

ISSUED JANUARY 5, 2001

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

JERRY KOWALCZK, ADAM	)	AB-7475
SUMINSKI, and PAMELA I. UBERTI)	
Appellants/Protestants,	)	File: 47-343689
	)	Reg: 99046100
v.)	
	)	Administrative Law Judge
JOHN F. MCCORMICK	)	at the Dept. Hearing:
2215 Powell Street	)	Stewart A. Judson
San Francisco, CA 94133,)	
Respondent/Applicant, and	)	Date and Place of the
	)	Appeals Board Hearing:
DEPARTMENT OF ALCOHOLIC	)	September 22, 2000
BEVERAGE CONTROL,	)	San Francisco, CA
Respondent.)	
)	

Jerry Kowalczk, Adam Suminski, and Pamela I. Uberti (protestants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which dismissed their protests against the transfer to John F. McCormick (applicant), of a person to person and premises to premises transfer of a license with an exchange of that transferred license to an on-sale general public eating place license.

Appearances on appeal include appellants and protestants Jerry Kowalczk,

¹The decision of the Department, dated July 29, 1999, is set forth in the appendix.

Adam Suminski, and Pamela I. Uberti, applicant John F. McCormick, appearing through his counsel, Richard Warren, and the Department of Alcoholic Beverage Control, appearing through its counsel, Robert Wieworka.

FACTS AND PROCEDURAL HISTORY

Applicant applied to the Department on June 15, 1998, for the transfer of a license from another licensee and location, with the exchange of that license to an on-sale public eating place license for his premises in San Francisco.

Thirteen protests were filed in opposition to the granting of the license. The protests alleged residential area noise, over-concentration of licenses in the area, close proximity to a school, law enforcement problems, failure to post the premises as required by law, and the premises would create a public nuisance.

An administrative hearing was held on May 14, 1999, in San Francisco, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that the license could be issued. The protests of ten of the protestants who did not appear at the hearing were deemed abandoned, and therefore dismissed. As to the three protestants who appeared at the hearing (being the three appellants in this appeal), their protests were dismissed.

Protestants thereafter filed a timely notice of appeal. In their appeal, protestants raise the following issues: (1) there was an apparent conflict of interest shown by the Administrative Law Judge (ALJ) and a witness in the proceedings; (2) there was no showing of a proper posting of the premises in

accordance with law; and (3) there was no proper conditional use permit existing.

DISCUSSION

I

Protestants contend that there was an apparent conflict of interest shown by the ALJ and a witness in the proceedings. Protestants argue that the ALJ during the hearing, and at a recess, had a conversation with Robert Barbageleta, the owner of the building where the proposed license would be operating. This argument alleges that the ALJ inquired as to Mr. Barbageleta's family and thereafter commenced a friendly conversation. It is apparent from the argument that the conversation and acquaintance status of the pair was not secreted or hidden.

No request for disqualification of the ALJ pursuant to Government Code §11512, subdivision (c), was made at the hearing, and the record contains no arguments or allegations of any impropriety of the ALJ during the hearing. However, Government Code §11425.40, subdivision (a), provides that an Administrative Law Judge "is subject to disqualification for bias, prejudice, or interest in the proceeding."

Protestants should have raised their concerns at the hearing, where a determination could be made by the ALJ as to his conduct, and a record made. Without such record, the Appeals Board has no evidence upon which to consider the question of the appropriateness of the conduct.

II

Protestants contend that a proper posting of the premises in accordance with

law was not shown.

Business and Professions Code §23985 states:

“After filing an application to engage in the sale of any alcoholic beverage at any premises, notice of intention to so commence shall be posted in a conspicuous place at the entrance to the premises. The applicant shall notify the department of the date when such notice was first posted. No license shall be issued for the premises until the notice has been so posted for at least 30 consecutive days...”

Exhibit 5 is an affidavit of posting, a Department form, which attests to the fact that the posting took place on June 16, 1998. The form states that the posting must remain for a period of 30 days. Department investigator Justin Gibb testified that the posting was made on the date certified by applicant's representative, but the investigator did not notice the posting again as he did not look for it again [RT 42]. One of the protestants, Pamela Uberti, testified that she did not see the notice posted during the month of June or July even though she boards a bus directly in front of the premises [RT 73]. Finding XV states that there was a failure of evidence that the site was not posted in accordance with law. Apparently, the ALJ believed the witnesses who attested to the fact of the posting continuously for the 30-day period.

The rationale for such posting is to afford nearby residents the opportunity to have voice in the proceedings concerning a proposed licensed premises. It appears, however, from the record, wherein it is shown that 13 protests were filed, that the application for the transfer of the license was adequately known within the neighborhood, that the intent of the posting was accomplished. Protestants have shown no prejudice in regards to posting.

III

Protestants contend there was no proper conditional use permit existing. None of the protestants raised this as an issue in their protests. Additionally, during the hearing, the ALJ set forth the issues on the protests before the hearing commenced. No one raised the conditional use permit as an issue [RT 7-9]. Since protestants had the burden to prove their protest issues, not raising them until after the hearing where applicant could not rebut them, would be grossly unfair.

ORDER

The decision of the Department is affirmed.²

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

²This 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.