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

AB-8220
File: 20-397752 Reg: 03055717

KIRPAL GILL.
Appellant/Protestant

v.

SIDHU K P, INC. dba Quick & EZ
150 East Hanford-Armona Road, Lemoore, CA 93245,
Respondent/Applicant

and

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: October 7, 2004
San Francisco, CA

ISSUED DECEMBER 8, 2004

Kirpal Gill, (appellant/protestant) appeals from a decision of the Department of Alcoholic Beverage Control[1] which granted the application of Sidhu K P, Inc., doing business as Quick & EZ (respondent/applicant), for an off-sale beer and wine license.

Appearances on appeal include appellant/protestant Kirpal Gill, appearing through his counsel, Lawrence Adelman; respondent/applicant Sidhu K P, Inc., appearing through its counsel, Richard A. Harris; and the Department of Alcoholic Beverage Control, appearing through its counsel, Thomas M. Allen.

FACTS AND PROCEDURAL HISTORY

An application for the issuance of an off-sale beer and wine license was filed on

[1]The decision of the Department, dated December 4, 2003, is set forth in the appendix.

February 19, 2003, followed by a petition for conditional license on August 8, 2003. The Department investigator recommended that the license be issued, but a protest was filed by appellant Kirpal Gill.

An administrative hearing was held on October 8, 2003, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which denied appellant's protest and allowed the license to issue. The Department made the following determinations: operation of appellant's convenience market would not interfere with the quiet enjoyment of the property of nearby residents; issuance of the applied-for license would not tend to create a law enforcement problem; evidence did not establish the existence of undue concentration; evidence did not establish that issuance of the proposed license would create a traffic problem; the nearby preschool does not qualify as a school within the meaning of Business and Professions Code section 23789, subdivision (b); evidence did not establish that issuance of the license would interfere with the operation of the preschool; granting of the license would not be contrary to welfare and morals. Each of these determinations addressed one of the issues on which the hearing was conducted.

Appellant thereafter filed a timely notice of appeal, and raises the following issues: the Department failed to proceed in the manner required by law because the Department's decision is based, in part, on the fact that protestant is applicant's competitor; the Department failed to thoroughly investigate the premises and the surrounding area to ensure that public welfare and morals would not be adversely affected; the Department's decision was not reasonable under the evidence; the Department's findings of fact are not supported by substantial evidence; relevant evidence (a petition from residents) was improperly excluded at the hearing.

DISCUSSION

I

Appellant contends that the Department's decision is based, in part, on appellant's status as a competitor of the applicant, and that the hearing placed undue emphasis on that fact. As a consequence, he claims, he was penalized because his protest was viewed with less weight than a protest of a non-competitor, or because he was deemed not to possess the same right to protest the issuance of the license as any other resident.

Appellant cites and quotes from *Matossian v. Fahmie* (1980) 101 Cal.App.3d 128, 135-136 [167 Cal.Rptr. 532], a decision affirming a summary judgment in favor of a group of licensees who were sued for malicious prosecution, tortious interference with a business, and abuse of process, as well as for alleged Cartwright Act violations, after having unsuccessfully protested the transfer of the plaintiffs' alcoholic beverage license. The court held that, regardless of any anti-competitive motive, the defendants had a First Amendment right to petition the Department, and their protests were an exercise of that right.

Appellant may be correct that he had a constitutional right to protest despite his status as a competitor. However, the hearing was not concerned with his right to register a protest. It was concerned, among other things, with the appropriate weight to be given his testimony, taking into account any bias which may have shaded his testimony because of his desire to avoid competition from another licensee.

We have reviewed the instances in the hearing transcript where appellant's status as a competitor was the subject of testimony or argument, and disagree with appellant that undue emphasis was accorded to his status. (See, *e.g.*, RT 43, 47-49,

123.) We find nothing to suggest that he was in any way penalized because of any anti-competitive motives he may have had in opposing the application, or that he was denied the right to protest. He was ably represented throughout the hearing, was permitted to call witnesses, and cross-examine other witnesses.

