record taken as a whole. Substantial evidence is not [just] any evidence—it must be reasonable in its nature, credible, and of solid value." (*Hill v. Nat. Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 51 [26 Cal.Rptr.2d 834].)

In the instant case, the Department's decision lacks substantial evidence to establish a violation of Penal Code section 148(a). Instead, the decision relies on unsupported conclusions that these violations occurred, rather than substantial

evidence to support the three necessary elements for finding such a violation, namely:

> (1) the person **willfully** resisted, delayed, or obstructed a peace officer;
>
> (2) the officer was engaged in the performance of his or her duties; and
>
> (3) the person knew or reasonably should have known that the other person was a peace officer engaged in the performance of his or her duties.

(*In re Muhammed C.*, *supra,* emphasis added.)

Appellant maintains that the "willful" element has not been established, and we agree. Balogun used no weapon; the record is devoid of any mention of affirmative acts such as struggling or fighting with the agent which might constitute disobeying or resisting; and there is no evidence that Balogun was attempting to leave the scene. (AOB at pp. 4-5.) "Willful" is defined as: deliberate, voluntary, or intentional.[3] And case law has established the following definition:

> "[I]t is well settled that the terms "willful" or "willfully," when applied in a penal statute, require only that the illegal act or omission occur "intentionally," without regard to motive or ignorance of the act's prohibited character." [Citation.]

(*People v. Honig* (1996) 48 Cal.App.4th 289, 336 [55 Cal.Rptr.2d 555].)

Here, the record is devoid of any evidence to support that Balogun's acts constituted deliberate, volutary, or intentional resistance, delay or obstruction. The Director cites a single example: "the act of Mr. Balogun tensing up while being placed in a compliance hold is sufficient resistance to constitute a violation." (Decision, at ¶ 19.) He cites no authority for his position that "tensing up" constitutes willful resistance. In

[3]Https://www.dictionary.com, accessed on October 17, 2018.

fact, he undercuts his own conclusion entirely by stating: "Regardless of whether he 'intended' to resist, delay, or obstruct, the fact is that he did so." (*Ibid.*) In other words, the decision finds strict liability for resisting or obstructing, without satisfying one of the necessary factors — the element of willfullness — thereby negating the finding that a violation of section 148(a) occurred. If Balogun did not **intend** to resist, his actions cannot be said to constitute willful resistance. The Director finds willfulness out of thin air — completely unsupported by any facts to show he intended to resist.

The record contains the following exchange, which appears to be the evidence on which the Director based his assumption:

[BY MR. NGUYEN]:

Q: In your opinion, was he resisting your hold on him?

[BY AGENT PEREZ]:

A: As soon as he put his arm and constricted his arm going downwards, I formed an opinion that he was going to resist. So I pinned him against the wall using my body.

(RT at pp. 143-144.) We fail to see — as a matter of law — how the act of tensing ones muscles in response to being pinned against the wall constitutes willful resistance, when the necessary element of willfulness is simply absent. Any normal person would have tensed his or her muscles in response to such treatment. As a matter of law, the actions of Balogun simply fail to meet the test of willfulness.

Furthermore, we question how being placed in a wrist lock by one agent can constitute willful resistance to two agents, thereby justifying two counts in the accusation. Even if "tensing up" constituted willful resistance, which, as explained above, we do not believe it does, it certainly does not provide substantial evidence to

support two counts of violating section 148(a).

Appellant contends that there was no violation of section 148 because, in addition to the lack of willfulness, the security guard did not know, and reasonably could not have known, that the ABC investigators were peace officers. While the decision asserts: "Balogun responded in a manner that indicated he understood that they were law enforcement officers," it offers no evidence to support this assertion, and a thorough reading of the record reveals none. Appellant argues that the investigators did not adequately identify themselves initially — and indeed **both agents admitted that their ID's were not visible during the intial encounter** (see RT at pp. 106 - Groff's ID was hidden by his shirt; p. 137 - Perez's ID was in his rear pocket), but after the agents did identify themselves, Balogun cooperated with the investigators.

By the same token, the agents did not know initially that Balogun was a security guard, whose primary concern during the entire incident was that alcohol should not be taken outside. The record is abundant with evidence that, as the ALJ said, "confusion—not interference—was the source of the problem" (Proposed Decision, at ¶ 20), rather than facts supporting willful resistance to individuals known to be peace officers. Indeed, if Balogun had <u>not</u> stopped an individual carrying beer outside — particularly when that person displayed no indicia of law enforcement employment — he would have been negligent in his duties, and subject to citation by these same agents.

The Director completely discounts the fact that Balogun was not cited or arrested, saying: "the fact that the agents exercised their discretion to not cite Balogun for a violation is of little probative value." We disagree. The fact that Balogun was not cited or arrested, in addition to numerous references in the record to apologies made to

him by the agents after the incident (see RT at pp. 186; 202; 204), indicate that the ALJ's version of the event in his proposed decision was much closer to the actual facts in this matter than that of the Director's final decision.

The record in this case simply does not support a single violation of section 148(a), let alone two. Instead, the record reflects that a security guard attempted to stop individuals he believed to be patrons — as those patrons were carrying two beers out of the premises — because a condition on appellant's alcoholic beverage license prohibited taking beer out of the premises. The guard was acting in the regular course of his duties, and attempting to prevent the violation of a condition on the license.

Substantial evidence in the record supports the finding that the security guard either did not hear, or did not take at face value the assertion by the Department's agents that they were "police." If the person carrying the beer out had not been a Department investigator, the security guard would have been derelict in his duties had he not challenged that person's right to remove the beer from the premises.

Furthermore, the evidence shows that Agent Perez had time to put down two glasses of beer before deciding to put Balogun up against the wall — indicating that this was not a situation where he was being overrun or threatened. The short delay caused by the security guard in this situation was negligible, and caused no actual harm to the investigation. In sum, this is not a case of violently resisting arrest or of actively and intentionally interfering with an investigation.

There are a considerable number of mitigating factors which must be considered: the security guard, just like the investigators, was acting within the scope of his duties; the security guard clearly acted with the intention of preventing a violation of a condition

on the license; the investigators were conducting their investigation in plain clothes, so it was not obvious that they were peace officers; it was reasonable for the security guard to attempt to stop individuals from carrying beer outside when he saw no badges and did not hear the agents say "police"; the investigation was not materially delayed and was completed shortly thereafter; the agents did not cite Balogun; and the agents apologized to Balogun for what happened.

