ISSUED JANUARY 7, 1999

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

HELEN M. BOYLE, et al. Appellants/Protestants, v. CALIFORNIA POLYTECHNIC STATE UNIVERSITY FOUNDATION Central Coast Performing Arts Center Building 6, Grand Avenue San Luis Obispo, California 93407, Applicant/Respondent, and DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7033 File: 41-323323 Reg: 97040647 Administrative Law Judge at the Dept. Hearing: Sonny Lo Date and Place of the Appeals Board Hearing: November 4, 1998 Los Angeles, CA

Helen M. Boyle, Larry Batcheldor, Katherine Estell, Dorothy Fritts, Sandra Folkrod, Carol Harris, Jim Harris, Roger Keep, Gina Nelson, Stephen Nelson, Adele Stern and Robert Stern, (appellants/protestants) appeal from a decision of the Department of Alcoholic Beverage Control[1] which overruled their protests against the issuance of an on-sale beer and wine public eating place license to respondent California Polytechnic State University Foundation (hereinafter “the Foundation”).

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[1]The decision of the Department, dated January 22, 1998, is set forth in the appendix.

Appearances on appeal include appellants/protestants Helen M. Boyle, Larry Batcheldor, Katherine Estell, Dorothy Fritts, Sandra Folkrod, Carol Harris, Jim Harris, Roger Keep, Gina Nelson, Stephen Nelson, Adele Stern and Robert Stern; respondent Foundation, appearing through its associate executive director, Robert Griffin; and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Applicant Foundation applied for an on-sale beer and wine license to permit the sale of alcoholic beverages in a performing arts center operated by the Foundation on the campus of California Polytechnic State University ("Cal Poly"). The Department, following its investigation, was prepared to approve the issuance of the requested license, with certain conditions imposed upon it reflecting concerns raised in the course of the Department's investigation, but action on the application has been withheld pending the resolution of protests against issuance of the license.

An administrative hearing, at which protestants and other witnesses testified, was held on October 8, 1997, following which the Administrative Law Judge (ALJ) issued a proposed decision, thereafter adopted by the Department, overruling the protests. This appeal followed.

Appellants raise four issues:

(1) They contend that the ALJ improperly disregarded the investigator's report regarding the application, and that it contains factual information which should have been considered;

(2) Appellants contend that the findings of fact are not supported by

substantial evidence in light of the whole record, alleging:

(a) Finding V (that no evidence was presented regarding the number of alcoholic beverage licenses in the Foundation's census tract or the number of licenses in the county) is incorrect and misleading;

(b) Finding VI (that since the university does not have crime reporting districts, the performing arts center is not in any particular district for the purpose of reporting crime rates) is also misleading;

(c) Finding IX (that there were no residents in the university dorms when the Foundation filed its application) is incorrect in its characterization of appellants' testimony as hearsay; and

(d) Finding X (that no student filed a protest or testified against the application) is inaccurate.

(3) Appellants contend that issuance of the license would exacerbate an existing law enforcement problem; and

(4) Appellants contend that the Department proceeded without jurisdiction, in that there was no compliance with the requirement of Business and Professions Code §23985.5 that notice of the application be mailed to "every resident of real property within a 500 foot radius of the premises for which the license is to be issued."

DISCUSSION

I.

Appellants contend that the ALJ improperly ignored the report prepared by Department investigator Bressler regarding the license application. They concede the report was not formally admitted, but claim they were led to believe the

administrative hearing would be "user friendly," in that the rules of evidence which apply in a court of law would not be strictly applicable.

Appellants offered other documents into evidence, but not the investigator's report. Nor was it offered by the Department. Appellants were not prevented from having it made part of the record.

Appellants rely on Business and Professions Code §23084, which permits the Board to remand a case to the Department where certain evidence could not, in the exercise of reasonable diligence, have been produced prior to the hearing, or was improperly excluded, and direct the Department to reconsider its decision in light of such evidence.

There is nothing to indicate that appellants' failure to place the report in evidence was not the product of a conscious decision not to do so. The report contains some comments indicating the investigator's personal concerns about the desirability of a license on the university campus, but, in addition, a great deal of material to the effect that the Department's decision whether or not to issue a license would be well within its discretion.

Under the circumstances, a remand for the purpose of reopening the record for the receipt of additional evidence, namely the investigator's report, would not be in the interest of justice. The Department has already considered the report in connection with its initial review of the application and its conclusion that the license should be issued.

II.

Appellants contend that the findings of fact are not supported by substantial evidence in light of the whole record. They challenge, as incorrect and misleading,

Finding V, in which the ALJ found that no evidence was presented regarding the number of alcoholic beverage licenses in the Foundation's census tract or the number of licenses in the county, and, as misleading, Finding VI, in which the ALJ found that, since the university does not have crime reporting districts, the performing arts center is not in any particular district for the purpose of reporting crime rates. Appellants also contend that Finding IX, that there were no residents in the university's dormitories when the Foundation filed its application, is incorrect in its characterization of appellants' testimony as "hearsay" and the Foundation's testimony as "direct." Finally, appellants challenge Finding X (that there were no student protests) as incorrect.

