ISSUED DECEMBER 20, 1999

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

JAMES LISSNER, Appellant/Protestant, v. EIN STEINS RESTAURANT AND BREWERY, INC. dba Ein Steins Restaurant and Brewery 1301 Manhattan Avenue Hermosa Beach, CA 90254, Respondent/Applicant, and DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7309 File: 23-339472 Reg: 98043954 Administrative Law Judge at the Dept. Hearing: Sonny Lo Date and Place of the Appeals Board Hearing: November 5, 1999 Los Angeles, CA

James Lissner (appellant/protestant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which denied his protest against the issuance of a small beer manufacturer license to Ein Steins Restaurant and Brewery, Inc., doing business as Ein Steins Restaurant and Brewery (respondent/applicant).

Appearances on appeal include appellant/protestant James Lissner; respondent/applicant Ein Steins Restaurant and Brewery, Inc., appearing through its counsel, Lucy Inman; and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

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[1]The decision of the Department, dated December 10, 1999, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Ein Steins Restaurant and Brewery, Inc., applied for a small beer manufacturer license on June 8, 1998. Protests were filed against the issuance of the license, and an administrative hearing was held on October 15, 1998, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Department investigator Joanne Aguilar; Hermosa Beach police chief Valentine Paul Straser; Hermosa Beach Community Development Director Sal Blumenfeld; two of appellant's principals, Jack Williams and Mike Ludwig; Jean Lombardo, an Hermosa Beach resident and an active participant and fund-raiser for various Hermosa Beach civic and charitable organizations; and the protestant, James Lissner.

Subsequent to the hearing, the Department issued its decision which determined that the protest of James Lissner should not be sustained and the protests of all other protestants were either withdrawn or deemed abandoned and dismissed.

Appellant thereafter filed a timely notice of appeal. In his appeal, appellant raises the following issues: (1) the Department erred in refusing to grant protestant's request to disqualify the administrative law judge; (2) protestant was deprived of his constitutional rights to be fairly and impartially heard; and (3) the definition of public convenience or necessity is unconstitutionally vague and therefore deprives applicants and protestants of their right to notice, violates due process, and is void as a matter of law.

DISCUSSION

I

Appellant contends the Department erred in refusing to grant his request to disqualify the administrative law judge (ALJ). Appellant's request was pursuant to Government Code §11512, subdivision (c), which states, in pertinent part:

> "Any party may request the disqualification of any administrative law judge or agency member by filing an affidavit, prior to the taking of evidence at the hearing, stating with particularity the grounds upon which it is claimed that the administrative law judge or agency member is disqualified. . . ."

Appellant contends that the ALJ in this matter was "predisposed to rule against appellant," since the same ALJ, in a prior case in which appellant was a prominent witness, had ruled against the same evidence appellant presented in this case. (App. Br. at 3-4.)

Government Code §11512, subdivision (c), provides, in relevant part:

> "An Administrative Law Judge . . . shall voluntarily disqualify himself or herself and withdraw from any case in which there are grounds for disqualification, including disqualification under Section 11425.40. . . . Any party may request the disqualification of any ALJ . . . by filing an affidavit, prior to the taking of evidence at a hearing, stating with particularity the grounds upon which it is claimed that the Administrative Law Judge . . . is disqualified. . . . Where the request concerns the Administrative Law Judge, the issue shall be determined by . . . the Administrative Law Judge."

Government Code §11425.40, subdivision (a), provides that an Administrative Law Judge "is subject to disqualification for bias, prejudice, or interest in the proceeding." Subdivision (b)(2) then provides that, without further evidence of bias, prejudice, or interest, an Administrative Law Judge is not subject to disqualification simply because he or she "has in any capacity expressed a view on a legal, factual, or policy issue presented in the proceeding."

The ALJ made an oral ruling at the beginning of the hearing, that, based on his review of appellant's affidavit in support of the request, he did "not see any grounds for" disqualifying himself, and "the affidavit does not state any reasons pursuant to

Government Code Section [11512, subd. (c)] and 11425.40 for me to disqualify myself." Appellant had nothing to add to his affidavit at the hearing. [RT 7.]

Appellant's affidavit merely states that the same ALJ had "heard previous cases for approval of alcohol licenses in downtown Hermosa Beach;" that the protestants, witnesses, issues, evidence and testimony at the hearing would be the same or similar as at previous hearings; that in the previous cases, this ALJ had ruled against the protestants; and, "based on these prior decisions, this administrative law judge is predisposed to a ruling in this case in favor of the licensee and cannot accord a fair and impartial hearing."

We see nothing in the affidavit that would be grounds for disqualifying the ALJ. The affidavit merely makes unsupported, general statements about an unnamed ALJ in unidentified "previous cases." Simply ruling against a party in a previous case (or even several previous cases) does not constitute grounds for concluding that the ALJ is unable to render a fair and impartial decision based on the law and facts presented. (See Gov. Code §11425.40, subd. (b)(2), *supra*.)