While the Department has broad discretion, in *Koss v. Department of Alcoholic Beverage Control*, that discretion was described this way:

> [T]he Department exercises a discretion adherent to a standard set by reason and reasonable people, bearing in mind that such a standard may permit a difference of opinion on the same subject**. If the decision is reached without reason under the evidence, the action of the Department is arbitrary, constitutes an abuse of discretion, and may be set aside.** Where the decision is the subject of a choice within reason, the Department is vested with the discretion of making the selection which it deems proper; its action constitutes a valid exercise of that discretion; and the appeals Board or the court may not interfere therewith.

(*Koss v. Dept. of Alcoholic Bev. Control* (1963) 215 Cal.App.2d 489, 496 [30 Cal.Rptr.2d 219], emphasis added.)

In light of the nature and circumstances of this case, the apparent disregard by the Department of the mitigating circumstances surrounding the interaction between Balogun and the agents, and a lack of substantial evidence to support the factors necessary to find violations of Penal Code section 148(a), we believe the Department's Decision Under Government Code section 11517(c) was reached without reason under the evidence, and constitutes an arbitrary action by the Department.

We find that the Department abused its discretion in sustaining counts 6 and 7

and imposing a 30-day suspension for those counts. Count 5 was properly sustained.

ORDER

The decision of the Department is reversed as to counts 6 and 7 and affirmed as to count 5. The matter is remanded to the Department for reconsideration of the penalty in light of the Board's decision.[4]

BAXTER RICE, CHAIRMAN
PETER J. RODDY, MEMBER
MEGAN McGUINNESS, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[4]This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 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 section 23090 et seq.

APPENDIX

BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF
THE STATE OF CALIFORNIA

IN THE MATTER OF THE ACCUSATION AGAINST: Wilson Pitruzzelli Investments LLC dba Sausage Grill 800-804 E. 3rd St. Los Angeles, California 90013-1820 Respondent(s)/Licensee(s).	**File No.: 47-466283** **Reg. No.: 16084430**

DECISION UNDER GOVERNMENT CODE SECTION 11517(c)

The above-entitled matter having regularly come before the Department on May 23, 2018, for decision under Government Code Section 11517(c) and the Department having considered its entire record, including the transcript of the hearing held on August 29, 2017, and October 6, 2017, before Administrative Law Judge Matthew G. Ainley, and the written argument of the parties, and good cause appearing, the following decision is hereby adopted:

The Department seeks to discipline the Respondent's license on the grounds that, on or about February 5, 2016, the Respondent, through its agent or employee, sold, furnished, or gave alcoholic beverages to John Keating, Herbert Sadler-Wong, Garrett Macarthur, Jacky Yeu-Shih Tung, and Connor McCarthy, all of whom were individuals under the age of 21, in violation of Business and Professions Code section 25658(a).[1] (Exhibit 1.)

The Department also seeks to discipline the Respondent's license on the grounds that, on or about February 5,2016, the Respondent's agent or employee, Olasunkanmi Balogun, willfully resisted, delayed, or obstructed Supervising Agent J. Perez and Agent J. Groff in the discharge or attempt to discharge a duty of their office, in violation of Penal Code section 148(a)(1). (Exhibit 1.)

[1] All statutory references are to the Business and Professions Code unless otherwise noted.

Oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the hearing. The matter was argued and submitted for decision on October 6, 2017.

FINDINGS OF FACT

1. The Department filed the accusation on July 5, 2016, a first amendment thereto on March 14, 2017, and a second amendment thereto on April 6, 2017. At the hearing, the Department amended the accusation by interlineation, replacing the name "Andi Gena Mitchell" with the name "John Doe" in counts 1, 2, 3, 4, and 5.

2. The Department issued a type 47, on-sale general eating place license to the Respondent for the above-described location on September 30, 2010 (the Licensed Premises).

3. There is no record of prior departmental discipline against the Respondent's license.

4. Connor McCarthy was born on July 3, 1995. On February 5, 2016, he was 20 years old.

5. Herbert Sadler-Wong was born on October 29, 1996. On February 5, 2016, he was 19 years old.

6. Jacky Yeu-shih Tung was born on September 19, 1996. On February 5, 2016, he was 19 years old.

7. John Keating was born on May 11, 1995. On February 5,2016, he was 20 years old.

8. Garrett Macarthur did not appear at the hearing.

9. On February 5, 2016, McCarthy, Sadler-Wong, Tung, Keating, and Macarthur were inside the Licensed Premises. McCarthy purchased a beer from one of the servers. The server in question asked to see some identification (ID). McCarthy showed a fake ID. McCarthy testified that the ID had his actual photograph on it and had his physical description. He did not recall the birthdate on the ID other than it indicated that he was over 21. In his opinion, the ID looked like a real ID.

10. Sadler-Wong denied purchasing any alcohol. He conceded that he was provided with alcohol at some point, but he did not recall who purchased it or who gave it to him. Although he had a fake ID in his possession (exhibit 13), he denied using it at the Licensed Premises.

11. Tung denied purchasing any alcohol, although he conceded that he was provided with alcohol at some point. He did not recall who purchased the alcohol.

12. Keating denied purchasing any alcohol. He testified that he was provided with alcohol at some point, but he did not recall who purchased it. He consumed some of the beer provided to him. He was in possession of a fake ID (exhibit 14), but he denied using it at the Licensed Premises.

13. Agent Groff entered the Licensed Premises and ordered a beer, which he was served. He noticed McCarthy, Sadler-Wong, Tung, Keating, and Macarthur sharing two beers, one in a stein and one in a goblet, both containing beer. (Exhibits 6,7,10 & 12.)

14. Agent Groff noticed that several employees were moving throughout the Licensed Premises. Two bartenders were behind the bar counter, Andi Mitchell and an unidentified male bartender. He could not recall if any of the employees walked past the five young men, but he noted that the view from the bar counter to the table where they were seated was unobstructed.

15. Agent Groff notified back-up agents, including Supervising Agent Joseph Perez. The back-up agents entered the Licensed Premises and contacted the five males. After determining that they were under the age of 21, they escorted all five outside. The agents picked up the stein and the goblet and carried them outside with them.

