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

AB-9587
File: 02-548261; Reg: 15082334
LAWRENCE CARR, ET AL.,
Appellants/Protestants

v.

RELIC WINE CELLARS, LLC,
dba Relic Wine Cellars
2400 Soda Canyon Road, Napa, CA 94558,
Respondent/Applicant

and

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judges at the Dept. Hearings: Nicholas Loehr and David W. Sakamoto

Appeals Board Hearing: January 11, 2017
Los Angeles, CA

ISSUED FEBRUARY 8, 2018

Appearances: *Appellants/Protestants:* Anthony G. Arger, of Robertson, Johnson, Miller & Williamson, and Yeoryios C. Apallas, of Apallas Law Group, as counsel for Lawrence Carr, et al.,

Respondent/Applicant: Melani Johns, of Strike & Techel, Beverage Law Group LLP, as counsel for Relic Wine Cellars, LLC, and

Respondent: Joseph J. Scoleri, III, as counsel for Department of Alcoholic Beverage Control.

OPINION

Lawrence Carr, et al., appeal from a decision of the Department of Alcoholic Beverage Control[1] granting the application of Relic Wine Cellars, LLC, doing business as Relic Wine Cellars, for a type-02 winery license.

[1]The decision of the Department, dated April 15, 2016, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

In August 2014, Relic Wine Cellars, LLC applied for a winery license. Protests were filed by appellant (and ten others), and a hearing was requested on the application. Administrative hearings were held on July 16, 2015, and November 16, 2015, before Administrative Law Judge (ALJ) Nicholas Loehr. The matter was not heard to completion prior to ALJ Loehr's retirement. Without objection of the parties, the matter was heard to completion on February 9, 10, and 11, 2016, before ALJ David W. Sakamoto.

Testimony and evidence concerning the application was presented by: Department licensing representatives Judy Anne Barrett and David Heitzman, Relic Wine Cellars owner Courtenay "Schatzi" Throckmorton, and expert witness Amber Dawn Manfree. Testimony and evidence concerning the protests was presented by: neighbors and/or concerned citizens Diane Shepp, Ann Palotas, Lynn Hallett, William Hocker, Alan Shepp, Cynthia Grupp, Lisa Hirayama, and Glenn Schreuder, as well as attorney/protestant Anthony Arger, and attorney Yeoryios Apallas.

The following issues were addressed: (1) whether the operation of the premises would interfere with the quiet enjoyment of nearby residents; (2) whether issuance of the license would add to traffic congestion; (3) whether issuance of the license would create increased fire risk; and (4) whether winery operations at the premises would violate the local zoning ordinance.

Testimony established that the applicant is a small winery, generating up to 5,000 gallons of wine per year. It has wine tastings by appointment only and is not the grower of the grapes it uses to produce the wine. In 2010, following a full hearing to

address conservation, traffic, fire threat, and construction issues, the applicant obtained a Conditional Use Permit (CUP) from the Napa County Planning Commission to operate as a winery. The Planning Commission's unanimous approval was appealed to the Napa County Board of Supervisors by several of the winery's neighbors. The applicant reached a settlement agreement with these neighbors (exh. B), which included revised limits on the winery's operation and a reduction in the number of annual visitors permitted. The CUP remains in effect. On or about May 22, 2015, the applicant was issued an interim operating permit by the Department, temporarily granting it the same license privileges as the applied for type-02 license.

The road on which the winery is located, Soda Canyon Road, is approximately eight miles long, ending at a dead-end at its most northern point. There are currently ten wineries on the road. Five of these wineries hold wine tastings at a shared tasting room, and one has its own tasting room. It is a two-lane road, used by both residential and commercial vehicles. The closest residence to Relic Wine Cellars is approximately 600 to 1,000 feet away.

The Department conducted an investigation as part of its licensing procedure. That investigation determined that the location was properly zoned for the requested use and that issuance of the license would not be contrary to public welfare or morals. (Exh. 2.) As part of its investigation into the issuance of the license, the Department contacted both the California Highway Patrol and the Napa County Sheriff's Department. Neither agency objected to the issuance of the license. The Department also contacted the state Fire Marshall for Napa County in 2015, and a representative at Cal-Fire in 2016, regarding possible fire issues and was told there were no particular

concerns with this application. (Exh. 6.)

ALJ Sakamoto submitted his proposed decision on March 7, 2016, denying the protests and determining that the license should be issued. On March 21, 2016, the Department sent a copy of the proposed decision to all parties pursuant to the Department's comment procedure. Appellants filed lengthy comments on April 1, 2016. The Department did not submit comments. On April 15, 2016, the Department issued its Certificate of Decision, adopting the proposed decision in its entirety. Appellants filed a petition for reconsideration on May 10, 2016, but it was denied.

