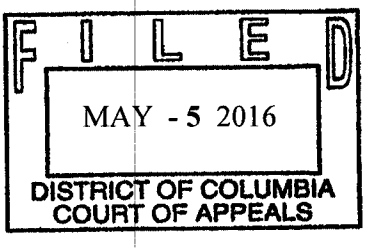
DISTRICT OF COLUMBIA COURT OF APPEALS

No. 14-AA-277



SAMI RESTAURANT, LLC T/A BISTRO 18,
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
(No. 2014-075)

(Submitted November 10, 2015 Decided May 5, 2016)

Before BLACKBURNE-RIGSBY and THOMPSON, *Associate Judges*, and REID, *Senior Judge*.

MEMORANDUM OPINION AND JUDGMENT

PER CURIUM: Petitioner Sami Restaurant, LLC appeals a decision of the District of Columbia Alcoholic Beverage Control Board ("the Board") arising from two separate Alcoholic Beverage Regulation Administration ("ABRA") investigations. The Board found petitioner liable for after-hours service and consumption of alcohol, interference with an ABRA investigation, and failure to produce a copy of a settlement agreement upon demand.[1] The Board imposed a fine of $16,000 and a license suspension of twenty days, with nine days suspended. Petitioner argues that the Board erred by (1) enforcing more restrictive hour limitations than appear in D.C. Code § 25-723 and the settlement agreement incorporated into its ABRA license, (2) concluding that a waitress's interference with ABRA investigators constituted action within the scope of her employment, and (3) abusing its discretion in selecting the fine and suspension imposed. We grant the petition for review in part, reverse the unsupported after-hours

[1] In violation of D.C. Code §§ 25-723, 25-823 (5), and 25-711 (a), respectively. All statutory citations herein refer to the 2012 Replacement.

consumption violation on December 18, 2012, and vacate the fine and suspension associated with that violation. We otherwise deny the petition for review.

I.

From 2011 through the relevant investigations in 2012, petitioner owned and operated a restaurant trading as "Bistro 18" located at 2420 18th Street, Northwest, Washington, D.C. The restaurant had an ABRA license with "hours of sale" ending at 1:30 a.m. on Sunday and "hours of operation" ending at 2:00 a.m. on Sunday. The license incorporated a voluntary settlement agreement from 2002 between the former holder of the license and two neighborhood associations, and petitioner was bound by its terms. Under the settlement agreement, petitioner was required "to announce last call at 1:25 a.m. Sunday . . . [,] to discontinue service of alcohol at 1:30 a.m. Sunday . . . [,] and to remove all alcohol from the tables and bar top by 2:00 a.m. Sunday . . . ."[2]

The first incident occurred at 1:45 a.m. on Sunday, November 18, 2012, when Brian Molloy, an ABRA investigator familiar with Bistro 18, followed some patrons into the restaurant. Molloy spoke with the first employee he saw and identified himself as an ABRA investigator. When he looked over to the bar, he observed a different employee serve a beer to a customer and saw the customer drink from that beer. Molloy then asked the owner, Sami Ghulais, for the restaurant's license, which Ghulais provided and which indicated that Sunday hours of sale ended at 1:30 a.m. Molloy informed Ghulais that his restaurant was violating the hours of sale, and his later-completed report indicated a violation of hours of sale. When Molloy testified, however, he explained that he witnessed only service and consumption but not sale because he did not see any exchange of money. Ghulais testified that no service occurred after 1:30 a.m., only consumption of previously-purchased drinks.

The second incident occurred at 1:45 a.m. on Sunday, December 30, 2012, when Molloy returned to the restaurant with another ABRA investigator, Josena MacKenzie. Molloy and MacKenzie identified themselves to the first employee they saw and requested to speak with the ABC-licensed manager or owner. Molloy saw several patrons at the bar and fifteen to twenty five more patrons

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[2] Though petitioner and the two neighborhood associations executed an amendment to the settlement agreement in 2011, the amendment was not incorporated into petitioner's license by the Board until 2013 and did not control at the time of the alleged violations at issue in this case.

across the restaurant. Several patrons had drinks that appeared to be alcoholic beverages, and Molloy instructed MacKenzie to take photographs. A waitress blocked MacKenzie to prevent her from taking photographs, and the waitress continued to block MacKenzie even after she identified herself as an ABRA investigator. Molloy spoke with Mohammad Alhada, the ABC-licensed manager, and recounted the violation on November 18 and the two violations from that night (after-hours consumption and interference by the waitress). Alhada and a non-ABC-licensed manager, Zakaria Ibrahim, apologized for the waitress's interference and provided the restaurant's license, but they could not find a copy of the 2002 settlement agreement. Molloy identified the inability to produce the agreement as another violation, and he and MacKenzie left the restaurant.

