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

**AB-8362**
File: 47-403418 Reg: 04057212

OVATIONS FANFARE, LIMITED PARTNERSHIP, dba Ovations Fanfare
2650 East Shaw Avenue, Fresno, CA 93710,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: October 6, 2005
San Francisco, CA

**ISSUED: MARCH 20, 2006**

Ovations Fanfare, Limited Partnership, doing business as Ovations Fanfare (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days, with 10 days thereof stayed on condition that appellant complete one year of discipline-free operation, for its bartender violating a condition on the license prohibiting the sale of more than two beers to a customer at a time, a violation of Business and Professions Code section 23804.

Appearances on appeal include appellant Ovations Fanfare, Limited Partnership, appearing through its counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Nicholas R. Loehr.

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[1]The decision of the Department, dated November 18, 2004, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on October 30, 2003. On May 5, 2004 the Department instituted an accusation against appellant charging that its bartender, Sherry Robertson, sold four glasses of beer to one patron in violation of a condition on the license prohibiting the sale of more than two beers to a customer at a time.

At the administrative hearing held on September 22, 2004, documentary evidence was received and testimony concerning the violation charged was presented by Department investigator Lars Oakander. Jim Stearley, appellant's general manager, testified about what the bartender told him later about the incident.

Appellant's premises, located on the campus of California State University, Fresno, is a sports and entertainment arena. On January 29, 2004, the facility was hosting a concert featuring George Strait, a popular country western singer, and an estimated 18,000 to 20,000 people attended.

Investigator Oakander and another Department investigator were there conducting a "shoulder tap" operation.[2] Oakander was observing the minor decoy at one of the portable bars where two bartenders, a man and a woman, were working. Each had a line of about 10 to 15 customers. While about six feet away from the female bartender, Oakander saw her pour four glasses of beer and placed them on the counter in front of a man who paid for the beers. The bartender asked if he would like something in which to carry the beers. When he said he would, she got a small

[2]In a "shoulder tap" operation, a minor decoy approaches an individual, presumably a stranger, and asks that individual to buy an alcoholic beverage for the decoy. If the individual does so, he or she is cited for furnishing an alcoholic beverage to a minor. (Bus. & Prof. Code, § 25658, subd. (a).)

cardboard box from an adjacent hot dog stand and put three of the beers in the box. Oakander then went up to the bartender and the patron and identified himself as an investigator.

About five or six minutes later the patron asked if he could take the beers he had paid for. When Oakander told him that only two beers per person were allowed, the patron left and came back a few minutes later with another person. Each of them was allowed to carry two beers away.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged was proved. Appellant appealed, contending that the decision is not supported by substantial evidence and the Department violated its right to procedural due process. Appellant also filed a motion to augment the record.

DISCUSSION

I

Appellant contends that the Department did not prove, by a preponderance of the evidence, that appellant violated condition 4 of its license, which states: "No more than two (2) cups containing alcoholic beverages may be sold to a customer at a time." (Exhibit 2.) It asserts that the record does not provide substantial evidence to support a suspension of its license.

Appellant attacks the decision on several theories: the condition is ambiguous and, therefore, appellant did not have adequate notice of what would constitute a violation of the condition; the evidence shows that two patrons ordered the four beers, so there was no violation; the investigator's testimony was unreliable; and the investigator's failure to obtain identifying information about the purchasing patron or his friend prevented appellant from presenting a full defense.

"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 [84 Cal.Rptr. 113].)

In *Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd*. (*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826], the court described the manner in which an appellate body must approach the evidence and factual findings under the substantial evidence standard of review:

> We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. (*CMPB Friends, supra,* 100 Cal.App.4th at p. 1254; *Laube v. Stroh* (1992) 2 Cal.App.4th 364, 367 [3 Cal.Rptr.2d 779]; [Bus. & Prof. Code] §§ 23090.2, 23090.3.) 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. 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."

Appellant's first contention – that the condition is so ambiguous that appellant did not have adequate notice of what would constitute a violation of this condition – is rejected for three reasons: First, this issue was not raised at the hearing and the Board is entitled to consider it waived. (See 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 394, p. 444.) Second, appellant had received a warning about possible violations of this conditions less than two months before. Third, we do not think the condition is ambiguous, but regardless of any possible ambiguity, no reasonable person would think that the sale of four beers to one person would comply with the condition.

Next, appellant argues there was no violation because the evidence shows that two patrons ordered the four beers, not one patron. This argument is rejected because the ALJ found that one person ordered the four beers. This finding is clearly supported by substantial evidence; indeed, there was no competent evidence offered to refute the investigator's testimony. Appellant's general manager testified about what the bartender purportedly said during a telephone conversation at some undefined time after the violation, but the bartender did not testify. This hearsay evidence, objected to by Department counsel at the hearing, is not sufficient to support a finding. (Gov. Code, § 11513, subd. (d).)[3] The testimony does not even qualify as administrative hearsay because it does not explain or supplement other competent evidence offered (*ibid*.); appellant offered no other evidence.

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[3]Government Code section 11513, subdivision (d), provides:

> Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. An objection is timely if made before submission of the case or on reconsideration.

Appellant's next contention is that Oakander's testimony is unreliable because "his perception was clouded" by factors such as the large number of people attending the event, his distance from the portable bar, and the 20 to 30 people in line at the portable bar. In essence, appellant is arguing about Oakander's credibility.