16. Agent Groff and Supv. Agent Perez were each holding one of the beers when they first exited. Once outside, Agent Groff handed the beer in his possession to Supv. Agent Perez. The agents instructed McCarthy, Sadler-Wong, Tung, Keating, and Macarthur to sit down against the wall, which they did. Agent Groff had his dome badge visibly hanging around his neck. Supv. Agent Perez was standing approximately eight feet to the side of Agent Groff, holding the two glasses of beer in his hands and his citation book under his arm. Supv. Agent Perez had his flat badge in his possession, but he was not wearing any visible forms of ID.

17. An individual dressed in all black, Olasunkanmi Balogun, began yelling at Supv. Agent Perez that he could not take any beers outside the Licensed Premises.[2] At this point, Balogun was approximately 15 feet from Groffand Perez. Agent Groffresponded by yelling, "Police," and held up his dome badge. Perez yelled, "Police officer," at approximately the same time. In addition, Perez said, "We're police. We're conducting an investigation."

18. Balogun kept approaching the agents. He spoke to Agent Groffand said, "See, you're doing it the right way." He then pointed to Supv. Agent Perez and said, "I don't know what this guy is

[2] The testimony established that the Respondent's license contains a condition prohibiting alcoholic beverages from being removed from the Licensed Premises.

doing." Balogun then reiterated that people could not take beers outside of the Licensed Premises.

19. Mr. Balgoun continued to shout at the agents that they were not allowed to bring beer outside, as he moved toward Supv. Agent Perez. Each time Balogun shouted, Perez responded with "police officer." He also told Balogun to "get back" approximately three or four times. Mr. Balogun continued to approach Perez.

20. When Balogun was within ten feet of Supv. Agent Perez, the latter set down the two beers, moved toward Balogun, and placed him in a wristlock. As he was doing so, Perez felt Balogun constrict his muscles, which indicated to Perez that Balogun was resisting, possibly seeking to escape or fight. At this point, Perez pinned Balogun against the wall, yelling "Police" once again. Agent Groff, concerned for his own safety, stopped what he was doing with the group of five minors and approached Mr. Balogun, placing his other wrist into a rear wrist lock, and placed handcuffs on him. The entire exchange between the agents and Balogun took between two and three minutes. At no point during this exchange did Balogun identify himself as a security guard.

21. The agents asked Balogun for permission to remove his wallet. Balogun agreed and stated that he was a security guard at the Licensed Premises. The agents looked at the wallet and located his driver license and guard card. They also spoke to his supervisor. Balogun was subsequently released without being cited.

22. The agents turned their attention back to McCarthy, Sadler-Wong, Tung, Keating, and Macarthur. They cited all five.

23. The agents entered the Licensed Premises and contacted Mitchell. They identified themselves and asked her to step outside. They showed her the five males and asked her if she had seen them consuming alcohol inside. Mitchell said that she had. They asked her which of the males had purchased the alcohol. She said that she believed that the other bartender had served Tung. Finally, she said that she did not know if the other bartender had asked to see ID from Tung.[3]

24. McCarthy, Sadler-Wong, Tung, Keating, and Macarthur were released. The agents took samples of the two beers, which they booked into evidence along with the stein and the goblet.

25. Except as set forth in this decision, all other allegations in the accusation and all other contentions of the parties lack merit.

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[3] Mitchell's statements to the agents set forth in this paragraph qualify as administrative hearsay.

CONCLUSIONS OF LAW

1. Article XX, section 22 of the California Constitution and section 24200(a) provide that a license to sell alcoholic beverages may be suspended or revoked if continuation of the license would be contrary to public welfare or morals.

2. Section 24200(b) provides that a licensee's violation, or causing or permitting of a violation, of any penal provision of California law prohibiting or regulating the sale of alcoholic beverages is also a basis for the suspension or revocation of the license.

3. Section 25658(a) provides that every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any person under the age of 21 years is guilty of a misdemeanor.

4. Section 25658(b) provides that any person under the age of 21 years who purchases any alcoholic beverage, or any person under the age of 21 years who consumes any alcoholic beverage in any on-sale premises, is guilty of a misdemeanor. An on-sale licensee has an active duty to prevent minors from violating this section and a failure to do so constitute permitting such a violation, for which discipline may be imposed.[4]

5. Section 25666(a) provides that, "[i]n any hearing on an accusation charging a licensee with a violation of Sections 25658, 25663, and 25665, the department shall produce the alleged minor for examination at the hearing unless he or she is unavailable as a witness because he or she is dead or unable to attend the hearing because of a then-existing physical or mental illness or infirmity, or unless the licensee has waived, in writing, the appearance of the minor."

6. The Department's pleadings in this matter, and the proof it offered at the hearing, are at odds with each other. The original accusation alleged that five separate minors were allowed to consume alcoholic beverages inside the Licensed Premises in violation of section 25658(b). On March 13, 2017, the Department filed a "First *Amendment*" to the accusation, replacing the five section 25658(b) counts with five counts alleging violations of section 25658(a). Thus, despite the language used in the caption, the so-called amendment was in fact an *amended* accusation.[5]

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[4] *Reilly v. Stroh*, 161 Cal. App. 3d 47,51,207 Cal. Rptr. 250,252 (1984); *Marcucci v. Board of Equalization*, 138 Cal. App. 2d 605,610,292 P.2d 264,266 (1956).

[5] The title of the Department's pleading is misleading, given that an amendment adds or deletes information from the accusation, whereas an amended accusation restates and replaces the original accusation.

Regardless of how the Department styled the March 13, 2017, pleading, the effect was to remove all five section 25658(b) counts and replace them with five section 25658(a) counts.[6]

7. During the course of the hearing, the Department presented testimony from Agent Jason Groff and four minors—John Keating, Herbert Sadler-Wong, Jacky Yeu-Shih Tung, and Connor McCarthy—concerning the minors' consumption of alcoholic beverages inside the Licensed Premises. Agent Groff testified that he saw all four minors consuming alcohol, which some of the minors conceded. Agent Groff also testified that Andi Mitchell told him that she had seen these four minors consuming alcohol. But the Department removed from the consumption violations from the accusation when it amended it. In other words, the evidence presented by the Department related to violations which were not at issue.[7]

8. The only evidence the Department submitted relating to the five sale-to-minor counts at issue was McCarthy's testimony that he purchased alcohol inside the Licensed Premises by using a fake ID. The Department did not present evidence concerning how the alcohol was furnished to the other minors. Agent Groff saw the minors consuming only from the stein and the goblet which were already on the table, while Sadler-Wong, Tung, and Keating testified generally that they were provided with alcohol, but not by who or how. In the absence of any details about the circumstances under which Sadler-Wong, Tung, and Keating were provided with alcohol, it is impossible to determine if the Respondent or any of its employees were involved.[8]

9. Since Garrett Macarthur did not appear at the hearing (Finding of Fact ¶ 8) as required by section 25666, cause for suspension or revocation of the Respondent's license was not established for the violation of section 25658(a) alleged in count 3.

