

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

AB-7617

JENNIE and KASSAB AMA dba K & K Market
12568 Lakeshore Drive, Lakeside, CA 92040,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

File: 21-341125 Reg: 99047949

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: February 1, 2001
Los Angeles, CA

ISSUED APRIL 12, 2001

Jennie and Kassab Ama, doing business as K & K Market (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which denied their petition to modify conditions on their license pursuant to Business and Professions Code §23803.

Appearances on appeal include appellants Jennie and Kassab Ama, appearing through their counsel, Freddy Garmo, and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

¹The decision of the Department, dated March 23, 2000, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants agreed to conditions being place on their license when it was issued in 1998 due to a "significant law enforcement problem" and the protest of the San Diego Sheriff's Department. (Ex. 2-Petition for Conditional License.) Among those conditions were the following:

6. Sales of alcoholic beverages shall be permitted only between the hours of 8:00 AM and 11:00 PM.

7. No wines or distilled spirits shall be sold in containers of less than 375 milliliters, except wine coolers which shall only be sold in four-pack quantity per sale.

9. The quarterly gross sales of alcoholic beverages shall not exceed the gross sales of food or other commodities during the same period.

Appellants thereafter requested that the Department modify condition 6 to allow alcoholic beverages to be sold between the hours of 6 a.m. and 2 a.m., seven days a week, modify condition 7 to allow distilled spirits to be sold in containers of 200 milliliters, and delete condition 9 entirely.

The Department denied the request on December 14, 1999, stating in its notice of denial, dated July 28, 1999, that the grounds which caused the imposition of the conditions continue to exist. A hearing on appellant's request was held on February 15, 2000. Testimony was presented by Leslie Pond, the Department investigator who conducted an investigation in response to appellant's request; San Diego Sheriff's deputy Kosta Kurupas; Murray Whichard, manager of the Crime Analysis Division of the San Diego Sheriff's Department; appellant Kassab Ama; Sheldon Grover, an agent for the California State Lottery; and Jennifer Lloyd, a resident of an apartment building near the premises.

Subsequent to the hearing, the Department issued its decision which determined that appellants did not meet their burden of establishing that the grounds for imposition of the conditions no longer existed and their petition to modify conditions should be denied.

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) appellants met their burden of establishing by a preponderance of the evidence that the grounds which caused the imposition of the conditions no longer exist, and (2) the decision is not supported by substantial evidence in light of the whole record.

DISCUSSION

I

Appellants contend that they met their burden of establishing by a preponderance of the evidence that the grounds which caused the imposition of the conditions no longer exist. The conditions were originally imposed on the license "due to a significant law enforcement problem in the area where the premises are located and due to the protest of the license by the San Diego Sheriff's Department." (Proposed Decision, Finding II.) Appellants state that the Sheriff's Department did not object to Condition 2, which restricts the sale of alcoholic beverages in containers of less than 375 milliliters capacity, and that they presented evidence showing a 24% reduction of the crime rate from 1998 to 1999.

Deputy Kurupas did not mention condition 9² during his testimony, and stated

² Appellants refer to the conditions involved as Conditions 1, 2, and 3. On the Petition for Conditional License, these conditions are numbered 6, 7, and 9,

that the Sheriff's Department viewed condition 7 as a lower priority than condition 6. Appellants use this as a basis for their argument the Sheriff's Department did not object to removal of conditions 7 and 9, and, therefore, one of the grounds for the imposition of the conditions, the Sheriff's Department protest, no longer exists.

Appellants fail to mention that Deputy Kurupas testified specifically that the Sheriff's Department protested the condition involving the hours (condition 6) [RT 16, 18] and, when asked during cross-examination if his testimony was that "the Sheriff's Department would probably object to the other two conditions being removed as well, too?" he responded "Yes" [RT 18]. The premise upon which appellants base their argument, therefore, is false, and this argument must fail.

Appellants also argue that they have met their burden by showing "a 24% reduction of crime rate from 1998 to 1999." (App. Opening Br. at 5.) They computed this reduction based on the listing in Exhibit B of "alcohol related arrests" in police beat 528 for the period 1/1/98 through 12/31/99. The Department contended that this listing was not relevant because it was limited to "alcohol related arrests" instead of including "Part I crimes" and "Part II arrests" as required by Business and Professions Code §23958.4. Appellants state that the crimes and arrests used by the Department "are not related to the sale of alcohol and do not contribute to law enforcement problems which originally caused the [appellants'] license to be conditioned." (App. Opening Br. at 6.)

Both the Department and appellants are off the mark on this. "Part I crimes" and

respectively, and were referred to by the ALJ in that manner. We follow the numbering of the Petition and the ALJ.

