

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

AB-9145

File: 41-486265 Reg: 10073463

GENE HAZZARD, et al, Appellants/Protestants,

v.

SCOTIA LLC, dba Commonwealth
2882 Telegraph Avenue, Oakland, CA 94609-3607,
Respondent/Applicant

and

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: July 14, 2011
San Francisco, CA

ISSUED AUGUST 10, 2011

Gene Hazzard and Akilah Zainabu-EI filed separate appeals from a decision of the Department of Alcoholic Beverage Control¹ which granted the application of Scotia LLC, doing business as Commonwealth (respondent/applicant), for an on-sale beer and wine license. The appeals were consolidated for hearing.

Appearances on appeal include appellant/protestant Gene Hazzard, appearing in propria persona; respondent/applicant Scotia LLC, appearing through one of its owners, Peter Jeffryes; and the Department of Alcoholic Beverage Control, appearing through its counsel, Sean Klein. Appellant/protestant Akilah Zainabu-EI did not file a brief, and did not appear at the hearing.

¹The decision of the Department, dated December 1, 2010, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

On January 25, 2010, applicant petitioned for issuance of an on-sale beer and wine license. Protests were filed by Gene Hazzard and Akilah Zainabu-EI, and an administrative hearing was held on November 3, 2010. At that hearing, oral and documentary evidence was presented concerning the application and the protests.

Subsequent to the hearing, the Department issued its decision which denied both protests and allowed the license to issue with conditions.

Both appellants/protestants filed timely appeals. Only appellant/protestant Hazzard has filed a brief; in it he makes the following contentions: (1) The Department's findings and decision are not supported by substantial evidence; (2) the conditions on the license are arbitrary; and (3) appellant/protestant was denied a fair hearing because evidence was improperly excluded. All further references to appellant/protestant herein refer to Mr. Hazzard.

DISCUSSION

I

Appellant/protestant contends that the Department's findings and decision are not supported by substantial evidence. When an appellant contends that the findings are not supported by the evidence, the standard of review is as follows:

In examining the sufficiency of the evidence, all conflicts must be resolved in favor of the department, and all legitimate and reasonable inferences indulged in to uphold its findings if possible. When findings are attacked as being unsupported by the evidence, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the findings. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the department. (See 6 Witkin, Cal. Procedure (2d ed. 1971) Appeal, § 245, pp. 4236-4238.)

(*Kirby v. Alcoholic Beverage Control Appeals Board* (1972) 25 Cal.App.3d 331, 335 [101 Cal.Rptr. 815].)

"Substantial evidence" is relevant evidence which reasonable minds would accept as 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]; *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. (*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd. (Masani)* (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826]; *Kruse v. Bank of America* (1988) 202 Cal.App.3d 38, 51 [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, 826-827 [40 Cal.Rptr. 666].)

Appellant/protestant argues that there was insufficient evidence presented to establish that this license should issue. The administrative law judge (ALJ), however, found in his Determination of Issues VI: "[p]rior to the hearing, Applicant met its burden of proving to the Department that its application for an alcoholic beverage license should be granted with conditions. There is no legal reason to change the Department's recommendation to grant the license with conditions."

A reasonable person would accept the evidence presented in this matter as

substantial evidence, even though objected to by appellant/protestant, for the conclusion that this license should issue. We disagree with appellant/protestant that insufficient evidence exists to support the ALJ's decision simply because the conclusion is contrary to appellant/protestant's position.

Each of appellant/protestant's objections were considered and rejected at the administrative hearing, and we decline the invitation to reweigh the evidence on appeal. We agree with the Department that "[t]he ALJ's decision to grant the license is supported by the facts and relevant law . . ." (Dept. Reply Brief at p. 5.)

II

Appellant contends secondly that the acceptance of conditions on the license, by the Department and the ALJ, was arbitrary.

The standard of review is as follows when an allegation of arbitrariness is made:

"In determining whether a decision of the Department of Alcoholic Beverage Control is arbitrary, its action is measured by the standard set by reason and reasonable people [citation], bearing in mind that such standard may permit a difference of opinion on the same subject [citation] and the court may not substitute a decision contrary to that made by the department, even though such decision is equally or more reasonable, if the determination by the department is one which could have been made by reasonable people. . . ."

(*Kirby v. Alcoholic Beverage Control Appeals Board* (1968) 261 Cal.App.2d 119, 122 [67 Cal.Rptr. 628].)

