ISSUED DECEMBER 18, 1996

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

MYUNG SANG PARK and SANG SUL PARK dba Double 8 Liquor Market 8205 East Hellman Avenue Rosemead, CA 91770, Appellants/Licensees, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6616 File: 21-289752 Reg: 9503335 Administrative Law Judge at the Dept. Hearing: Ronald Gruen Date and Place of the Appeals Board Hearing: August 7, 1996 Los Angeles, CA

Myung Sang Park and Sang Sul Park, doing business as Double 8 Liquor Market (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended appellants' off-sale general license for 60 days, with 15 days thereof stayed for a probationary period of one year, for appellants' willfully resisting, delaying and obstructing two Department investigators in their duty and committing a battery upon one of the investigators, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from violations of Business and Professions Code §24200, subdivision (a), and Penal Code §§148, subdivision (a), and 243, subdivision (b).[2]

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[1]The decision of the Department dated November 11, 1995, is set forth in the appendix.

[2]The relevant text of the statutes is set forth in the appendix.

Appearances on appeal included appellants Myung Sang Park and Sang Sul Park, appearing through their counsel, John K. Park; and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued December 8, 1993. Thereafter, the Department initiated a three-count accusation against appellants' license on July 13, 1995. The accusation charged that appellants resisted, delayed, or obstructed two peace officers in the discharge of their duties and did willfully and unlawfully use force against one officer in the performance of his duties. The two other counts concerned individual sales of alcoholic beverages to minors.

An administrative hearing was held on November 1, 1995, at which time oral and documentary evidence was presented. Following the hearing the Administrative Law Judge (ALJ) issued his proposed decision finding that appellants were in violation of Penal Code §§148, subdivision (a), and 243, subdivision (b), but were not in violation regarding the counts of sales of alcoholic beverages to minors.[3] The Department adopted the ALJ's decision in its entirety and suspended appellants' license.

Appellants thereafter filed a timely notice of appeal. In the appeal, appellants generally raise the following issues: (1) appellants' right to due process was violated

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[3]The Department's brief devotes considerable space to arguing that, in fact, there was sufficient evidence to justify findings of two violations of Business and Professions Code § 25658, subdivision (a). Pursuant to Government Code §11517, subdivision (c), the Department may adopt the ALJ's proposed decision in part or in its entirety. In this case the Department adopted the proposed decision in its entirety. Therefore, this issue is not properly before the Board on appeal.

through use of an incorrect standard of proof, (2) there was a lack of substantial evidence to support a finding of battery against a peace officer, and (3) the penalty is excessive.

DISCUSSION

I

The authority of the Department is different than the authority of the Appeals Board. The Department is authorized by the California Constitution to exercise its discretion whether to suspend or revoke an alcoholic beverage license, if the Department shall reasonably determine for "good cause" that the continuance of such license would be contrary to public welfare or morals.

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.[4]

Appellants contend that the findings resulting in the suspension of the license were without basis and unfounded by the evidence presented due to the application of an incorrect standard of proof, thus violating their due process rights. Specifically, appellants argue that in finding the violations, the ALJ was required to use the same

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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].

standard of proof that would be used in a criminal trial for the identical violation. Appellants further argue that no criminal charges were brought, no arrests made, and no criminal trial conducted pursuant to the violations; it is thus error, they contend, to find a violation at all without using the standard of proof that would be afforded them in the criminal courts. Appellants' argument is unavailing. California has three main standards for degree of proof: preponderance of the evidence, clear and convincing evidence, and proof beyond a reasonable doubt. Evidence Code §115 states:

> "The burden of proof may require a party to raise a reasonable doubt concerning the existence or nonexistence of a fact or that he establish the existence or nonexistence of fact by a preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt. . . . Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence."

"Beyond a reasonable doubt" is the standard used in criminal cases in California. See Penal Code §1096. Administrative proceedings, however, are civil in nature and under most circumstances use the "preponderance of the evidence" standard of proof.

The standard of "preponderance of the evidence" is appropriate for disciplinary actions for nonprofessional licenses, such as the ABC license in question here. (McGuire Enterprises (1985) AB-5258.) Only in the suspension or revocation of *professional* licenses does the standard of proof heighten, becoming that of "clear and convincing evidence", as these cases involve the right to professional employment.[5]

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[5]Wright v. Munro (1956) 144 Cal.App.2d 843 [301 P.2d 997] is the only ABC act case to mention a "clear and convincing" standard of proof. Careful reading, however, leads to the conclusion that the court was actually applying "preponderance of the evidence" as the standard: "[T]he evidence produced, although weak, supports the findings and judgment, and that is all that is required." (301 P.2d at 1000.)

