

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 17-AA-13

2461 CORPORATION T/A MADAM’S ORGAN, PETITIONER,

v.

DISTRICT OF COLUMBIA ALCOHOLIC BEVERAGE CONTROL BOARD, RESPONDENT.

Petition for Review of an Order
of the District of Columbia Alcoholic Beverage Control Board
(15-251-157)

(Argued March 20, 2018)

Decided May 1, 2018)

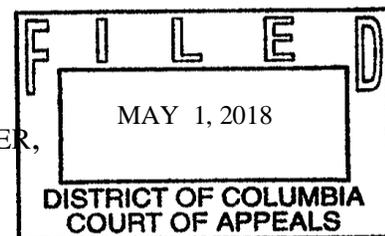
Before FISHER and EASTERLY, *Associate Judges*, and FARRELL, *Senior Judge*.

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: The District of Columbia Alcoholic Beverage Control Board (“the Board”) concluded that petitioner 2461 Corporation t/a Madam’s Organ (“Madam’s Organ” or “petitioner”) violated D.C. Code § 25-823 (a)(5) (2012 Repl.) by failing to allow an investigator to enter the premises without delay. Petitioner argues that the Board’s decision is not supported by substantial evidence and that the Board misinterpreted the meaning of “delay.” We affirm.

I. Background

On September 5, 2015, the Metropolitan Police Department (“MPD”) received a complaint about noise at Madam’s Organ, a bar located in the Adams Morgan neighborhood. MPD notified Alcoholic Beverage Regulation Administration (“ABRA”) Supervisory Investigator Craig Stewart of the complaint. Investigator Stewart and his team, which included Investigators Mark Brashears and Torren Fox, arrived at Madam’s Organ around 1:40 a.m. to conduct an inspection. Daniel Carr was working at Madam’s Organ that evening as security and stood by the front entrance collecting money. As Investigator Stewart tried to enter the establishment, the Board found, Mr. Carr “attempt[ed] to block his path” and “push[ed] on the supervisory investigator with his body.” Petitioner



was charged with violating D.C. Code § 25-823 (a)(5) (2012 Repl.) which states in relevant part: “The Board may fine, . . . and suspend, or revoke the license of any licensee . . . if: The licensee fails or refuses to allow an ABRA investigator . . . to enter or inspect without delay the licensed premises”

The Board held a two-day show cause hearing on March 9 and July 20, 2016. After listening to testimony and watching video footage submitted by petitioner, the Board issued a written Order on November 30, 2016. Although the Board noted there were “some inconsistencies with the testimony of witnesses on both sides,” it was ultimately “persuaded that the Government’s version of events . . . [was] accurate and corroborated by the video evidence in the record.” Because the “videos clearly miss and exclude parts of the incident,” the Board also concluded it was reasonable to “make inferences about events that occurred within the missing moments of the footage, as well as anything obscured in the video or occurring off-camera.”

The Board credited Investigator Stewart’s testimony and found that he “had his badge visibly displayed on his chest when he first approached Mr. Carr.” Investigator Stewart also testified that he heard Mr. Carr say into a radio, “ABRA’s here,” notifying management of the investigator’s arrival as he reached the entrance. Investigator Stewart said he showed the badge that was “hanging from a chain on his neck” to Mr. Carr and indicated that he was with ABRA and going to enter the establishment. The Board found that the video footage was consistent with Investigator Stewart’s testimony and “show[ed] the corner of a black object” on his chest as he approached Mr. Carr and tried to enter the bar. The Board “infer[red]” that the black object was the leather case that contained the investigator’s badge and that Mr. Carr’s body “obscure[d] the investigator holding it up to Mr. Carr.” To the extent that the other video angles did not show Investigator Stewart’s badge, the Board was “satisfied that the badge was being obscured by the crowd, individual bodies, and a pole.”

