ISSUED JUNE 29, 1998

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

JAMES LISSNER, Appellant/Protestant, v. HENNESSEY'S TAVERN, INC. dba Hennessey's Tavern 2-4-8 Pier Avenue Hermosa Beach, CA 90254, Respondent/Applicant, and DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6911 File: 47/48-317537 Reg: 96037674 Administrative Law Judge at the Dept. Hearing: John P. McCarthy Date and Place of the Appeals Board Hearing: May 6, 1998 Los Angeles, CA

James Lissner (protestant) appeals from a decision of the Department of Alcoholic Beverage Control[1] denying his protest against the application by Hennessey's Tavern, Inc. (applicant), doing business as Hennessey's Tavern, for a premises-to-premises transfer and exchange of an on-sale general public premises license for an on-sale general public eating place license.

[1]The decision of the Department, dated June 12, 1997, is set forth in the appendix.

Appearances on appeal include appellant/protestant James Lissner; respondent/applicant Hennessey's Tavern, Inc., appearing through its counsel, Michael Steger; and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew Ainley.

FACTS AND PROCEDURAL HISTORY

Applicant applied for the premises-to-premises transfer and exchange of an alcoholic beverage license on February 28, 1996. Several protests were filed and a hearing on the protests was held on December 20, 1996, and March 5, 1997. Only protestant James Lissner appeared at the hearing, and the other protests were deemed abandoned.

At the hearing, oral and documentary evidence was received regarding the issues raised by the protests: the existence of an undue or over concentration of alcoholic beverage licenses in the area; the creation of a law enforcement problem for the City of Hermosa Beach; interference with the quiet enjoyment of their property by nearby residents; interference with the normal operation of nearby religious, youth and /or public recreational facilities; and the creation of a public nuisance in the immediate neighborhood.

Subsequent to the hearing, the Department issued its decision which determined that the protest should be overruled and a conditional license should be issued.

Protestant thereafter filed a timely notice of appeal. In his appeal, protestant raises the following issues: (1) The Department failed to perform its

constitutionally mandated duties regarding the issuance of this license; (2) the ALJ's failure to render an independent judgment is an abuse of discretion due to bias and prejudice; and (3) the ALJ's finding that public convenience or necessity would be served by issuance of this license is arbitrary and capricious.

DISCUSSION

I

Protestant contends the Department failed to perform its constitutionally mandated duties regarding issuance of this license in that it did not conduct a thorough investigation regarding this application. Protestant accuses the Department generally of using a "rubber stamp process" in which it "performs a perfunctory investigation and makes a report so that it can recommend issuance of the license. . . . It is this 'process' that needs to be scrutinized." (App. Closing Br. at 1.) Specifically, protestant says, the Department investigator, Gwen McElroy (McElroy), did not contact protestants or nearby residents to determine their concerns with this application, did not discover and use the Hermosa Beach Police Department (HBPD) crime statistics that show the proposed premises are within a high crime area, and did not visit the proposed premises while it was operating at night or on the weekends.

It was not necessary for McElroy to contact the protestants, since they had already expressed their concerns in their written protests and McElroy considered and reached conclusions regarding each of the concerns expressed by the original protestants. Protestant argues in his closing brief that McElroy's investigation and

conclusions are irrelevant, since she did not make a thorough and complete investigation, resulting in her conclusions being based on inadequate and incomplete information. Protestant has not shown, however, that McElroy's investigation was less than complete. Other than the general requirement in §23598 that the Department make a "thorough investigation," there is no requirement that it contact residents for comment.

There were no residents within 100 feet of the proposed premises, so Rule 61.4 did not apply to this application.

We are satisfied that the investigator was sufficiently familiar with the operation of the premises and the effect on the neighborhood through a number of visits she made to the premises during the day, even though she did not visit the premises at night and on weekends. In addition, investigator McElroy routinely dealt with licensees in the Hermosa Beach vicinity and was familiar with the area in general.

With regard to the crime statistics, the Department is provided crime statistics by the various police departments and those provided by HBPD were not in a format that the Department could use to do the particular computations listed in §23958.4, subdivision (a)(1). Protestant suggests that if he could procure crime statistics and analyze them to see if the premises was in a "high crime" area, the Department could have also, and its failure to do so is evidence of the Department's failure to properly investigate. We disagree.

