

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

AB-8111

File: 41-388147 Reg: 02053896-

DR. JULIAN T. LOPEZ, Superintendent, Centinela Valley Union High School District,
Appellant/Protestant

v.-

ELIAZAR VALENCIA MORENO, JUAN MORENO, and MARTIN VALENCIA MORENO-
dba El Tarasco Burrito
4809 Marine Avenue, Lawndale, CA 90260,
Respondents/Applicants

and-

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,-
Respondent-

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria-

Appeals Board Hearing: February 19, 2004-
Los Angeles, CA-

ISSUED MAY 13, 2004

Dr. Julian T. Lopez, Superintendent, Centinela Valley Union High School District (protestant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which granted the application of Eliazar Valencia Moreno, Juan Moreno, and Martin Valencia Moreno (applicants), doing business as El Tarasco Burrito, for an on-sale beer and wine public eating place license.

Appearances on appeal include protestant Dr. Julian T. Lopez, Superintendent, Centinela Valley Union High School District, appearing through his counsel, Daniel E. Wright; applicants Eliazar Valencia Morena, Juan Moreno, and Martin Valencia Moreno,

¹The decision of the Department, dated February 27, 2003, is set forth in the appendix.

appearing through their counsel, Rick A. Blake; and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY-

In May 2002, applicant applied for an on-sale beer and wine public eating place license. A protest was filed by protestant and an administrative hearing was held on December 12, 2002. At that hearing, oral and documentary evidence was presented concerning the application and the protest.

Subsequent to the hearing, the Department issued its decision which denied the protest and allowed the license to issue.

Protestant thereafter filed a timely notice of appeal. In his appeal, protestant raises the following issues: (1) the decision of the Department is not supported by the findings and the findings are not supported by substantial evidence; (2) the Administrative Law Judge (ALJ) erred in placing the burden of proof on the protestant; and (3) the ALJ erroneously sustained evidentiary objections during the hearing.

DISCUSSION-

The following statutes and statements are foundational and are considered in this appeal.

The Department is authorized by the California Constitution to exercise its discretion whether to grant an alcoholic beverage license, if the Department shall reasonably determine for "good cause" that the granting of such license would not be contrary to public welfare or morals. The Department's exercise of discretion "is not absolute but must be exercised in accordance with the law, and the provision that it may deny a license 'for good cause' necessarily implies that its decisions should be based on sufficient evidence and that it should not act arbitrarily in determining what is

contrary to public welfare and morals.” (*Martin v. Alcoholic Beverage Control Appeals Board* (1961) 55 Cal.2d 867, 876 [13 Cal.Rptr. 513] quoting from *Weiss v. State Board of Equalization* (1953) 40 Cal.2d 772, 775.) “[T]he Department’s role in evaluating an application for a license to sell alcoholic beverages is to assure that the public welfare and morals are preserved ‘from probable impairment in the future.’” (*Kirby v. Alcoholic Beverage Control Appeals Board (Schaeffer)* 7 Cal.3d 433, 441 [102 Cal.Rptr. 857, 498 P.2d 1105.])

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. The Appeals Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing.²

"Substantial evidence" is relevant evidence which reasonable minds would accept as a reasonable support for a conclusion. (*Universal Camera Corp. v. Labor Bd.* (1951) 340 US 474, 477 [95 L.Ed. 456, 71 S.Ct. 456] and *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].)

When, as in the instant matter, the findings are attacked on the ground that there

²The California Constitution, article XX, section 22; Business and Professions Code sections 23084 and 23085; and *Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

is a lack of substantial evidence, the Appeals Board, after considering the entire record, must determine whether there is substantial evidence, even if contradicted, to reasonably support the findings in dispute. (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925].)

Appellate review does not "resolve conflicts in the evidence, or between inferences reasonably deducible from the evidence." (*Brookhouser v. State of California* (1992) 10 Cal.App.4th 1665, 1678 [13 Cal.Rptr.2d 658].)

The court in *Koss v. Department of Alcoholic Beverage Control* (1963) 215 Cal. App.2d 489 [30 Cal.Rptr. 219, 222], enumerated several considerations the Department may consider in determining if a license would endanger public welfare or morals: "the integrity of the applicant as shown by his previous business experience; the kind of business to be conducted on the licensed premises; the probable manner in which it will be conducted; the type of guests who will be its patrons and the probability that their consumption of alcoholic beverages will be moderate."

I

Protestant contends the decision of the Department is not supported by the findings and the findings are not supported by substantial evidence, arguing that applicant failed to show all statutory requirements were met.

Findings and conclusions of law are extremely important to a reviewing tribunal to ascertain the thought process of the ALJ to insure that the hearing with its record are consistent with the findings.

