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

AB-8336a
File: 47-392950 Reg: 04056912

COUNTY OF SAN DIEGO, et al.,
Appellants/Protestants

v.

BARONA TRIBAL GAMING AUTHORITY
dba Barona Valley Ranch Casino and Resort
1932 Wildcat Canyon Road, Lakeside, CA 92040,
Respondent/Applicant

and

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: May 7, 2009
Los Angeles, CA

ISSUED JULY 21, 2009

County of San Diego, et al. (appellants/protestants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which granted the application of Barona Tribal Gaming Authority, doing business as Barona Valley Ranch Casino and Resort ("Barona") (respondent/applicant), for a conditional on-sale general license. This is the second appeal in this matter, and follows the annulment by the Fourth District Court of Appeal of the Board's decision affirming the initial decision of the Department in 2005 approving issuance of a license.[2] (*Coffin v. Alcoholic Beverage Control Appeals Bd.*

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[1]The decision of the Department, dated December 7, 2007 , is set forth in the appendix.

[2] Only two Board members (Wong and Armendariz) participated in the first
(continued...)

(2006) 139 Cal.App.4th 471 [43 Cal.Rptr.3d 420] (*Coffin)*.)

The Court of Appeal held that the Board erred in imposing the burden of proof on the protestants in connection with the issue of whether the Department's decision was supported by substantial evidence.[3] It did not address any substantive issue.

Upon remand to the Department following the annulment of the Board's decision, the record was supplemented by documentary evidence and testimony presented in three additional days of hearings before administrative law judge (ALJ) Echeverria in July 2007.[4] Thereafter, ALJ Echeverria again ruled that Barona's application should be granted. The present appeal followed.

Appearances on appeal include appellant/protestant County of San Diego ("the County"), appearing through its counsel, John J. Sansone and Thomas L. Bosworth; individual appellants/protestants, appearing through their counsel (also a protestant), Robert B. Coffin; respondent/applicant Barona Tribal Gaming Authority, doing business as Barona Valley Ranch Casino and Resort, appearing through its counsel, Art Bunce and William R. Winship, Jr.; and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry K. Winters.

DISCUSSION

There are two issues raised in the present appeal that we must address:

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[2](...continued)
appeal to the Board.

[3] The court also ruled that the protestants were not parties to the proceeding, but were more like complaining witnesses. Nonetheless, in the present appeal, and in the post-remand hearings, everyone appears to have accorded them a status equivalent to a party.

[4] ALJ Echeverria also presided over the first administrative hearing.

appellants contend that ALJ Echeverria was required to disqualify himself from hearing this matter following the appellate court's decision because he had presided over the original hearing, and that he again improperly allocated the burden of proof to the appellants in connection with the issue whether substantial evidence supported the Department decision.

I

County of San Diego argues that ALJ Echeverria was not qualified to preside over the hearings conducted after remand from the Court of Appeal for two reasons: it contends that section 24210 of the Business and Professions Code,[5] chaptered under the title "Suspension and Revocation," authorizes the Department to appoint its own administrative law judges only in cases involving suspension or revocation, while section 24016, chaptered under the title "Issuance and Renewal of Licenses," requires hearings on protests to be heard by administrative law judges appointed by the Office of Administrative Hearings (OAH). Additionally, the County contends that ALJ Echeverria should have stepped aside when a peremptory challenge asserted by the attorney for the remaining protestants was filed. The County asks that the matter be remanded and heard by an ALJ appointed by OAH. We decline to do so for several reasons.

First, this involves an issue and theories raised for the first time in the County's closing brief in the present appeal, despite the fact that, at the outset of the hearings following remand, the County expressly disavowed any objection to ALJ Echeverria presiding over the hearings (RT 13-21, 3/13/2007; RT 87-89, 7/24/2007.) Now, in

[5] Unless otherwise indicated, references to statutes are to sections of the Business and Professions Code.

apparent hindsight, the County relies on the peremptory challenge made by the Coffin protestants,[6] and attempts to broaden it to include an objection and a theory never presented until the hearings on remand were closed and a proposed decision written. We consider the objection waived. (See *Caminetti v. Pac. Mut. Life Ins. Co. of Calif.* (1943) 22 Cal.2d 386, 389-391 [139 P.2d 930]; see also, 2 Witkin, California Procedure (5th ed. 2008) Courts §128, p. 178 : "In most of the cases holding the challenge too late, the emphasis was not so much on the duration of time that elapsed as on the obvious fact that the party, with knowledge of the disqualifying facts, kept the challenge in reserve until the time of the unfavorable judgment or ruling on the merits.")

