

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

AB-8269

File: 21-343494 Reg: 03055995

EDWARD I. YOON and SUNG W. YOON, dba Tom's Liquor
1355 West Florence Avenue, Los Angeles, CA 90044,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: February 3, 2005
Rehearing: June 2, 2005
Los Angeles, CA

ISSUED AUGUST 25, 2005

Edward I. Yoon and Sung W. Yoon, doing business as Tom's Liquor (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which revoked their license, but stayed the revocation on the conditions that the premises remain violation-free for a period of one year and that the license is suspended for 10 days, for appellants' employee purchasing food stamps at a discount for cash, in violation of Business and Professions Code section 24200, subdivision (a), and United States Department of Agriculture (USDA) food stamp regulations (7 C.F.R. § 278.2).

¹The decision of the Department, dated March 25, 2004, is set forth in the appendix.

Appearances on appeal include appellants Edward I. Yoon and Sung W. Yoon, appearing through their counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on October 5, 1998. The Department filed an accusation on October 7, 2003, charging the illegal purchase of food stamps at a discount by appellants' employee, Wesley Wade, on three occasions in December 2001 and January 2002.

At the administrative hearing on January 14, 2004, documentary evidence was received, and testimony concerning the violation was presented by USDA investigator Carolina Rivas. Appellant Edward Yoon and premises manager Zhu Yi Jim also testified.

Rivas, in an undercover capacity, went to appellants' licensed premises on December 3, 2001. After purchasing a few items using food stamps, she asked the clerk, later identified as Wesley Wade, if he would give her cash for food stamps, and he offered to give her cash equal to half the value of the stamps. She agreed, and gave him \$87 worth of food stamps. Wade gave her approximately \$43, money which he took from the cash register.

Rivas returned to the store on December 17, 2001, when Wade gave her \$65 in cash from the register in exchange for food stamps worth \$130. On January 7, 2002, Rivas again went to the premises and sold Wade food stamps worth \$198 in exchange for approximately half that amount in cash, which Wade took from the register.

On each of the three occasions, Rivas saw Wade place the food stamps he had purchased "under the register." In addition, on each visit Rivas saw an "Asian" man behind the counter. At the hearing, Rivas identified appellant Edward Yoon as the "Asian" man she had seen.

Yoon testified that he is at the premises every day, although he is usually in the office doing paperwork. He deposits food stamps received each day in the bank. Yoon said he attended a USDA Food Stamp Program training class shortly after he took over the store in late 1998 or early 1999. He explained the rules to his employees, and when he hired Jim as manager, he told him what was required for food stamp sales and gave him the responsibility of making sure the employees understood the rules.

Jim testified that he was responsible for supervising Wade, but did not stand next to him or monitor all his activities. He would occasionally leave the store to purchase merchandise. He testified that he gave the employees instruction on the rules of the Food Stamp Program periodically, once or twice a month. He received his food stamp training from Yoon.

The Department's decision determined that the charges of the accusation were proved. Appellants filed an appeal contending the Department did not show that the illegal food stamp purchases had some minimal nexus to appellants' sale of alcoholic beverages and, alternatively, the penalty is excessive. Appellants also assert that the Department violated their right to procedural due process when the attorney who represented the Department at the hearing before the administrative law judge (ALJ) provided a Report of Hearing to the Department's decision maker after the hearing, but before the Department issued its decision.

DISCUSSION

I

Appellants contend the Department did not show that the act giving rise to discipline had some "minimal nexus" to appellants' sale of alcoholic beverages as required by *Santa Ana Food Market, Inc. v. Alcoholic Beverage Control Appeals Bd.* (1999) 76 Cal.App.4th 570 [90 Cal.Rptr.2d 523] (*Santa Ana*). They rely particularly on language from *Santa Ana*, which we have italicized:

To be reasoned and not arbitrary, license suspensions must further the goal of the constitutional and statutory provisions. That goal in general is to protect public welfare and morals, but it must be viewed in the context in which it arose--the sale of alcoholic beverages. *For a suspension to be rational, the acts giving rise to it must have some minimal nexus to the licensee's sale of alcoholic beverages.* Application of the rule of imputed knowledge must have that nexus as well.

