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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

AC MASSAGE et al.,

Plaintiffs and Appellants,

v.

CITY OF PALM DESERT,

Defendant and Respondent.

E055466

(Super.Ct.No. INC10005945)

OPINION

APPEAL from the Superior Court of Riverside County. Harold W. Hopp, Judge.

Affirmed.

Joseph T. Vodnoy and Holly L. Hostrop for Plaintiffs and Appellants.

Best Best & Krieger and Douglas S. Phillips for Defendant and Respondent.

Plaintiffs and appellants AC Massage and Lawrence Andrews petitioned the trial court for an administrative writ of mandate directing defendant and respondent City of Palm Desert to vacate its decision revoking AC Massage's massage establishment permit. The trial court denied the writ petition. AC Massage contends the trial court erred in denying the petition because, at the administrative hearing, AC Massage was

denied due process by not being permitted to cross-examine the law enforcement officer who discovered prostitution activity was occurring at AC Massage. We affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

On December 19, 2009, at approximately 11:35 a.m., Riverside County Sheriff's Deputy Bazanos acted in an undercover capacity during a "buy/bust prostitution program" at AC Massage, in Palm Desert. While the deputy was undercover, a masseuse at AC Massage agreed to masturbate the deputy in exchange for \$40. The masseuse "grabbed" the deputy's genitals. Deputy Rentle arrested the masseuse for prostitution. (Pen. Code, § 647, subd. (b).) Deputies Bazanos and Rentle wrote incident reports describing the details of the events.

At 12:22 p.m. on December 19, Deputy Rentle issued AC Massage a "Notice of Violation." The notice cited Palm Desert Municipal Code 5.87.180 B-4, which directs the city manager to suspend or revoke a "massage establishment permit" if a business "is being operated in an illegal or disorderly manner." The notice advised AC Massage that its massage establishment permit was suspended, and therefore, it must cease all business activity.

On December 21, the City of Palm Desert (the City) sent AC Massage notice that its massage establishment permit was "revoked for noncompliance with the Palm Desert Municipal Code . . . due to the recent arrest of an employee at the establishment for soliciting prostitution." The revocation was immediately effective. On December 30,

AC Massage filed an application to appeal the permit revocation. In February 2010, the City Council directed that the appeal be referred to a hearing officer.

On April 16, 2010, the City Attorney sent AC Massage's attorney notice that the City would be relying on three documents during the administrative hearing: (1) the declaration of Lauri Aylaian "with relevant code sections attached as Exhibits"; (2) the declaration of Deputy Bazanos; and (3) the City's brief in support of denying AC Massage's appeal.

Deputy Bazanos's declaration reflected that he was participating in an undercover operation at AC Massage on December 19. The deputy explained that "[a]s part of the staging for [his] undercover identity, when [he] initially entered AC Massage, [he] held an empty can of beer and simulated as if [he were] drinking from it." The deputy declared that the masseuse fondled the deputy's genitals.

The administrative hearing took place on April 28, 2010. At the beginning of the hearing, the following discussion occurred:

"[AC Attorney]: All right. First of all is the officer here?"

"The Hearing Officer: I'm sorry?"

"[AC Attorney]: Is the officer here?"

"The Hearing Officer: Is the officer here?"

"[City Attorney]: No.

"[AC Attorney]: He's not here. Well, what—I spent a lot of time planning on cross-examining the officer in this case. There is a major discrepancy, as you may have heard, between what's on the tape of the encounter and what he represented as what

occurred in the room by his police report as well as by his declaration. [¶] In my opinion, given the fact that the officer is not here to be cross-examined, I believe that in effect his statements are hearsay because I believe that I have a right to cross-examine the officer.”