Anticipating a waiver argument, the County asserts that the issue of whether ALJ Echeverria should have been disqualified is jurisdictional, i.e., lack of jurisdiction is an issue that can be raised at any time.

Aside from the question whether that rule applies to administrative agencies and administrative hearings, and whether the County's reading of the two supposedly competing sections of the Business and Professions Code is sound, the County is wrong on the law. So long as an adjudicative body has subject matter jurisdiction, an objection to the qualifications of the particular judge assigned to the case does not give rise to a jurisdictional challenge. (See 2 Witkin, California Procedure(5th ed. 2008) Jurisdiction § 95, p. 139.) By analogy, the Department of Alcoholic Beverage Control

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[6] Attorney Coffin's peremptory challenge was premised on Code of Civil Procedure section 170.6, which does not require any showing of bias or prejudice. The Appeals Board, in an earlier case, has held that the Code of Civil Procedure provisions for judicial disqualification do not apply in administrative proceedings. (*Chevron Stations, Inc*. (2003) AB-7912; and see *Gai v. City of Selma* (1998) 68 Cal.App.4th 213, 230-233 [79 Cal.Rptr.2d 910.]) The Board, as did the court in *Gai*, ruled that the provisions of the Administrative Procedure Act set forth what is required to warrant disqualification of an ALJ. We have not been persuaded to the contrary.

clearly had subject matter jurisdiction - the power to hear and decide the matter. Even if the assignment of Judge Echeverria to the matter had been subject to challenge, the issue would not have affected subject matter jurisdiction.

Similarly, the fact that the language in section 24016 remained unchanged when section 24210 was amended in 1995 proves little. Section 24210 empowered the Department to appoint administrative law judges "to hear and decide," without limitation on what they could hear and decide. Government Code section 11410.20 provides that the APA applies to all agencies "except as otherwise expressly provided by statute." With section 24210, the Legislature has otherwise provided by statute that the Department may appoint administrative law judges to hear and decide cases before the Department. It would seem ineluctable that the provisions of Government Code section 11502, upon which the County relies, are superseded by Business and Professions Code section 24210. It simply makes no sense to interpret statutes with almost identical language to produce conflicting results. In *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2002) 99 Cal.App.4th 880, 883-885 [121 Cal.Rptr.2d 753] (*Vicary*), the court acknowledged the broad impact of section 24210 on the right of the Department to appoint its own ALJ's. We find its discussion particularly helpful.

The County has abandoned the position initially expressed by its counsel, and, obviously unhappy with ALJ Echeverria's decision, now attempts to breathe life into a procedurally defective peremptory challenge - the Coffin peremptory challenge - by recasting it as a challenge to an ALJ improperly appointed in the first place.

The County's contention that it would have been entitled to a peremptory challenge if the matter had been heard by an OAH ALJ is also without merit. The

County's contention ignores the language of the OAH regulation in question (Title 1, Cal. Code Regs., §1034) that a peremptory challenge "is not allowed ... in a proceeding on reconsideration or remand." ALJ Echeverria was presiding over the hearings on remand pursuant to the order of the Department directing him to do so, and, thus, immune to a peremptory challenge under that regulation even if he had been an OAH ALJ.

Finally, this Board knows from the many appeals it has heard that Department ALJ's have routinely heard protest matters ever since the Department was authorized in 1995 to appoint its own ALJ's. (See *Vicary, supra*.) There is nothing to be gained by a reading of interrelated statutory provisions that supports the County's position, when, in the last analysis, the County expressly waived its opportunity to object to Judge Echeverria. The Department at all times retained subject matter jurisdiction, so any error could not rise to a constitutional dimension immune to waiver.

We hold the County has voluntarily waived any ground it might have had to disqualify ALJ Echeverria, by assuring him on two different occasions that it had no objection to his presiding over the hearings. We hold as well that the County's reliance on the Coffin protestants' peremptory challenge was similarly waived, and that the Coffin challenge itself lacked merit because it was not based on any ground recognized by the Administrative Procedure Act.