When, as in the instant matter, the findings are attacked on the ground that there is a lack of substantial evidence, the Appeals Board, after considering the entire record, must determine whether there is substantial evidence, even if contradicted, to reasonably support the findings in dispute. (Bowers v. Bernards (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925].)

"Substantial evidence" is relevant evidence which reasonable minds would accept as a reasonable support for a conclusion. (Universal Camera Corporation v. National Labor Relations Board (1950) 340 US 474, 477 [71 S.Ct. 456]; Toyota Motor Sales USA, Inc. v. Superior Court (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].) Substantial evidence has been said to be evidence that is of ponderable legal significance, reasonable in nature, credible, and of solid value, and its existence is determined as follows:

"When a finding of fact is attacked on the ground that there is not any substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination whether there is any substantial evidence, contradicted or

uncontradicted, which will support the finding of fact, and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court." (Bowers v. Bernards, supra, 150 Cal.App.3d at 874-875 (court's italics).)

Finding V.

Appellants contend that evidence was presented regarding the number of licenses in the census tract, citing to the Department investigator's report, a copy of which is attached to appellant's brief. Thus, they assert, the ALJ erred when he found there had been no such evidence.

Although the investigator, Ronald Bressler, testified extensively (see RT 56-106), and was asked about certain comments in his report, the report itself was never placed in evidence, so is not part of the formal record, and may not be considered by the Board.[2]

Bressler, who has been an investigator for the Department for 25 years, initially testified that the census tract in question was not over-concentrated, and was not a high-crime area [RT 63]. He apparently was referring to the Cal Poly campus as constituting the census tract, and on cross-examination acknowledged that the statistical data needed to determine whether or not the area was a high-crime area did not exist [RT 82-83, 87]. Bressler conceded that the testimony of Cal Poly's police chief that there had been a 2,800 percent increase in alcohol and drug arrests since 1992 indicated crime was a problem. However, in light of the chief's opinion that issuance of the license would not add to the problem, he was

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[2] Bressler's report notes that while a total of 17 licenses were permissible, based upon population figures, only one license has been issued.

"hard-pressed to deny a license if the policing facility on that campus said we can handle it" [RT 87].[3]

While appellants may be technically correct that some evidence was presented relating to the number of licenses in the census tract (i.e., Bressler's testimony), any error in Finding V is immaterial, since there is no substantial evidence of over concentration under any definition.

Appellants argue that it is unreasonable to rely on the census tract ratio of licenses issued to licenses authorized because the area consists for the most part of a dry campus, and the majority of the residents are students who object to the issuance of the license.

The Department, in response, points out that, while some students may have harbored objections against issuance of the license, none, other than the then-president of the associated student body, filed a formal protest or testified at the administrative hearing, and the student body president's protest was dismissed for its failure to state cognizable legal grounds.

Finding VI.

Appellants argue that Finding VI is misleading, contending that it is based upon a technicality, namely, the absence of statistical data from which any incidence of crime can be determined. They refer to a newspaper article and to a letter and statistical report prepared by Cal Poly Police Chief Mitchell, and cite Chief

[3] Chief Mitchell indicated that the bulk of the alcohol-related crime problems involved students returning from off-campus. He has not seen any relationship between service of alcohol at the Performing Arts Center and problems on campus [RT 37].

Mitchell's statement to the Department investigator that he would prefer that there not be a license on the campus.

Since they were not part of the record created at the hearing, neither the newspaper article nor Chief Mitchell's letter report are properly before the Board.

The comments attributed to Chief Mitchell in the investigator's report (which, as noted above, is also not properly before the Board) are essentially consistent with his testimony, which was to the effect that, given the conditions on the license, placed there at his request, and assuming proper supervision, issuance of the license would have little, if any, effect on law enforcement problems.

San Luis Obispo police Chief Gardiner was also of the opinion that the issuance of the license would not create a law enforcement problem.

Finding IX.

In Finding IX, the ALJ found that there were no residents in the university's dormitories when the Foundation filed its application with the Department, and, therefore, no one in the dormitories need be given notice of the application. He also found that protestants' hearsay testimony that there were residents in the dormitories was not sufficient to overcome the foundation's direct testimony to the contrary. Appellants object to what they argue is his inconsistent characterization of their evidence as hearsay, and the foundation's evidence as direct.

The ALJ did not identify the evidence he characterized as direct, and the testimony about which appellants complain as being hearsay was not the only evidence in the record upon which he could have relied.

Robert Griffin, an associate director of the applicant, gave two reasons why,

in the notification process in connection with the application, residents in the dormitories across the street from the performing arts center were not notified. He first stated that he did not feel those residence halls were within the requirement, and that the persons in those dorms were not the kind of residents contemplated by the law. In further response, he then said there were no occupants in the dorms within 500 feet, based upon his having personally walked through them [RT 114-116].

Appellants' "evidence" consisted of information obtained as a result of a phone call by one of the protestants to the university housing director. This purported testimony was clearly hearsay.