"Part II arrests" are used under Business and Professions Code §23958.4 to determine if a "high crime area" exists, resulting in undue concentration. However, in the present matter the question is whether a "law enforcement problem" exists. While a "high crime area" as defined in §23958.4 may well be an area with a law enforcement problem, the two concepts are not necessarily equivalent.

On the other hand, appellants' reduction in "alcohol related arrests" does not prove that a law enforcement problem no longer exists. For one thing, only violations in which inebriation is an element of the violation itself are included, e.g., Penal Code §647, subdivision (f) (drunk in public). Not included are other crimes in which alcohol may have been involved indirectly, such as assaults and batteries occurring when the participants have been drinking. The inclusion of only actual arrests, not reported crimes, is another factor affecting the relevance and probity of appellants' statistics.

The ALJ found (Finding V-D) that appellants' statistics were unpersuasive because they did "not include any arrests by the California Highway Patrol which has primary jurisdiction for traffic matters in Beat 528."

What appellants failed to refute was the testimony of the deputy regarding the enforcement problems encountered by the Sheriff's Department in the area of the premises and the belief that removing or modifying the conditions would tend to worsen the law enforcement problem that already existed. Even if there had been a 24% decrease in overall crime, the Sheriff's Department would be best equipped to know if a law enforcement problem still existed.

II

Appellants contend the decision is not supported by substantial evidence

because "the ALJ did not properly consider numerous policies in favor of Appellant," and appellants have not been treated the same as other business owners in the area.

Appellants argue that the ALJ should have considered that "public convenience would be served if customers that live near the store are able to purchase alcoholic beverages until 2:00 a.m. and be [sic] purchase half pints of liquor or wine"; the store is "clean, safe, and bright"; "Mr. Ama is friendly with customers and deters homeless and others from loitering around the store"; Mr. Ama has cooperated with an agent of the California State Lottery in investigations; and Mr. Ama has donated time and money to the community and local organizations.

"Public convenience or necessity" provides an exception from the general rule that a license application is to be denied when the premises is located in an area of "undue concentration." Undue concentration was not listed as a reason for the imposition of the conditions. Therefore, the concept of public convenience or necessity simply is not applicable to the present request to modify conditions.

The cleanliness of the store and the friendliness and civic spirit of the licensee are all admirable, but irrelevant to the issue at hand. Appellants must show that the grounds for the imposition of the conditions (law enforcement problem) no longer exist. Neither the cleanliness, friendliness nor public spiritedness have managed to dissipate the existing law enforcement problem. There was no impropriety in the ALJ's disregard of these factors.

Appellants' contentions of unequal treatment arise from other licensed premises in the area having conditions different from those on appellants' license. Exhibits C and D are reports on license applications for two other premises in the area, Lakeside

Liquor and Wrigley's Supermarket. Lakeside Liquor, about a mile and a half from appellants' premises, is not in the same Sheriff's beat (beat 528) according to the map of the area supplied by appellants (Exhibit G). On this basis alone, Lakeside Liquor is inappropriate for comparison.

Wrigley's Supermarket, located in the same block as appellants' premises, is described in its report as a "large grocery store," and Exhibit F, a photograph showing both appellants' premises and Wrigley Supermarket, confirms the fact that Wrigley's is much larger. Wrigley's is subject to the same requirement as are appellants, that quarterly sales of alcoholic beverages not exceed quarterly sales of other commodities sold. Wrigley's also has restrictions on the hours during which alcoholic beverages may be sold and the minimum size of containers for certain alcoholic beverages. Wrigley's is permitted to sell alcoholic beverages only between 6 a.m. and 11 p.m. while appellants may sell alcoholic beverages only between 8 a.m. and 11 p.m. Wrigley's hours of operation are listed in its report, however, as 7 a.m. to 10 p.m. Therefore, appellants have the same number of hours to sell alcoholic beverages as Wrigley's, and actually sell until an hour after Wrigley's has closed.

There are differences in the container-size restrictions: Wrigley's may not sell wine in bottles of less than 750 ml., except for wine coolers, while appellants may not sell wine or distilled spirits in bottles of less than 375 ml. The "unequal treatment" complained of by appellants thus comes down to the single fact that they cannot sell whiskey or vodka in half-pint bottles, while Wrigley's can.

The Department may place any reasonable conditions on a license where it finds that grounds for denial of the license may be removed by the imposition of those

conditions. (Bus. & Prof. Code §23800.) Even if the conditions at issue in the present appeal were more disparate, it would be very difficult to say that appellants are subject to unequal treatment, given the different times and circumstances under which the conditions were imposed in each case. No showing has been made that the Department acted arbitrarily or abused its discretion in this case.

ORDER

The decision of the Department is affirmed.³

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

³This 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.