II

Appellants/protestants contend that the decision of the Department is not supported by substantial evidence, arguing that the Department has isolated evidence which supports its decision and ignored facts which rebut or explain that evidence. They place their greatest emphasis on their claim that the decision fails to discuss the

testimony of a Commander in the San Diego Sheriff's Department or refer to affidavits of officials of the Sheriff's Department and the California Highway Patrol regarding traffic and crime problems said to be associated with the issuance of the interim operating permits.

The overriding objections to the issuance of the license in question were and are grounded on fears that difficult driving conditions on Wildcat Canyon Road would be aggravated by the addition of intoxicated drivers. The only access to the premises is over Wildcat Canyon Road.

"Substantial evidence" is relevant evidence which reasonable minds would accept as reasonable support for a conclusion. (*Universal Camera Corp. v. Labor Bd.* (1951) 340 U.S. 474, 477 [95 L.Ed. 456, 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 an appellant charges that a Department decision is not supported by substantial evidence, the Appeals Board's review of the decision is limited to determining, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. (Cal. Const., art. XX, § 22; Bus. & Prof. Code, §§ 23084, 23085; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113].) In making this determination, the Board may not exercise its independent judgment on the effect or weight of the evidence, but must resolve any evidentiary conflicts in favor of the Department's decision and accept all reasonable inferences that support the Department's findings. (*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd*. (*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826];

Kruse v. Bank of America (1988) 202 Cal.App.3d 38, 51 [248 Cal.Rptr. 271]; *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925]; *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, 826-827 [40 Cal.Rptr. 666].)

Substantial evidence, of course, is not synonymous with "any" evidence, but is evidence which is of ponderable legal significance. It must be "reasonable in nature, credible, and of solid value; it must actually be 'substantial' proof of the essentials which the law requires in a particular case." (*Estate of Teed* (1952) 112 Cal.App.2d 638, 644 [247 P.2d 54]; *Kruse v. Bank of America* (1988) 202 Cal.App.3d 38, 51.) Thus, the focus is on the quality, not the quantity of the evidence. Very little solid evidence may be "substantial," while a lot of extremely weak evidence might be "insubstantial." *(Toyota Motor Sales U.S.A., Inc. v. Superior Court, supra).*

Of course, “[t]rial court findings must be supported by substantial evidence *on the record taken as a whole*. Substantial evidence is not [literally] *any* evidence--it must be reasonable in nature, credible, and of solid value.” (*Hill* v. *National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 51 [26 Cal.Rptr.2d 834, 865 P.2d 633], italics [and bracketed insertion] added.)

In reviewing a decision to determine whether it is supported by substantial evidence, the Appeals Board "may not confine [its] consideration to isolated bits of evidence, but must view the whole record in a light most favorable to the judgment, resolving all evidentiary conflicts and drawing all reasonable inferences in favor of the decision of the [Department]. [Citation.] . . . [W]e must accept any reasonable interpretation of the evidence which supports the [Department's] decision." (*Beck*

Development Co., Inc. v. Southern Pacific Transportation Company (1996) 44 Cal.App.4th 1160, 1203 [52 Cal.Rptr.2d 518].)

Appellate review does not "resolve conflicts in the evidence, or between inferences reasonably deducible from the evidence." (*Brookhouser v. State of California* (1992) 10 Cal.App.4th 1665, 1678 [13 Cal.Rptr.2d 658].) It is not the function of the Appeals Board to conduct a trial de novo.

Needless to say, there are many conflicts in the evidence regarding the issue of potential problems, or absence thereof, relating to traffic on Wildcat Canyon Road and the effect of sales of alcoholic beverages at the Barona facilities. Expert witnesses offered contrasting opinions and interpretations of the content and significance of what appellants/protestants claimed were DUI-involved traffic accidents on Wildcat Canyon Road, and which Barona contended were accidents wholly unrelated to the operation of the licensed premises. Law enforcement officials offered their personal views, and individual protestants expressed their concerns. As might be expected, the parties argued vigorously for their respective positions.

We can not say, based on our review of the substantial record in this case, that the Department abused its discretion in concluding that a license should issue. We are well aware that the Department has broad discretion in determining whether or not a license shall issue, and this is an area where that discretion must be respected.

