

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

AB-8192

File: 70/66-387801 Reg: 03055271

JAMES LISSNER, Appellant/Protestant

v.

PACIFIC BEACH HOUSE, LLC, dba Beach House
1300 The Strand, Hermosa Beach, CA 90254,
Respondent/Applicant

and

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: June 10, 2004
Los Angeles, CA

ISSUED JULY 30, 2004

James Lissner (appellant/protestant) appeals from a decision of the Department of Alcoholic Beverage Control¹ which granted the application of Pacific Beach House, LLC, doing business as Beach House (respondent/applicant), for an on-sale general restrictive license.

Appearances on appeal include appellant/protestant James Lissner; respondent/applicant Pacific Beach House, LLC, appearing through its general manager, Kevin McCarthy; and the Department of Alcoholic Beverage Control, appearing through its counsel, David B. Wainstein.

¹The decision of the Department, dated August 28, 2003, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

On April 1, 2003, applicant petitioned for issuance of an on-sale general restrictive license with conditions. Protests were filed by appellant (and others), and an administrative hearing was held on August 7, 2003. At that hearing, oral and documentary evidence was presented concerning the application and the protests. Appellant and one other protestant were present at the hearing. Subsequent to the hearing, the Department issued its decision which denied appellant's protest and dismissed the protests of the other protestants who did not appear.

Appellant thereafter filed an appeal making the following contentions: 1) The administrative law judge (ALJ) should have disqualified himself; 2) the Department provided incomplete and inaccurate discovery; and 3) the decision is contrary to public welfare and morals and deprives protestant and the community of due process, in that the decision is unenforceable.

DISCUSSION

I

Before any evidence was taken at the hearing, appellant requested that ALJ Lo disqualify himself and filed an affidavit in support of his request. (Exhibit II.) In his affidavit, appellant stated that ALJ Lo had heard numerous cases regarding license applications for Hermosa Beach; that the protestant's witnesses had also testified in the prior matters; that the issues in the present case were the same as in the prior cases; that the evidence to be presented in the present case was the same or similar to that presented in prior cases; that ALJ Lo had ruled against appellant in the prior cases; and that ALJ Lo was predisposed to rule in favor of the applicant in the present case and could not "accord [appellant] a fair and impartial hearing." ALJ Lo denied the

request, saying that the affidavit did not state facts that "constitute legal cause for the disqualification of the Administrative Law Judge." [RT 8.]

On appeal, appellant contends that ALJ Lo should be disqualified because he has presided at numerous protest hearings involving downtown Hermosa Beach and has denied the protests in every one of them. Appellant argues that ALJ Lo could not reach a different conclusion in the present case without "throw[ing] into question all of his previous decisions" granting licenses in downtown Hermosa Beach.

Administrative law judges may be disqualified for bias, prejudice, or interest in the proceeding. (Gov. Code, § 11425.10, subd. (a)(5).) Section 11425.40, subdivision (b)(2), provides that it is *not* grounds for disqualification, without further evidence of bias, that the ALJ "has in any capacity expressed a view on, a legal, factual, or policy issue presented in the proceeding."

Views adverse to appellant's protest that ALJ Lo may have expressed in any prior hearing or proposed decision, cannot be grounds for his disqualification. (Gov. Code, § 11425.40, subd. (b)(2).) Even if we accept as true appellant's allegation that ALJ Lo has ruled against protestants in every protest hearing involving downtown Hermosa Beach, this does not, by itself, prove disqualifying bias on the part of ALJ Lo.

II

Appellant's contention appears to be that he was deprived of due process because the Department was late in providing him with discovery that, when received, was inaccurate, and the ALJ refused his request to reschedule the hearing.

Appellant does not elaborate on this contention, but in that part of the transcript to which he refers [RT 13-18], he stated that he did not receive discovery documents from the Department, consisting of about 40 pages, until four days before the hearing

and that some of the documents were incomplete or inaccurate, so that it was "very difficult" for appellant to prepare for the hearing. [RT 17.] The ALJ did not find that sufficient justification for postponing the hearing because appellant had received the material with enough time to read and understand the documents, and any inaccuracies, to the extent they were relevant to the application for license, could be addressed during the hearing.

Pursuant to Government Code section 11524, an ALJ may grant a request for a continuance for good cause. A party has no absolute right to a continuance; one is granted or denied at the discretion of the ALJ and a refusal to grant a continuance will not be disturbed on appeal unless it is shown to be an abuse of discretion. (*Givens v. Dept. of Alcoholic Bev. Control* (1959) 176 Cal.App.2d 529 [1 Cal.Rptr. 446].)

We cannot say that the ALJ abused his discretion in refusing to continue the hearing. Appellant did not show that he was unfairly disadvantaged or that a continuance would allow him to obtain additional or different information that would provide him with evidence materially aiding his case.

III

Appellant contends the decision deprives him and the community of their right to due process and is contrary to public welfare and morals. The decision violates due process, according to appellant, because, once the license is issued, the conditions on the license can be removed without notice to the public and an opportunity for objections to be heard. The decision is contrary to public welfare and morals, appellant argues, because there is nothing to prevent removal of the conditions on the license, and the application for conditional license states that it would be contrary to public welfare and morals for the license to issue without conditions.

Appellant alleges that "there have been numerous instances of the administrative removal of license conditions" in Hermosa Beach. He notes that he was personally notified of some of the requests to remove conditions, but there was no notification of the general public. The requests for removal of conditions, appellant asserts, were granted. A petition for modification of the conditions on respondent's license, appellant fears, "is easily anticipated."

Appellant is arguing about something that has not happened yet and may never happen.² In any case, notice is provided to the community, at least technically, because section 23803 of the Business and Professions Code provides that written notice of the intention to remove or modify a condition must be given to "the local governing body of the area in which the premises are located." This body then has 30 days to object to the modification or removal of the condition, and, if an objection is filed, the Department must hold a hearing. Appellant's remedy then, lies with the local governing body.

The Board has previously rejected this due process argument in several of appellant's prior appeals. (See, e.g., *Lissner v. Miller* (2002) AB-7816; *Lissner v. Pierview, LLC* (2001) AB-7650.) No evidence or argument has been presented that would cause us to decide this matter differently from the previous ones.

²Appellant appends to his closing brief a copy of a notice that a different licensee in Hermosa Beach has applied for removal of one of the conditions on its license. This document is not part of the record in the present matter, and this Board is limited to considering the record of the Department's administrative proceeding. (Bus. & Prof. Code, § 23083.) In any case, it would have no probative value since it is dated well after the administrative hearing in the present matter and deals with a different, unrelated license.

ORDER

The decision of the Department is affirmed.³

TED HUNT, CHAIRMAN
KAREN GETMAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

³This final order is filed in accordance with Business and Professions Code section 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.