10. Cause for suspension or revocation of the Respondent's license was not established for the violations of section 25658(a) alleged in counts 1, 2, and 4. Specifically, there was no evidence that John Keating, Herbert Sadler-Wong, or Jacky Yeu-Shih Tung purchased any alcoholic beverages inside the Licensed Premises. Additionally, there was no evidence that the Respondent or any of its employees caused any alcohol to be furnished to Keating, Sadler-Wong, or Shih. (Findings of Fact ¶¶ 5-7, 10-15 & 22-24.)

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[6] The Department's second amendment added an additional count alleging a second violation of Penal Code 148(a)(1). This amendment had no effect on the alleged sale-to-minor violations and, therefore, is not relevant to this discussion.

[7] Moreover, since the consumption violation had been removed before the hearing commenced the Respondent did not present any evidence concerning Keating's, Sadler-Wong's, Tung's, and McCarthy's consumption of alcoholic beverages. Presumably, had such counts been left in place, the Respondent would have called Mitchell, at a minimum, to explain or clarify her hearsay statements to Agent Groff.

[8] Mitchell's hearsay statement that she thought that the other bartender might have sold alcohol to Tung is too vague to be of any use, particularly in the absence of any direct evidence on point.

11. Cause for suspension or revocation of the Respondent's license exists under Article XX, section 22 of the California State Constitution, and sections 24200(a) and (b) on the basis that, on February 5,2016, one of the Respondent's employees, inside the Licensed Premises, sold an alcoholic beverage to Connor McCarthy, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 4, 9, 13-16 & 22-24.)

12. Section 25660 provides a defense to any person who was shown and acted in reliance upon bona fide evidence of majority in permitting a minor to enter and remain in a public premises in contravention of section 25665, in making a sale forbidden by section 25658(a), or in permitting a minor to consume in an on-sale premises in contravention of section 25658(b). This section expressly states that "[b]ona fide evidence of majority and identity of the person is any of the following: (1) A document issued by a federal, state, county, or municipal government, or subdivision or agency thereof, including, but not limited to, a valid motor vehicle operator's license, that contains the name, date of birth, description, and picture of the person. (2) A valid passport issued by the United States or by a foreign government. (3) A valid identification card issued to a member of the Armed Forces that includes a date of birth and a picture of the person."

13. The defense offered by this section is an affirmative defense. As such, the licensee has the burden of establishing all of its elements, namely, that evidence of majority and identity was demanded, shown, and acted on as prescribed.[9] This section applies to IDs actually issued by government agencies as well as those which purport to be.[10] A licensee or his or her employee is not entitled to rely upon an ID if it does not appear to be a bona fide government-issued ID or if the personal appearance of the holder of the ID demonstrates above mere suspicion that the holder is not the legal owner of the ID.[11] The defense offered by section 25660 is not established if the appearance of the minor does not match the description on the ID.[12]

14. In the present case, the Respondent failed to meet its burden with respect to the fake ID used by McCarthy to purchase beer. The fake ID in question was not presented at the hearing and the only testimony about it was very general. The fact that the ID had Keating's actual photo and physical description is a good starting point, but standing alone this is insufficient to establish

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[9] *Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control*, 261 Cal. App. 2d 181,189,67 Cal. Rptr. 734,739 (1968); 27 Ops. Atty. Gen. 233, 236 (1956).

[10] *Dept. of Alcoholic Beverage Control v. Alcoholic Control Appeals Bd. (Masani)*, 118 Cal. App. 4th 1429, 1444-45,13 Cal. Rptr. 3d 826, 837-38 (2004).

[11] *Masani*, 118 Cal. App. 4th at 1445-46,13 Cal. Rptr. 3d at 838; *5501 Hollywood, Inc. v. Department of Alcoholic Beverage Control*, 155 Cal. App. 2d 748,753, 318 P.2d 820, 823-24 (1957); *Keane v. Reilly*, 130 Cal. App. 2d 407,411-12,279 P.2d 152,155 (1955); *Conti v. State Board of Equalization*, 113 Cal. App. 2d 465,466-67, 248 P.2d 31, 32 (1952).

[12] *5501 Hollywood*, 155 Cal. App. 2d at 751-54,318 P.2d at 822-24; *Keane*, 130 Cal. App. 2d at 411-12, 279 P.2d at 155 (construing section 61.2(b), the predecessor to section 25660).

bona fide evidence of majority as defined by section 25660. Keating, the only witness to testify about the fake ID, could not remember what state purportedly issued it (he only knew that it was not a California ID) and could not recall the birthdate listed on the ID.[13] Additionally, there was no evidence whether or not the ID bore the hallmarks of an actual ID issued by the agency in question. Keating's opinion that it looked like a real ID is insufficient by itself to establish that the ID qualified under section 25660, since there is no basis for concluding that he knew what an actual ID from the unknown issuing agency looked like.

15. Penal Code section 148(a)(1) provides that it is illegal for a person to willfully resist, delay, or obstruct any peace officer in the discharge or attempt to discharge any duty of his or her office or employment.

16. Cause for suspension or revocation ofthe Respondent's license was established for the violations of Penal Code section 148(a)(1) alleged in counts 6 and 7. (Findings of Fact ¶¶ 16-21.)