> Where the decision is the subject of choice within reason, the department is vested with the discretion of making the selection which it deems proper; its action constitutes a valid exercise of that discretion; and the appeals board or the court may not interfere therewith. ... Where the determination of the department is one which could have been made by reasonable people, the appeals board or the courts may not substitute a decision contrary thereto, even though such decision is equally or more reasonable in the premises. (Citations omitted).

Koss v. Department of Alcoholic Beverage Control (1963) 215 Cal.App.2d 489, 496 [30 Cal.Rptr. 219].

The licensed premises includes a 397-room hotel, a championship golf course, an events center, a fine dining area, and a high-stakes gaming area. The license does not extend to the gaming casino operated by Barona, nor to a convenience store operated by the tribe. The license, as issued, contains 17 conditions, 13 of which were proposed by Barona in its petition for conditional license, and four additional conditions which were imposed by ALJ Echeverria. The conditions, among other things, place strict limits on where, when, and in what manner alcoholic beverages may be served at the Barona facility. The broadest of these conditions prohibits sales, service, and consumption of alcoholic beverages in the casino itself, with the exception of a private gaming area, where, according to Barona witnesses, guests ordinarily arrive and depart via private limousine.

As we said when we first heard this case, it is undeniable that drivers who have consumed alcohol pose a risk to themselves and to the general public. The State of California acknowledges that risk, and at the same time permits drivers who have consumed alcohol to drive lawfully. In this case, the question is whether the condition of the road on which those drivers and the general public will travel is such that *any* increased risk is unacceptable. The Department has said, by granting the license, that while it recognizes there is some risk, steps have been or will be taken to alleviate that risk, and that risk is not of sufficient magnitude to warrant the denial of the license to an otherwise well-qualified applicant.

In *Kirby v. Alcoholic Bev. Control Appeals Bd.* (1972) 7 Cal.3d 433, 436 [102

Cal.Rptr. 857], the California Supreme Court, quoting from *Martin v. Alcoholic Bev. Control Appeals Bd.* (1961) 55 Cal.2d 867, 876 [13 Cal.Rptr. 513], said:

> If] it be conceded that reasonable minds might differ as to whether granting [a license] would or would not be contrary to public welfare, such concession merely shows that the determination of the question falls within the broad area of discretion which the Department was empowered to exercise.[7]

The primary issues that were litigated concerned whether the licensing of the Barona facility would lead to an increase in driving under the influence accidents on Wildcat Canyon Road and whether the licensing would create a law enforcement problem apart from DUI accidents. Barona's burden was essentially to establish that neither condition would be exacerbated by the issuance of a license, and what might have been the subject of speculation at the time the first protests arose gave way to several years of operating experience by virtue of the temporary permits permitting the sale of alcoholic beverages under the limiting conditions imposed by the Department.[8] The bulk of the testimony on these issues came from expert witnesses, and the areas of disagreement were many and sharply drawn, for the most part disputing which, if any, of the 39 DUI accident reports had a nexus to the operation of the resort.

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[7] Each side argues that this case supports it. The County points to the court's acceptance of a sheriff's opinion as a reason to deny a license, while Barona points out that in *Kirby*, the license had not issued and the court was writing on a blank slate, while Barona had been operating three and one-half years with no police, CHP or Department complaint.

[8] Approximately three months prior to the initial administrative hearing, the Department granted Barona an interim operating permit, pursuant to Business and Professions Code section 24044.5. That code section authorizes the Department to grant such a permit when a protest has been filed against the application and the Department has, based upon its investigation, made a determination that a license should be issued. The Department has continued to grant such interim operating permits during the pendency of the appeals.

ALJ Echeverria, in a 28-page opinion, provided a comprehensive discussion of the evidence. His opinion included 27 broad factual findings and 42 sub-findings, which led him to his conclusions that issuance of the applied-for license would not interfere with the quiet enjoyment of nearby residents, would not create a law enforcement problem in the area where the Barona resort is located, and that the limited sale of alcoholic beverages in the five areas of the resort where such sales would be permitted would not create a traffic problem or lead to an increase in traffic accidents on Wildcat Canyon Road.

Protestants argue that the Department's decision is not supported by substantial evidence because it does not address or acknowledge the testimony of Commander Debra Hanlon, a 30-year veteran of the San Diego County Sheriff's Department, or the affidavits of a captain in the Sheriff's Department and a lieutenant of the California Highway Patrol, neither of whom testified at the hearing. Barona's attorneys discount Hanlon's testimony as based only on what she heard at the hearing, including the testimony of the protestants' traffic expert, whose testimony ALJ Echeverria rejected.