The court in *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 516-517 [113 Cal.Rptr. 836], discussed the question of administrative findings which are supported by the agency's analysis based on its

investigative facts:

Our ruling in this regard finds support in persuasive policy considerations ... the requirements that administrative agencies set forth findings to support their adjudicatory decisions stems primarily from judge-made law, and is 'remarkably uniform in both federal and state court.' As stated by the United States Supreme Court, the 'accepted ideal ... is that the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained.'

Among other functions, a findings requirement serves to conduce the administrative body to draw legally relevant sub-conclusions supportive of its ultimate decision; the intended effect is to facilitate orderly analysis and minimize the likelihood that the agency will randomly leap from evidence to conclusions. In addition,³ findings enable the reviewing court to trace and examine the agency's mode of analysis.

A review of the decision of the Department shows a consistent analysis of the matter by the ALJ, which analysis sets forth the evidence in brief form, and is consistent with the record. The record consistently supports the Findings and the Conclusions.

Contrarily, the arguments of protestant show a great misunderstanding of the licensing process. Protestant argues that the Applicant has a duty to present evidence of conformity to the various code sections concerning whether all the statutory "hoops" have been properly conformed to.

The Report on Application for License written by the investigator for the Department shows that the premises was properly posted thus allowing citizens of the area to contact the Department if they wished to; the publication date in the local newspaper of the pending application; and the notice date the applicant notified all residents of real property within 500 feet of the premises. All required supervisory staff of the Department approved the issuance of the license, before the documents were

³In footnote 14, the court cited the words of Mr. Justice Cardozo: "We must know what [an administrative] decision means ... before the duty becomes ours to say whether it is right or wrong."

sent to the Sacramento Main Office of the Department [Exhibit 7]. Since all statutory requirements were shown by Department testimony and reports, applicant did not need to redundantly testify to such facts.

As all related documents show, the process once the Department approves the application, and would issue the license in due course, is to allow for objections by properly filed protests. This was accomplished by written objection and a hearing on those issues raised by protestant. If there were irregularities in the Department's procedures, it would be incumbent upon the protestant to add that as an issue for the hearing, if possible, and to the Appeals Board to determine if substantial evidence upheld the decision of the Department.

While one may seriously question whether a license should be issued so close to the two high schools (one directly next door, and the other down the street), the Department in its discretion decided it was legally proper to approve such license. The protest, properly drafted and later supported, can be an effective method to show the irregularities or at least the ill-advisement of the issuance of the license. The record shows that the decision of the Department to issue the license was based on substantial evidence.

II

Protestant contends the ALJ erred in placing the burden of proof on protestant.

Protestant filed with the Department a Protest form which stated that the undersigned (on the form) protested the issuance of the license to the applicants "on the grounds that," and then Protestant listed his reasons for the protest.

These objections were the basis for the hearing before the Department, and the ALJ advised counsel for Protestant those would be the issues before the hearing.

While counsel for Protestant first objected that there were other issues he would like to raise, the ALJ explained that the only issues the parties were aware of were these objections raised in the protest documents. When the law was explained, counsel for Protestant consented to the procedure [RT 8-9].

Protestant contends on appeal for the first time, that the “Statement of Issues to be Determined” clause in the form, Notice of Hearing on Protest, included “public welfare and morals” terminology as found in article XX, section 22 of the Constitution of the State of California, and sections 23958 of the Alcoholic Beverage Control Act of the Department of Alcoholic Beverage Control. This, according to Protestant, allows Protestant to open the hearing and evidence to all issues that could affect the area of the schools, such as alcohol in the community, and not limited to the protest issues raised.

The issue as to public welfare and morals is for the Department to determine in its final assessment of the application. The court in *Boreta Enterprise, Inc. v. Department of Alcoholic Beverage Control* (1970) 2 Cal.3d 85, 99 [84 Cal.Rptr. 113], defined the concept:

It seems apparent that the “public welfare” is not a single, platonic archetypal idea, as it were, but a construct of political philosophy embracing a wide range of goals including the enhancement of majority interest in safety, health, education, the economy, and the political process, to name a few. In order intelligently to conclude that a course of conduct is “contrary to the public welfare” its effects must be canvassed, considered and evaluated as being harmful or undesirable. Ordinarily it is delusive to speak in terms of conduct which is per se contrary to public welfare.

The Constitution gives to the Department the duty and discretion as to what comes within the meaning of “public welfare.”

Correctly, Protestant claims that the burden was placed on him to carry the load

of the hearing. No hearing would have been necessary but for the issues raised by Protestant. Protestant filed a protest listing the issues Protestant apparently felt were issues that should be considered by the Department. The claim by Protestant that the welfare and morals statements are an open invitation to bring up every alcohol-related social ill of the area over and above the issues raised in the protest filed, would create chaos and license to extend the hearing far beyond its proper boundaries.