In our review of the cases involving ABC suspensions, the criminal or wrongful acts by employees have rarely involved directly the sale of alcoholic beverages, but *the acts have been traditionally considered to be adjuncts of alcohol sales, such as gambling, prostitution and drug use.* Much as the Supreme Court in *Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control* [(1970)] 2 Cal.3d [85] at page 95 [[84 Cal.Rptr. 113, 465 P.2d 1]] was unable to discern a per se nexus between topless waitresses and public welfare and morals, *we see no per se nexus between a food market's sale of alcoholic beverages and unlawful food stamp purchases.* Evidence in another case might show a specific nexus, such as where the seller used the proceeds to buy alcohol, but no such evidence existed here.

(76 Cal.App.4th 570 at p. 575.)

Appellants assert that the decision misconstrues the holding in *Santa Ana*, *supra*, because it refers to the differences between that case and the present one, instead of focusing on the presence or absence of any nexus between the food stamp violations and appellants' sale of alcoholic beverages. They contend that the present case and *Santa Ana* "share one single, dispositive fact: there is no nexus between the Appellant's [sic] sale of alcoholic beverages and the unlawful food stamp purchases."

Appellants are mistaken in their belief that nexus is the single, dispositive factor in this case. They completely ignore the factual differences between *Santa Ana* and the present case. The California Supreme Court has noted that:

It is a foundational principle that: " '[T]he language of an opinion must be construed with reference to the facts presented by the case, and the positive authority of a decision is coextensive only with such facts.' " (*Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 734-735 [257 Cal.Rptr. 708, 771 P.2d 406]; see also 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 783, p. 753.)

(*Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1157 [805 P.2d 873; 278 Cal.Rptr. 614].)

In *Santa Ana*, an employee, at great pains to hide the transaction from the licensee, surreptitiously and for her own personal gain, committed food stamp fraud. The licensee had taken substantial measures to prevent such criminal activity by its employees. The court held the Department abused its discretion when it suspended the market's license, but also warned against attributing too much to its decision:

By concluding the ABC's action in this case was an abuse of discretion, we do not intend to change the basic rules for suspension of licenses or unduly restrict the ABC from exercising its discretion. But where, as here, a licensee's employee commits a single criminal act unrelated to the sale of alcohol, the licensee has taken strong steps to prevent and deter such crime and is unaware of it before the fact, suspension of the license simply has no rational effect on public welfare and morals.

ALJ McCarthy engaged in an extensive explication of the fundamental differences between *Santa Ana* and the present case (Legal Basis for Decision, ¶ 7):

a. In *Santa Ana* there was a single purchase of food stamps for cash. In this case there were three purchases over a period of one month. In *Santa Ana* clerk Huerta used her personal funds to buy the food stamps (*Santa Ana, supra*, 76 Cal.App.4th, at 572), while here clerk Wade took all the money from Respondents' cash drawer. (Findings of Fact, ¶¶ 4, 5 & 6.)

b. No benefit to the licensee was shown in Santa Ana since Huerta was arrested on the spot. (*Santa Ana, supra*, 76 Cal.App.4th, at 572.) It appears as if Respondents here benefited from Wade's misconduct. The evidence is ambiguous as to where the food stamps unlawfully purchased were placed. Rivas said the stamps were placed "under the register" (Findings of Fact, ¶¶ 4, 5 & 6) and Yoon testified that food stamps properly acquired should have gone "in the register." It is unclear whether that is the same or a different place. Does "under the register" mean under the pull-out cash drawer, which would be inside the register housing, or does it mean under the entire register housing, which could require Wade to lift the appliance. In any event, it is most likely the case that Yoon benefited from the fraudulent transactions. Otherwise, the cash drawer would have come up significantly short on the dates of each transaction and there was no evidence of a shortage.

