

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

AB-9470a

File: 21-522095; Reg: 14080188

BALVINDER SINGH SARAI and RANJIT KAUR SARAI,
5444 Watt Avenue, Suite 900,
North Highlands, CA 95660,
Appellants/Applicants

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: David W. Sakamoto

Appeals Board Hearing: December 7, 2017
Sacramento, CA

ISSUED DECEMBER 27, 2017

Appearances: *Appellants/Applicants:* Balvinder Singh Sarai and Ranjit Kaur Sarai,
in propria persona,

Respondent: Jennifer M. Casey, as counsel for Department of
Alcoholic Beverage Control.

OPINION

Balvinder Singh Sarai and Ranjit Kaur Sarai appeal from a decision of the Department of Alcoholic Beverage Control¹ denying their application for a premises-to-premises transfer of their type-21 off-sale general license from a previous location in Carmichael, California to 5444 Watt Avenue, Suite 900, North Highlands, California.

FACTS AND PROCEDURAL HISTORY

Appellants' previous off-sale general license was issued on September 14, 2007,

¹The decision of the Department, dated June 8, 2016, is set forth in the appendix.

for premises doing business in Carmichael, California. The licensed premises at that location was closed by appellants in 2011 for economic reasons. On May 22, 2012, appellants applied for a premises-to-premises transfer of the previous off-sale general license to a new location in North Highlands. That application was denied by the Department of Alcoholic Beverage Control, in a decision dated March 12, 2014, finding: that the applied-for license would be contrary to public welfare or morals; that no exception for public convenience or necessity would be served by the issuance; that it would tend to aggravate an existing law enforcement problem; that it would add to an undue concentration of licenses in the area; and, that it would interfere with a nearby school. That decision was appealed, and a hearing was held before the Appeals Board on July 9, 2015.

At that hearing, appellants argued: (1) the County of Sacramento's determination regarding public convenience or necessity was not timely made; (2) the ABC investigator who visited the proposed premises was not present at the administrative hearing, thereby depriving appellants of the opportunity to examine her; (3) the Department's decision was not supported by substantial evidence; (4) the "consideration point" cited is no longer in operation as a school for minors, but is now operated as a day program for disabled adults, and appellants could not have produced this evidence at the administrative hearing; and (5) appellants were not treated fairly.

The Appeals Board affirmed the decision of the Department in part, and remanded the matter to the Department for a further evidentiary hearing on two issues: whether public convenience or necessity would be served by allowing the transfer of the license, and whether or not a consideration point currently exists at a nearby school.

An administrative hearing was held on March 22, 2016. Documentary evidence was received and testimony concerning the two issues was presented by Cathryn Sandberg, a Supervising Agent with the Department of Alcoholic Beverage Control; Charles Price, from the Sacramento County Sheriff's Department; and appellants Balvinder Sarai and Ranjit Kaur Sarai.

On March 25, 2016, the administrative law judge (ALJ) submitted a proposed decision, denying the transfer of the license. On April 7, 2016, the Department's Administrative Hearing Office sent a letter from its Chief ALJ to both appellants and Department counsel, inviting the submission of comments on the proposed decision and stating that the proposed decision and any comments submitted will be submitted to the Director of ABC in 14 days. Appellant submitted its comments to the Director, arguing that public convenience or necessity would be served by the issuance of the license. The Department did not submit comments.

On June 8, 2016, the Department issued its Certificate of Decision, adopting the proposed decision in its entirety. It determined that the activities occurring on the Aero Haven Campus did not constitute a "school" within the meaning of Business and Professions Code section 23789, subdivision (b), and that therefore its existence was not a cause for denial of the application under that section. However, it also determined that issuance of the license would be contrary to public welfare and morals—on the basis of over-concentration of licenses in the area and high crime—and that it would not serve public convenience or necessity. Therefore, the application for a premises-to-premises transfer of the license to 5444 Watt Avenue, Suite 900, North Highlands, California was denied.

Appellants then filed the present appeal, maintaining: (1) that the Department's decision is not supported by substantial evidence, and (2) that public convenience and necessity would indeed be served by the transfer of the license to this location. These issues will be discussed together.

DISCUSSION

This Board is bound by the factual findings in the Department's decision so long as those findings are supported by substantial evidence. The standard of review is as follows:

We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. [Citations.] We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor [an appellate] court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. [Citations.] The function of an appellate board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

(Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Masani) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

When findings are attacked as being unsupported by the evidence, the power of this Board begins and ends with an inquiry as to whether there is substantial evidence, contradicted or uncontradicted, which will support the findings. When two or more competing inferences of equal persuasion can be reasonably deduced from the facts, the Board is without power to substitute its deductions for those of the Department—all conflicts in the evidence must be resolved in favor of the Department's decision. *(Kirby v. Alcoholic Bev. Control Appeals Bd. (1972) 25 Cal.App.3d 331, 335 [101 Cal.Rptr.*

815]; *Harris v. Alcoholic Beverage Control Appeals Board* (1963) 212 Cal.App.2d 106 [28 Cal.Rptr.74].)

