ISSUED JANUARY 15, 2009

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

AB-8753
File: 21-395084 Reg: 07065621
MICHAEL NOVOTNY and SALLY NOVOTNY, Appellants/Protestants

v.

ASLAM HUSSAIN ALI, dba Jerry's Market
1791 South Main Street, Milpitas, CA 95035,
Respondent/Applicant

and

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John W. Lewis

Appeals Board Hearing: October 2, 2008
San Francisco, CA

Michael Novotny and Sally Novotny (appellants/protestants) appeal from a decision of the Department of Alcoholic Beverage Control[1] which granted, subject to conditions, the application of Aslam Hussain Ali, doing business as Jerry's Market (respondent/applicant), for an off-sale general license permitting the sale of beer, wine and distilled spirits in sealed containers.

Appearances on appeal include appellants/protestants Michael Novotny and Sally Novotny, appearing in propria persona; respondent/applicant Aslam Hussain Ali, appearing through his counsel, Richard D. Warren; and the Department of Alcoholic Beverage Control, appearing through its counsel, Nicholas R. Loehr.

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[1]The decision of the Department, dated September 5, 2007, is set forth in the appendix.

PROCEDURAL HISTORY

Protests were filed by appellants (and others) against the applicant's petition for issuance of an off-sale general license, with conditions. An administrative hearing was held on August 2, 2007. At that hearing, oral and documentary evidence was presented concerning the application and the protests.

Subsequent to the hearing, the Department issued its decision which denied appellants' protests, dismissed the protests of other protestants who did not appear, and allowed the license to issue, subject to the licensee's acceptance of the conditions set forth in his petition for conditional license.

Appellants thereafter filed an appeal making the following contentions: (1) The findings are not supported by substantial evidence and the decision is not supported by the findings; (2) the Department did not proceed in the manner required by law; and (3) evidence was improperly excluded.

DISCUSSION

I

Appellants contend that the decision is not supported by the findings and the findings are not supported by substantial evidence.

"Substantial evidence" is relevant evidence which reasonable minds would accept as a reasonable support for a conclusion. (*Universal Camera Corp. v. Labor Bd.* (1951) 340 U.S. 474, 477 [71 S.Ct. 456]; *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].) 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].) Appellate review does not "resolve conflicts in the evidence, or between inferences reasonably deducible from the evidence." (*Brookhouser v. State of California* (1992) 10 Cal.App.4th 1665, 1678 [13 Cal.Rptr.2d 658].)

Protestants reside in close proximity to the premises in question, which currently operates with an off-sale beer and wine license, free of any operating conditions. If the application for the proposed off-sale general license is granted, the license would be constrained by 16 operating conditions, including hours of sale restrictions (condition 1); prohibition of video or coin games (condition 4); trash disposal restrictions (condition 6); prohibition of a pay phone (to discourage drug dealing or loitering) (condition 14); restriction on vehicle traffic in rear parking lot in late evening hours (condition 16); and prohibitions with respect to size and quantity of specified items (conditions 7, 8, and 9). Conditions similar to these have been relied upon by the Department in many cases to protect the quiet enjoyment of nearby residences, and frequently where the provisions of Department Rule 61.4 (4 Cal. Code Regs., §61.4) apply.

Rule 61.4 places the burden of proof on the applicant for a license to demonstrate that the issuance of the sought-for license will not interfere with the quiet enjoyment of residents living within 100 feet of the proposed premises. The Department found that the applicant had met that burden, and we agree that its conclusion is supported by substantial evidence.

It cannot be ignored that, with his existing license, applicant could continue to operate as he has in the past, with more extended business hours, and free of trash disposal, parking lot, and product size and quantity restrictions. It appears to us that the Department, acting within its broad discretion and wide experience, has concluded that protestants will have more protection from potential disturbances than they enjoy at present.

This Board's review of a decision of the Department is strictly confined to a determination of whether the record supports the decision. *(Reimel v. Alcoholic Beverage Control Appeals Bd.* (1967) 252 Cal.App.2d 520 [60 Cal.Rptr. 641].) The Appeals Board is not entitled to reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable result. (*Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control* (1968) 261 Cal.App.2d 181, 185 [63 Cal.Rptr. 734].)

Much of appellants' brief is devoted to an interpretation of the facts as seen by appellants. We do not doubt the sincerity of appellants' arguments, but we must remind them that the limitations upon the scope of Appeals Board review preclude this Board from overturning the Department's factual findings.

II

Appellants allege that the administrative law judge (ALJ) erred when he ruled that the Department's investigator could testify at the outset of the hearing, and that they were denied the opportunity to cross-examine a witness.

The ALJ has a great deal of discretion as to the order of proof. The Department's practice of beginning a license application case with the testimony of the

Department licensing investigator is long established. It has proven to be an effective way of identifying the major considerations, both pro and con, relating to the license being sought.