The Department may not issue licenses that will result in or add to "undue concentration," unless the applicant shows that issuance of the license will serve public convenience or necessity. (§§23958; 23958.4, subd. (b)(2).) Areas that have a "high crime" rate, as defined by §23598.4, subdivision (a)(1), are considered to be areas of undue concentration. However, undue concentration is also deemed to exist if there is an excessive ratio of licenses to population in a census tract as defined in §23958.4, subdivision (a)(2). The Department determined that undue concentration existed under subdivision (a)(2), so it did not need to use the crime statistics that protestant claims it should have obtained in order to see if undue concentration existed under subdivision (b)(2).

II

Protestant contends the ALJ did not exercise his independent judgment and that he was biased and prejudiced in deciding this case against protestant. Protestant states that as an employee of the Department, "it is inherent in the nature of [the ALJ's] relationship with the Department that he did not exercise his independent judgment." The ALJ's bias and prejudice is also shown, according to protestant, by the ALJ previously hearing two cases presented by protestant on the same issues and deciding them adversely to protestant, and by the ALJ's questions, comments, and interruptions of protestant during the hearing. Protestant argues that Government Code §11425.30 prohibits the ALJ from serving as presiding officer in this case because there is no separation of the Department's enforcement and adjudicative functions and because the ALJ served

as a staff counsel for the Department within one or two years prior to the hearing on this matter.

Applicant's counsel aptly points out that Government Code §11425.30 was not in effect until July 1, 1997, after the December 20, 1996, and March 5, 1997 hearing dates in this matter. Even if applicable, Government Code §11425.30 prohibits a person from presiding at an administrative adjudicative proceeding only if that person "served as investigator, prosecutor, or advocate in the proceeding or its preadjudicative stage" (emphasis added) or if that person "is subject to the authority, direction, or discretion" of someone who served as such.

Protestant has presented no evidence that ALJ McCarthy, although previously a staff counsel for the Department, had anything to do with protestant's present case or either of the other two cases protestant mentions. Therefore, §11425.30 would not prohibit the ALJ from hearing this matter.

Protestant also alleges inherent bias from the ALJ's position as an employee of the Department. The Department points out that, in fact, the Department's adjudicatory function is separated from its investigative and administrative function. We will not infer any "inherent bias" in an ALJ; it is up to protestant to show that actual bias existed.

With regard to the comments and interruptions of the ALJ, we have examined the instances cited in protestant's brief and agree with the Department's comment that they really attest to the fact that the ALJ was properly performing his adjudicative function. The ALJ's questions were for clarification, to make

evidentiary rulings, and to ensure that testimony was relevant. Included in the list were instances of assistance to protestant's counsel, rulings adverse to respondents, and rulings favorable to protestant. There is no bias or prejudice obvious in the transcript.

Protestant has provided no legal or evidentiary authority for any of his allegations of improper proceedings or bias. While use of "in-house" ALJ's has raised questions from many appellants, the Department is authorized to use them (Bus. & Prof. Code §24210) and this Board has routinely upheld their use by the Department.

III

Protestant contends the ALJ's determination that public convenience or necessity would be served by issuance of the license is arbitrary and capricious, first, because he and other protestants think that issuance would not be "'convenient' or 'necessary'." However, the Department is vested with discretion in approving applications. When there are conflicting interests that must be balanced, the Appeals Board will generally upheld the Department's exercise of discretion in determining public convenience or necessity when issuance is beneficial to some, even if it might be adverse to others. (See Adcock v. Uthman, AB-6175 (1992).)

Protestant argues that the Department's determination is arbitrary and capricious also because the Department has not defined the term "public convenience or necessity." The Appeals Board dealt with exactly the same

contention in Vogl v. Bowler (1997) AB-6753. There the Board analyzed the case relied upon by protestant, Sepatis v. Alcoholic Beverage Control Appeals Board (1980) 110 Cal.App.3d 93 [167 Cal.Rptr. 729], and concluded that the standard to which the Department must adhere is "the standard set by reason and reasonable people, bearing in mind that such a standard may permit a difference of opinion upon the same subject." (Koss v. Dept. of Alcoholic Beverage Control, supra, quoted in Sepatis v. Alcoholic Beverage Control Appeals Board, supra.) The Department has adhered to that standard in this case.

CONCLUSION

The decision of the Department is affirmed.[2]

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

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[2]This final order 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 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.