Therefore the issue of substantial evidence, when raised by an appellant, leads to an examination by the Appeals Board to determine, 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. The Appeals Board cannot disregard or overturn a finding of fact by the Department merely because a contrary finding would be equally or more reasonable. (Cal. Const. Art. XX, § 22; Bus. & Prof. Code § 23084; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113]; *Harris, supra*, at 114.)

The Department has been given broad discretion by the legislature with respect to the issuance or denial of a license. In *Koss v. Dept. of Alcoholic Bev. Control* (1963) 215 Cal.App.2d 489, 496 [30 Cal.Rptr.2d 219], that discretion was described this way:

[T]he Department exercises a discretion adherent to a standard set by reason and reasonable people, bearing in mind that such a standard may permit a difference of opinion on the same subject. If the decision is reached without reason under the evidence, the action of the Department is arbitrary, constitutes an abuse of discretion, and may be set aside. Where the decision is the subject of a 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.

Appellants maintain that public convenience or necessity would be served by the issuance of a license to this premise, but offer only a repetition of the same argument that failed at the administrative hearing, namely, that issuance of the license would increase revenues and over all sales at the premises. Ordinarily, in order for the public convenience or necessity exception to apply—to allow issuance of a license in spite of

over-concentration or high crime in the area—it must be demonstrated that the applicant offers something special or unique that is not offered by other off-sale licensees in the area. (See *Sepatis v. Alcoholic Beverage Control Appeals Board* (1980) 110 Cal.App.3d 93 [167 Cal.Rptr. 729].)

The ALJ addressed this issue at length—explaining why the public convenience and necessity exception did not apply in this case—as follows:

3. Business and Professions Code section 23958 requires that the Department conduct a thorough investigation to determine, among other things, if the applicant and the Proposed Premises qualify for a license, if the provisions of the Alcoholic Beverage Control Act have been complied with, and if there are any matters connected with the application which may affect public welfare or morals.

It provides, in part, that the Department shall deny an application for a license if the applicant or the Proposed premises do not qualify for a license under the Act. It further provides that the Department shall deny an application for a license if issuance of the license (a) would tend to create a law enforcement problem or (b) would result in or add to an undue concentration of licenses, except as provided in section 23958.4.

Section 23958.4 provides that even if the applicant applies for premises in an over-concentrated or in a high crime area, as described in that section, a license can still be issued if doing so serves public convenience or necessity.

4. In this instance, even though the County of Sacramento expressly determined that issuance of the license would not serve public convenience or necessity, as it is permitted to so find under section 23958.4, the Appeals Board remanded the matter for an additional hearing so the Department itself could expressly assess whether issuance of the license would meet the “public convenience or necessity” exception under section 23958.4 so as to permit issuance of the license at the applied for premises.

5. Based upon the evidence, issuance of the license would not serve public convenience or necessity. The applicant's premises is in a census tract that permits 3 off-sale licenses and 8 already exist. Three off-sale licensees already exist within 1000 feet of Petitioner's applied for site. The Petitioner's premises is in an extremely high crime reporting district, experiencing 557% of the average crimes per reporting district. Further,

and most notably, Petitioner presented no evidence that it offers any unique or specialized goods, products, or services not otherwise available from any of the other off-sale general licensees in the area. Petitioner did not show that it would serve some otherwise un-served or underserved patronage or section of the community due to a particular quality, aspect, feature, trait, or character it has that is not available from the other off-sale general licensees in the area. Petitioner did contend it believes its overall sales and revenue would increase if they were issued the license for this location. However, even if that was true, that would not be sufficient grounds to issue the license at the applied for premises. Were that sufficient grounds to issue a license in an over-concentrated area, then every license would be approved and the statute's requirement of a showing of public convenience or necessity would be meaningless. Petitioner believes it should be given some due consideration as it is just transferring its license from one site in Sacramento County to another. However, the specific site where it wants to place the license is already over-concentrated with off-sales licensees and high in crime. The applied for site is in much too troubled a location to add yet another off-sale general license. For the Department to approve the transfer of the license under the current circumstances would be contrary to public welfare and morals, and would not serve public convenience or necessity.

(Conclusions of Law, ¶¶ 3-5, emphasis added.)

Caselaw has instructed us again and again that the Board is not permitted to consider the facts and reach a contrary conclusion simply because it may be sympathetic to appellants' plight. Instead, when the ALJ's findings are supported by substantial evidence, the Board lacks the discretion to reach a different conclusion. Denial of this license transfer—on the basis of over-concentration, high crime, and failure to show public convenience or necessity—was a “choice within reason” and the Board may not overturn it absent some evidence that the Department's decision was arbitrary or constituted an abuse of discretion. Neither has been demonstrated.

Having reviewed the entire record, we see no flaw in the ALJ's determinations and therefore must affirm the Department's decision. Ultimately, appellants are asking this Board to consider the same set of facts and reach a different conclusion, despite

substantial evidence to support the findings made at the administrative level. This the Board cannot do.

ORDER

The decision of the Department is affirmed.²

PETER J. RODDY, ACTING
CHAIRMAN JUAN PEDRO
GAFFNEY RIVERA, 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.