

ISSUED JUNE 29, 1998

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

JAMES LISSNER,	)	AB-6766a
Appellant/Protestant,	)	
	)	
v.	)	File: 47-313717
	)	Reg: 96036719
CLUB SUSHI, INC.	)	
1200 Hermosa Ave.	)	
Hermosa Beach, CA 90254,	)	Decision Following Appeals
Respondent/Applicant,	)	Board Decision
	)	
and	)	
	)	Date and Place of the
DEPARTMENT OF ALCOHOLIC	)	Appeals Board Hearing:
BEVERAGE CONTROL,	)	May 6, 1998
Respondent.	)	Los Angeles, CA

James Lissner (protestant) appeals from a Decision Following Appeals Board Decision of the Department of Alcoholic Beverage Control<sup>1</sup> which refused to sustain his protest against the person-to-person and premises-to-premises transfer of an on-sale general public eating place license to Club Sushi, Inc. (applicant).

Appearances on appeal include appellant/protestant James Lissner; respondent/applicant Club Sushi, Inc., appearing through its counsel, Michael

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<sup>1</sup> The Decision Following Appeals Board Decision of the Department, dated December 12, 1997, is set forth in the appendix.

Steger; and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew Ainley.

#### FACTS AND PROCEDURAL HISTORY

Applicant filed an application for a person-to-person and premises-to-premises transfer of an on-sale general eating place license. The Department recommended approval of the transfer, but several individuals filed protests against issuance of the license. An administrative hearing was held regarding the protests on September 5, 1996. On October 17, 1996, the Department issued its decision ("the 1996 decision") dismissing the protests. Protestant thereafter filed an appeal with this Board. After oral argument, this Board issued its decision affirming in part and reversing in part the action of the Department and remanding the matter to the Department for the purpose of making a finding on the issue of public convenience or necessity.

The Department reviewed the matter and issued its Decision Following Appeals Board Decision on December 12, 1997 ("the 1997 decision"). The decision adopted the Findings of Fact and Determinations of Issues of the 1996 decision, made an additional Finding of Fact and an additional Determination of Issues, and adopted the Order of the 1996 decision. Appellant then filed this appeal.

In his appeal, protestant contends that the Department erred in: (1) failing to remand this matter for hearing on the issue of public convenience or necessity; (2) determining that issuance of this license would serve public convenience or

necessity; and (3) determining that protestants failed to carry their burden of showing issuance would result in a generic over concentration, or add to an undue concentration, of licenses since the Appeals Board determined that this issue was waived by the Department.

## DISCUSSION

### I

Protestant contends that the Department erred in not remanding the matter for further hearing, that the Department did not actually review the record, and, even if it had reviewed the record, the decision is flawed due to the bias and prejudice of the Administrative Law Judge (ALJ).

Appellant's first contention is simply an unsupported statement. There is no statutory authority of which we are aware requiring the Department to re-hear a matter that is remanded to it. The Board's decision remanded the matter "for the purpose of making a finding on the issue of public convenience or necessity," but did not require a rehearing.

As the Department's brief points out, the parties all agreed that undue concentration existed, so evidence was presented on public convenience or necessity at the administrative hearing. Therefore, the Department had a full record to review, making a rehearing unnecessary.

Appellant infers a lack of review by the Department because it recited "no factual basis for its decision nor makes any specific reference to testimony or any aspect of the record." (App. Opening Br. at 4-5.) Once again, appellant cites no

authority for a requirement that the Department's decision include specific references to testimony or other evidence. In fact, as the Department points out, the new finding of fact is based on the testimony of the Department investigator and one of applicant's shareholders.

Protestant appears to argue that the ALJ's erroneous determination that there was no non-hearsay evidence to support a finding of undue concentration is itself evidence of the ALJ's bias, since it showed a "predisposition" on the part of the ALJ to impose on protestant the burden of proving that undue concentration existed, a burden that protestant characterizes as "neither legal nor appropriate." (App. Opening Br. at 6.) Protestant concludes that, given this "predisposition" on the part of the ALJ, "evidence may have been excluded or admitted improperly." (Id.) Protestant does not explain how one erroneous evidentiary ruling taints the hearing or demonstrates bias on the part of the ALJ.

