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

AB-8327
File: 20-287170 Reg: 03056453

NARINDER KUMAR ANAND and USHA ANAND
dba North Hollywood Mini Mart
12050 Roscoe Boulevard, North Hollywood, CA 91605,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen

Appeals Board Hearing: May 5, 2005
Los Angeles, CA

ISSUED JULY 1, 2005

Narinder Kumar Anand and Usha Anand, doing business as North Hollywood Mini Mart (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 25 days, with 10 days thereof conditionally stayed for two years, for their clerk, Gurjit Singh, having sold a 12-pack of Corona beer to Jesus De Leon Sada, a 19-year-old non-decoy minor, and appellant Narinder Kumar Anand having willfully and unlawfully obstructed and prevented Department investigators from completing their investigation, violations of Business and Professions Code section 25658, subdivision (a), and Penal Code section 148, subdivision (a).

Appearances on appeal include appellants Narinder Kumar Anand and Usha Anand, appearing through their counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

---

[1]The decision of the Department, dated August 5, 2004, is set forth in the appendix.

PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on November 3, 1993. On December 22, 2003, the Department instituted an accusation against appellants charging an unlawful sale to a minor (Count 1), the unlawful obstruction and prevention of an investigation (Count 2), and the refusal to permit Department investigators to examine books and records of the licensees (Count 3).

An administrative hearing was held on April 23 and June 22, 2004, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which sustained the charges of Counts 1 and 2 and dismissed the charge in Count 3.

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) the transmission of a hearing report to the decision-maker denied appellants due process; and (2) the findings with respect to the Penal Code section 148 charge are not supported by substantial evidence. Appellants have not challenged the Department's determination that their clerk sold an alcoholic beverage to a minor.

DISCUSSION

I

Appellants assert the Department violated their right to procedural due process when the attorney (the advocate) representing the Department at the hearing before the administrative law judge (ALJ) provided a document called a Report of Hearing (the report) to the Department's decision maker (or the decision maker's advisor) after the hearing, but before the Department issued its decision. Appellants also filed a Motion to Augment Record (the motion), requesting that the report provided to the Department's decision maker be made part of the record. The Appeals Board

discussed these issues at some length, and reversed the Department's decisions, in three appeals in which the appellants filed motions and alleged due process violations virtually identical to the motions and issues raised in the present case: *Quintanar* (AB-8099), *KV Mart* (AB-8121), and *Kim* (AB-8148), all issued in August 2004 (referred to in this decision collectively as "*Quintanar*" or "the *Quintanar* cases").[2]

The Board held that the Department violated due process by not separating and screening the prosecuting attorneys from any Department attorney, such as the chief counsel, who acted as the decision maker or advisor to the decision maker. A specific instance of the due process violation occurs when the Department's prosecuting attorney acts as an advisor to the Department's decision maker by providing the report before the Department's decision is made.

The Board's decision that a due process violation occurred was based primarily on appellate court decisions in *Howitt v. Superior Court* (1992) 3 Cal.App.4th 1575 [5 Cal.Rptr.2d 196] (*Howitt*) and *Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81 [133 Cal.Rptr.2d 234], which held that overlapping, or "conflating," the roles of advocate and decision maker violates due process by depriving a litigant of his or her right to an objective and unbiased decision maker, or at the very least, creating "the substantial risk that the advice given to the decision maker, 'perhaps unconsciously' . . . will be skewed." (*Howitt*, *supra*, at p. 1585.)

---

[2]The Department filed petitions for review with the Second District Court of Appeal in each of these cases. The cases were consolidated and the court affirmed the Board's decisions in *Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2005) 127 Cal.App.4th 615 [25 Cal.Rptr.3d 821]. In response to the Department's petition for rehearing, the court modified its opinion and denied rehearing. (127 Cal.App.4th 615; ___ Cal.Rptr.3d ___). The Department has petitioned the California Supreme Court for review. The court has yet to act on the petition.

Although the legal issue in the present appeal is the same as that in the *Quintanar* cases, there is a factual difference that we believe requires a different result. In each of the three cases involved in *Quintanar*, the administrative law judge (ALJ) had submitted a proposed decision to the Department that dismissed the accusation. In each case, the Department rejected the ALJ's proposed decision and issued its own decision with new findings and determinations, imposing suspensions in all three cases. In the present appeal, however, the Department adopted the proposed decision of the ALJ in its entirety, without additions or changes.