17. "The legal elements of a violation ofsection 148, subdivision (a) are as follows: (1) the defendant willfully resisted, delayed, or obstructed a peace officer, (2) when the officer was engaged in the performance of his or her duties, and (3) the defendant knew or reasonably should have known that the other person was a peace officer engaged in the performance of his or her duties. [Citations.]" (*People v. Simons* (1996) 42 Cal.App.4th 1100, 1108-1109.) The offense is a general intent crime, proscribing only the particular act (resist, delay, obstruct) without reference to an intent to do a further act or achieve a future consequence. (*People v. Roberts* (1982) 131 Cal.App.3d Supp. 1, 8-9.) See, in re Muhammed C, (2002) 95 Cal.App.4th 1325, 1329. A subject is resisting within the meaning of section 148(a)(1) when physical restraint is the only way a police officer can keep a subject from leaving. (*In re Frederick B.* (19870 192 Cal.App.3d 79, revd. on other grounds (2001) 26 Cal.4th 466.) The simple act of pulling an arm away from an officer's control hold qualifies as physical resistance. (In re J.C. (2014) 228 Cal.App.4th 1394, 1400.)

18. Balogun testified that he did not hear anyone say "police" and did not see any badges on display. However, upon cross-examination, Balogun testified that he could not recall the whole situation and was unable to recall many aspects of the interaction between himself and the agents. For example, despite both agents testifying that they yelled "police" and told Balogun to stay back, Balogun asserts simply that he did not hear anything and that it all happened too fast. Further, Balogun testified that the only thing he said was that they could not take the beers outside. Yet both agents testified consistently that Balogun stated that Agent Groffwas "doing it the right way" and that he didn't know what Supv. Agent Perez was doing.

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[13] There is a crucial difference between and ID which would have made him out be 21 years old and one which would have made him out to be 30, 40, or 50.

19. Here, the evidence supports a determination that Balogun violated Penal Code section 148(a)(1). The testimony of both Agent Groff and Supv. Agent Perez is consistent that they stated that they were police officers involved in an investigation, that Balogun should stay back, and that Balogun responded in a manner that indicated he understood that they were law enforcement officers. That Mr. Balogun testified that he did not hear the agents say anything, and that it all happened "so fast," is not credible and does not overcome the evidence that he knew or should reasonably have known under the circumstances that they were police officers and were engaged in an investigation. Further, the act of Mr. Balogun tensing up while being placed in a compliance hold is sufficient resistance to constitute a violation. Regardless of whether he "intended" to resist, delay, or obstruct, the fact is that he did so. Although the physical resistance may appear to be on the low end of the scale does not mean it did not occur. The fact that the delay was for only a relatively short time is irrelevant. Indeed, much could have occurred in the two to three minutes that the agents were required to divert their attention from the investigation they were conducting, such as allowing an opportunity for the suspects to flee the scene or to engage in other mischief. Likewise, the fact that the agents exercised their discretion to not cite Balogun for a violation is of little probative value.

20. It is noted, however, that Balogun was endeavoring to do the right thing to the extent he was trying to prevent alcoholic beverages from being removed from the licensed premises; and Respondent was acting responsibly in retaining licensed security personnel. While these factors do not absolve Respondent or Balogun of responsibility, they are mitigating factors that may be taken into consideration in assessing the appropriate level of discipline.

PENALTY

The Department requested that the Respondent's license be suspended for a period of 15 days for each of the sale-to-minor violations and 30 days for the Penal Code section 148(a)(1) violation.[14] The Respondent did not recommend a penalty in the event that the accusation, or any counts therein, were sustained. The penalty recommended herein complies with rule 144.[15]

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[14] Although Rule 144 provides for a 35-day suspension and up to revocation of the license for a violation of Penal Code section 148, the Department recommended only a 30-day suspension. While not stated, it is presumed that this mitigated discipline reflects the circumstances of the violation as well as the approximately five and a half years of discipline-free history of the licensed business.

[15] All rules referred to herein are contained in title 4 of the California Code of Regulations unless otherwise noted.

ORDER

Count 5 is sustained. Respondent's on-sale general eating place license is hereby suspended for a period of 15 days.

Counts 6 and 7 are sustained. Respondent's on-sale general eating place license is hereby suspended for a period of 30 days.

Although the violations established are for different offenses, they arise out of the same investigation and circumstances. As such, and given other facts particular to this case, the suspensions ordered above are to run concurrently.

Counts 1, 2, 3, and 4 are dismissed.

Sacramento, California

Dated: May 23, 2018

Jacob A. Appelsmith
Director

Pursuant to Government Code section 11521(a), any party may petition for reconsideration of this decision. The Department's power to order reconsideration expires 30 days after the delivery or mailing of this decision, or on the effective date of the decision, whichever is earlier.

Any appeal of this decision must be made in accordance with Chapter 1.5, Articles 3, 4 and 5, Division 9, of the Business and Professions Code. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005.

BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA

IN THE MATTER OF THE ACCUSATION AGAINST:

WILSON PITRUZZELLI INVESTMENTS
LLC SAUSAGE GRILL
800-804 E. 3RD STREET
LOS ANGELES, CA 90013-1820

ON-SALE GENERAL EATING PLACE - LICENSE

Respondent(s)/Licensee(s)
Under the Alcoholic Beverage Control Act

CERRITOS DISTRICT OFFICE

File: 47-466283

Reg: 16084430

CERTIFICATE OF DECISION

NOTICE CONCERNING PROPOSED DECISION

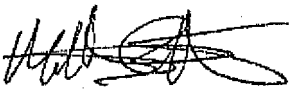
To the parties in the above-entitled proceedings:

You are hereby advised that the Department considered, but did not adopt, the Proposed Decision in the above titled matter and that the Department will itself decide the case pursuant to the provisions of Section 11517(c)(2)(E). A copy of the Proposed Decision has previously been sent to all parties.

The Department has requested that a transcript of the hearing be prepared. A copy of the record will be made available to you. Upon receipt of the hearing transcript, the Department will notify you of the cost of a copy of the record. At that time you all also be advised of the date by which written argument if any, is to be submitted.

Sacramento, California

Dated: January 23, 2018



Matthew D. Dotting
General Counsel

BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA

IN THE MATTER OF THE ACCUSATION AGAINST:

Wilson Pitruzzelli Investments LLC dba Sausage Grill 800-804 E. 3rd St. Los Angeles, California 90013-1820 Respondent	File: 47-466283 Reg.: 16084430 License Type: 47 Word Count: 3,000 & 35,000 Reporter: Pamela Williamson & Dorian Sait California Reporting
On-Sale General Eating Place License	**PROPOSED DECISION**

Administrative Law Judge Matthew G. Ainley, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Cerritos, California, on August 29, 2017 and October 6, 2017.