AC Massage’s attorney continued, saying, “Now, I’ve done a lot of these cases; this is the first time I’ve done a case where the police officer wasn’t produced because that’s the kind of evidence you’d expect to have under oath and so we request examination instead of hearsay.” The attorney went on, “I fully expected the officer to be here. I prepared all kinds of notes to cross-examine him about it, not that my evening was ruined last night, but the point being that one would expect if they’re going to use—and it’s standard to substantiate evidence.” The attorney concluded by saying, “I was going to say I’d like to call the officer and get started but it just took my completely by surprise.”

The administrative hearing then proceeded with the testimony of Lawrence Andrews. When the City Attorney began to present the City’s portion of the case, she said, “[AC’s attorney] made a number of comments about the attendance or lack of attendance by the officer today and I want to clarify that the City didn’t notice or indicate that Deputy Bazanos was going to be attending today. This is the business appeal and they didn’t make any—they didn’t notice the officer to appea[r] today and the criminal prosecution is pending and to the extent that his testimony here could have in some way worked against or have something to do with the criminal prosecution—he

just didn't really need to be here today." The City Attorney asserted the hearing officer could rely on Deputy Bazanos's incident report and declaration as evidence.

When the City Attorney requested to submit Deputy Bazanos's declaration as evidence, AC's attorney objected. The hearing officer responded, "[T]hey're already in evidence because I've [previously] received those documents." The hearing officer took the matter under submission.

In the hearing officer's "Report and Recommendation," he found (1) the masseuse unlawfully touched Deputy Bazanos's genital area in violation of the City's Municipal Code; (2) AC Massage failed to present evidence that the touching did not occur; and (3) the masseuse's conduct was "of sufficient importance to warrant the revocation of the Massage License and Conditional Use Permit." The hearing officer recommended the license and permit be permanently revoked.

On May 27, 2010, the City Council voted to revoke AC Massage's massage establishment permit for violating the Municipal Code "by operating in an illegal or disorderly manner, by virtue of an arrest and due to miscellaneous code violations." On November 23, 2010, AC Massage filed a verified first amended petition for writ of administrative mandamus. In the petition, AC Massage alleged Deputy Bazanos's declaration was inadmissible hearsay, and therefore there was not evidence to support the revocation because the decision was based on hearsay evidence. AC Massage requested the trial court issue a writ directing the City to vacate its decision revoking AC Massage's permit.

In the trial court’s written ruling, it explained that Deputy Bazanos’s incident report was admissible evidence to the extent it described his personal observations. The court found “even without the admission of Deputy Rentle’s report or Deputy Bazanos’s declaration to supplement or explain, Deputy Bazanos’s report is sufficient evidence to support the decision of the hearing officer and its approval by the City Council.” The trial court found AC Massage was not denied due process. Thus, the court denied the writ petition.

DISCUSSION

AC Massage¹ contends it was deprived of its due process right to cross-examine Deputy Bozano. We find the alleged error to be harmless.²

¹ Lawrence Andrews, co-appellant, is also raising this issue. For ease of reading, we use only “AC Massage” when discussing the co-appellants’ contention.

² The City asserts AC Massage forfeited its contention by failing to request a continuance at the administrative hearing so that Deputy Bazanos could attend and be questioned by AC Massage. Issues such as due process objections that are not presented at the administrative hearing, cannot be raised at a reviewing court. (*Niles Freeman Equipment v. Joseph* (2008) 161 Cal.App.4th 765, 787-788.) We choose to address the merits of AC Massage’s contention because (1) at the administrative hearing AC Massage requested to examine Deputy Bazanos, which could imply a request for a continuance; (2) AC Massage also objected to the introduction of Bazanos’s declaration; and (3) the issue is easily resolved.

In a mandamus proceeding, the superior court’s inquiry “shall extend to the questions [of] whether the [agency, i.e., the City,] has proceeded without, or in excess of, jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion.” (Code Civ. Proc., § 1094.5, subd. (b).)³ An “abuse of discretion is established if the [agency] has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.” (§ 1094.5, subd. (b).) We independently review the issue of whether AC Massage was denied a fair hearing. (*City of Pleasanton v. Board of Administration of the California Public Employees’ Retirement System* (2012) 211 Cal.App.4th 522, 531.)