Where, as here, there has been no change in the proposed decision of the ALJ, we cannot say, without more, that there has been a violation of due process. Any communication between the advocate and the advisor or the decision maker after the hearing did not affect the due process accorded appellants at the hearing. Appellants have not alleged that the proposed decision of the ALJ, which the Department adopted as its own, was affected by any post-hearing occurrence. If the ALJ was an impartial adjudicator (and appellants have not argued to the contrary), and it was the ALJ's decision alone that determined whether the accusation would be sustained and what discipline, if any, should be imposed upon appellants, it appears to us that appellants received the process that was due them in this administrative proceeding. Under these circumstances, and with the potential of an inordinate number of cases in which this due process argument could possibly be asserted, this Board cannot expand the holding in *Quintanar* beyond its own factual situation.

Under the circumstances of this case and our disposition of the due process issue raised, appellants are not entitled to augmentation of the record. With no change in the ALJ's proposed decision upon its adoption by the Department, we see no

relevant purpose that would be served by the production of any post-hearing document. Appellants' motion is denied.

II

The Department found that appellant Narinder Anand willfully and unlawfully delayed and obstructed Department investigator Brandon Shotwell from completing his investigation by having his clerk record over the videotape evidence of the sale to the minor, in violation of Penal Code section 148.[3] Appellants challenge certain of the findings relating to this charge as unsupported by substantial evidence.

"Substantial evidence" is relevant evidence which reasonable minds would accept as a 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 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].)

Appellate review does not "resolve conflicts in the evidence, or between inferences reasonably deducible from the evidence." (*Brookhouser v. State of*

---

[3] Penal Code section 148, subdivision (a), provides, in pertinent part:

> Every person who willfully resists, delays, or obstructs any public officer, 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.

California (1992) 10 Cal.App.4th 1665, 1678 [13 Cal.Rptr.2d 658].) Where there are conflicts in the evidence, the Appeals Board is bound to resolve them in favor of the Department's decision, and must accept all reasonable inferences which support the Department's findings. (*Kirby v. Alcoholic Bev. Control App. Bd.* (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857] (in which the positions of both the Department and the license-applicant were supported by substantial evidence); *Kruse v. Bank of America* (1988) 202 Cal.App.3d 38, 51 [248 Cal.Rptr. 271]; *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734]; *Gore v. Harris* (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

The sale to the minor took place at 1:00 a.m. on the day in question. The transaction was witnessed by Shotwell. After issuing citations to the clerk and to the minor, Shotwell told the clerk he intended to seize the surveillance videotape of the transaction. Advised by the clerk that the recorder was in the locked office, to which only appellant Anand had a key, Shotwell called Anand at his home and asked him to come to the store. Anand said to do so would be a hardship, so the two agreed to meet at the store in the morning. Findings 10 through 16 contain the ALJ's assessment of the evidence which bears on the challenged findings, and we set them out here in full, so that appellants' objections to findings 10 and 13, which we have italicized, can be best understood:

> *10. Shotwell agreed to meet with Anand at 10:00 a.m. and he warned Anand that the evidence on the videotape was not to be destroyed or altered in any way. Anand acknowledged the warning and stated "I won't touch it." Shotwell further advised Anand that if he were to arrive at the store before 10:00 a.m., to call Shotwell, and he provided Anand with his cell phone number for this purpose*.
>
> 11. The next morning Anand arrived at his store at 9:00 a.m. instead of the agreed upon hour of 10:00 a.m. He never advised Shotwell of this contrary to their arrangement. He then instructed the on-duty clerk identified as Narinder

Singh Thiara (Thiara) to replay the sale of [sic] the minor portion of the videotape to identify the purchaser of the beer. Anand purportedly gave Thiara directions on how to view, rewind and then eject the tape from the VCR after he was done viewing it. Anand testified he then left the office to work at the cashier counter leaving Thiara to view the tape in the office.

12. Thiara testified that he viewed and rewound the tape but he accidentally hit the record button instead of the eject button, thereby causing the relevant portion of the tape to be erased. He further testified that after realizing his error, he attempted to hit the eject button on the VCR a number of times, with no success in ejecting the tape. He thereupon sought out co-respondent Anand, who then discovered that the evidence had been erased from the tape.

13. The evidence established that the relevant functional buttons on the VCR machine were clearly marked and the record and eject buttons were not in such close proximity as to invite the error described by Thiara. Thiara's testimony stretches credulity and is disbelieved.

14. Investigator Shotwell had arrived at Anand's premises the next morning at 10:00 a.m. and asked for the videotape evidence. Anand advised him the videotape of the incident had been accidentally recorded over. Thereafter, Thiara gave Investigator Shotwell inconsistent versions of how he accidentally erased the pertinent portion of the videotape. Curiously, only the actual part of the videotape containing the sale to minor incident had been erased; the before and after recordings had remained fully intact.