The Oakland Police Department was consulted prior to the administrative hearing and requested conditions on the license because the premises are in a high crime area. [RT 10.] In the ALJ's Findings of Fact VII he states:

The local law enforcement agency informed the Department that it had no

problem with Applicant's application, provided that certain conditions were placed in Applicant's license. Applicant has agreed to accept those conditions, plus others, on its license should the license be granted. The conditions are contained in Applicant's Petition for Conditional License, included as a part of the Department's Report On Application For License.

The following nine conditions are contained in the Petition for Conditional License (Exh. 2.):

1. Sales, service and consumption of alcoholic beverages shall be permitted only between the hours of 10:00 AM to 11:00 PM each day of the week.
2. Any graffiti painted or marked upon the premises or on any adjacent area under the control of the licensee(s) shall be removed or painted over within 48 hours of being applied.
3. There shall be no live entertainment of any type, including but not limited to live music, disc jockey, karaoke, topless entertainment, male or female performers or fashions [*sic*] shows.
4. A single jukebox or stereo may be maintained upon the premises; however, the music shall not be audible outside the premises.
5. Entertainment provided shall not be audible beyond the area under the control of the licensee(s) as defined on the ABC-257 and ABC-253 dated January 25, 2010.
6. The sale of alcoholic beverages for consumption **off** the premises is strictly prohibited.
7. The subject alcoholic beverage license shall not be exchanged for a public premises type license nor operated as a public premises.
8. The monthly gross sales of alcoholic beverages shall not exceed the gross sales of food during the same period. The licensee(s) shall at all times, maintain records, which reflect separately the gross sales of food and the gross sales of alcoholic beverages of the licensed business. Said records shall be kept no less frequently than on a monthly basis and shall be made available to the Department on demand.
9. Loitering (loitering is defined as "to stand idly about; linger aimlessly without lawful business") is prohibited on any sidewalks or property adjacent to the licensed premises under the control of the licensee(s) as depicted on the ABC-257 dated Jan 25, 2010.

Appellant/protestant maintains that the acceptance of the above conditions is arbitrary because they lack mechanisms of enforcement and specific penalties. This is

patently false. As the Department notes, "penalties and methods of enforcement are public record, contained in the business and Professions Code and Title 4 of the California Code of Regulations. They are easily available to protestant." (Dept. Reply Br. at p. 4.) We agree.

III

Appellant/protestant contends throughout his Opening Brief that he was denied a fair hearing because evidence was improperly accepted or excluded, or otherwise not properly considered by the ALJ.

The admission or rejection of evidence by an administrative agency is not grounds for reversal unless the error has resulted in a miscarriage of justice. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1054 [228 Cal.Rptr. 567].) In other words, it must be reasonably probable a more favorable result would have been reached absent the error. (*Brokopp v. Ford Motor Co.* (1977) 71 Cal.App.3d 841, 853–854 [139 Cal. Rptr. 888].) Such error "is not prejudicial if the evidence "was merely cumulative or corroborative of other evidence properly in the record," or if the evidence "was not necessary, the judgment being supported by other evidence." [Citation.]" (*McCoy, supra*, 183 Cal.App.3d at p. 1054, quoting *Rue-Ell Enterprises, Inc. v. City of Berkeley* (1983) 147 Cal.App.3d 81, 91 [194 Cal.Rptr. 919].)

(*Lone Star Security & Video, Inc. v. Bureau of Security & Investigative Services* (2009) 176 Cal.App.4th 1249, 1254-1255 [98 Cal. Rptr. 3d 559].)

As the Department notes in their Reply Brief on page 3, the licensing representative testified at the administrative hearing that a greater number of residents had received notice than she had previously indicated in her report. Appellant had an opportunity to cross examine the witness but failed to address this discrepancy at the hearing. Appellant did not raise this issue at the hearing, and the Board is entitled to consider it waived. (See 9 Witkin, *Cal. Procedure* (5th ed. 2008) Appeal, §400, p. 458.)

Appellant's general complaint of unfairness in this proceeding has no basis in fact and is legally unsound. The "facts" he cites that purportedly support his position are almost entirely negatives, i.e., things the ALJ failed to do, or appellant/protestant's disagreement with the ALJ's decision. However, unless the ALJ had a duty to say or do something, the failure to say or do the thing would have no legal significance. Certainly it is not "unfair" simply because an appellant/protestant is not happy with the result.

It is the responsibility of this Board to affirm the factual findings and determinations of the ALJ and the Department unless they are clearly shown to be unsupported or unreasonable. We cannot say that the statements at issue here have been clearly shown to be unsupported or unreasonable, nor do we find that they constitute evidence of unfairness on the part of the ALJ.

ORDER

The decision of the Department is affirmed.²

FRED ARMENDARIZ, CHAIRMAN
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

²This 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.