Appellants thereafter filed a timely appeal making the following contentions: (1) evidence was improperly excluded at the administrative hearing, and (2) relevant evidence exists which could not have been produced at the hearing—accordingly, appellants submitted two motions to supplement the record.[2] Issues one and two will be discussed together. And, (3) the decision is not supported by the findings, and is not supported by substantial evidence.

DISCUSSION

I

Appellants contend that evidence was improperly excluded at the administrative hearing (App.Op.Br at pp. 17-27) and that relevant evidence exists which could not have been produced at the hearing. (*Id*. at pp. 27-39.) Accordingly, appellants submitted two motions to supplement the record with what they label "newly discovered

[2]Motion 1: Motion to Supplement the Record with Newly Discovered Evidence, submitted Aug. 21, 2017 with appellants' Opening Brief; and Motion 2: Supplemental Motion to Supplement the Record with Additional Newly Discovered Evidence, submitted December 4, 2017.

evidence."

This Board's scope of review is limited by the California Constitution and by statute. The Constitution provides:

> Review by the board of a decision of the Department shall be limited to the questions whether the department has proceeded without or in excess of its jurisdiction, whether the department has proceeded in the manner required by law, whether the decision is supported by the findings, and whether the findings are supported by substantial evidence in the light of the whole record.

(Cal. Const. art. XX, § 22.)

Additionally, the Constitution provides that "the board shall review the decision subject to such limitations as may be imposed by the Legislature." Those limitations are articulated in section 23084 of the Business and Professions Code, captioned "Questions to be considered by the board on review":

> The review by the board of a decision of the department shall be limited to the questions:
>
> (a) Whether the department has proceeded without, or in excess of, its jurisdiction.
>
> (b) Whether the department has proceeded in the manner required by law.
>
> (c) Whether the decision is supported by the findings.
>
> (d) Whether the findings are supported by substantial evidence in light of the whole record.
>
> (e) Whether there is relevant evidence, which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before the department.

(Bus. & Prof. Code, § 23084.)

Appellants contend it was error for the ALJ to have excluded certain evidence which was offered at the administrative hearing, in violation of section 23084(e). They

maintain the ALJ erred by excluding from evidence the introduction of a Department decision, *Fletcher Benton, et al. v. Soda Canyon Real Estate Investment, Inc.* (1999), referred to in appellants' brief as *Astrale e Terra.* (App.Op.Br. at p. 18.)

This 1999 decision denied a type-02 license to another applicant on the same road as Relic Wine Cellars. The ALJ ruled that the decision in *Astrale e Terra* was not relevant to the instant proceedings because it was a protest which occurred 17 years ago, it involved a different set of facts, different parties, and different premises. (See RT III at pp. 163-170.) The ALJ also noted that it would not help him one way or the other in making his decision. (*Ibid.*) As counsel for the applicant noted, the excluded matter was unlike the current one because it involved an applicant that was not seeking to have retail sales or a tasting room as this applicant is. (*Id*. at p. 167.)

Appellants also contend it was error for the ALJ to exclude photographic and videographic evidence offered by appellants to show that traffic, fire and safety issues exist on Soda Canyon Road. (App.Op.Br. at p. 26.) (See RT IV at pp. 146-150; RT V at pp. 26-31.) The ALJ found this evidence to be cumulative, duplicative, and not probative. (*Ibid*.) This was his prerogative.

The trier of fact is accorded broad discretion in ruling on the admissibility of evidence, and the ruling will be reversed only if there is a clear showing of an abuse of discretion. (*Aguayo v. Crompton & Knowles Corp*. (1986) 183 Cal.App.3d 1032, 1038 [228 Cal.Rptr. 768].) A ruling excluding evidence . . . will be overturned on appeal only if the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice (*People v. Espinoza* (2002) 95 Cal.App.4th 1287 [116 Cal.Rptr.2d 700].)

Appellants have failed to demonstrate an abuse of discretion by the ALJ in excluding the evidence they wished to introduce, neither have they demonstrated that this evidence was excluded in a manner resulting in a miscarriage of justice—they simply disagree with the ALJ. This, however, does not establish error.

The California Constitution and state statutes cited above limit the scope of the Board's review to the record established at the administrative level for a good reason: "we interpret the record limit as applying to prevent parties from relitigating substantive matters by submitting new evidence." (Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Quintanar) (2006) 40 Cal. 4th 1, 15, fn. 11 [50 Cal.Rptr.3d 585].)