After Mr. Carr told Investigator Stewart to “wait for him to get a manager,” Investigator Stewart cautioned Mr. Carr that he could “not delay or impede the investigation team.” He then “stepped to the right, in an attempt to go around Mr. Carr.” “In response, Mr. Carr moved in front of Supervisory Investigator Stewart to block his entrance into the establishment.” The Board determined that the camera “footage show[ed] Mr. Carr step to his left with his arm out in front of the supervisory investigator as [he] attempted to enter.” Mr. Carr then “lean[ed] down on” Investigator Stewart and “push[ed] him against the wall with his chest and shoulder.” Eventually, Investigator Stewart entered the establishment and told

the bar's manager what had happened. Along with the video footage, the Board also found that the testimony of Investigator Mark Brashears "corroborated the testimony provided by" Investigator Stewart.

Although "the Board considered Mr. Carr's testimony that Supervisory Investigator Stewart's badge was not visible" and that he "only stood there" as the investigator entered the bar, it determined that his statements were "unreliable" and contradicted by the video footage. The Board also noted that "witness testimony by [petitioner's] doorman and manager attempting to bolster Mr. Carr's testimony [could not] be deemed reliable based on the lack of firsthand knowledge."

Thus, the Board concluded that Mr. Carr "impeded and delayed" Investigator Stewart by "stepping in front of the investigator, putting his arm out, and pushing on the supervisory investigator with his body." "Even though the delay was only momentary and did not prevent the supervisory investigator from ultimately entering the premises, this act [was] sufficient to constitute a violation of § 25-823 (a)(5)." In its written Order, the Board focused on the fact that Mr. Carr "push[ed]" Investigator Stewart and cited two Ohio cases that involved physical obstruction of an officer who was performing his duties. The Board sustained the government's charges and imposed a \$1,000 fine on petitioner.

II. Analysis

"This court reviews with deference the factual findings of the Board, reversing only if the findings are not based on substantial evidence in the record as a whole." *Levelle, Inc. v. District of Columbia Alcoholic Beverage Control Bd.*, 924 A.2d 1030, 1035 (D.C. 2007). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Tiger Wyk Ltd., Inc. v. District of Columbia Alcoholic Beverage Control Bd.*, 825 A.2d 303, 307 (D.C. 2003). "[A]s long as [the] agency's decision is properly supported by substantial evidence in the record, we will not substitute our own judgment for that of the agency even though there may also be substantial evidence to support a contrary decision." *Acott Ventures, LLC v. District of Columbia Alcoholic Beverage Control Bd.*, 135 A.3d 80, 88 (D.C. 2016) (internal quotation marks and citation omitted). However, we review legal conclusions of the Board *de novo*. *Levelle, Inc.*, 924 A.2d at 1035.

A. The Board's Findings Are Supported by Substantial Evidence

Petitioner claims that the Board's findings are not supported by substantial evidence in the record. We disagree and conclude that there was substantial evidence from which the Board could find that Mr. Carr intentionally failed to allow Investigator Stewart to enter Madam's Organ without delay. The Board heard conflicting testimony about whether Mr. Carr knew the investigators were with ABRA and chose to credit the testimony of Investigator Stewart. "[C]redibility findings by a trier of fact who has had the opportunity to observe the witnesses and assess their demeanor are accorded considerable deference by reviewing courts." *Eilers v. District of Columbia Bureau of Motor Vehicles Servs.*, 583 A.2d 677, 684 (D.C. 1990). This court "will not redetermine the credibility of witnesses where" the fact finder "had the opportunity to observe their demeanor and form a conclusion." *Shepherd v. United States*, 905 A.2d 260, 262 (D.C. 2006) (internal quotation marks and citation omitted).

The Board found that Investigator Stewart's testimony was reliable and corroborated by both video footage and testimony from Investigator Brashears. Although the Board "considered" Mr. Carr's testimony that Investigator Stewart was not wearing his badge and refused to show identification, it ultimately found that Mr. Carr's story was "unreliable" and contradicted by the video footage. The Board also determined that the testimony from petitioner's additional witnesses did not "bolster Mr. Carr's testimony" because the witnesses missed key parts of Mr. Carr's interaction with Investigator Stewart. Given that it is not our role to "redetermine the credibility of witnesses," we defer to the Board's findings.