““The right to cross-examine witnesses in quasi-judicial administrative proceedings is considered as fundamental an element of due process as it is in court trials.” [Citations.]’ [Citation.]” (*Manufactured Home Communities, Inc. v. County of San Luis Obispo* (2008) 167 Cal.App.4th 705, 711.) “[A] party may only introduce a witness’s declaration if the opposing party had the opportunity to cross-examine the witness at deposition or could require the witness to be subject to cross-examination at trial.” (*Target Nat. Bank v. Rocha* (2013) 216 Cal.App.4th Supp. 1, 160 [discussing Code of Civil Procedure section 98, which permits declarations in limited civil cases.]

³ All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

Witnesses can be subpoenaed to appear at administrative hearings (Gov. Code, § 11450.40), and “[a] police officer enjoys no immunity to a subpoena” (*People v. Singletary* (1969) 276 Cal.App.2d 601, 603). Therefore, it is arguable that AC Massage’s due process rights were not violated because it could have required Deputy Bazanos’s attendance at the hearing for purposes of cross-examination. Nevertheless, for the sake of judicial efficiency, rather than explore this area further, we will assume AC Massage’s due process rights were violated by admission of the declaration into evidence without an opportunity for cross-examination. Accordingly, we must turn to the issue of harmless error.

Procedural due process violations are subject to harmless error analysis. (*Hinrichs v. County of Orange* (2004) 125 Cal.App.4th 921, 928.) In civil proceedings, the right to confront witnesses is an aspect of procedural due process set forth in the Fifth and Fourteenth Amendments of the federal Constitution. (*Target Nat. Bank v. Rocha, supra*, 216 Cal.App.4th Supp. at pp. 159-160.) Because federal constitutional rights are implicated, we apply the harmless beyond a reasonable doubt standard. (*Nizam-Aldine v. City of Oakland* (1996) 47 Cal.App.4th 364, 379.)

At the trial court, the City conceded Deputy Bazanos’s incident report was inadmissible, except for the portions reflecting the deputy’s personal observations. The City asserted the personal observation portions of the report were admissible pursuant to the “public employee record” exception to the hearsay rule. (Evid. Code, § 1280.) The trial court found the incident report was properly admitted into evidence by the hearing officer to the extent the report reflected the deputy’s personal observations.

AC Massage's opening brief focuses solely on the lack of cross-examination. We are not presented with an argument concerning the admissibility of the incident report. Accordingly, we will accept the trial court's ruling that the incident report was a properly admitted document. The incident report reflects Deputy Bazanos's personal observations of the masseuse touching the deputy's genitals during the massage. The deputy wrote that the masseuse "grabbed the shaft of [the deputy's] penis with her left hand and touched [his] testicles with her right hand."

Given the details in the incident report about improper sexual touching, the hearing officer could reasonably reach the conclusions set forth in the "Report and Recommendation," even if the declaration had been excluded, i.e., (1) the masseuse unlawfully touched Deputy Bazanos's genital area in violation of the City's Municipal Code; and (2) the masseuse's conduct was "of sufficient importance to warrant the revocation of the Massage License and Conditional Use Permit."⁴ Since AC Massage failed to present evidence that the touching did not take place, it can be concluded beyond a reasonable doubt that a different result would not have occurred.

Thus, if the hearing officer had not made the alleged error (in that the hearing officer excluded Bazanos's declaration, rather than admitting it) then, beyond a reasonable doubt, the result of the hearing would have been the same due to the documentary evidence. As a result, we conclude that to the extent there was error, the error was harmless.

⁴ There was nothing in the declaration authenticating the incident report. As a result, no authenticating information was lost by excluding the declaration.

DISPOSITION

The judgment is affirmed. Respondent, City of Palm Desert, is awarded its costs on appeal.

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MILLER
J.

We concur:

McKINSTER
Acting P. J.

KING
J.