Jonathan V. Nguyen, Attorney, represented the Department of Alcoholic Beverage Control.

Rick A. Blake, attomey-at-law, represented respondent Wilson Pitruzzelli Investments LLC. Corporate officers Joseph N. Pitruzzelli and Tyler J. Wilson were present.

The Department seeks to discipline the Respondent's license on the grounds that, on or about February 5, 2016, the Respondent, through its agent or employee, sold, furnished, or gave alcoholic beverages to John Keating, Herbert Sadler-Wong, Garrett Macarthur, Jacky Yeu-Shih Tung, and Connor McCarthy, all of whom were individuals under the age of 21, in violation of Business and Professions Code section 25658(a).[1] (Exhibit 1.)

The Department also seeks to discipline the Respondent's license on the grounds that, on or about February 5, 2016, the Respondent's agent or employee, Olasunkanmi Balogun, willfully resisted, delayed, or obstructed Supervising Agent J. Perez and Agent J. Groff in the discharge or attempt to discharge a duty of their office, in violation of Penal Code section 148(a)(1). (Exhibit 1.)

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[1] All statutory references are to the Business and Professions Code unless otherwise noted.

Oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the hearing. The matter was argued and submitted for decision on October 6, 2017.

FINDINGS OF FACT

1. The Department filed the accusation on July 5, 2016, a first amendment thereto on March 14, 2017, and a second amendment thereto on April 6, 2017. At the hearing, the Department amended the accusation by interlineation, replacing the name "Andi Gena Mitchell" with the name "John Doe" in counts 1, 2, 3, 4, and 5.

2. The Department issued a type 47, on-sale general eating place license to the Respondent for the above-described location on September 30, 2010 (the Licensed Premises).

3. There is no record of prior departmental discipline against the Respondent's license.

4. Connor McCarthy was born on July 3,1995. On February 5, 2016, he was 20 years old.

5. Herbert Sadler-Wong was born on October 29, 1996. On February 5, 2016, he was 19 years old.

6. Jacky Yeu-shih Tung was born on September 19,1996. On February 5, 2016, he was 19 years old.

7. John Keating was born on May 11, 1995. On February 5, 2016, he was 20 years old.

8. Garrett Macarthur did not appear at the hearing.

9. On February 5, 2016, McCarthy, Sadler-Wong, Tung, Keating, and Macarthur were inside the Licensed Premises. McCarthy purchased a beer from one of the servers. The server in question asked to see some ID. McCarthy showed a fake ID. McCarthy testified that the ID had his actual photograph on it and had his physical description. He did not recall the birthdate on the ID other than it indicated that he was over 21. In his opinion, the ID looked like a real ID.

10. Sadler-Wong denied purchasing any alcohol. He conceded that he was provided with alcohol at some point, but did not recall who purchased it or who gave it to him. Although he had a fake ID in his possession (exhibit 13), he denied using it at the Licensed Premises.

11. Tung denied purchasing any alcohol, although he conceded that he was provided with alcohol at some point. He did not recall who purchased the alcohol.

12. Keating denied purchasing any alcohol. He testified that he was provided with alcohol at some point, but did not recall who purchased it. He consumed some of the beer provided to him. He was in possession of a fake ID (exhibit 14), but denied using it at the Licensed Premises.

13. Agent Groffentered the Licensed Premises and ordered a beer, which he was served. He noticed McCarthy, Sadler-Wong, Tung, Keating, and Macarthur sharing two beers, one in a stein and one in a goblet, both containing beer. (Exhibits 6, 7, 10 & 12.)

14. Agent Groffnoticed that several employees were moving throughout the Licensed Premises. Two bartenders were behind the bar counter, Andi Mitchell and an unidentified male bartender. He could not recall if any of the employees walked past the five young men, but noted that the view from the bar counter to the table where they were seated was unobstructed.

15. Agent Groffnotified back-up agents, including Supervising Agent Joseph Perez. The back-up agents entered the Licensed Premises and contacted the five males. After determining that they were under the age of 21, they escorted all five outside. The agents picked up the stein and the goblet and carried them outside with them.

16. Agent Groffand Supv. Agent Perez were each holding one of the beers when they first exited. Once outside, Agent Groffhanded the beer in his possession to Supv. Agent Perez. The agents instructed McCarthy, Sadler-Wong, Tung, Keating, and Macarthur to sit down against the wall, which they did. Agent Groffhad his dome badge visibly hanging around his neck. Supv. Agent Perez had his flat badge in his possession, but was not wearing any visible forms of ID.

17. An individual dressed in all black, Olasunkanmi Balogun, began yelling at Supv. Agent Perez that he could not take any beers outside the Licensed Premises.[2] Agent Groff responded by yelling, "Police," and held up his dome badge. Perez yelled, "Police officer," at approximately the same time.

18. Balogun kept approaching the agents. He spoke to Agent Groffand said, "See, you're doing it the right way." He then gestured to Supv. Agent Perez and said, "I don't know who this guy is." Balogun then reiterated that people could not take beers outside of the Licensed Premises.

[2] The testimony established that the Respondent's license contains a condition prohibiting alcoholic beverages from being removed from the Licensed Premises.

19. Supv. Agent Perez told Balogun to get back, but Balogun did not comply. Instead, he kept walking toward Supv. Agent Perez. As he walked forward, Supv. Agent Perez repeatedly told Balogun to get back.

20. When Balogun was within ten feet of Supv. Agent Perez, the latter set down the two beers, moved toward Balogun, and placed him in a wristlock. Agent Groffalso moved toward Balogun, restrained his other arm, then handcuffed him. The entire exchange between the agents and Balogun took between two and three minutes. At no point during this exchange did Balogun identify himself as a security guard.

21. The agents asked Balogun for permission to remove his wallet. Balogun agreed and stated that he was a security guard at the Licensed Premises. The agents looked at the wallet and located his driver license and guard card. They also spoke to his supervisor. Balogun was subsequently released without being cited.