15. Anand never provided an explanation of why he had broken his promises to Shotwell "not to touch" the videotape before Shotwell arrived at the premises, after having been warned of the tape's importance. Further as Shotwell had informed Anand of the importance of the tape as evidence, Anand provided less than lucid reasoning as to why he delegated the duty to view the tape to his clerk, instead of securing it for his meeting with Investigator Shotwell, as he had promised. Nor did he offer a plausible explanation for his failure to contact Shotwell of his arrival at the premises prior to 10:00 a.m.

16. Investigator Shotwell's instructions to respondent Anand the night before to safeguard the videotape had been disregarded resulting in destruction of the evidence relating to Count 1. Based on the evidence and the inferences drawn therefrom, the undersigned is persuaded that the motive of respondent Anand was to undercut the ability of the complainant to prove a violation of Count 1 by destroying video evidence of the violation. Anand's as well as the clerk's testimony that the erasure on the videotape was accidental, is found not to be credible. It is found that the videotape evidence was deliberately erased at the direction of Mr. Anand.

Appellants claim that the statement in finding 10 attributed to Anand - "I won't touch it" was never made; therefore, claim appellants, the decision rests on a faulty

finding of fact.

We have reviewed the 225-plus page record, and are satisfied that the finding is not defective.

Appellants cite examples of Shotwell's testimony where he was asked what he had said to Anand about the videotape, and stresses the absence of any definitive claim by Shotwell that Anand said "I won't touch it." As did the ALJ, we have little difficulty understanding Shotwell's testimony to be that he told Anand, in words Anand would reasonably have understood, not to do anything that would jeopardize the content of the videotape, and that Anand agreed he would do as Shotwell ordered. It is clear from the findings that the ALJ simply did not believe Anand's claim that he did not recall being told not to do anything with the videotape, and that he did not remember whether he told Shotwell he would not do anything with the videotape until Shotwell arrived. Anand did not deny being told not to touch the videotape, or saying he would not. Whether the words Anand spoke were quoted exactly is immaterial; Shotwell's testimony, read as a whole, is sufficient to support the challenged finding.

In any event, the violation of Penal Code section 148 does not turn on whether Anand broke his word to Shotwell. Instead, the critical finding is that Anand and/or Thiara intentionally caused the erasure of the segment of the videotape recording the transaction. We agree with the ALJ that Anand's and Thiara's explanation of how what was on the videotape before the transaction remained intact, as well as that which followed the critical portion, and only the critical portion was "accidentally" erased, was less than credible.

Appellants also contend that Shotwell's testimony establishes that the test he conducted that led him to determine that the erasure could not have occurred in the

manner Anand and Thiara said it had, was conducted on a different recording machine than the one Anand and Thiara had used. Thus, they say, finding 13 is also flawed.

According to Shotwell, Thiara initially told him that, intending to hit the eject button, he hit the record button and left the room. By the time he realized what happened, he had erased the incident from the videotape. Later, Thiara said he was rewinding the tape, and, intending to hit the eject button, hit the record button. Shotwell testified that when he tried to depress the record button while the tape was rewinding, he could not do so. Only by first hitting the stop button, and then the record button, would the machine record. When confronted with this information, Thiara changed his story, admitting hitting the stop button, then the record button instead of the eject button.

Shotwell testified that this last explanation was still flawed. He said that to record, it was necessary to depress the record and play buttons simultaneously. Appellants dispute this, citing the testimony of Anand and Thiara that only the record button had to be depressed. They say Shotwell had conducted his test on a different recorder, one of two in the office.

Shotwell's testimony was equivocal as to whether he recalled there being two recorders in the office, or only one. Appellants say his testimony clearly established there were two, and that he conducted his tests on a recorder other than the one Thiara had used to review the videotape. Appellants brought a video recorder to the hearing, purportedly the one used by Thiara, but did not demonstrate its operation. Shotwell testified that recorder at the hearing was not the one he used for his test.

The ALJ resolved the testimonial conflicts in favor of the Department. Based upon our own review of the record, we are not in a position to say the ALJ erred in

doing so.

The findings, taken as a whole, demonstrate that the erasure of the portion of the videotape recording that would have shown the sale to the minor, but not what preceded and followed it, could not have occurred by accident. The only other conclusion is that it was done intentionally, either by Anand or by Thiara pursuant to the instruction of Anand. The ALJ was not required to accept the denials and explanations of Anand and Thiara to the contrary.

ORDER

The decision of the Department is affirmed.[4]

SOPHIE C. WONG, MEMBER
FRED ARMENDARIZ, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

---

[4] This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate district court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.