Essentially, the Department determined that the license should issue but for the protest. As is fundamental law, it is the Department which has the discretion to issue or not issue a license. If it is the decision of the Department to issue the license, no one can contend otherwise, other than through the process of filing a protest. Protestant is incorrectly stating that once he has filed a protest, he may bring up any somewhat related issue at the hearing without allowing the other parties to the process access to Protestant's intended scheme.

Protestant argues from the point of view of an Appeals Board case of *Chambers v. Prestige Stations* (1992) AB-6247. In that case, like this matter, the Department-accepted protests and sustained objections to evidence of the protestants who tried to put on evidence of crime problems.

While the decision seems to be at odds with the conduct of the hearing in this matter, this Board concludes that the cases are not sufficiently similar. In the *Chambers* matter, the ALJ excluded testimony offered as to crime problems. However, there were two things that distinguishes the cases: (1) Protestants had stated in their protest documents, the wording: "Therefore, [in] this area ... crime is very high" and the fact that the sheriff's department had not been notified of the pending application and therefore was not in a position to file a protest or aid in information which could shed

light on crime in the area.

The theory of a protest that certain important items to the protestant can be expanded to limitless issues that affect the general area, is an uncontrollable theory fraught with mischief and needless time consuming rhetoric.

III

Protestant contends the ALJ erroneously sustained evidentiary objections during the hearing. Protestant argues that "... both attorneys of the Department and the Applicant objected numerous times to the attempts of [Protestant] to introduce evidence relevant to the Statement of Issues based upon the broad constitutional standard of 'public welfare and morals.'" We have already concluded that broad standard does not apply to this matter. Protestant in its brief then cites some of the objectionable dialogue:⁴

[PORTIONS OF TRANSCRIPT pp. 79-80]

MR. BLAKE [counsel for Applicant]: Objection. Lack of foundation and hearsay. It's my understanding he's not the author of the survey. He didn't conduct it.

MR. GARCIA [counsel for Protestant]: I'm submitting his testimony as an expert. He certainly can tell you what the basis of his expert opinion is going (sic) be, and give you data and information at that point on nationally recognized, state recognized data.

THE COURT: Okay. Well, why don't we ask him for his opinions first, and then you can ask him what his opinions are based on.

MR. GARCIA: Sure.-

MR. BLAKE: I'm going to have to object to even the opinions based on relevancy. The issue is not the social problems with regard to alcohol or alcohol abuse. The issue is will it affect this particular location at the high school, and relevancy as to trends or social problems among high school students or alcohol use in general just doesn't bear any relationship to this application.

MR. LOGAN [counsel for the Department]: It must go to [Evidence Code section]

⁴Protestant cites portions of these pages as showing the problem of a hearing frustrated by continuous objections and rulings against admissibility. The Appeals Board has supplemented Protestant's cites to show a more broad problem, to the Board, created by Protestant.

352 probably.

THE COURT: I'm going to have to sustain that objection, and as we indicated before, the issue that was raised in your protest is - -

MR. GARCIA: Impact on operations.

THE COURT: - - is how - - whether this - - the licensing of this premises would interfere with the operation of the school. Let's limit that to those.

MR. GARCIA: All right. And I was getting to that. The statistics that are contained within the Healthy Start Studies related directly to Lawndale and Lloyd High Schools. What I was getting at was, number 1 - -

THE COURT: Okay. We don't - - first of all, do not have any testimony from this witness whether he feels that a beer and wine license at a restaurant across the street is going to interfere with the operation of the school. Let's start there.

BY MR. GARCIA: Q: Do you feel that a beer and wine license adjacent to Lawndale High School would interfere with the operations of the school?

A: Yes.-

MR. LOGAN: Objection. Lack of foundation.-

THE COURT: Overruled. And now you can ask him why.-

BY MR. GARCIA: Q: Why?-

A. It's been my experience with the students I work with that alcohol is accessible as it is, and having a restaurant adjacent to a high school is just allowing more accessibility to alcohol. And students use alcohol as a gateway drug, students use alcohol as a rite of passage to adulthood; and to have a restaurant establishment purvey alcohol hits all three of those areas. To me it directly affects the operation of both high schools.

[PORTIONS OF TRANSCRIPT, pp. 95]

Q: [BY MR. GARCIA]: All right. Now gangs - - are alcohol - - are gangs busted near - - does gang activity increase or decrease depending on the amount of alcohol available to those gangs?

MR. LOGAN: Objection; lacks foundation.-

MR. BLAKE: And there's a relevancy issue there, to the issues before - - before the Department at this time, Your Honor.

THE COURT: Sustained. I'm giving you some leeway.