(Ettinger v. Board of Medical Quality Assurance (1982) 135 Cal.App.3d 853 [185 Cal.Rptr. 601], and Pereyda v. State Personnel Board (1971) 15 Cal.App. 3d 47, 52 [92 Cal.Rptr. 746]; California Administrative Hearing Practice (Cont. Ed. Bar 1984) §3.59 at 202-203, and 1 Witkin, California Evidence 3d, Introduction, Evidence in Administrative Proceedings. As there is no minimum literacy, knowledge, or education requirement to obtain an ABC license, an ABC license falls into the *nonprofessional* category. (McGuire Enterprises, supra; Amouri (1994) AB-6398.) As such, the "preponderance of the evidence" standard of proof accorded by the ALJ was appropriate and was not violative of appellants' due process rights. The Appeals Board has consistently held that the burden of proof to be used in Alcoholic Beverage Control (ABC) Act cases is "preponderance of the evidence." (Midway Resources (1996) AB-6490, Haddad (1994) AB-6373, McGuire Enterprises, supra, and Bruno's (1993) AB-6307).

Appellants argue that an ABC license is a valuable property right and thus due process requires a hearing before licensees may be deprived of this property interest, citing Dash, Inc. v. Alcoholic Beverage Control Appeals Board (1982) 638 F.2d 1229. [App. Brief 8]. Appellants contend that their due process rights were first threatened when the investigators were at the premises and attempted to remove their license from the premises [App. Brief 12]. The license, however, was demonstrated only to have been removed from the premises to obtain information for the investigation, due to appellants' denials of ownership and interferences with the officers' performance of their duties [RT 91-94, 120]. The license was returned to the premises after the information was obtained with the help of the uniformed backup police officers [RT 95-

96]. There was no indication that the investigators were summarily revoking the license at the time of the incident. There is no unlawful seizure of property. Appellants seem to forget that the possession of an ABC license is a *privilege*, not a *right*. A license is technically the property of the state, allowing its holder to engage in a practice (in this case, the sale of alcoholic beverages) which would otherwise be illegal. The license is given according to certain lawful constraints, the violation of which may result in the loss, temporarily or permanently, of that privilege.

Appellants due process contentions and arguments are without merit.

II

Appellants contend that there was a lack of substantial evidence to support a finding of battery against a peace officer. "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]; 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].) The court in County of Mariposa v. Yosemite West Associates (1988) 202 Cal.App.3d 791, 807 [248 Cal.Rptr. 779] stated: "'[I]n examining the sufficiency of the evidence to support a questioned finding, an appellate court must accept as true all evidence tending to establish the correctness of the finding as made. . . . Every

substantial conflict in the testimony is . . . to be resolved in favor of the finding.' (Bancroft-Whitney Co. v. McHugh (1913) 166 Cal. 140, 142 [134 P. 1157].)"

The account given by the investigators and the minors is quite different than that of co-licensee Mrs. Park. The security camera videotape from the premises supports the statements made by the investigators and the minors. Where there are conflicts in the evidence, however, the Appeals Board is bound to resolve conflicts of evidence in favor of the Department's decision, and must accept all reasonable inferences which support the Department's findings. (Kirby v. Alcoholic Beverage Control Appeals Board (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857], a matter where substantial evidence supported the Department's as well as the license-applicant's position); Kruse v. Bank of America (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 217]; Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control (1968) 261 Cal.App.2d 181 [67 Cal.Rptr. 734, 737]; Gore v. Harris (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

Appellants argue that there was insufficient substantial evidence to support the finding of a violation of Penal Code §243, subdivision (b). By finding such, appellants insist that the Department has convicted them of a crime without probable cause or trial. In essence, it is asserted that the licensees' actions did not constitute a penalty for battery as set forth under §243, subdivision (b). The relevant portion of Penal Code §243, subdivision (b) provides as follows:

> "(b) When a battery is committed against the person of a peace officer. . . . in the performance of his or her duties . . . and the person committing the offense knows or reasonably should know that the victim is a peace officer. . . the battery is punishable by a fine not exceeding two thousand dollars ($2,000), or by imprisonment in a county jail not exceeding one year, or by both the fine and imprisonment."

Thus, what might otherwise be a simple battery carries a higher level of punishment when the victim is a peace officer engaged in the performance of his or her duties.

The record shows that Investigators Pacheco and Barnes tried to obtain licensing information from the licensee in an investigation regarding a possible sale of alcoholic beverages to minors.[6] When Pacheco was unable through questioning to determine who owned the license, he reached across the counter of the premises and took the framed license off the wall [RT 89, 91-94, 119]. Co-licensee Mrs. Park started screaming incoherently and tried to remove the license from Pacheco's hand [RT 92, 119].

The situation worsening, Pacheco gave the license to Barnes to go outside to obtain the information from the license [RT 93-94, 120]. Co-licensee Mr. Park grabbed the license and blocked the door, preventing Barnes from exiting even after repeated requests for him to move [RT 95, 97, 120]. Pacheco then took Mr. Park by the arms and physically moved him aside to allow Barnes to pass [RT 98, 122-23]. Mrs. Park, still screaming, then grabbed and pulled on Pacheco's arm to release his grip on Mr. Park [RT 98, 124]. To prevent the situation from further escalating, uniformed backup officers were then summoned [RT 96, 101].

Licensees must be assumed to have known that the two individuals were peace officers. The officers showed their identifications to the licensees more than once [RT 63, 80-81, 92, 119]. They tried to explain the possible violation that had occurred and

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[6]The investigators had legal authority under Business and Professions Code §25755 "in enforcing the provisions of [the Act, to] visit and inspect the premises of any licensee at any time during which the licensee is exercising the privileges authorized by his or her license on the premises."

the need for information from the license [RT 89] and were met with verbal and physical resistance.

The testimony of the investigators and the minors, supported by the videotape which recorded a portion of the confrontation of appellants, was found by the ALJ to be more credible than that of co-licensee Mrs. Park. The credibility of a witness's testimony is 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]; Lorimore v. State Personnel Board (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640, 644].)

Appellants' also argue that "[b]attery is not a crime of 'moral turpitude' (citations omitted)" thus supposedly, not providing grounds upon which to suspend the license under California Constitution, article XX, §22, and Business and Professions Code §24200, subdivision (a). Appellants seem to argue that even if battery on a peace officer did occur, it is not a sufficient violation to warrant a penalty. Appellants misinterpret the statute as meaning that only a crime of moral turpitude can result in a penalty. The State Constitution contains at least two significant clauses regarding grounds for the Department's authority to discipline licensees: the "moral turpitude clause" and the "public welfare and morals clause." In Boreta Enterprises, Inc., supra at 99, the Court declared:

> "It is not disputed that . . the Department may properly look to and consider a licensee's violation of the Alcoholic Beverage Control Act, the Penal Code, other state and federal statutes, or Department rules as constituting activities contrary to public welfare or morals. . . ."

(See also Mercurio v. Department of Alcoholic Beverage Control (1956) 144

Cal.App.2d 626, 622 [301 P.2d 472]; Cornell v. Reilly (1954) 127 Cal.App.2d 178 [273 P.2d 572].) Were this a crime of moral turpitude, the license would certainly be revoked; however, where the penalty is suspension, there is no requirement that the violation be one of moral turpitude in order to warrant action against that license.

The important evaluation is whether violation of Penal Code §§ 148, subdivision (a), and 243, subdivision (b), has a rational relationship to the operation of the licensed business in a manner consistent with public welfare and morals. The violation occurred in a licensed premises open to the public, the providing the requisite nexus between the violation and its potential negative effects on public welfare and morals.[7]

We conclude that the contention and arguments of appellants have no merit.

III

Appellants contend that the penalty is excessive. The Appeals Board will not disturb the Department's penalty orders in the absence of an abuse of the Department's discretion. (Martin v. Alcoholic Beverage Control Appeals Board & Haley (1959) 52 Cal.2d 287 [341 P.2d 296].) However, where an appellant raises the issue of an excessive penalty, the Appeals Board will examine that issue. (Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183].)

Appellants in the present matter argue that the recommended penalty is

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[7]H.D. Wallace and Assoc. v. Department of Alcoholic Beverage Control (1969) 271 Cal.App.2d 589 [76 Cal.Rptr. 749, 752] states: "Properly construed, the public welfare and morals clause permits license termination [or suspension] for law violations not involving moral turpitude but having a rational relationship with the operation of the licensed business in a manner consistent with public welfare and morals."

excessive, especially emphasizing there has been no unlawful conduct at the premises since the date of initial licensing. While licensee's record of conduct may influence the severity of the penalty imposed, it is merely one factor to consider and is certainly not the definitive determinant in the Department's decision.

The Department had the following factors to consider: (1) the licensees knew or should have known the investigators were peace officers engaged in the performance of their duties; (2) the obstruction and interference by appellants with the performance of that duty; (3) actions by licensees creating a dangerous situation for investigators; and (4) acts of employees in assisting licensees' action against the investigators. Considering such factors, such dilemma as to the appropriateness of the penalty must be left to the discretion of the Department. The Department having exercised its discretion reasonably, the Appeals Board will not disturb the penalty.

CONCLUSION

The decision of the Department is affirmed.[8]

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

JOHN B. TSU, MEMBER, Abstaining.

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[8]This final order is filed as provided by Business and Professions Code §23088, and shall become effective 30 days following the date of this filing of the final order as provided by §23090.7 of said statute for the purposes of any review pursuant to §23090 of said statute.