Petitioner claims that the "cameras show conclusively" that Investigator Stewart was not wearing his badge when he approached Mr. Carr and attacks the Board's conclusion that the "small dark patch" depicted in the video is the leather case containing the badge. Although we are not persuaded by the Board's inference that the small black object is the corner of Investigator Stewart's badge, we nevertheless conclude that substantial evidence supports the Board's decision.

As the Board noted, the video "footage skips randomly" and "clearly miss[es] and exclude[s] parts of the incident." Investigator Stewart is never in full view of the cameras and is partially obscured by Mr. Carr's body or other objects until he comes back out of the establishment. Thus, the footage does not conclusively disprove or contradict Investigator Stewart's testimony that he displayed his badge, as petitioner argues, and is fairly consistent with his other statements. Because the Board found that Investigator Stewart's testimony was

credible and corroborated by the video footage and Investigator Brashears' testimony, we conclude that the Board's findings are supported by substantial evidence.

B. The Board Did Not Misinterpret § 25-823 (a)(5)

Petitioner also claims that the Board erred "in holding that a licensee can be liable under D.C. Code § 25-823 (a)(5) for 'delaying' an inspection without there being any element of intention on the part of the licensee nor any element of materiality respecting the degree of the alleged 'delay.'" It argues that Mr. Carr did not "inten[d] to deliberately prevent entry" of an ABRA investigator because Investigator Stewart failed to properly identify himself and Mr. Carr did not know he was with ABRA. Petitioner also argues that the delay was "at most merely a few seconds" and therefore "not material such as to support a charge of delaying an inspection."

As discussed above, the Board did not credit Mr. Carr's testimony and found that Investigator Stewart declared he was with ABRA and showed identification to Mr. Carr as he entered the bar. We defer to the Board's factual and credibility findings and uphold its determination that Mr. Carr intentionally delayed Investigator Stewart from entering the establishment. Petitioner also claims that, because only "a few" seconds passed from the time Investigator Stewart arrived outside of Madam's Organ and approached Mr. Carr to the time he entered the bar, there was no material delay. Assuming without deciding that materiality is an element of § 25-823 (a)(5), substantial evidence in the record supports the conclusion that the delay was material.

Although the Board recognized in its written Order that "a violation under § 25-823 (a)(5) may be found where the delay is only 'momentary'" and cited *In re Jasper Ventures, LLC t/a K St.*, Case Nos. 10-CMP-00540, 10-251-00282, Board Order No. 2011-403, ¶ 27 (D.C.A.B.C.B. Oct. 12, 2011), it primarily relied upon its findings that Mr. Carr "lean[ed] down on" Investigator Stewart and "push[ed] him against the wall with his chest and shoulder" to conclude that there was a delay. Therefore, we need not decide whether this brief temporal delay by itself was material, and focus as well on the physical obstruction Mr. Carr interposed.

The Board repeatedly noted that Mr. Carr "pushed" Investigator Stewart and cited two cases from Ohio that involved physical obstruction of an officer who was performing his duties. The Ohio cases interpreted a statute similar to D.C. Code § 25-823 (a)(5) that included the word "delay" and, according to the Board,

showed that “minor or brief contacts between the accused and government officials may result in a violation, even if the official is not ultimately prevented from fulfilling [his] desired intent.” *See State v. Flickinger*, No. 06CA44, 2007 WL 1821685, at *1, *3 (Ohio Ct. App. June 21, 2007) (grabbing officer’s wrist and refusing to let go was an affirmative act that intentionally obstructed and delayed the officer from investigating). Although Mr. Carr only briefly prevented Investigator Stewart from entering the bar, the Board reasonably found that Mr. Carr’s physical contact with Investigator Stewart constituted a delay which violated the statute. Thus, we affirm the Board’s finding that petitioner intentionally violated § 25-823 (a)(5).

III. Conclusion

The Alcoholic Beverage Control Board’s judgment is hereby

Affirmed.

ENTERED BY DIRECTION OF THE COURT:



JULIO A. CASTILLO
Clerk of the Court

Copies to:

Gregory A, Slate, Esquire
PO Box 21020
Washington, DC 20009

Copies e-served to:

Ronald R. Massumi, Esquire

Richard S. Love, Esquire

Loren L. AliKhan, Esquire
Solicitor General – DC