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

AB-8238
File: 20-395408 Reg: 03055123

FADIE ABI ATMI, dba Arco Sherman Way
14053 Sherman Way, Van Nuys, CA 91405,
Appellant/Applicant
v.

DONALD DYE,
Respondent/Protestant

and

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen

Appeals Board Hearing: September 2, 2004

Los Angeles, CA

ISSUED NOVEMBER 18, 2004

Fadie Abi Atmi, doing business as Arco Sherman Way (appellant/applicant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which sustained the protest against issuance to him of an off-sale beer and wine license.

Appearances on appeal include appellant/applicant Fadie Abi Atmi, appearing through his counsel, Andreas Birgel, Jr.; respondent/protestant Donald Dye, appearing through his counsel, Mark Lynch; and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

---

[1]The decision of the Department, dated January 22, 2004, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

On November 27, 2002, applicant petitioned for issuance of an off-sale beer and wine license. A protest was filed, and applicant filed a petition for conditional license, agreeing to six conditions on the license. An interim operating permit was issued to applicant on or about August 29, 2003. An administrative hearing on the protest was held on November 5, 2003. 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 sustained the protest.

Appellant appealed the Department's decision making the following contentions: The protest should have been disallowed because the verification was not timely; the administrative law judge erred in considering evidence beyond the scope of the limited, single issue; there was insufficient evidence to support the determinations; the administrative law judge erred in considering evidence that appellant failed to comply with the proposed conditions while operating on an interim permit; and the Notice of Hearing on Protest did not give appellant sufficient notice of the grounds of the protest.

DISCUSSION

I

Appellant contends the protest should have been disallowed because the protest letter, although timely filed, was not verified as required by Business and Professions Code section 24014 until after the final filing date. The last day for filing a protest was December 26, 2002.[2] The protest letter was received by the Department on December

---

[2]Business and Professions Code 24013, subdivision (a), provides:

> Protests may be filed at any office of the department at any time within 30 days from the first date of posting the notice of intention to engage in the sale of alcoholic beverages at the premises, or within 30 days of the mailing of the notification pursuant to Section 23985.5, whichever is later.

13, 2002, but no verification was filed until February 10, 2003, well after the statutory time limit had expired. Therefore, appellant asserts, the Department should have disallowed the protest as unverified when received.

In civil law, the lack of a required verification on a pleading does not deprive a court of jurisdiction to hear the matter on its merits, and the defect is curable by amendment even though the statute of limitations has run on the time to file the original complaint. (*Ware v. Stafford* (1962) 206 Cal.App.2d 232, 237 [24 Cal.Rptr. 153].) Here, the protest letter serves much the same purpose as a complaint, and since the defect was cured, there was no reason for the Department to dismiss or disallow the protest.

Even if the protest letter were defective, appellant did not object at the hearing on the ground it was not properly verified; he merely objected to including in the protest the additional issues raised in a second letter received by the Department on February 14, 2003. [RT 26, 30-31.] Appellant waived any objection to the lack of verification by proceeding to argue the case on the merits without objecting to the verification defect, and he cannot now raise the issue on appeal. (*Zavala v. Board of Trustees* (1993) 16 Cal.App.4th 1755, 1761 [20 Cal.Rptr.2d 768].)

II

At the beginning of the hearing, the administrative law judge (ALJ) stated that the issue was whether issuance of the license would be contrary to public welfare and morals "in that normal operation of the proposed premises will interfere with the functions of two schools located within the immediate vicinity." [RT 8.] He reaffirmed the limitation of the issue later as well. [RT 32-33.]

Appellant contends that the two schools referred to are the Pinecrest Schools and the Hazeltine Elementary School, which are both deemed "consideration points" by the Department. The Pinecrest Toddler Center, which abuts the proposed premises, is not a consideration point for the Department, and, therefore, appellant argues, any evidence concerning the Toddler Center goes beyond the limited issue of the case. It was error, appellant asserts, for the ALJ to admit and consider such evidence. His doing so was to appellant's detriment, since "most of the damaging testimony" was with reference to the Toddler Center, according to appellant.