22. The agents turned their attention back to McCarthy, Sadler-Wong, Tung, Keating, and Macarthur. They cited all five.

23. The agents entered the Licensed Premises and contacted Mitchell. They identified themselves and asked her to step outside. They showed her the five males and asked her if she had seen them consuming alcohol inside. Mitchell said that she had. They asked her which of the males had purchased the alcohol. She said that she believed that the other bartender had served Tung. Finally, she said that she did not know if the other bartender had asked to see ID from Tung.[3]

24. McCarthy, Sadler-Wong, Tung, Keating, and Macarthur were released. The agents took samples of the two beers, which they booked into evidence along with the stein and the goblet.

25. Except as set forth in this decision, all other allegations in the accusation and all other contentions of the parties lack merit.

CONCLUSIONS OF LAW

1. Article XX, section 22 ofthe California Constitution and section 24200(a) provide that a license to sell alcoholic beverages may be suspended or revoked if continuation of the license would be contrary to public welfare or morals.

[3] Mitchell's statements to the agents set forth in this paragraph qualify as administrative hearsay.

2. Section 24200(b) provides that a licensee's violation, or causing or permitting of a violation, of any penal provision of California law prohibiting or regulating the sale of alcoholic beverages is also a basis for the suspension or revocation of the license.

3. Section 25658(a) provides that every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any person under the age of 21 years is guilty of a misdemeanor.

4. Section 25658(b) provides that any person under the age of 21 years who purchases any alcoholic beverage, or any person under the age of 21 years who consumes any alcoholic beverage in any on-sale premises, is guilty of a misdemeanor. An on-sale licensee has an active duty to prevent minors from violating this section and a failure to do so constitute permitting such a violation, for which discipline may be imposed.[4]

5. Section 25666(a) provides that, "[i]n any hearing on an accusation charging a licensee with a violation of Sections 25658,25663, and 25665, the department shall produce the alleged minor for examination at the hearing unless he or she is unavailable as a witness because he or she is dead or unable to attend the hearing because of a then-existing physical or mental illness or infirmity, or unless the licensee has waived, in writing, the appearance of the minor."

6. The Department's pleadings in this matter, and the proof it offered at the hearing, are at odds with each other. The original accusation alleged that five separate minors were allowed to consume alcoholic beverages inside the Licensed Premises in violation of section 25658(b). On March 13, 2017, the Department filed a "First *Amendment*" to the accusation, replacing the five section 25658(b) counts with five counts alleging violations of section 25658(a). Thus, despite the language used in the caption, the so-called amendment was in fact an *amended* accusation. Not to be overly technical, but an amendment adds or deletes information from the accusation, whereas an amended accusation restates and replaces the original accusation. Regardless of how the Department styled the March 13, 2017 pleading, the effect was to remove all five section 25658(b) counts and replace them with five section 25658(a) counts.[5]

7. During the course of the hearing, the Department presented testimony from Agent Jason Groff and four minors—John Keating, Herbert Sadler-Wong, Jacky Yeu-Shih Tung, and Connor McCarthy—concerning the minors' consumption of alcoholic beverages inside the Licensed Premises. Agent Grofftestified that he saw all four minors

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[4] *Reilly v. Stroh*, 161 Cal. App. 3d 47,51,207 Cal. Rptr. 250,252 (1984); *Marcucci v. Board of Equalization*, 138 Cal. App. 2d 605,610,292 P.2d 264,266 (1956).

[5] The Department's second amendment added an additional count alleging a second violation of Penal Code 148(a)(1). This amendment had no effect on the alleged sale-to-minor violations and, therefore, is not relevant to this discussion.

consuming alcohol, which some of the minors conceded. Agent Groff also testified that Andi Mitchell told him that she had seen these four minors consuming alcohol. **But the Department removed the consumption violations from the accusation when it amended it**. In other words, the evidence presented by the Department related to violations which were not at issue.[6]

8. The only evidence the Department submitted relating to the five sale-to-minor counts at issue was McCarthy's testimony that he purchased alcohol inside the Licensed Premises by using a fake ID. The Department did not present evidence concerning how the alcohol was furnished to the other minors. Agent Groff only saw the minors consuming from the stein and the goblet which were already on the table, while Sadler-Wong, Tung, and Keating only testified generally that they were provided with alcohol. In the absence of any details about the circumstances under which Sadler-Wong, Tung, and Keating were provided with alcohol, it is impossible to determine if the Respondent or any of its employees were involved.[7]

9. Since Garrett Macarthur did not appear at the hearing (Finding of Fact ¶ 8) as required by section 25666, cause for suspension or revocation of the Respondent's license was **not** established for the violation of section 25658(a) alleged in count 3.

10. Cause for suspension or revocation of the Respondent's license was **not** established for the violations of section 25658(a) alleged in counts 1, 2, and 4. Specifically, there was no evidence that John Keating, Herbert Sadler-Wong, and Jacky Yeu-Shih Tung purchased any alcoholic beverages inside the Licensed Premises. Additionally, there was no evidence that the Respondent or any of its employees caused any alcohol to be furnished to Keating, Sadler-Wong, or Shih. (Findings of Fact ¶¶ 5-7, 10-15 & 22-24.)

11. Cause for suspension or revocation of the Respondent's license exists under Article XX, section 22 of the California State Constitution, and sections 24200(a) and (b) on the basis that, on February 5, 2016, one of the Respondent's employees, inside the Licensed Premises, sold an alcoholic beverage to Connor McCarthy, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 4, 13-16 & 22-24.)

12. Section 25660 provides a defense to any person who was shown and acted in reliance upon bona fide evidence of majority in permitting a minor to enter and remain in a public

[6] Moreover, since the consumption violations had been removed before the hearing commenced, the Respondent did not present any evidence concerning Keating's, Sadler-Wong's, Tung's, and McCarthy's consumption of alcoholic beverages. Presumably, had such counts been left in place, the Respondent would have called Mitchell, at a minimum, to explain or clarify her hearsay statements to Agent Groff.

[7] Mitchell's hearsay statement that she thought that the other bartender might have sold alcohol to Tung is too vague to be of any use, particularly in the absence of any direct evidence on point.

premises in contravention of section 25665, in making a sale forbidden by section 25658(a), or in permitting a minor to consume in an on-sale premises in contravention of section 25658(b). This section expressly states that "[b]ona fide evidence of majority and identity of the person is any of the following: (1) A document issued by a federal, state, county, or municipal government, or subdivision or agency thereof, including, but not limited to, a valid motor vehicle operator's license, that contains the name, date of birth, description, and picture ofthe person. (2) A valid passport issued by the United States or by a foreign government. (3) A valid identification card issued to a member of the Armed Forces that includes a date of birth and a picture of the person."