Although there were suggestions that the timing of the application may have been calculated to avoid having to notify dormitory residents who had not yet assumed occupancy, there was no evidence that this was the case.

There is little doubt that members of the public and those persons concerned about the welfare of the university were aware of the application and made their voices heard. In addition to the protestants who have appealed, there were others who did not appeal, many others who wrote letters, including the student body president, purportedly on behalf of his constituents, and even a declaration from the mayor of the city of San Luis Obispo, the city being one of the partners in the performing arts center operation!

Investigator Bressler testified [RT 76] that, in connection with this application, he received "more public input, public outcry, public comments" than in 99 percent of the applications he has worked on.

In light of Robert Griffin's testimony that he personally inspected the dormitories and found them vacant, we cannot say the ALJ erred in concluding that there had been compliance with the notification requirements of the Act. Nor is it necessary to reach the question whether the transient and seasonal population of university dormitories are "resident[s] of real property" within the meaning of that term as used in Business and Professions Code §23985.

Finding X.

Appellants assert that finding X is inaccurate, alleging that, as a result of the absence of notification, students learned of the need to protest only 24 hours before the deadline for protests, and, as a result, their protests were not in proper legal form so were disregarded by the Department.

Appellants are apparently referring to the protest filed by the then-president of the student body, which Department investigator Bressler testified [RT 70-71] was rejected because it merely expressed a preference for a dry campus, and stated no valid legal grounds against issuance of the license.

There is no indication that any other formal protests were filed by students, so the finding - that there were no formal protests filed by students and no student testified against the application - is accurate.

III.

Appellants contend that issuance of the license would aggravate an existing law enforcement problem, citing a written statement (Exhibit IV) from the mayor of San Luis Obispo, and a letter (Exhibit 5) (which was not admitted in evidence) from the County of San Luis Obispo Drug and Alcohol Advisory Board to the Board of

Supervisors, urging the Board of Supervisors to oppose the application.

While both of these documents contain general references to concerns associated with the sale and consumption of alcohol, it cannot be said that either offers any substantial evidence to the effect that the issuance of an on-sale beer and wine license to the performing arts center will exacerbate an existing crime problem. There is nothing in either document which indicates that the writers had taken into account the various conditions which would be imposed upon the license as a result of the suggestions of the principal law enforcement officers of the city and the Cal Poly campus, who testified that they did not believe that issuance of the license would contribute to a law enforcement problem.

Where there are conflicts in the evidence, the Appeals Board is bound to resolve them in favor of the Department's decision, and must accept all reasonable inferences which support the Department's findings. (Kirby v. Alcoholic Beverage Control Appeals Board (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857] (in which the positions of both the Department and the license-applicant were supported by substantial evidence); Kruse v. Bank of America (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 271]; Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control (1968) 261 Cal.App.2d 181 [67 Cal.Rptr. 734, 737]; and Gore v. Harris (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

The Department was entitled to rely on the opinion testimony of Chief Mitchell and Chief Gardiner, both of whom have considerable experience in law enforcement. Their opinions were based on their personal knowledge of the nature of existing law enforcement problems involving alcohol-related crimes and their

interaction with the Department in devising conditions to be placed on the license to minimize or eliminate possible problems, and their judgment that the sale and consumption of alcohol at the performing arts center would not add to those problems, is entitled to considerable weight. (See Kirby v. Alcoholic Beverage Control Appeals Board (1972) 7 Cal.3d 433 [102 Cal.Rptr. 857].)

The Department has undoubtedly relied substantially upon the character and credibility of the applicant, and its assumption that there will be continuing oversight by the Foundation of the performing arts center operations. We cannot say that it was wrong to do so. The Department brings its considerable expertise to bear in determining whether the issuance of an alcoholic beverage license is in the interest of public welfare and morals, and the Appeals Board may not reverse the Department's decision simply because it disagreed with the Department.

Given these considerations, we cannot say that the decision of the Department to issue the sought-after license, in the face of strong community opposition, was an abuse of discretion.

IV.

This issue, regarding the absence of any notice to dormitory inhabitants, was discussed in section II of this decision, in connection with Findings IX and X.

No evidence was presented concerning the existence of any identifiable individuals who, although claiming to have been occupants of the dormitories during the period in question, denied any awareness of the pending application or claimed any prejudice from not having received notice of its pendency.

We do not believe the Department was required to await the future tenancy

of potential recipients of notice.

Although there were suggestions that the filing of the application was timed to evoke Department action at a time when the campus dormitories were empty, there was no evidence that the filing was intended to avoid any notice requirement.

ORDER

The decision of the Department is affirmed.[4]

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

Dissent of JOHN B. TSU, Member, follows.

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[4] 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 order as provided by §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 §23090 et seq.

Dissent of JOHN B. TSU, Member

I believe the Department erred in issuing a license. The dangers of underage drinking are well-known, and to authorize the sale of alcoholic beverages on a college or university campus in a location hosting functions to be attended by many students under the age of 21, does little to discourage this sort of activity. Therefore, I dissent from the Board's decision.