ISSUED JANUARY 12, 1998

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

JAMES LISSNER 2715 El Oeste Hermosa Beach, CA 90254, Appellant/Protestant, v. RO AL, INC. dba Patrick Molloy's Steakhouse 50 Pier Ave., #A Hermosa Beach, CA 90254, Respondent/Applicant, and DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6810 File: 47-317239 Reg: 96037194 Administrative Law Judge at the Dept. Hearing: John P. McCarthy Date and Place of the Appeals Board Hearing: October 1, 1997 Los Angeles, CA

James Lissner (protestant) appeals from a decision of the Department of Alcoholic Beverage Control[1] which refused to sustain his protest against the premises-to-premises transfer and exchange of an on-sale general public eating place license to Ro Al, Inc., doing business as Patrick Molloy's Steakhouse (applicant).

Appearances on appeal include appellant/protestant James Lissner;

[1] The decision of the Department, dated January 23, 1997, is set forth in the appendix.

respondent/applicant Ro Al, Inc., appearing through its counsel, William Beverly; and the Department of Alcoholic Beverage Control, appearing through its counsel, David Sakamoto.

FACTS AND PROCEDURAL HISTORY

Applicant filed an application for a premises-to-premises transfer and exchange of an on-sale general public premises license for an on-sale general public eating place license. The Department recommended approval of the transfer, but several individuals filed protests against its issuance. An administrative hearing was held on November 4, 1996, at which time testimony and documentary evidence were presented. On March 10, 1997, the Department adopted the proposed decision of the Administrative Law Judge (ALJ) dismissing the protests. Protestant thereafter filed this appeal.

In his appeal, protestant contends that the ALJ erred in finding that no non-hearsay evidence was presented of undue concentration and, because of that error, in failing to make a finding on the issue of public convenience or necessity.

DISCUSSION

Protestant contends that the ALJ made errors of law in finding, first, that "no non-hearsay evidence was presented to show that the proposed premises is located in [an area of undue concentration as defined in §23958.4, subdivision (a)(2)]" and, second, that "Whether the proposed premises serves public convenience or necessity is therefore of no consequence." (Dept. Decision, Finding VIII.)

The ALJ, by finding that the parties had not proven the existence of undue

concentration (which they justifiably believed was already admitted as a fact) avoided the difficult issue of what constitutes "public convenience or necessity." We cannot say that we agree with his position regarding whether or not undue concentration was proven.[2] However, in this appeal we have determined that the ALJ erred in considering the issue of undue concentration at all.

The present appeal involves the transfer of a license from one location to another and the exchange of that license for another type of license. The license to be transferred and exchanged is an on-sale general public premises license (type 48 license) that allows applicant to serve hard liquor in addition to beer and wine in a bar-type setting. The applicant is requesting that the type 48 license be exchanged for an on-sale general public eating place license (type 47 license). The type 47 license requires that applicant operate a "bona fide public eating place" in order to retain its right to sell alcoholic beverages. It is, in some sense, a downgrading of applicant's present license in that it automatically imposes substantially more restrictions on the operation of the licensed premises. These restrictions inherent in the license are in addition to the conditions that applicant has agreed to in its Petition for Conditional License. Applicant is, in essence, closing a bar and opening a restaurant.

Of primary significance, however, is the fact that issuance of the license requested will cause no increase in the number of licenses in the census tract [RT

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[2] In Lissner v. Club Sushi (1997) AB-6766, we determined that the ALJ had erred in his conclusions that undue concentration had not been established by admissible evidence and, therefore, that the existence of public convenience or necessity did not need to be examined. We remanded that case to the Department for findings on the issue of public convenience or necessity.

44], since both the transferor premises and the transferee premises are in the same census tract.[3]

Section 23958 requires the Department to "deny an application for a license . . . if issuance would result in or add to an undue concentration of licenses, except as provided in Section 23958.4." Section 23958.4, subdivision (a), states that "'undue concentration' means the case in which the applicant premises for an original or premises-to-premises transfer of any retail license are located in an area where" there exist greater than average numbers of reported crimes or certain specified ratios of licenses to population.

We do not read these provisions as requiring consideration of undue concentration in a case such as the present one, where the proposed premises are in the same census tract as the transferor premises and the transfer would not result in any change in the number of licenses in the census tract. Such a transfer simply could not "result in or add to an undue concentration of licenses," and, therefore, should not be subject to the provisions of §23958.4. The "undue concentration" and "public convenience or necessity" provisions of Business and Professions Code §23958.3 are simply not applicable to this situation and the ALJ erred in requiring the parties to prove undue concentration.

Under the circumstances of this appeal as described above, even though we find that the ALJ erred in his legal conclusions, this is not an appropriate case for reversal or remand to the Department for further findings in light of the correct legal theory. Remand to the Department is only appropriate when there is "real doubt"

[3] In fact, the proposed premises are located within a city block of the transferor premises.

that the Department would reach the same decision after considering the case in the context of the proper legal principles. (Miller v. Eisenhower Medical Center (1980) 27 Cal.3d 614 [166 Cal.Rptr. 826]; Sica v. Board of Police Com'rs of City of Los Angeles (1962) 200 Cal.App.2d 137, 141 [19 Cal.Rptr. 277, 281].) On the record before us, we have no real doubt that the Department would reach the same decision on remand that it reached after the administrative hearing. Reversal is equally inappropriate. In the course of the application process, applicant obviously convinced the Department that there was no basis for denial of the application under the criteria set forth in Business and Professions Code §23958, since the Department proposed to approve the application. We find that the record fully supports the decision of the Department based on the issues other than that of undue concentration and there has been no showing that the Department abused its discretion in approving issuance of this license.

CONCLUSION

The decision of the Department is affirmed.[4]

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

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[4]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.