Business and Professions Code section 23789 authorizes the Department to deny issuance of a new license for premises "within the immediate vicinity of churches and hospitals" (subd. (a)) or "within at least 600 feet of schools and public playgrounds or nonprofit youth facilities . . ." (subd. (b)).

The Department considers churches, hospitals, schools, public playgrounds, and nonprofit youth facilities "consideration points" for purposes of its investigation into a license application. The investigator's Report on Application for License (Ex. I) (Report), states that the Toddler Center does not qualify as a consideration point "under the rules and regulations of the Department."[3] To qualify as a consideration point, the Report states, a school "must be an institution, place, or building used for imparting of organized instruction, but does not include nursery schools or other institutions which are primarily for the purpose of care rather than instruction."

---

[3]We have found no promulgated regulation dealing with this subject. However, the Department's Instructions, Interpretations, and Procedures Manual does contain a definition of "school" on page L137 that corresponds to the language used in the Report. We do not decide whether that definition constitutes an "underground regulation," since neither party has raised or briefed the issue.

It is clear that the ALJ did not consider the Toddler Center to be "primarily for the purpose of care rather than instruction," as evidenced by Findings of Fact 4 and 5:

> 4. Pinecrest School is a private elementary school through 8th grade and is located at the northwest corner of Hazeltine and Sherman Way, directly across Hazeltine Avenue and within 100 feet or the premises. It has been at this location many years and together with its companion Pinecrest Toddler Center located on the east side of Hazeltine immediately north of the proposed premises has a student body of 500 students. The school is in session nearly year-round including a summer camp.
>
> 5. The Pinecrest Toddler Center, a licensed preschool, is immediately adjacent to and north of the premises; separated therefrom by what appears to be a party wall between the [Toddler Center and the proposed premises]. The protestant provides a continuous educational experience for students from the toddler stage through elementary school.

The ALJ's conclusion that the Toddler Center qualified as a consideration point is not unreasonable. The Toddler Center was identified as part of the Pinecrest Schools by Jeri Lynch, the director of the Van Nuys Pinecrest School campus. When asked the location of the Pinecrest Schools, she responded: "Well, it's located – there's one address 14111 Sherman Way, and it stretches down to Hazeltine and across the street at the toddler center. Actually there are three physical mailing addresses." [RT 134.] Lynch also testified that the age range of the students in the school was "18 months to 14 years" [RT 134], encompassing the children at the Toddler Center as well as the elementary school.

In addition, Donald Dye, the protestant and president of Pinecrest Schools, testified that the Toddler Center was not simply a child care facility:

Q. And with regard to the toddler center, there is actually instruction going on with those children, isn't there?

A. Of course.

Q. So that, in effect, it is a school as well, is it not?

A. A licensed school. You have to get a license from the state the same as we do here. From the city and state, and it says a school.

[RT 79.]

We agree with the ALJ that the Toddler Center is a school, both in its own right and as part of the larger Pinecrest Schools campus, and should have been treated by the Department as a consideration point during its investigation. Since the Toddler Center is part of Pinecrest Schools, it was not beyond the scope of the stated issue for the ALJ to admit and consider evidence regarding the Toddler Center.

Treating the Toddler Center as a consideration point does raise an issue of fair notice to appellant, since the Department investigation specifically excluded it. However, even were we to conclude that the Toddler Center was not a consideration point, much of the evidence appellant objects to (he particularly notes findings 8, 9, and 10) was used by the ALJ for the purpose of describing appellant's violations of conditions on the property under his control, after he obtained his interim operating permit.[4]

---

[4]Appellant contends that the administrative law judge erred in considering evidence that appellant failed to comply with the conditions while operating on an interim permit because there is no evidence in the record that he was required to comply with the conditions proposed for his permanent license. However, counsel for the Department, in his closing argument, referred the ALJ to the statute that requires proposed conditions to be observed by interim permit holders. (Bus. & Prof. Code, § 24044.5, subd. (b).) [RT 174.] This was a legal, not a factual question, and therefore, was properly noted in closing argument. The ALJ found in Finding of Fact 7 that appellant was required to comply with the proposed conditions while holding the interim permit.