MR. GARCIA: I understand.-

MR. GARCIA: Q: Do gangs in the Lawndale area congregate in other (sic) any other areas other than the park?

A: Mostly in personal homes.-

[PORTIONS OF TRANSCRIPT, pp. 109-110]

BY MR. GARCIA: Q: Then what was the reputation of the district as an institution for the quality of the education that was being received there?

MR. BLAKE: Objection; relevancy.-

MR. LOGAN: Not being within the Statement of Issues.-

THE COURT: Sustained.-

BY MR. GARCIA: Q: What was the reputation of the district with respect to the

safety of students at the district?-

MR. BLAKE: Objection. Same objection.-

THE COURT: Sustained. We need (sic) limit ourselves to these two high schools.

MR. GARCIA: Well, then let's just say what was the reputation for the district after having - - the day after you opened Lawndale High School.

MR. LOGAN: Objection. Not being comprised within the Statement of Issues. There's nothing about reputation in there.

THE WITNESS: It goes with the operations.-

MR. BLAKE: What was the reputation?-

MR. GARCIA: Let me rephrase that. Q: What kind of reputation did the district have before its operations at Lawndale High School and Lloyd High School?

MR. BLAKE: It's five years ago. What's the relevance?-

MR. GARCIA: Well, because there's - - I'm just trying to establish that five years ago there was a huge problem that Dr. Lopez has spent hundreds of thousands of dollars to improve the safety and security of the kids, and the granting of a license to this site adjacent to it is going to impair that safety and security of those kids.

THE COURT: Why don't you ask this witness how and why he feels that issuance of a license will interfere with the operations.

MR. GARCIA: Q: How and why do you feel - - how do you feel the operation of this license - - the granting of this license will interfere with the operation of Lawndale High school?

A: One of the problems we're up against - - there's two major issues. One issue is there has never been any sale of alcohol at this establishment or any establishment that's been there before, so there's nothing to be able to establish any precedence.

(¶) The second issue is that Lawndale just opened up five years ago, but I can tell you specifically about the youngsters that come to Lawndale High School, because they come from all over the district; it's a school of choice. So it's the same youngsters that attend our other comprehensive high schools. It's not any different.

(¶) One of the number-one issues pertaining to our school district dealing with school safety, a tremendous amount of violence we had in our school, gang activity, and youngsters did not feel safe in school, teachers did not feel safe on the staff. One of our main goals was to try to move and make schools safe, and conducive towards teaching and learning; and we have been able to do that within the last five years.

(¶) It not something that you just simply fix and it's fixed forever. It's something you have to maintain and stay on top of it on a daily basis.

(¶) Lawndale High School is fairly new, and Lawndale High School would have the same problems that any other school would, and its my particular opinion and my experience that having the sale of alcohol and consumption of alcohol in the proximity of El Tarasco and Lawndale High School would be detrimental to youngsters that are currently attending there.

(¶) We're going to see Lawndale High School grow. We're going to see Lawndale High School having tremendous amount of activities going day and

night, and also during weekends; and as you may or may not be familiar with under the - - the civic - - we have to allow community use of the school.

Protestant and his witnesses tried to give testimony as to the effects and evils of alcohol, as a general effect on society. Protestant failed to link the alcohol at the premises and show a reasonable impact specifically on Protestant's students. Protestant appears to have a general feeling expressed against alcohol itself.

Protestant's main approach was to testify that since the school teaches against the use of alcohol, having the restaurant in close proximity would be contrary to their teaching program.

CONCLUSION-

Perhaps the California Constitution, Article XX, Section 22, says it best: "...The Department of Alcoholic Beverage Control shall have the exclusive power ... [within the terms of the Constitution and enactments of the Legislature] ... in its discretion, to deny, suspend or revoke any specific alcoholic beverage license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals" The Department in our view has acted within its discretion and not arbitrarily so. The Department within its proper processing of applications, determined the license so applied for should be granted.

In accordance with law, time was allowed for the receipt of objections to its issuance, in the protest process. Following the proper processing of the protest, as we view the record, the Department after hearing, determined that "... Protestant had raised legitimate concerns regarding the issuance of the applied-for license, however, the preponderance of the evidence did not establish that the issuance of the applied-for license would interfere with the operation of the two high schools that are located in

close proximity to the premises” [Determination of Issues I.] One of the conditions imposed on the license was a condition that sales and service of alcoholic beverages could only commence after 4 p.m. each day of the week, except Saturdays and Sundays.

Protestant’s weakness of his case, is the apparent attempt to attack the procedures of the Department, with little focus on the impact the license could have on the students of the school.

We conclude that the evidence submitted by Protestant was insubstantial on the issues raised by his protest.

ORDER-

The decision of the Department is affirmed.⁵

TED HUNT, CHAIRMAN
KAREN GETMAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁵This 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.