In this case, the ALJ explained why he thought it useful to begin with the testimony of the Department investigator:

> THE COURT: Based upon my reading of the Coffin case, here is how we are going to proceed in this matter. The Department - I am going to ask the Department to proceed by putting the investigator on first so I can get an understanding of what this case involves and his findings during the course of the investigation..."

In the *Coffin* case to which the ALJ referred *(Coffin v. Alcoholic Beverage Control Appeals Bd.* (2006) 139 Cal.App.4th 471 [43 Cal.Rptr.3d 420]), the court sided with a 1954 opinion of the California Attorney General[2] which asserted two significant principles. First, contrary to the position traditionally taken by the Department, the court's opinion stated that the burden of proof remains on the license applicant at all times, not on a protestant. Second, the opinion stated that a protestant lacks the rights possessed by a party - in this appeal the protestants' right to cross-examine witnesses. The court stated:

> The ALJ's ruling also is inconsistent with a 1954 opinion by the California Attorney General that supports our conclusion. The opinion addressed the question of upon whom does the burden of proof rest, and upon whom is the burden of going forward with the evidence in a variety of situations, including, "Where a citizen has filed a protest to the granting of a license and the proceeding is adversary as between protest and applicant." The opinion answered, "'In all of the enumerated instances, the primary burden of proof is upon the applicant for a license." (23 Ops.Cal.Atty.Gen. 290, 291 (1954).)
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> The opinion, which expressly disagrees with the position advocated by Barona and the Attorney General in this appeal, states:

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[2] 23 Ops.Cal.Atty.Gen. 290, 293-294 (1954).

> "[I]t has been suggested that, where a protest is filed, the subsequent proceedings are 'adversary between the applicant and protestant.' Such is not, in our opinion, a correct analysis of the statutory scheme. When a protest is made to the issuance of a liquor license, the qualification[] of the applicant (or his proposed premises) is challenged. But it is the [Department], not the citizen, who is charged with the obligation to file a statement of issues (Gov. Code Sec. 11504), and the protestant has no further rights in the cause - except to be heard. Thus, the protestant is, in our opinion, but analogous to a 'complainant' in a criminal proceeding, or the 'complaining witness,' not a real party in interest to the administrative proceeding. The failure of the protestant to prove, by a preponderance of the evidence, the validity of his objections to the issuance of the license in controversy, is no aid to the applicant in the establishing of his right to the license. (23 Ops.Cal.Atty.Gen., *supra*, at p. 294.) "

It seems that the Department has taken a number of different views as to the effect the *Coffin* decision should have on the degree of participation a protestant may have in an administrative hearing. In this case, appellants were not permitted to cross-examine a witness who testified he had not experienced some of the concerns protestants expressed. There is nothing in the decision that would indicate any weight was given to that witness's testimony, and the assertions in appellants' brief that his testimony was "manipulated" to make it appear he had, contrary to fact, been a long-time resident, are based on matters outside the record.

This does not mean that this Board concurs in the Department's reading of *Coffin*, as expressed by the ALJ in this case, that protestants will not be accorded the rights of parties to the proceeding. We have seen different treatments of protestants in other cases pending before this Board; in one case, for example, Department counsel stated the Department's position to be that protestants would be treated as parties; in another, the transcript reflects the ALJ's disagreement with and rejection of the Department's attempt to limit the participation of a protestant to a role of complaining witness. (*Cowboy Up, Inc*. (July 8, 2008) AB-8683.)

Were this not such a strong case favoring issuance of the license, we could question the soundness of a decision where the witnesses supporting the issuance of a license (the Department investigator and the applicant) faced cross-examination only from the Department attorney, whose client intends to issue the license, and the applicant's attorney, who wants it to issue. In this case, appellants made no claim that they were not permitted to cross-examine those witnesses.

This may well be an issue in future cases, depending upon what position the Department ultimately takes with respect to the *Coffin* decision. Suffice it to say that, in this case, any error regarding it was harmless.

III

It is difficult to discern from appellants' brief what evidence was improperly excluded. The only item they specifically identify is a CD offered by the applicant which purportedly contained numerous letters in support of the application. Appellants say that a review of the contents of the CD would have demonstrated how weak that support was. Even if we assume that what appellants say is true, we do not see how that can be considered reversible error. Under Evidence Code section 352, the ALJ has the discretion to exclude otherwise relevant evidence if it would tend to consume an excessive amount of time.

Appellants' brief contains many criticisms of the manner in which the evidence was presented and the ALJ's assessment of the evidence, but we do not address them. It is enough to say that appellants wish this Board to review the evidence and make its own findings, something this Board clearly lacks the power to do.

ORDER

The decision of the Department is affirmed.[3]

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[3] This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate district 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.