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

AB-9341
File: 47-500055 Reg: 12076399
JAMES MARINO, JENNIFER SORENSEN, and STEVE RAFTOPOULOS,
Appellants/Protestants
v.

SANTA YNEZ BAND OF MISSION INDIANS,
dba Chumash Casino Hotel and Resort
3400 East Highway 246, Santa Ynez, CA 93460-9405,
Respondent/Applicant

and

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley

Appeals Board Hearing: December 5, 2013
Los Angeles, CA

ISSUED JANUARY 30, 2014

James Marino, Jennifer Sorensen, and Steve Raftopoulos (appellants/protestants) appeal from a decision of the Department of Alcoholic Beverage Control[1] which granted the application of Santa Ynez Band of Mission Indians, doing business as Chumash Casino Hotel and Resort (respondent/applicant), for an expanded, type-47, on-sale general public eating license.

Appearances on appeal include appellants/protestants James Marino, Jennifer Sorensen, and Steve Raftopoulos, appearing through their counsel, James E. Marino; respondent/applicant Santa Ynez Band of Mission Indians, appearing through their

[1]The decision of the Department, dated January 25, 2013, is set forth in the appendix.

counsel, Ralph Barat Saltsman; and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

The applicant operates a hotel and casino on tribal land in Santa Ynez, and portions of the hotel and casino are currently licensed under two different licenses: a type-70, on-sale general restrictive service license for mini-bars in the hotel rooms, and a type-47, on-sale general eating place license covering the Willows Restaurant in the casino. There is no record of disciplinary action against either of the licenses.

On June 1, 2010, applicant petitioned for issuance of an expanded, type-47, on-sale general public eating license. The pending application is for a premises-to-premises transfer to enlarge the type-47 license to cover other portions of the casino and the entire hotel. If approved, the existing type-70 license will be surrendered. An interim operating permit was issued to the applicant on September 30, 2011.

Protests were filed by appellants (and others), and administrative hearings were held on October 16, 17, 18, and 19, 2012. At those hearings, oral and documentary evidence was presented concerning the application and the protests by Rhonda Whittington, an ABC licensing representative; Robert Olshaskie, an ABC supervising agent; William Peters, the applicant's general manager; Lauren Tyson, an expert witness for ABC; Steve Ernst, retired Assistant Director of the ABC; and five individual protestors.

The issues considered at the administrative hearing were:

> whether issuance of the license would be contrary to public welfare or morals on the basis that: (1) it would lead to an over-concentration of licenses in the census tract; (2) it would lead to an over-concentration of alcohol outlets in the area; (3) it would create a law enforcement problem or result in an increase in crime; (4) the applied-for premises is located

> within 600 feet of a public playground; (5) the applied-for premises is not properly zoned; (6) it would create a traffic problem in the area, specifically as it relates to driving under the influence; and (7) it would lead to consumption of alcohol by minors.

(Proposed Decision at pp. 3-4.)

Subsequent to the hearing, the Department issued its decision which overruled appellants' protest, dismissed the protests of the protestants who did not appear at the hearing, and allowed the license to issue with eighteen conditions.

Appellants thereafter filed an appeal making the following contentions: (1) The burden of proof was improperly shifted from the applicant to the protestants; (2) the Department's investigation was insufficient; (3) the ALJ erred in excluding certain testimony and documents; and (4) the Department and applicant misled the County of Santa Barbara and its Sheriff regarding the conditions to be imposed on the license. None of these issues were raised at the administrative hearing.

DISCUSSION

I

Appellants contend the burden of proof was improperly shifted at the administrative hearing from the applicant to the protestants.

In a protest matter, "the applicant bears the burden of proof regarding the applicant's eligibility for a liquor license from the start of the application process until the Department makes a final determination." (*Coffin v. Alcoholic Beverage Control Appeals Bd.* (2006) 139 Cal.App.4th 471 [43 Cal.Rptr.3d 420].)

The ALJ is clearly aware of who has the burden of proof and cites the *Coffin* case in his Proposed Decision on page 8. Appellants, however, contend they were expected to demonstrate why the applied-for license should *not* be issued. They go on

to assert that "absolutely no evidence was presented by the Applicant establishing why the license should issue in the form and of the type applied for . . . " (App.Br. at p. 11.)