In the second part of protestant's bias argument, he states that the ALJ is prohibited by §11425.30 from acting as a hearing officer in Department cases. Applicant points out that §11425.30 was not in effect until July 1, 1997, so it was not applicable to the hearing held on September 5, 1996. However, even if Government Code §11425.30 were applicable, it would not prevent ALJ McCarthy from hearing this matter.

Government Code §11425.30 provides:

"(a) A person may not serve as presiding officer in an adjudicative proceeding in any of the following circumstances:

(1) The person has served as investigator, prosecutor, or advocate in the proceeding or its preadjudicative stage.

(2) The person is subject to the authority, direction, or discretion of a person who has served as investigator, prosecutor, or advocate in the proceeding or its preadjudicative stage. . . .”

Protestant argues that, since the ALJ in this matter, John McCarthy, was formerly a Department staff counsel, he was an “advocate” for the Department and prohibited by statute from hearing the matter. Protestant ignores the part of the statute which states that the person must have served as an advocate “in the proceeding or its preadjudicative stage.” There is no allegation or proof that the ALJ was involved in any way with respect to this proceeding.

Finally, protestant states that the ALJ “serves at the discretion of the Department and is subject to its 'authority and direction.'” (App. Opening Br. at 6.) Protestant concludes that “it is inherent in the nature of [the ALJ's] relationship with the Department and clear from the way he ruled in this case that the ALJ did not exercise his independent judgment.” (App. Opening Br. at 7.) The Department points out that, in fact, the Department's adjudicatory function is separated from its investigative and administrative function.

Protestant has provided no legal or evidentiary authority for any of his allegations of improper proceedings or bias. While use of “in-house” ALJ's has raised questions from many appellants, the Department is authorized to use them and this Board has routinely upheld their use by the Department.

## II

Protestant argues that the Department's finding of public convenience or necessity is an abuse of discretion because the Department has never defined or adopted standards susceptible of meaningful review on the issue of public

convenience or necessity, leaving all parties without guidance as to what must be shown to overcome the license prohibition of Business and Professions Code §23958.

The Appeals Board dealt with exactly the same contention in Vogl v. Bowler (1997) AB-6753. There the Board analyzed the case relied upon by appellant, Sepatis v. Alcoholic Beverage Control Appeals Board (1980) 110 Cal.App.3d 93 [167 Cal.Rptr. 729], and concluded that the standard to which the Department must adhere is "the standard set by reason and reasonable people, bearing in mind that such a standard may permit a difference of opinion upon the same subject." (Koss v. Dept. of Alcoholic Beverage Control, supra, quoted in Sepatis v. Alcoholic Beverage Control Appeals Board, supra.) The Department has adhered to that standard in this case.

### III

As part of its Determination of Issues II, the Department stated "The Protestants did not carry their burden to show that issuance of the license would result in a generic over concentration of licenses in the immediate vicinity or add to an undue concentration of licenses . . . ." Protestant contends that he does not have the burden of proof on the issue of over concentration, that the term "generic over concentration" does not occur in the Business and Professions Code and therefore is undefined, and that the Appeals Board ruled that the issue of over concentration did not need to be proven. The Department's statement, protestant

argues, "demonstrates the Department's biased and careless review in this case."

(App. Opening Br. at 12.)

Protestant is correct in his comment that "generic over concentration" is not a statutory term, but the deficiencies that protestant points out do not cause the decision to be erroneous or the process or persons involved to be biased. In light of substantial evidence to support the findings and determinations, the statement in the decision is irrelevant.

### CONCLUSION

The decision of the Department is affirmed.<sup>2</sup>

RAY T. BLAIR, JR., CHAIRMAN  
BEN DAVIDIAN, MEMBER  
JOHN B. TSU, MEMBER  
ALCOHOLIC BEVERAGE CONTROL  
APPEALS BOARD

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<sup>2</sup>This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate 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.