ISSUED OCTOBER 3, 1997

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

PURDEEP K. and SUKHSAGAR PANNU dba Tip Top Food Stores 6043 Tampa Boulevard Tarzana, CA 91356, Appellants/Applicants, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6799 File: 20-309532 Reg: 96037195 Administrative Law Judge at the Dept. Hearing: John A. Willd Date and Place of the Appeals Board Hearing: August 6, 1997 Los Angeles, CA

Purdeep K. and Sukhsagar Pannu, doing business as Tip Top Food Stores (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which denied their application for an off-sale beer and wine license on the grounds appellants have a history of violations at three other licensed premises and failed to establish that the privilege of selling alcoholic beverages can safely be extended to another licensed premises, and, therefore, the granting of a license would be contrary

[1] The decision of the Department dated January 9, 1997, is set forth in the appendix.

to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, and Business and Professions Code §23958, subdivision (a).

Appearances on appeal include appellants Purdeep K. and Sukhsagar Pannu, appearing through their counsel, Louis R. Mittelstadt; and the Department of Alcoholic Beverage Control, appearing through its counsel, David B. Wainstein.

FACTS AND PROCEDURAL HISTORY

Appellants filed an application with the Department for the issuance of an off-sale beer and wine license for premises located at 6043 Tampa Boulevard, Tarzana, California. Following its initial investigation of the circumstances of the application, and after being contacted by the Los Angeles Police Department and several private citizens who opposed the issuance of the license, the Department denied the issuance of the license. Prior to its denial, the Department had proposed a number of conditions which would be placed on any license which might issue, some of which appellants were willing to accept, others they would not. Among the conditions appellants deemed unacceptable were limitations on single-unit sales of beer and malt beverages and on the sale of certain sizes of beer and malt beverages.

Pursuant to appellants' request, an administrative hearing took place on November 12, 1996, for the purpose of considering appellants' petition for issuance of the license and the protests which had been filed against it. Only one protestant, Evelyn Garfinkle, appeared at the hearing. The other protestants, including the Los

Angeles Police Department, failed to appear, although having been given notice, and their protests were deemed abandoned

At the hearing, the Department introduced evidence showing appellants' history of violations at three other licensed premises operated by appellants, in Northridge, Encino and Woodland Hills. This history consisted of a total of 14 instances of sales to minors, six (one of which is pending before the Department) occurring between 1994 and 1996. The Department also introduced evidence of appellants' unwillingness to accept certain conditions it had proposed, which, among other things, would have limited appellants' sales of certain sizes and quantities of beer and malt beverages.

Appellant Sukhsagar Pannu testified that the three licensed premises were operated as 7-Eleven franchises of the Southland Corporation. The premises which was the subject of the application under consideration had been operated as a 7-Eleven franchise by Pannu's brother between 1988 and 1995, until Southland withdrew the franchise.[2] Southland apparently operated the store itself for a brief period of time, then closed it and abandoned the location. Appellants then leased the premises and operated the store as independent owners.

Evelyn Garfinkle, a private citizen, objected to issuance of the license on several grounds, the principal one being her opinion that the issuance of the license would interfere with the operation of a private school immediately adjacent to the proposed

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[2] Appellant did not know why the prior franchise was terminated, stating that he was not on speaking terms with his brother.

licensed premises. Garfinkle claimed to have personally observed beer and distilled spirit bottles littering the parking lot adjacent to and behind the store, and expressed concerns that children attending the school would be exposed to risks. She acknowledged that the administrator of the school had expressed to her the opinion that the issuance of the license would not present a problem to the school.

Subsequent to the hearing, the Administrative Law Judge (ALJ) issued his proposed decision which denied the petition for the license on the grounds that appellants' three existing licensed premises had a disciplinary history of violations of the Alcoholic Beverage Control Act and appellants had failed to establish that the privilege to sell alcoholic beverages could be safely extended to another location. In so doing, the ALJ stated (Determination of Issues III):

> "[I]t is noted that the applicant does have the burden of establishing that the issuance of the applied for license would not be contrary to public welfare or morals and the applicant's past disciplinary history is sufficiently grave to justify the Department's reluctance to extend the applicant's privileges to another licensed premises, at least without a clear showing on the part of the applicant that those privileges can be extended without risk to the public."