It is 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. Contro*l (1957) 153 Cal.App.2d 315, 323 [314 P.2d 807].) The Board will not interfere with those determinations without a clear showing of an abuse of discretion. No such showing has been made here.

Appellant also complains that it was prejudiced by the investigator's failure to obtain the names of the patron who purchased the beers and his friend who came to help him carry the beers. This failure, appellant argues, deprived it of the right to present a defense based on a full account of the events, since it could not interview the percipient witnesses.

Appellant cites no authority for its assertion that the investigator's failure to get the names of the patrons justifies reversing the Department's decision. We have found no authority for this either.

In the criminal law context, a law enforcement agency's destruction of, or failure to preserve, evidence results in sanctions at trial in only very limited circumstances:

> [A] defendant claiming a due process violation based on the failure to preserve evidence must show the exculpatory value of the evidence at issue was apparent before it was destroyed, and that the defendant could not obtain comparable evidence by other reasonable means. ([*California v.*] *Trombetta* [(1984)] 467 U.S. [479,] 489 [104 S.Ct. [2528,] 2534[, 81 L.Ed.2d 413]].) The defendant must also show bad faith on the part of the police in failing to preserve potentially useful evidence. ([*Arizona v.*] *Youngblood* [(1988)] 488 U.S. [51,] 58 [109 S.Ct. [333,] 337-338[, 102 L.Ed.2d 281]].) "The presence or absence of bad faith by the police . . .

> must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." (*Id*. at p. 57, fn. * [109 S.Ct. at p. 337].)

*(People v. Frye* (1998) 18 Cal.4th 894, 942-943 [959 P.2d 183; 77 Cal.Rptr.2d 25].)

Perhaps even more to the point, law enforcement agencies are not under an obligation to obtain evidence that would or might be useful to the defense:

> The identity of an informant who is a percipient witness must be disclosed (see *Williams v. Superior Court* (1974) 38 Cal.App.3d 412, 417-421 [112 Cal.Rptr. 485]). That assumes of course that the police themselves know the informant's identity. We are unaware of any decision holding the police have an affirmative obligation to determine the identity of an anonymous informant who provides information. Defendant's reliance on *People v. Hitch* (1974) 12 Cal.3d 641 [117 Cal.Rptr. 9, 527 P.2d 361] and *People v. Nation* (1980) 26 Cal.3d 169 [161 Cal.Rptr. 199, 604 P.2d 1051], is misplaced. Both of those decisions impose a duty of preservation of evidence favorable to the accused *if the People have gathered such evidence*. "'[The] law does not impose upon law enforcement agencies the requirement that they take the initiative, or even any affirmative action, in procuring . . . evidence deemed necessary to the defense of an accused.' [Citation.]" (*People v. Newsome* (1982) 136 Cal.App.3d 992, 1006 [186 Cal.Rptr. 676]; see, *e.g*., *In re Michael L.* (1985) 39 Cal.3d 81, 86-87 [216 Cal.Rptr. 140, 702 P.2d 222] (no duty to seize victim's videotape of robbery); *People v. Hogan* (1982) 31 Cal.3d 815, 851 [183 Cal.Rptr. 817, 647 P.2d 93]; *People v. McNeill* (1980) 112 Cal.App.3d 330, 338 [169 Cal.Rptr. 313] (no duty to seize fingernail scrapings of victim); *People v. Ventura* (1985) 174 Cal.App.3d 784, 794-795 [220 Cal.Rptr. 269] (no duty to take and preserve intoxication test at time of arrest); *People v. Kane* (1985) 165 Cal.App.3d 480, 485 [211 Cal.Rptr. 628] (no duty to impound victim's automobile); *People v. Bradley* (1984) 159 Cal.App.3d 399, 404-408 [205 Cal.Rptr. 485] (no duty to seize blood-stained articles at crime scene); *People v. Maese* (1980) 105 Cal.App.3d 710, 719-720 [164 Cal.Rptr. 485] (no duty to take fingerprints); *People v. Flores* (1976) 62 Cal.App.3d Supp. 19, 23 [133 Cal.Rptr. 759] (no duty to obtain names of witnesses).) "The police cannot be expected to 'gather up everything which might eventually prove useful to the defense.' [Citations.]" (*People v. Hogan*, *supra*, 31 Cal.3d 815, 851; see *People v. McNeill*, *supra*, 112 Cal.App.3d at p. 338.)

Even if we were to treat these criminal law rules as applicable to administrative proceedings, no evidence was presented indicating that Oakander had any reason to

think that the patrons would be able to provide any exculpatory evidence for appellant. Neither the bartender nor the manager said anything to Oakander about two patrons purchasing the beer. It is difficult to believe that the bartender would not have immediately pointed out to Oakander that two patrons purchased the four beers if that had indeed been the case.

II

Appellant asserts the Department violated its 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. Appellant also filed a motion to augment the 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").[4]

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[4]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 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 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.)

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 appellant at the hearing. Appellant has 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 appellant has 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 appellant, it appears to us that appellant received the process that was due to it 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.

Under the circumstances of this case and our disposition of the due process issue raised, appellant is 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. Appellant's motion is denied.

ORDER

The decision of the Department is affirmed.[5]

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

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[5]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.