c. Huerta took steps to conceal the single Santa Ana transaction. (*Santa Ana, supra*, 76 Cal.App.4th, at 572.) Wade made the exchanges out in the open and, if operative Rivas is correct, within the eyesight of either Jim or Yoon on all three occasions. (Findings of Fact, ¶ 7.) In *Santa Ana*, the evidence showed that the cash register area was constantly monitored by a camera or cameras. (*Santa Ana, supra*, 76 Cal.App.4th, at 572.) Here, according to both Jim and Yoon, no one directly and constantly supervised Wade while he worked the register. (Findings of Fact, ¶¶ 11 & 15.) In fact, Wade was permitted to work at the store on his own for substantial periods with neither Jim nor Yoon even present at the store. (Findings of Fact, ¶ 17.)

d. Yoon and Jim both testified that their training and education of Wade on the proper and lawful acceptance of food stamps was on-going and frequent. (Findings of Fact, ¶¶ 11 & 15.) The claims seem exaggerated. Nothing was offered to document that training. In *Santa Ana*, the store's food stamp training program had been certified effective by USDA.

e. Finally, in *Santa Ana*, USDA found no need to discipline the market. (*Santa Ana, supra*, 76 Cal.App.4th, at 573.) Here, while Complainant withdrew the allegation of permanent disqualification as of a particular date, a preponderance of the credible evidence did establish that Respondents were disqualified from participation in the Food Stamp Program by USDA, if not permanently, for some period of time. (Findings of Fact, ¶¶ 12 & 19.)

Respondents were not shown to be personally aware of the unlawful activity at the time it was occurring even though Rivas believed it was Yoon who was quite near Wade during all three transactions. That they failed to learn of it before action was taken by USDA, however, was due to their inadequate supervision of clerk Wade and/or their failure to have sufficient cash controls in place to alert them to the misconduct at any time. Under the circumstances, the dishonesty of employee Wade should properly be imputed to Respondents.

The resolution of conflicts in testimony and other evidence is one of the tasks of the ALJ. (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 334 [96 P.3d 194; 17 Cal.Rptr.3d 906].) Where conflicts exist, the Appeals Board is bound to resolve them in favor of the Department's decision, and must accept all reasonable inferences that support the Department's findings. (*Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734].)

It is also the province of the ALJ, as trier of fact, to make determinations as to witness credibility. (*Lorimore v. State Personnel Board* (1965) 232 Cal.App.2d 183, 189 [42 Cal.Rptr. 640]; *Brice v. Dept. of Alcoholic Bev. Control* (1957) 153 Cal.App.2d 315, 323 [314 P.2d 807].) The Appeals Board will not interfere with those determinations in the absence of a clear showing of an abuse of discretion.

We find no abuse of discretion in the ALJ's evaluation of the evidence and the witnesses. Other inferences might be made from some of the evidence, but the ALJ's inferences were reasonable, and we are bound to accept them.

The lack of a specific finding of nexus between the unlawful sale of food stamps and the sale of alcoholic beverages is inconsequential. Any nexus necessary is supplied by use of money from the cash register of this liquor store to purchase the food stamps and the ALJ's reasonable inference that the purchases benefited appellants.

II

Appellants assert the Department violated their right to procedural due process when the attorney (the advocate) representing the Department at the hearing before the 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.

²The 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 response to the Department's petition for rehearing, the court modified its opinion and denied rehearing. The cases are now pending in the California Supreme Court and, pursuant to Rule of Court 976, are not citable. (*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2005) 127 Cal.App.4th 615, review granted July 13, 2005, S133331.)

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.)

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 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 to them in this administrative proceeding. Under these circumstances, and with the potential for 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.

III

Appellants contend, in the alternative, that the penalty is excessive because the factors considered by the court in *Santa Ana* are present in this case. They assert that, as did the licensee in *Santa Ana*, they took measures to prevent the exchange of food stamps for cash, they terminated Wade as a result of the violation, they had no knowledge of Wade's purchase of food stamps for cash, and they did not benefit from Wade's acts.

This contention, like the first one, was answered in Legal Basis for Decision, ¶ 7, quoted, *ante*, in part I of this opinion. The ALJ determined that appellants' case did not fit within the rubric of *Santa Ana*, so there is no basis for reducing the penalty.

ORDER

The decision of the Department is affirmed.³

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

³This 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.