

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

AB-7939

File: 41-376918 Reg: 01051616

HARMON KASLOW,
Appellant/Protestant

v.

BLACK JET CATERING, INC.
16240 Ventura Boulevard, Encino, CA 91436,
Respondent/Applicant

and

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen

Appeals Board Hearing: November 14, 2002

Redeliberation: April 3, 2003

Los Angeles, CA

ISSUED APRIL 10, 2003

Harmon Kaslow (appellant/protestant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which overruled his protest against the issuance of an on-sale beer and wine public eating place license to Black Jet Catering, Inc. (respondent/applicant).

Appearances on appeal include appellant/protestant Harmon Kaslow; respondent/applicant Black Jet Catering, Inc., appearing through its counsel, Robert M. Victor; and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew Ainley.

¹The decision of the Department, dated January 23, 2002, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

In May 2001, applicant petitioned for issuance of an on-sale beer and wine public eating place license. The restaurant has operated since October 2001 under a temporary license. Protestant had filed a protest against issuance of an alcoholic beverage license to a different entity in the same location on October 20, 2000, and he requested that the prior protest be considered as filed against the present application as well.

An administrative hearing was held on December 13, 2001, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning conditions on the applied-for license, the operation of the proposed premises, and the basis for the protest.

Subsequent to the hearing, the Department issued its decision which overruled appellant's protest, allowing the license to issue.

Appellant thereafter filed a timely notice of appeal. In his appeal, appellant raises the following issues: (1) The Administrative Law Judge (ALJ) erred in determining that "undue concentration" did not exist; (2) applicant did not prove that public convenience or necessity would be served by issuance of the license; and (3) the ALJ improperly precluded appellant from addressing the issue of public convenience or necessity. The issues are all related to one another and will be discussed together.

DISCUSSION

Business and Professions Code² section 23958 requires the Department to "deny an application for a license . . . if issuance would result in or add to an undue

²Unless otherwise indicated, statutory references herein are to the Business and Professions Code.

concentration of licenses, except as provided in Section 23958.4." Appellant's protest stated, "There is an over concentration of on-sale beer & wine eating places." The ALJ treated this as an allegation of what he called "generic overconcentration," or simply too many licenses in the immediate area in light of all the circumstances. Based on the non-specific language of the protest, he did not believe that the applicant had properly been put on notice that the protestant would raise the more specific statutory provisions of "undue concentration"³ and "public convenience or necessity."⁴ The ALJ determined that appellant failed to properly raise the issue and, under the circumstances, we cannot say that his determination was unreasonable or an abuse of discretion.⁵

Finding 7 notes that there are seven on-sale licenses within a 1000-foot radius of the proposed premises, all of which are eating establishments serving various ethnic dishes. The finding continues:

Census tract evidence disclosed that four on-sale premises are permitted in the census tract and there are 17 in existence, seven of which are within 1000 feet of the premisses. However, statistical evidence of undue

³Section 23958.4, subdivision (a), provides that "undue concentration" exists where the applicant premises are located in an area where there exist greater than average numbers of reported crimes or certain specified ratios of licenses to population.

⁴Section 23958.4, subdivision (b)(1), provides that the Department may issue a license such as applied for here, in spite of undue concentration "if the applicant shows that public convenience or necessity would be served by the issuance."

⁵Appellant is correct in stating that, "The issue of 'public convenience or necessity' is not triggered by the filing of a protest or the contents of a protest." This does not mean, however, that the issues stated in the protest are irrelevant for purposes of the hearing. The Department must consider, during its investigation pursuant to section 23958, whether undue concentration exists, and, if so, whether the applicant has shown that public convenience or necessity exists. If so, the Department may issue the license, unless, as happened here, a protest is filed and a hearing is scheduled. At this point, the protest determines what issues will be explored at the hearing. For purposes of the hearing, therefore, the issue of public convenience or necessity is an issue only if explicitly raised in the protest.

concentration and public convenience or necessity for the issuance of the license has no bearing on the issues raised in this matter. Such a theory of undue concentration and its attendant requirements as defined by Business and Professions Code Section 23958.4 were not fairly noticed as an issue in the Protestant's verified protest. It is patently unfair to put the Applicant to its defense against an issue which was not timely raised in the protest document and is outside the scope of the pleadings. ¶ . . . No problem of undue concentration has been established.

The ALJ summed up the protestant's case as follows, in Finding of Fact 8:

The record is bare of any evidence on the part of the Protestant to support any of the issues raised in the protest. No witnesses were presented. All that is in the record is the Applicant's uncontroverted testimony of on-going discussions with the Protestant concerning beams of light flooding into the rear of the Protestant's residence during the evening hours interfering with his quiet enjoyment. However, this source of consternation is a security-type light fixture atop a four-story business building nearby the proposed premises whose landlord has refused entreaties of the Protestant for relief, and which the Applicant is powerless to remedy.

There is no evidence that this problem is associated in any way with the operation of the proposed premises.

The decision ultimately determined that "There is not an undue concentration of licenses within the immediate vicinity of the proposed premises," and ordered the protest overruled.

The ALJ found that the protestant did not provide evidence of the existence of generic overconcentration in the immediate area around the applicant's premises. On this issue, the burden of proof was on the protestant and his failure to produce any evidence in support of this contention dictates the result reached by the ALJ.

Even if the ALJ erred in determining that the statutory provisions regarding undue concentration and public convenience or necessity were not properly at issue, we do not believe that reversal of the decision is required. The Department, in its investigation, determined that statutory undue concentration existed pursuant to section

23958, subdivision (a), but also determined that the applicant had established that public convenience or necessity would be served by issuance of the license. There is clearly substantial evidence in the record to support this determination.⁶ Having established to the satisfaction of the Department that public convenience or necessity would be served by issuance of the license, applicant did not bear the affirmative burden of establishing it again at the hearing.

ORDER

The decision of the Department is affirmed.⁷

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

⁶The Department investigator testified regarding the type of cuisine offered by other on-sale licensees within 1000 feet of the proposed premises, the type of cuisine offered by applicant, and the existence of potential clientele in the businesses near the proposed premises [RT 50-51]. The investigator also testified that applicant had submitted a letter of public convenience or necessity indicating the area from which it would draw its clientele and that only one other establishment in the area provided the same type of cuisine.

⁷This 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 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.