The mere fact that the administrative law judge (ALJ) made findings adverse to his contentions does not mean that his views and the evidence he presented were not taken seriously or given the weight they deserved. The Department has a great deal of discretion in determining whether or not a license may properly issue, and there is nothing in the decision that would suggest that in doing so, it deprived appellant of any of his constitutional right to petition the Department to refuse the license.

II

Business and Professions Code section 23958 requires the Department to make "a thorough investigation to determine whether the applicant and the premises for which a license is applied qualify for a license." Appellant contends that the Department failed to conduct the thorough investigation required by section 23958.

The investigation was conducted by Joyce Knodel, a 17-year investigator with the Department. Knodel prepared a written report of her investigation (Exhibit A), and recommended that the license issue with five conditions imposed upon it to safeguard the quiet enjoyment of residents located in a large apartment complex adjacent to the premises.[2]

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[2] The conditions would prohibit the consumption of alcoholic beverages on any property adjacent to the premises which is under the control of the licensee; would require the licensee to maintain the area adjacent to the premises free of litter and graffiti; would require a solid six-foot fence on the north property line; would require the illumination of the area adjacent to the premises in a manner that would not disturb the normal privacy and use of neighboring residences; and would require the licensee to

Appellant registers a number of criticisms of Knodel's investigation, and argues that the decision must be reversed so that a new, more thorough investigation may be conducted, the result of which, appellant contends, would be the denial of the license.

Appellant complains that Knodel failed to note the operating hours of a day care center across the street from the premises, or that there was a public school bus stop in front of the day care center. Appellant argues that since Knodel did not note the operating hours of the day care center, and was never present when school buses were picking up or dropping off children, she was unable to assess how the license might adversely affect the welfare and morals of the children at the day care center, or those riding the school buses. Appellant also criticizes the investigator's failure to advise the owner of the day care center of the possibility that the off-sale beer and wine license might at some time in the future be upgraded to an off-sale general license.

Knodel testified that she spoke to the owner of the day care center and determined that the children were delivered and picked up by their parents. The center is separated from the premises by a major thoroughfare and two secondary roads. The initial concern of the owner of the center was that the premises would be a liquor store, but her concerns vanished when she learned the premises was to be a convenience store. Although she had filed a protest, it was never verified.

The facts concerning the day care center which appellant claims were not considered by the investigator were brought out in the hearing and were considered by the ALJ. He concluded that the day care center was not a school, and, thus, not a consideration point; the children were transported by their parents, and were in a fence-

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take steps to prevent loitering in the area adjacent to the premises.

enclosed area; the issuance of the license would not interfere with the operation of the center. Although he did not refer to the hours of operation, it may be assumed the hours would be no different from any other day care operation.

In any event, appellant has not explained how the operation of the day care center bears on any of the issues raised in his protest. There is no evidence that it contributes to any traffic problem; it is not a school; it is not a residence subject to Rule 61.4; it has nothing to do with any possible law enforcement problem; and is totally irrelevant on the issue of undue concentration.

Appellant cites several other instances where, he contends, the investigator did not throughly investigate the consequences which would flow from the issuance of a license. He points to the potential noise and lighting disturbance; the possible creation or exacerbation of a crime problem; the presence of the Light of Life church 497 feet east of the premises; the presence of a medical center near the premises; and the inability of the Department to gauge the accuracy of the applicant's estimate of potential sales of alcoholic beverages.

In fact, the investigator did take each of these factors into consideration. The possible noise and lighting problem was addressed in the conditions imposed on the license. Any concern about a crime problem was allayed following her conversations with Commander Jeff Wauz of the Lemoore Police Department. Appellant has not suggested what impact, if any, the operation of the premises would have on the operation of the Light of Life church - it should be noted that, at the time of her investigation, the church was an apparently abandoned building.[3] The investigator was

[3] Because it was not in operation at the time of the application, the church was not included in appellant's protest. Offered the option of including it in the protest,

aware of the existence of the medical center, and noted it in her diagram of the area. While it is true that the Department has no means of gauging the accuracy of the applicant's sales projections, both the Department and the investigator have a great deal of experience in the licensing of convenience stores, so would know whether the estimate was within the bounds of reason.