The ALJ found that appellant violated conditions 2, 4, and 5 on his Petition for Conditional License. These conditions prohibit consumption of alcoholic beverages and loitering on property under appellant's control (conditions 2 and 4), and require the public pay phones to be programmed so that they cannot receive incoming calls.

The Toddler Center is not referred to at all in finding 8. It finds there was loitering and littering on the property under appellant's control, young people were observed drinking "on the property adjacent to an outside phone booth at the premises," and a beer bottle was thrown at, and damaged, the Pinecrest Elementary School sign in front of the school (across the street from the proposed premises and the Toddler Center). Finding 9 states that patrons of the proposed premises have been seen drinking beer near the phone booth at the premises.

Finding 10 does mention the Toddler Center:

> An official of the Toddler Center adjacent to the premises observed individuals sitting around the premises' phone booth and on a wall separating [the Toddler Center from the premises] drinking alcoholic beverages. This public pay phone appears to be a magnet attracting loiterers to the location. These [loiterers] have been repeatedly asked to leave the area and have littered both the premises property and the Toddler Center with alcoholic beverage containers and broken glass. The safety of young children is jeopardized by such behavior.

In this finding, as in 8 and 9, the primary relevant findings are that people are drinking alcoholic beverages on property controlled by appellant (prohibited by condition 2), people are loitering on property controlled by appellant (prohibited by condition 4), and the public pay phone is attracting loiterers (addressed in condition 5). All of the findings address violations of conditions occurring on appellant's property. We could ignore any statements in these findings concerning the Toddler Center, and the evidence would still be sufficient to support a finding that conditions were violated.

Except for the last sentence of finding 10, which mentions "the safety of young children," mention of the Toddler Center as a "consideration point" is non-existent; the adjacent property could be any business, and the violations would be the same.[5]

III

Appellant contends that the Notice of Hearing on Protest did not give him sufficient notice of the grounds of the protest. The notice served on appellant states, under the heading Statement of Issues to be Determined:

> The issues to be determined at said hearing are whether the granting of such license(s) would be contrary to public welfare and morals by reason of Article XX, Section 22 of the Constitution of the State of California, Section(s) 23958 of the Alcoholic Beverage Control Act of Department of Alcoholic Beverage Control.

Appellant argues that the notice did not provide sufficient specific facts to apprise him of the nature of the proceeding to allow him to prepare an adequate defense. He also alleges that "[t]he notice did not advise him that his application was being protested." On the contrary, the notice clearly advised appellant that his application was being protested: the document is entitled "Notice of Hearing on *Protest*" (italics added).

In a hearing on a protested license application, the initial pleading is the Statement of Issues which should specify the statutes and rules with which the license applicant must comply and any matters that would authorize denial of the license application. (Gov. Code, § 11504.) As in all administrative pleadings, fair notice to the respondent is more important than compliance with technical pleading rules. (*Cooper v.*

---

[5]In his closing brief, appellant included two photographs showing changes made to the premises after the administrative hearing that purportedly address the concerns about the phone booth near the Toddler Center. This Board is not authorized to take additional evidence outside the record made before the Department, and the photographs have not been considered in reaching our decision.

Board of Med. Examiners (1975) 49 Cal.App.3d 931, 942 [123 Cal.Rptr. 563].) A pleading is sufficient and satisfies due process if it provides the respondent with enough notice of the basis of the action to permit the respondent to gather witnesses and evidence to refute the allegations. (*Hostetter v. Alderson* (1952) 38 Cal.2d 499, 502 [241 P.2d 230]; *Stoumen v. Munro* (1963) 219 Cal.App.2d 302, 306-307 [33 Cal.Rptr. 305].) The agency is not required to identify all the circumstances of the acts alleged or to specify the evidence it will present to support the charges. (*Nelson v. Dept. Alcoholic Bev. Control* (1959) 166 Cal.App.2d 783, 787-788 [333 P.2d 771]; *Most v. State Board of Optometry* (1956) 139 Cal.App.2d 78, 90-91 [293 P.2d 148].)