The record, however, does not support these allegations. The ALJ considered all issues raised by the protestants and determined that the evidence supported the issuance of the expanded type-47 license, subject to eighteen conditions. The issue considered, and the evidence presented at four days of administrative hearings, was whether the issuance of this expanded license would be contrary to public welfare or morals. To reach a conclusion, the ALJ considered evidence and testimony on whether there would be an over-concentration of licenses in this area; whether the license would result in a law enforcement problem or an increase in crime; whether there was proper zoning; whether expanding the license would create a traffic problem in the area; and whether it would contribute to the consumption of alcohol by minors. He concluded that the eighteen conditions imposed on the expanded license adequately addressed the concerns raised by the protestants, the county, and the sheriff. As a result, the county and Sheriff withdrew their objections. These conditions, among other things, restrict the hours during which alcoholic beverages can be sold; restrict the percentage of alcohol sales as they relate to food sales; restrict off-sale privileges; prohibit unaccompanied minors from staying in the hotel; restrict alcohol sales in the showroom when not being used for banquet services; and provide for inspection of the premises by law enforcement personnel. (See Exhibit 5.)

This Board is bound by the factual findings in the Department's decision as long as they are supported by substantial evidence.

> We cannot interpose our judgment on the evidence, and we must accept as conclusive the Department's findings of fact. *CMPB Friends,* [*Inc. v. Alcoholic Bev. Control Appeals Bd.* (2002) 100 Cal.4th [1250,] 1254 [122

> Cal.Rptr.2d 914]; *Laube v. Stroh* (1992) 2 Cal.4th 364, 367 [3 Cal.Rptr.2d 770;. . . We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor an appellate court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. (See *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734] (*Lacabanne*).) The function of an appellate Board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

(*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd*. (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826] (*Masani*).) We have carefully reviewed the voluminous record in this matter and believe that the decision is supported by substantial evidence.

The record also does not support the charge that the ALJ erred by not "requiring the proof of good cause to remove the existing conditions . . ." (App.Br. at p. 15.) This application does not ask for the removal of conditions, nor does the application for a premises-to-premises transfer constitute a condition modification simply because the new license would no longer be limited to the Willows Restaurant.

This is a non-issue and appellants offer no authority for this position. "When an issue is unsupported by pertinent or cognizable legal argument it may be deemed abandoned and discussion by the reviewing court is unnecessary." (*Landry v. Berryessa Union School Dist*. (1995) 39 Cal.App.4th 691, 699-700 [46 Cal.Rptr.2d 119].)

II

Appellants contend the Department's investigation was insufficient and that the Department failed to conduct a "thorough investigation," as required by Business and Professions Code section 23958, which states in pertinent part:

> Upon receipt of an application for a license or for a transfer of a license and the applicable fee, the department shall make a thorough investigation to determine whether the applicant and the premises for which a license is applied qualify for a license and whether the provisions of this division have been complied with, and shall investigate all matters connected therewith which may affect the public welfare and morals. The department shall deny an application for a license or for a transfer of a license if either the applicant or the premises for which a license is applied do not qualify for a license under this division.

Appellants further contend — for a second time — that the investigation does not meet the requirement of Business and Professions Code section 23803 that the applicant demonstrate why conditions previously imposed should be removed. (App.Br. at p. 18.) This issue was addressed in conjunction with issue I, above.

The Department's investigation resulted in a 15-page report, excluding attachments. (Exhibit 11.) In addition, the individuals who conducted the investigation were available at the administrative hearing to give testimony and to be cross-examined by the appellants. This was appellants' opportunity to demonstrate to the ALJ any insufficiency in the investigation as well as their opportunity to present evidence in support of their position that the license should not be issued. This they failed to do.

Disagreement with the conclusions reached by the ALJ constitutes neither error nor an abuse of discretion. The applicant made its case — that the issuance of an expanded license would not be contrary to public welfare and morals — and having failed to rebut that case at the administrative hearing, appellants would like this Board to reweigh the evidence and reach a different conclusion.

> In determining whether the decision of the department is arbitrary, its action is measured by the standard set by reason and reasonable people [citation], bearing in mind that such a standard may permit a difference of opinion upon the same subject [citation]; and the court may not substitute a decision contrary to that made by the department, even though such decision is equally or more reasonable, if the determination by the department is one which could have been made by reasonable people.

(*Kirby v. Alcoholic Beverage Control Appeals Board* (1968) 261 Cal.App.2d 119, 122 [67 Cal.Rptr. 628].)

As stated previously, we have carefully reviewed the voluminous record in this matter and believe that the decision is supported by substantial evidence.

III

Appellants contend the ALJ erred in excluding the testimony of Deputy Sheriff Troy Marino[2] and not admitting Exhibits XI and XII.