A thorough investigation is not necessarily a perfect investigation. We are not prepared to say that the criticisms registered by appellant demonstrate any failure on the part of the Department to perform its duties under section 23958.

III

Appellant contends that the Department's decision was not reasonable under the evidence, and not supported by substantial evidence.

Appellant draws on the same arguments made in his attack on the adequacy of the Department's investigation in an attempt to demonstrate the absence of substantial evidence to support the decision.

"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 U.S. 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 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

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appellant's counsel elected to treat it as within a law enforcement quiet enjoyment issue. [RT 8-9.]

870, 873-874 [197 Cal.Rptr. 925].)

Where there are conflicts in the evidence, the Appeals Board is bound to resolve them in favor of the Department's decision, and must accept all reasonable inferences which support the Department's findings. (*Kirby v. Alcoholic Bev. Control App. Bd.* (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857] (in which the positions of both the Department and the license-applicant were supported by substantial evidence); *Kruse v. Bank of America* (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 271]; *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734]; *Gore v. Harris* (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

Appellant cites the testimony of three witnesses called by appellant, each of whom expressed concerns over possible adverse consequences should the license issue. The proposed decision discussed the testimony of these witnesses, and concluded, nonetheless, that none of the issues raised warranted a denial of the license.

IV

Appellant contends that the ALJ erred in excluding, as administrative hearsay, a petition circulated by Gloria Williams, one of the witnesses called by appellant. The petition recites opposition to the issuance of the license, asserting that there are enough retail stores selling alcoholic beverages in Lemoore, and expressing concerns that an increase in the number of stores will create a greater opportunity for the purchase of alcoholic beverages by persons under 21 years of age, and provide a location for possible neighborhood noise, crime, loitering and littering. The petition bears 15 signatures of residents of the Heritage Apartments and nearby areas.

Appellant argues that the petition should have been admitted into evidence as administrative hearsay to supplement the testimony of the witnesses at the hearing.

Although he declined to admit the petition as administrative hearsay, the ALJ specifically acknowledged the testimony of Ms. Williams that those who signed the petition lived in the apartments or nearby, and opposed the license. The Department had not objected to consideration of the petition as administrative hearsay, but the applicant's counsel did object, arguing that the assertions in the petition went beyond administrative hearsay.

We cannot say that consideration of the petition as administrative hearsay would lead to a different result in this case. The ALJ already knew there was opposition to the license from some of the residents of the Heritage Apartments, opposition that generated the conditions imposed on the license. He undoubtedly took these considerations into account in concluding that issuance of the license would be consistent with welfare and morals. He was in a better position than is this Board to weigh the competing and conflicting evidence on the effects which might flow from the issuance of the license. It is enough for us that there is substantial evidence in the record to support the ALJ's decision, and appellant has not persuaded us that a reversal of his decision is warranted.

We are guided by the leading case of *Sepatis v. Alcoholic Bev. Control Appeals Bd.* (1980) 110 Cal.App.3d 93, 102 [167 Cal.Rptr. 729], where the court stated, quoting from *Koss v. Dept. of Alcoholic Bev. Control* (1963) 215 Cal.App.2d 489, 496 [30 Cal.Rptr. 219 :

> "[T]he department exercises a discretion adherent to the standard set by reason and reasonable people, bearing in mind that such a standard may permit a difference of opinion on the same subject. ... Where the decision is the subject of

> choice within reason, the department is vested with the discretion of making the selection which it deems proper; its action constitutes a valid exercise of that discretion; and the appeals board or the court may not interfere therewith. [Citations.] Where the determination of the department is one which could have been made by reasonable people, the appeals board or the courts may not substitute a decision contrary thereto, even though such decision is equally or more reasonable in the premises."

We have considered the remainder of appellant's arguments, and find none which compels a different result.

ORDER

The decision of the Department is affirmed.[4]

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

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[4] This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

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