The Board charged petitioner with (1) permitting service and consumption of alcohol after Board-approved hours on November 18, 2012; (2) permitting service and consumption of alcohol after Board-approved hours on December 30, 2012, (3) interfering with an ABRA investigation on December 30, 2012, and (4) failing to make a copy of the agreement immediately accessible to the ABRA investigator on December 30, 2012. The Board held a show cause hearing regarding both incidents on October 23, 2013, and heard testimony from Molloy, Ghulais, and Ibrahim. In its Order issued March 5, 2014, the Board credited Molloy and discredited Ghulais regarding the service of alcohol after 1:30 a.m. on November 18, and it credited Molloy regarding the consumption of alcohol, interference with investigator MacKenzie, and failure to produce the settlement agreement after 1:30 a.m. on December 30.[3] The Board majority imposed a total fine of $16,000 and a twenty-day license suspension, with eleven days to be served and nine days to be suspended unless petitioner committed another violation within one year. One member concurred in the liability finding but dissented from the penalty imposed because the majority did not demonstrate that both a fine and a suspension were "in the best interests of the locality" under D.C. Code § 25-447.[4] This petition for review followed.

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[3] The Board's purported "Findings of Fact" merely summarize the evidence from the hearing, but it resolved the material factual disputes within its "Conclusions of Law."

[4] The Board's decision contains a second, shorter concurrence/dissent, but, unlike Board Chairperson Ruthanne Miller's separate opinion, it was not signed by its listed author, Board Member Herman Jones.

II.

"We review decisions of the Board with deference. They will be upheld if they are in accordance with the law and supported by substantial evidence." *Aziken v. D.C. Alcoholic Beverage Control Bd.*, 29 A.3d 965, 972 (D.C. 2011). "Substantial evidence has been defined as 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Park v. D.C. Alcoholic Beverage Control Bd.*, 555 A.2d 1029, 1031 (D.C. 1989) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). We also "defer to the Board's interpretation of the statutes that it is charged with administering unless that interpretation is arbitrary, capricious, or an abuse of discretion." *Aziken*, *supra*, 29 A.3d at 972.

Petitioner raises multiple arguments challenging the Board's conclusion that sale, service, and consumption of alcohol on its premises was prohibited after 1:30 a.m. on Sundays. First, it argues that the Board lacked the power to restrict sale and service beyond the hours listed in D.C. Code § 25-723 (b), which precludes the sale and service of alcohol between "3:00 a.m. and 8:00 a.m. on Saturday and Sunday." This argument lacks merit because the hours listed in § 25-723 (b) apply "[e]xcept as provided in § 25-724," which allows the Board to "further limit the hours of sale and delivery" when issuing a license, renewing a license, or approving a settlement agreement.

Second, petitioner asserts that the license restricts only "hours of sale" to 1:30 a.m. on Sundays, necessarily allowing gratuitous service and consumption of alcohol for the remainder of the "hours of operation" until 2:00 a.m. on Sundays. Petitioner's license incorporated the 2002 voluntary settlement agreement, however, which only required petitioner "to discontinue service of alcohol at 1:30 a.m." on Sunday while allowing beverages to remain on "the tables and bar top" until 2:00 a.m. on Sunday.[5] Because the Board approved and incorporated the

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[5] Settlement agreements impose additional restrictions beyond those in the Board-issued license to protect the interests of protestants — local citizens who opposed the grant of the license — in exchange for the withdrawal of a protest. *See, e.g.*, *North Lincoln Park Neighborhood Ass'n v. D.C. Alcoholic Beverage Control Bd.*, 727 A.2d 872, 875–76 (D.C. 1999). Once the settlement agreement has been approved by the Board, the Board "shall penalize the licensee" for violations. D.C. Code § 25-446; *see also North Lincoln Park Neighborhood Ass'n, supra*, 727 A.2d at 875–76 (reversing and remanding where Board did not impose sanctions for violations of settlement agreement that were not *de minimis*).

settlement agreement and its terms do not contravene the statutory limitations of § 25-723 (b), the more specific sale, service, and consumption limitations outlined in the settlement agreement control.

The settlement agreement's prohibition on service after 1:30 a.m. on Sundays supports the Board's finding of a service violation on November 18, 2012, based on Molloy's credited testimony that service of a beer occurred shortly after he arrived at 1:45 a.m. The evidence supported only a finding of consumption by customers at 1:45 a.m. on December 30, 2012, however, which is permissible under the settlement agreement that permits consumption until 2:00 a.m. on Sunday. Because no testimony indicated that petitioner permitted consumption of alcoholic beverages after 2:00 a.m. on December 30, the finding of a consumption violation on that date is unsupported by substantial evidence.