While it is true that ALJ Echeverria did not refer to the testimony of Commander Hanlon, it does not necessarily follow that he ignored or isolated her testimony. Similarly, his omission of any reference to affidavits submitted by Captain Revell and Lieutenant Leeper, is inconsequential, since neither testified in person, and hearsay objections were asserted against the affidavits.

We are not in a position to say that the Department abused its discretion when it granted the license in question. The record is substantial, ALJ Echeverria addressed the issues in detail, and his comprehensive decision and extensive findings are

supported by substantial evidence.

Finally, we see no merit in appellants' contention that ALJ Echeverria again imposed the burden of proof on appellants. ALJ Echeverria was aware throughout the hearing, as reflected in his comments, and when he wrote his proposed decision, that the Fourth District Court of Appeal's decision controlled on that issue.

ORDER

The decision of the Department is affirmed.[9]

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

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[9] 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.

ADDENDUM TO BOARD DECISION

The petition for conditional license recites that the petitioner

"wishes to permit consumption of alcoholic beverages in the gaming facility where Class III Gaming Activities will be conducted; and

> "persons under 21 years of age cannot be present in any area in which Class III Gaming and the consumption of alcoholic beverages occur"

The petition sets forth thirteen proposed conditions:

1. The sales, service and consumption of alcoholic beverages shall be limited to the fine dining restaurant, golf course, private gaming area, event center and room service to the hotel, as depicted on the ABC-257 dated 11-14-03.

2. The sales, service and consumption of alcoholic beverages in the casino is prohibited, with the exception of the private gaming area as depicted on the ABC-257 dated 11-14-03.

3. The sales and service of alcoholic beverages on the golf course shall be by cart service only and shall only be allowed through the 9th hole.

4. The sales service and consumption of alcoholic beverages in the event center as depicted on the ABC-257 dated 11-14-03 shall cease one hour prior to the pre-scheduled ending time of an event up to four hours and 90 minutes for pre-scheduled events over four hours.

5. There shall be no bar or lounge area upon the licensed premises maintained for the purpose of sales, service or consumption of alcoholic beverages directly to patrons for consumption, with the exception of the event center as depicted on the ABC-257 dated 11-14-03, during pre-scheduled events.

6. Live entertainment on any portion of the licensed premises is prohibited except in the event center during pre-scheduled events and an unamplified solo pianist in the dining area as depicted on the ABC-257 dated 11-14-03

7. Patron dancing on any portion of the licensed premises is prohibited except in

the event center, as depicted on the ABC-257 dated 11-14-03, during pre-scheduled events.

8. A list, including the dates and times of all pre-scheduled events at the event center shall be maintained by the licensee at all times and made available to the Department upon request.

9. The sale of alcoholic beverages for consumption off the premises is strictly prohibited.

10. The licensee shall maintain a full-time security staff which, at a minimum, shall be assigned and posted at the ingress and egress to any portion of the licensed premises serving alcoholic beverages.

11. No person under the age of 21 shall be permitted to remain in any Class III gaming areas, except that employees not engaged in the sales or service of alcoholic beverages shall be permitted to be in such areas in the performance of their duties.

12. Persons under the age of 18 years old shall not be permitted to remain in any room in which Class III gaming activities are being conducted unless the person is en-route to a non-gaming area of the Gaming Facility.

13. The applicant shall report to the Department in writing any change in members of the elected tribal council. This report shall be made within 30 days of said changes.

Four additional conditions were imposed by the administrative law judge:

1. The sale, service and consumption of alcoholic beverages in the fine dining restaurant as depicted in the ABC-257 shall be allowed only from 5:00 p.m. until 10:00 p.m. on Sunday through Thursday and from 5:00 p.m. until 12 midnight on Friday and Saturday.

2. The sale of alcoholic beverages in the hotel through room service shall be allowed only between the hours of 9:00 a.m. until 1:00 a.m.

3. Alcoholic beverages at the service cart at the golf course shall be limited to two drinks per person per visit.

4. The sale and service of alcoholic beverages at the special event center shall be allowed only from 9:00 a.m. until midnight on Sunday through Thursday and from 9:00 a.m. until 1:00 a.m. on Friday and Saturday.