The ALJ found (Finding of Fact VIII) that appellants had failed to show how much time they would personally spend at the location, had not demonstrated what steps would be taken to comply with the Department's conditions as well as insuring the protection of the children at the nearby school, and, in addition, had failed to describe any program to reduce or eliminate liquor law violations at the existing three licensed premises, or the proposed premises, if licensed.

Finally, the ALJ sustained the protest of Evelyn Garfinkle on the ground normal operation of the premises would interfere with the operation of the school.

The Department adopted the proposed decision. Thereafter, appellants filed a timely notice of appeal. In their appeal, appellants contend: (1) the "disqualifying history" relied upon by the ALJ consisted of matters too remote to be considered substantial evidence; and (2) there is no substantial evidence to support the finding that the operation of the premises would adversely affect the school located nearby.

DISCUSSION

I

Appellants contend that the disciplinary history relied upon by the ALJ consisted of matters so remote as not to constitute substantial evidence sufficient to warrant denial of the license. Appellants assert the Department relied upon instances of discipline which were six, seven, nine and 14 years old, and implies that if these were not considered, their disciplinary history would be relatively benign. Appellants also assert that since the Southland Corporation is a co-licensee on the three licenses they hold, it also would be charged with the same disciplinary history as appellants, so that consistency and logic would obligate the Department to deny Southland any future license on the same grounds.

The Department not only relied on the instances of discipline appellants refer to, it also relied on the five disciplinary proceedings in 1995 and 1996, along with a pending matter.

While it is true that, when considering the appropriate discipline to be imposed, the Department ordinarily confines its review to the prior disciplinary history of that license only, different considerations govern when the question is whether another license should be issued to an already licensed applicant. The Department is looking at the character of the applicant, and his or her ability to operate under the license in a manner consistent with the public welfare and morals.

The Department is authorized by the California Constitution to exercise its discretion whether to deny, suspend, or revoke an alcoholic beverage license, if the Department shall reasonably determine for "good cause" that the granting or the continuance of such license would be contrary to public welfare or morals.

In the exercise of that discretion, it is to be expected that the Department would be particularly alert to the possibility of minors' access to alcoholic beverages. Appellants' track record with respect to sales to minors could well be considered a warning to the Department that granting an additional license to these appellants would increase the risk of sale to minors.

While the additional conditions the Department proposed, and which appellants declined to accept, do not necessarily appear to be aimed at sales to minors, appellants' unwillingness to accept certainly did not help their case before the Department. The Department frequently requires such conditions when it has concerns about littering and public drinking, conduct which, according to Ms. Garfinkle's testimony, has occurred in the area adjacent to the school.

The ALJ specifically noted that appellants had not described any program to reduce or eliminate liquor law violations at either their existing locations or the proposed location. This, again, is a consideration of some import in light of appellants' disciplinary history, particularly in the most recent years. For example, if the current version of Business and Professions Code §25658.1 had been in effect in 1994, one of appellants' licenses would have been subject to revocation, and a second at risk.

The argument that Southland Corporation shares appellants' disciplinary history is unpersuasive. Southland is not involved in the day-to-day operation of the stores where it is a co-licensee, including appellants' stores.

II

Appellants contend that the testimony of Evelyn Garfinkle is insufficient support for the ALJ's determination that the issuance of the license would adversely affect the operation of the nearby school. They contend that Garfinkle had no knowledge of the school operations, in that she only visited it occasionally, and had no children or grandchildren in the school, and that her testimony concerning the school's motive for not opposing the license was speculative and entitled to no weight.

The Department, on the other hand, stresses Garfinkle's first-hand observations, her familiarity with the area, based on her long-term residence in Tarzana, and her position as a director of the Tarzana Home Owners Association.

Appellants are correct in their contention that Garfinkle's testimony concerning the motive of the school in electing not to oppose the application is speculative and

entitled to no weight. However, the balance of their criticism of her testimony is to no avail. The ALJ chose to believe her testimony concerning the potential risks posed to children attending the school from customers of the store who resort to the parking lot to do their drinking, as the evidence showed had been the case in the past.

The evidence that the school favored the issuance of the license, as stated to Garfinkle, is not controlling. There is no indication the operators of the school were aware of appellants' track record at their other stores. Conceivably, armed with such knowledge, their views might well be different. In any event, since, as the ALJ apparently concluded, issuance of the license would expose the students to risk, there was no abuse in its denial.

CONCLUSION

The decision of the Department is affirmed.[3]

BEN DAVIDIAN, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
JOHN B. TSU, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[3] 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 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.