Appellants contend there is relevant evidence that could not have been produced at the administrative hearing and they attached a Motion to Supplement the Record with Newly Discovered Evidence along with their opening brief. (Motion 1.) In addition, in December 2017, appellants submitted a Supplemental Motion to Supplement the Record with Additional Newly Discovered Evidence. (Motion 2.) The material offered in both motions includes updated CHP, CalFire, and Napa Sheriff's Department reports regarding traffic, fire and safety issues obtained from recent Public Records Act (PRA) requests. Appellants request that the matter be remanded to the Department to consider this new evidence.

Rule 198 provides:

> When the board is requested to remand the case to the department for reconsideration upon the ground that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced at the hearing before the department, the party making such request must, in the form of a declaration or affidavit, set forth:
>
> (a) The substance of the newly-discovered evidence;

(b) Its relevancy and that part of the record to which it pertains;
(c) Names of witnesses to be produced and their expected testimony;

(d) Nature of any exhibits to be introduced;

(e) A detailed statement of the reasons why such evidence could not, with due diligence, have been discovered and produced at the hearing before the department.

Merely cumulative evidence shall not constitute a valid ground for remand.

(4 Cal.Code Regs, § 198.)

Compliance with rule 198 requires that the evidence be something that could not have been produced at the administrative hearing—but which was in existence at the time of the hearing—and it must not be cumulative. Appellants' motions attempt to introduce evidence which fails both these tests. With one minor exception, these "updated" reports include data from incidents in 2016 and 2017, which had not yet occurred at the time of the hearing. California courts have long held that newly-discovered evidence generally must be in existence at the time of the trial. (*Cansdale v. Bd. of Administration* (1976) 59 Cal.App.3d 656,667 [130 Cal.Rptr.880].) Furthermore, the evidence appellants seek to introduce with these motions are simply updated versions of evidence already in evidence or previously rejected by the ALJ as irrelevant or unhelpful. It is therefore in violation of rule 198, and, in our view, an attempt to relitigate the matter.

Furthermore, even if the Board were to remand this matter—so that an ALJ could consider the single report being offered here that was in existence at the time of the administrative hearing—we believe it is highly unlikely that an ALJ would admit such evidence. Far more likely is that the evidence would be rejected for the same reasons

the other traffic and safety reports were rejected by the ALJ, and we would simply delay for a period of months seeing this identical matter come before the Board once again. If we were to set a precedent for allowing such PRA requests to be "newly-discovered evidence" our cases would never end—appellants could simply request an ever-newer version of previous PRA reports and extend the appeal process indefinitely.

Accordingly, both the Motion to Supplement the Record with Newly Discovered Evidence (motion 1) and the Supplemental Motion to Supplement the Record with Additional Newly Discovered Evidence (motion 2) are denied.

II

Appellants contend the decision is not supported by the findings, and is not supported by substantial evidence. (App.Op.Br. at pp. 39-73.)

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.

The ALJ made extensive findings on the issues raised during the five days of administrative hearings, and determined that issuance of the license would not be contrary to public welfare or morals. Specifically, he ascertained that operation of the premises would not unduly interfere with the quiet enjoyment of residential neighbors, would not add an unacceptable amount of traffic, would not increase the risk of fire, and was not contrary to local zoning. (See Conclusions of Law, ¶¶ 4-8.) Appellants clearly favor a different conclusion, but mere disagreement with a decision is not grounds for reversal, when, as here, it is a "choice within reason." (*Koss*, *supra* at p. 496.) Appellants have not demonstrated that the decision was arbitrary or an abuse of discretion—accordingly, the Board is not empowered to reach a different result.

After careful examination of the voluminous record in this matter, we find no flaw in the ALJ's findings or determinations. Ultimately, appellants are asking this Board to consider the same set of facts and reach a different conclusion, despite substantial evidence to support those findings. Without establishing actual error—bAny party, before this final order becomes effective, may apply to the appropriateut merely criticizing the Department's investigation and ultimate decision—appellants are essentially urging the Board to re-litigate the underlying case. It is not within the Board's authority to do so. (See Bus. & Prof. Code, § 23084, *supra*; *Boreta, supra*, at p. 94; *Harris*, *supra*, at 114; *Kirby, supra*, at p. 335.)

ORDER

The motions to supplement the record are both denied and the decision of the Department is affirmed.[3]

BAXTER RICE, CHAIRMAN
PETER J. RODDY, MEMBER
JUAN PEDRO GAFFNEY RIVERA, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[3]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.