> The admission or rejection of evidence by an administrative agency is not grounds for reversal unless the error has resulted in a miscarriage of justice. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1054 [228 Cal.Rptr. 567].) In other words, it must be reasonably probable a more favorable result would have been reached absent the error. (*Brokopp v. Ford Motor Co*. (1977) 71 Cal.App.3d 841, 853–854 [139 Cal.Rptr. 888].) Such error "'is not prejudicial if the evidence "was merely cumulative or corroborative of other evidence properly in the record," or if the evidence "was not necessary, the judgment being supported by other evidence." [Citation.]'" (*McCoy*, *supra*, 183 Cal.App.3d at p. 1054, quoting *Rue-Ell Enterprises, Inc. v. City of Berkeley* (1983) 147 Cal.App.3d 81, 91 [194 Cal.Rptr. 919].)

(*Lone Star Security & Video, Inc. v. Bureau of Security & Investigative Services* (2009) 176 Cal.App.4th 1249, 1254-1255 [98 Cal.Rptr.3d 559].)

Appellants attempted to call Deputy Troy Marino as a witness, even though he was not identified as a potential witness during the discovery period. The ALJ had imposed a discovery cut-off date of September 17, 2012, but appellants did not disclose the identity of this witness until October 1, 2012. [RT II at pp. 186-189.] When the applicant objected to the testimony, the ALJ granted the motion to exclude the testimony, finding that the offer of proof regarding the delay was insufficient to allow the late disclosure. [RT II at pp. 196-197.]

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[2]Deputy Marino is the son of James E. Marino, counsel for the appellants and co-protestant.

The ALJ also declined to admit into evidence Exhibits XI and XII — two stacks of paper which the protestants maintained contained police reports — because there was no foundation, the documents were unauthenticated, and they contained hearsay as well as hearsay upon hearsay. [RT III at pp. 95-97.] This is within the discretion of the trier of fact.

> "No judgment shall be set aside . . . for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13.)
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> This provision "is amplified by Code of Civil Procedure section 475, which states that trial court error is reversible only where it affects '. . . the substantial rights of the parties . . .,' and the appellant 'sustained and suffered substantial injury, and that a different result would have been probable if such error . . . had not occurred or existed.' *Prejudice is not presumed, and the burden is on the appealing party to demonstrate that a miscarriage of justice has occurred*. [Citations.] . . . [P] . . . When the trial court commits error in ruling on matters relating to pleadings, procedures, or other preliminary matters, reversal can generally be predicated thereon only if the appellant can show resulting prejudice, and the probability of a more favorable outcome, *at trial*. Article VI, section 13, admonishes us that error may lead to reversal only if we are persuaded 'upon an examination of the entire cause' that there has been a miscarriage of justice. In other words, we are not to look to the particular ruling complained of in isolation, but rather must consider the full record in deciding whether a judgment should be set aside." (*Waller v. TJD, Inc*. (1993) 12 Cal.App.4th 830, 833 [16 Cal.Rptr.2d 38], first italics added (*Waller*).)

(*Paterno v. State of California* (1999) 74 Cal.App.4th 68, 104 [87 Cal.Rptr.2d 754].)

Appellants have not demonstrated that a miscarriage of justice has occurred, nor that it is probable a more favorable result would have come about had this evidence been admitted. We believe the ALJ ruled properly in both instances.

IV

Appellants contend the Department and applicant misled the County of Santa Barbara and its Sheriff regarding the conditions to be imposed on the license.

Initially, both the County of Santa Barbara and the Santa Barbara County Sheriff filed protests against the issuance of the license. Both protests were subsequently withdrawn in light of the eighteen conditions to which the applicant agreed.

The appellants complain that the Department's investigators interpreted conditions on the license differently than they should be interpreted, and in so doing they misled the county and the Sheriff regarding the extent of the privileges to be granted under the license. This appears to be strictly the opinion of the appellants.

At the administrative hearing, no witnesses were called by appellants to establish that the county or Sheriff had any misunderstanding regarding the scope of the privileges to be conveyed with this license. In fact, the only basis for this claim is appellants' subjective belief about what the county or its Sheriff thought prior to withdrawing their protests to this application; there is no basis for this claim in the record.

CONCLUSION

In sum, as the ALJ notes in Conclusions of Law ¶ 7, "The differing opinions in this case are emblematic of a long-standing rift between the Protestants, on the one hand, and the Applicant, on the other." Appellants, it appears, would like to relitigate all of the issues in this matter — not just the issues raised at the four days of hearings in October 2012, but also the original issuance of the license in 2004.

We have carefully reviewed the record and are satisfied that the decision is supported by substantial evidence and that no error of law exists to support a remand to the Department to reconsider any part of its decision.

ORDER

The decision of the Department is affirmed.[3]

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
PETER J. RODDY, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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

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