Failure to object to the accusation on the ground that it is so indefinite or uncertain that respondent cannot identify the transaction or prepare a defense, waives that objection. (Gov. Code, § 11506, subd. (a)(3); *Shea v. Board of Medical Examiners* (1978) 81 Cal.App.3d 564, 576 [146 Cal.Rptr. 653]; *Collins v. Board of Medical Examiners* (1972) 29 Cal.App.3d 439, 444 [105 Cal.Rptr. 634]; *Goldsmith v. Cal. State Bd. of Pharmacy* (1961) 191 Cal.App.2d 866, 872-873 [13 Cal.Rptr. 139].)

In the present case, appellant did not object to the Statement of Issues within 15 days after being served, as required by the statute. Because the objection may not be raised for the first time on appeal, the Board may consider this objection waived.

In any case, we have no indication that appellant was misled or prejudiced. At the beginning of the hearing, the ALJ stated that the issue set forth in the protest, and the only issue involved in the hearing, was whether "normal operation of the proposed premises will interfere with the functions of two schools located within the immediate vicinity of [the] proposed premises with the meaning of Business and Professions Code

Section 23789." [RT 8.] Appellant did not object to the ALJ's statement of issues, and proceeded with the hearing on that basis. He evidenced no surprise or lack of preparation with regard to the testimony or the exhibits.

IV

Appellant contends the evidence was insufficient to support a determination that normal operation of the premises would interfere with the functions of the nearby schools. Appellant points out that one of the nearby schools, Hazeltine Elementary School, did not object to issuance of the license, nor did the local police department; the Department investigator did not observe groups of people loitering or drinking at or near the premises; and the investigator received no complaints about the premises during the investigation and up to the time of the hearing. Although the premises was previously licensed beginning in 1983, no written complaints were filed against the prior operators, and appellant states, "the area was so problem free that Mr. Dye did not even know the premises had been previously licensed to sell, and sold, alcoholic beverages." (App. Br. at 6.) Since the premises did not interfere with the school when it was previously licensed, appellant asserts that "future interference is merely speculative . . . ." (*Ibid*.)

When an appellant charges that a Department decision is not supported by substantial evidence, the Appeals Board's review of the decision is limited to determining, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. (Cal. Const., art. XX, § 22; Bus. & Prof. Code, §§ 23084, 23085; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].) "Substantial evidence" is relevant evidence which

reasonable minds would accept as reasonable support for a conclusion. (*Universal Camera Corp. v. Labor Board* (1951) 340 U.S. 474, 477 [95 L.Ed. 456, 71 S.Ct. 456]; *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].) In making this determination, the Board may not exercise its independent judgment on the effect or weight of the evidence, but must resolve any evidentiary conflicts in favor of the Department's decision and accept all reasonable inferences that 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]; *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925]; *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 has noted many things that were *not* found, such as objections from the police department and complaints to the Department. However, the ALJ found that there was evidence of loitering, littering, and drinking on appellant's premises and on the Pinecrest School campus. In addition, the ALJ found that appellant has violated conditions on his interim license. There is more than enough substantial evidence to support those findings, and the findings support the Department's determination that normal operation of the premises would interfere with the functions of the nearby schools. The nonexistence of factors mentioned by appellant does not affect the substantiality of the evidence that supports the findings and the determination.

Appellant is really asking the Board to substitute its judgment for that of the Department. The ALJ and the Department are the primary triers of fact. It is not the

province of this Board to substitute its judgment for that of the Department and the ALJ on factual issues. Where, as here, there is substantial evidence that supports those findings, they may not be set aside.

ORDER

The decision of the Department is affirmed.[6]

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

---

[6]This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 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 section 23090 et seq.