II

Appellant contends he did not receive a fair and impartial hearing, citing the ALJ's "comments and asides deriding [appellant] for his reasons for protesting and his lack of having a case" and "his impatience with [appellant] and the evidence presented . . ." (App. Br. at 4.)

Appellant cites, out of context, several statements of the ALJ that purport to show "the court's bias" (App. Br. at 5). Read in context, they do no more than show the ALJ's difficult task of keeping appellant focused on the issues relevant to the hearing,

i.e., those that appellant alleged in his protest as reasons the license should not issue. While the ALJ may have been somewhat impatient with appellant's persistent forays into irrelevant issues, especially after several hours, impatience does not amount to an unfair hearing or bias on the part of the ALJ.

Appellant objects to not being allowed to testify regarding issues related to alcoholic beverage consumption or crimes in general "even though case law supports the notion that the Department may consider the impact the license may have on the neighborhood, surrounding area and future harm of the public health, safety and welfare." (App. Br. at 7.) Appellant ignores the fact that the Department had already used its experience, expertise, and discretion in deciding that the license ***should*** issue. It was appellant's job, as a protestant, to show why this particular license should not issue, not why ***no*** alcoholic beverage license should issue.

The ALJ is required to be fair not only to appellant as a protestant, but also to the applicant, who should not be required to defend all charges that could be brought against alcoholic beverage consumption in general. As the ALJ said at one point [RT 41] in response to appellant's generalized arguments:

> "If drinking alcoholic beverages and the fact that it could lead to drunk driving or assaults, if that by itself were grounds for denial of a license, the license – I mean drinking would be illegal in California, but it's not."

Appellant also contends that witnesses for the applicant were allowed to generalize and make assumptions about the operation of this not-yet-operating premises even though he was precluded from doing so. This was not the case.

Appellant states that the police chief "was allowed to theorize (without any actual knowledge) that crime would not increase." (App. Br. at 7.) In fact, the chief's

testimony was that the trend in crimes was down, both nationally and in Hermosa Beach, and that the new premises would not create an undue law enforcement problem that the police could not handle [see RT 59, 61, 67-68, 75-76]. The ALJ specifically stated in his Finding II-B that he gave greater weight to the chief's opinion, whose job it is to know about law enforcement issues in Hermosa Beach, than to Mr. Lissner's unsubstantiated concern.

Appellant also complains that the owner was allowed to testify about other establishments in other cities and he was not. Although he has not been specific, he is presumably referring to the testimony of Mike Ludwig, president and co-developer of appellant, regarding his ownership and operation of a restaurant with an alcoholic beverage license for six years in Colorado [RT 116, 117]. This testimony appears to be designed to address concerns about the premises being operated in a manner that would not interfere with quiet enjoyment or be a law enforcement problem by showing that Ludwig had operated a similar premises without problems. Appellant did not object to this testimony as irrelevant.

Appellant argues that other witnesses were allowed to testify about public convenience or necessity while his testimony was restricted on this subject. Again, appellant has not specified the particular testimony to which he refers. However, the testimony of other witnesses was, in general, addressing the public convenience or necessity that would be served by this particular premises, while much of appellant's testimony dealt with issues unrelated to the issuance of this license, and as such, was properly limited.

Appellant's focus is on general issues relating to alcoholic beverage consumption and its effects and what he sees as the inability (or neglect) of law

enforcement to adequately police alcoholic beverage premises and enforce the conditions and laws that affect those establishments. However, he has picked the wrong forum in which to plead his case. Most of appellant's objections belong before the local zoning board, planning commission, or other local agencies, not before the Department in an application proceeding. Application matters are restricted to certain issues and are particular to the premises for which a license application has been filed. Appellant's argument is with the city politicians and business people and the reality of modern life in a popular beach community.

III

Appellant contends the definition of public convenience or necessity is unconstitutionally vague and therefore deprives applicants and protestants of their right to notice, violates due process, and is void as a matter of law. He refers to the case of Sepatis v. Alcoholic Beverage Control Appeals Board (1980) 110 Cal.App. 3d 93 [167 Cal.Rptr. 729], in which, he says, the court advised the Department to define "public convenience or necessity."[2] This is essentially an attack on the constitutionality of §23958 and 23958.4, both of which use, without definition, the term "public convenience or necessity."

The California Constitution, article III, section 3.5, prohibits an administrative agency, such as the Appeals Board, from holding an Act of the Legislature

[2]Appellant has made similar attacks on "public convenience or necessity" in prior cases, contending that use of the term without a specific definition made the Department's decision arbitrary and capricious. In those cases he also relied on the Sepatis case. The Board has consistently rejected this argument when considering it on the merits. A full discussion of the issue was included in the Board's decision in Vogl v. Bowler (1997) AB-6753.

unconstitutional except in specified circumstances, none of which are present here. Consequently, the Appeals Board declines to consider this issue.

ORDER

The decision of the Department is affirmed.[3]

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[3]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 order as provided by §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 §23090 et seq.