The Board's decision is sound regarding the remaining violations occurring on December 30, 2012. First, petitioner does not dispute that managers Alhada and Ibrahim failed to produce the settlement agreement upon demand. Contrary to petitioner's argument, Molloy's prior experience investigating the restaurant did not relieve petitioner of its duty under D.C. § 25-711 (a) to "make a copy of the settlement agreement immediately accessible . . . upon request."[6] Second, petitioner was liable under *respondeat superior* for the interference by its waitress because she acted within the scope of her employment. Our jurisprudence conforms to Section 228 of the Restatement (Second) of Agency, which imposes liability on an employer for an employee's conduct that is the kind of work she is employed to perform, within the authorized space and time limits, and motivated at least in part by a purpose to serve the employer. *See Schecter v. Merchants Home Delivery, Inc.*, 892 A.2d 415, 427–28 (D.C. 2006). A waitress's employment at a bar includes compliance with alcohol regulations and, when necessary, limited interaction with ABRA investigators. The waitress's conduct here took place at petitioner's business location during business hours. Finally, the waitress intended the interference for petitioner's benefit because she was aware of MacKenzie's identity as an ABRA investigator and prevented MacKenzie from documenting alcohol consumption. Whether that consumption was ultimately legal or not, substantial evidence supported the conclusion that petitioner's waitress "otherwise interfere[d] with an investigation" within the scope of her employment, placing petitioner in violation of D.C. Code § 25-823 (5).

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[6] Indeed, petitioner's defense in this case — that the settlement agreement permitted its actions where the license was unclear — reflects the need to have it available for ABRA investigators.

Turning to the sanctions imposed, we vacate the $4,000 fine and five-day suspension associated with the unsupported consumption violation on December 30, 2012. Additionally, petitioner challenges the remaining sanctions on other grounds, arguing that the Board (1) lacked authority to impose both a fine and a suspension for each violation; (2) failed to consider the "interests of the locality" under § 25-447 (f); and (3) otherwise abused its discretion in imposing unduly harsh sanctions. These contentions lack merit. First, D.C. Code § 25-823 (a) gives the Board power to "fine . . . and suspend, or revoke the license of any licensee" based on violations of "any provision" of D.C. Code Title 25. By the statute's plain language, fines "and" suspensions may be imposed simultaneously, and the disjunctive "or" applies only to complete revocation of the license, which did not occur in this case.[7] Second, section 25-447 (f) only requires the Board to consider "the best interests of the locality" when imposing "certain conditions" on a license. Title 25 uses the terms "fine" and "suspension" separately from permanent "conditions" placed on a license, so the Board need not separately address "the best interests of the locality" when imposing fines and temporary suspensions.[8] Third, the sanctions imposed fell within the relevant fine range for repeat primary tier violations, *see* 23 D.C.M.R. § 801.1 (b) (prescribing range of $2,000 to $4,000 consistent with D.C. Code § 25-830 (c)(1)),[9] and the suspensions fell within the wide discretion given by D.C. Code § 25-823 (a) (which includes revocation, though that power was not exercised in this case). We do not disturb a sanction within the agency's lawful discretion based on apparent severity. *See Spicer v. D.C. Real Estate Comm'n*, 636 A.2d 415, 418 (D.C. 1993). The sanctions for the

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[7] Petitioner cites inapposite North Carolina precedent interpreting a dissimilar statute that used only the disjunctive. *See In re Bruce*, 387 S.E.2d 82, 83 (N.C. Ct. App. 1990) (holding agency could not impose both a fine and suspension where relevant statute provided that agency "may suspend . . . or levy a fine").

[8] Title 25 repeatedly refers to "fines," *e.g.*, § 25-830, and "suspensions," *e.g.*, § 25-828, and petitioner cites no authority equating those terms with permanent "conditions."

[9] Each violation in this case qualified as a "primary tier violation" because after-hours service and interference are always primary tier violations, *see* 23 D.C.M.R. § 800, and the failure to produce the settlement agreement must be treated as a primary tier violation, although it is usually categorized as a secondary tier violation, because petitioner had already committed more than four secondary tier violations within four years, *see* D.C. Code § 25-830 (d)(2). Further, the violations in this case triggered the second violation fine range of $2000 to $4000, *see* 23 D.C.M.R. § 801.1 (b), because petitioner had a prior primary tier violation.

three surviving violations — a cumulative $12,000 fine and fifteen-day suspension, with seven days stayed — stand as originally imposed.

Accordingly, we grant the petition for review in part, reverse the Board's finding of an after-hours consumption violation on December 30, 2012, and vacate the sanctions imposed for that violation. We otherwise deny the petition for review and affirm the after-hours service violation on November 18, 2012, the interference and failure-to-produce-settlement-agreement violations on December 30, 2012, and the sanctions imposed for those violations.

So ordered.

ENTERED BY DIRECTION OF THE COURT:

Julio A. Castillo

JULIO A. CASTILLO
Clerk of the Court

Copies to:

Gina Mondesir, Esq.
619 Somerset Place, NW
Washington, DC 20011

Todd S. Kim, Esq.
Solicitor General – DC