13. The defense offered by this section is an affirmative defense. As such, the licensee has the burden of establishing all of its elements, namely, that evidence of majority and identity was demanded, shown, and acted on as prescribed.[8] This section applies to IDs actually issued by government agencies as well as those which purport to be.[9] A licensee or his or her employee is not entitled to rely upon an identification if it does not appear to be a bona fide government-issued ID or if the personal appearance of the holder of the identification demonstrates above mere suspicion that the holder is not the legal owner of the identification.[10] The defense offered by section 25660 is not established if the appearance of the minor does not match the description on the identification.[11]

14. In the present case, the Respondent failed to meet its burden with respect to the fake ID used by McCarthy to purchase beer. The fake ID in question was not presented at the hearing and the only testimony about it was very general. The fact that the ID had Keating's actual photo and physical description is a good starting point, but standing alone is insufficient to establish that it qualified as bona fide evidence of majority as defined by section 25660. Keating, the only witness to testify about the fake ID, could not remember what state purportedly issued it (he only knew that it was not a California ID) and could not recall the birthdate listed on the ID.[12] Additionally, there was no evidence whether or not the ID bore the hallmarks of an actual ID issued by the agency in question. Keating's opinion that it looked like areal ID is insufficient by itself to

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[8] *Lacabanne Properties, Inc. v. DepartmentofAlcoholic Beverage Control*, 261 Cal. App. 2d 181,189, 67 Cal. Rptr. 734, 739 (1968); 27 Ops. Atty. Gen. 233,236 (1956).

[9] *Dept, ofAlcoholic Beverage Control v. Alcoholic ControlAppealsBd. (Masani)*, 118 Cal. App. 4th 1429,1444-45, 13 Cal. Rptr. 3d 826, 837-38 (2004).

[10] *Masani*, 118 Cal. App. 4th at 1445-46, 13 Cal. Rptr. 3d at 838; *5501 Hollywood, Inc. v. Department of Alcoholic Beverage Control*,155 Cal. App. 2d 748,753,318 P.2d 820, 823-24 (1957); *Keane v. Reilly*, 130 Cal. App. 2d 407,411-12,279 P.2d 152, 155 (1955); *Conti v. State Board of Equalization*, 113 Cal. App. 2d 465,466-67, 248 P.2d 31, 32 (1952).

[11] *5501 Hollywood*, 155 Cal. App. 2d at 751 -54,318 P.2d at 822-24; *Keane*, 130 Cal. App. 2d at 411 -12, 279 P.2d at 155 (construing section 61.2(b), the predecessor to section 25660).

[12] There is a crucial difference between and ID which would have made him out be 21 years old and one which would have made him out to be 30, 40, or 50.

establish that the ID qualified under section 25660, since there is no basis for concluding that he knew what an actual ID from the unknown issuing agency looked like.

15. Penal Code section 148(a)(1) provides that it is illegal for a person to willfully resist, delay, or obstruct any peace officer in the discharge or attempt to discharge any duty of his or her office or employment.

16. Cause for suspension or revocation of the Respondent's license was **not** established for the violations of Penal Code section 148(a)(1) alleged in counts 6 and 7. (Findings of Fact ¶¶ 16-21.)

17. The facts in this case establish that, during a two to three minute period, there was confusion. From the agents' perspective, an unidentified man approached them while they were in the middle of an investigation. This man refused to stop even though they yelled that they were police and yelled at him to get back. From the security guard's point ofview, two unidentified men carrying alcoholic beverages as they left the Licensed Premises, a violation of the conditions attached to the license. He stepped forward and told them that they could not do so. When one ofthe men held out his badge, he directed his attention to the other man—the one holding the alcoholic beverages—and insisted that he take the alcoholic beverages back inside. As he did so, he stated that he did not know who this man was. Both agents testified that they yelled out that they were police; the security guard testified that he did not hear them do so.

18. Ultimately, things came to a head. Supv. Agent Joseph Perez, concerned that Olasunkanmi Balogun continued to approach, moved toward Balogun and restrained him. It is worth noting that Balogun's approach was slow enough that Supv. Agent Perez had the time to bend over and set both beers down. It is also worth noting that, after the confusion ended, the agents decided **not** to cite Balogun for interfering with their investigation.

19. The Department, in its closing argument, emphasized that Penal Code section 148(a)(1) uses the word "delay" and argued that Balogun's actions had delayed the agents' investigation. Accordingly, in the Department's opinion, Balogun's actions violated section 148(a)(1). The Department did not cite any authority in support of its argument. Taking the Department's argument to its illogical extreme, ifa mere delay constituted a violation of this section, any person who asked an officer why he was arresting someone, forcing the officer to stop mid-arrest to talk to said person, could be considered to have delayed the arrest and therefore violated section 148(a)(1).

20. There is no evidence that Balogun intended to interfere with the agents' investigation. Rather, unaware of the agents' identities, Balogun was simply trying to keep them from taking the two beers outside. Once he saw Agent Groff's badge, he

changed his focus to Supv. Agent Perez, who had no visible badge. Conversely, since the agents were unaware that Balogun was a security guard, they viewed him as a threat as he approached. Had the two sides known the truth, the situation would not have escalated the way it did. The agents' decision not to cite Balogun once the truth was known further indicates that confusion—not interference—was the source of the problem.

PENALTY

The Department requested that the Respondent's license be suspended for a period of 15 days for each ofthe sale-to-minor violations and 30 days for the Penal Code section 148(a)(1) violation. The Respondent did not recommend a penalty in the event that the accusation, or any counts therein, were sustained. The penalty recommended herein complies with rule 144.[13]

[13] All rules referred to herein are contained in title 4 ofthe California Code of Regulations unless otherwise noted.

ORDER

Count 5 is sustained. In light of this violation, the Respondent's on-sale general eating place license is hereby suspended for a period of 15 days.

Counts 1, 2, 3, 4, 6, and 7 are dismissed.

Dated: November 5, 2017

Matthew G. Ainley
Administrative Law Judge

☐ Adopt

☑ Non-Adopt:

By: 12/14/17

Date: