ISSUED APRIL 30, 1997

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

HOMETOWN CONCEPTS, INC. dba Huntington Beach Beer Company 201 East Main Street Huntington Beach, CA 92648, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6659 File: 23-272787 Reg: 95033438 Administrative Law Judge at the Dept. Hearing: Sonny Lo Date and Place of the Appeals Board Hearing: November 6, 1996 Los Angeles, CA

Hometown Concepts, Inc., doing business as Huntington Beach Beer Company (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended appellant's small beer manufacturer's license for 30 days, with 15 days stayed for a one-year probationary period, for appellant's employees having willfully delayed or obstructed two Department investigators from conducting their investigation at the premises, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Penal Code section 148, subdivision (a).

[1]The decision of the Department under Government Code §11517, subdivision (c), dated April 26, 1996, and the Administrative Law Judge's proposed decision dated October 26, 1995, are set forth in the appendix.

Appearances on appeal include appellant Hometown Concepts, Inc., appearing through its counsel, Ralph Barat Saltsman and Stephen Warren Solomon; and the Department of Alcoholic Beverage Control, appearing through its counsel, John P. McCarthy.

FACTS AND PROCEDURAL HISTORY

Appellant's license was issued in October 1992. Thereafter, the Department instituted an accusation against appellant on August 3, 1995. Appellant requested a hearing.

An administrative hearing was held on October 23, 1995, at which time oral and documentary evidence was received.

At that hearing, it was determined that during the late evening or early morning hours of June 2-3, 1995, two Department investigators entered appellant's premises to investigate whether a customer who had been served a beer was a minor. They learned that the suspected minor's identification was outside, and the two investigators accompanied her to get it. One of the investigators had "seized" the beer as evidence and had it in her hand as she left the pub. The security guard refused to allow them to exit the premises with the beer until the manager appeared.

Subsequent to the hearing, the Administrative Law Judge (ALJ) issued his proposed decision, which suspended appellant's license for five days. The Department rejected the proposed decision and in a decision issued under

Government Code §11517, subdivision (c), suspended the license for 30 days, with 15 days stayed for a one-year probationary period. Appellant filed a timely appeal.

In its appeal, appellant raises the issue that the evidence does not support the finding that appellant's employees violated Penal Code §148, subdivision (a), since they did not know nor reasonably could have known that the investigators were peace officers acting in the conduct of their duty, their verbal conduct did not constitute obstruction of the officers, and the employees' failure to provide identification as requested by the officers did not constitute a violation of the statute.

DISCUSSION

Appellant contends that its employees did not violate Penal Code §148, subdivision (a).

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].) Where there are conflicts in the evidence, 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 case where there was substantial evidence supporting 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. 271]; Lacabanne Properties, Inc. v.

Department of Alcoholic Beverage Control (1968) 261 Cal.App.2d 181 [67 Cal.Rptr. 734, 737]; and Gore v. Harris (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

Penal Code §148, subdivision (a), provides:

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

Department investigators are "peace officers" for purposes of this section of the Penal Code. (Pen. Code,§830.2, subd. (h); Bus. & Prof. Code, §25755.)

In order to violate this statute, the security guard must have "(1) . . . 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 [security guard] knew or reasonably should have known that the other person was a peace officer engaged in the performance of his or her duties." (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].)

A. Appellant argues that the refusal of the security guards to provide the ABC investigators with identification is not a violation of the statute. In support, appellant cites a case which held that the refusal of an arrestee to provide personal identification following his arrest for a misdemeanor did not constitute resisting a peace officer. (People v. Quiroga (1993) 16 Cal.App.4th 961[20 Cal.Rptr.2d 446].) We agree that Quiroga supports appellant's position, since the failure of the

security guards to identify themselves "did not delay or obstruct a peace officer in the discharge of any duty within the meaning of [Penal Code §148]." (People v. Quiroga, supra, 16 Cal.App.4th at 966.) The Department has not alleged that any statute requiring identification applied in this situation; without that, the refusal to give one's name to a peace officer does not violate §148. (See In re Gregory S. (1993) 112 Cal.App.3d 764, 779-800 [169 Cal.Rptr. 540].)

B. Appellant contends that it was unreasonable to find a violation of the statute when the only "obstruction" by the security guards that could possibly be alleged was verbal. Appellant cites the case of People v. Quiroga, supra, for the proposition that speech alone cannot constitute a violation of Penal Code §148. This statement goes somewhat farther than Quiroga. The Quiroga court stated that "Penal Code section 148 is not limited to nonverbal conduct involving flight or forcible interference with an officer's activities. No decision has interpreted the statute to apply only to physical acts, and the statutory language does not suggest such a limitation." (People v. Quiroga, supra, 16 Cal.App.4th at 968.) The court did go on to say, however, that "the statute must be applied with great caution to speech. Fighting words or disorderly conduct may lie outside the protection of the First Amendment (Houston v. Hill, [(1987) 482 U.S. 451[96 L.Ed.2d 398]]), ... But the areas of unprotected speech are extremely narrow." (Ibid.) The court also emphasized the right of individuals to verbally contest an officer's actions:

> "Moreover, appellant possessed the right under the First Amendment to dispute Officer Stefani's actions. '[T]he First Amendment protects a significant amount of verbal criticism and challenge directed at police officers.' (Houston v. Hill (1987) 482 U.S. 451, 461 [96 L.Ed.2d

> 398, 411-412, 107 S.Ct. 2502].) Indeed, '[t]he freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state.' (Id. at pp. 462-463 [96 L.Ed.2d at pp. 412-413].) While the police may resent having abusive language 'directed at them, they may not exercise the awesome power at their disposal to punish individuals for conduct that is not merely lawful, but protected by the First Amendment.' (Duran v. City of Douglas, Ariz. (9th Cir. 1990) 904 F.2d 1372, 1378.)"

(Id., at 966.)

There is no evidence or allegation in the record of "fighting words," disorderly conduct, or even abusive language. Telling the investigators that they could not take the beer out of the establishment did not constitute a violation of §148, even when the security guard briefly stood in the way of the investigator. (See, e.g., People v. Wetzel (1974) 11 Cal.3d 104 [113 Cal.Rptr. 32].)

C. Appellant contends that there was no violation of §148 because the security guards did not know, and reasonably could not have known, that the ABC investigators were peace officers. It argues that the investigators did not adequately identify themselves to the security guards initially, but after they did, the security guards cooperated with the investigators. Accordingly, appellant argues that the security guards cannot be said to have willfully delayed the investigators.

The ALJ, in his proposed decision, made a finding that the security officers "either did not see the badges, or did not believe they were authentic." (Finding of Fact V.) In his proposed Order, the ALJ stated that the security guards stopped the investigators "in order to enforce a condition of [appellant's] alcoholic beverage

license, not to delay or obstruct the investigators' discharge of their duties," and considered this in mitigation in ordering a suspension of only five days.

The Department, in its decision under §11517, subdivision (c), recited no factors in mitigation, rejecting entirely the testimony of the security guard as lacking credibility. The Department made several findings, apparently based on the testimony of the two investigators, Weldon and Eckhoff. In Finding of Fact II, the Department states that "Eckhoff's state peace officer badge was clearly displayed" when she attempted to exit the premises and was stopped by the security guard. This Board has not found any specific testimony stating that the badge was displayed "clearly," what the lighting conditions were like, how far away from the security guard investigator Eckhoff was, or other circumstances that would affect the guard's ability to see her badge clearly. Nevertheless, in rejecting the testimony of the security guard that the investigators did not clearly display their badges, the Department obviously made the negative inference that the badges were, in fact, clearly displayed. Therefore, the guards reasonably should have known that they were dealing with peace officers. Under these circumstances, even though the statute was not violated by the guards' verbal obstruction or by their initial refusal to provide identification, the 10-minute delay in the investigation was, technically, sufficient to constitute a violation of Penal Code §148.

The record in this case does show a violation of Penal Code §148, but it was certainly not an egregious one. The security guards simply stopped patrons, who were dressed in jeans, as the patrons were carrying a beer out of the premises,

because a condition on appellant's alcoholic beverage license prohibited taking beer out of the premises. The guards were acting in the regular course of their duties, attempting to prevent the violation of the condition on the license. The security guards did not take at face value the assertion of special authority and the brief display of badges by the Department's agents, since others had attempted to circumvent rules in this manner on other occasions. If the person carrying the beer out had not been a Department investigator, the security guards would have been derelict in their duties had they not challenged that person's right to remove the beer from the premises. The delay caused by the security guards in this situation was, although technically a violation of the statute, at least understandable.

It is clear that there was a confrontation in which voices were raised, and that the Department investigators were delayed by this. It is also clear that both the Department personnel and the security guards, in trying to do their respective jobs, might well have handled the situation more effectively. We realize that the Department must have cooperation from licensees when conducting an investigation and that some disciplinary action is warranted in this case. However, we find that under the particular circumstances of this case, a substantial suspension is not reasonable. This is not a case of violently resisting arrest or of actively and intentionally interfering with an investigation. There are also a considerable number of mitigating factors in this instance: the security guards, just like the investigators, were acting within the scope of their duties; the security guards 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 guards to be disinclined to accept badges at face value since some patrons do try to use badges to circumvent rules; the investigation was not materially delayed and was completed shortly thereafter; and this was the first violation appellant has been charged with since opening in 1992.

In light of the nature and circumstances of the violation in this case and the apparent disregard by the Department of the mitigating circumstances, we find that the Department abused its discretion in imposing the penalty it did.

CONCLUSION

The decision of the Department is affirmed, except that the penalty ordered is reversed, and the matter is remanded to the Department for reconsideration of the penalty.[2]

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

[2]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.