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

AB-9470
File: 21-522095; Reg: 14080188

BALVINDER SINGH SARAI and RANJIT KAUR SARAI
5444 Watt Avenue, Suite 900,
North Highlands, CA 95660,
Appellants/Applicants

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Nicholas R. Loehr

Appeals Board Hearing: July 9, 2015
San Francisco, CA

ISSUED JULY 31, 2015

Appearances by counsel:

Balvinder Singh Sarai and Ranjit Kaur Sarai, in propria persona as appellants.

Dean Lueders, for respondent Department of Alcohol Beverage Control.

Opinion:

Balvinder Singh Sarai and Ranjit Kaur Sarai appeal from a decision of the Department of Alcoholic Beverage Control[1] which denied their application for a premises-to-premises transfer of an off-sale general license from a previous location in Carmichael, California to a new location in neighboring North Highlands.

FACTS AND PROCEDURAL HISTORY

Appellants' previous off-sale general license was issued on September 14, 2007, for premises doing business in Carmichael, California. The licensed premises at that

[1]The decision of the Department, dated July 23, 2014, is set forth in the appendix.

location was closed by appellants in 2011 for economic reasons. On May 22, 2012, appellants applied for a premises-to-premises transfer of the previous off-sale general license to a new location in North Highlands. That application was denied by the Department of Alcoholic Beverage Control, in a decision dated March 12, 2014, finding that the applied-for license would be contrary to public welfare or morals, and that no exception for public convenience or necessity would be served by the issuance; that it would tend to aggravate an existing law enforcement problem; that it would add to an undue concentration of licenses in the area; and that it would interfere with a nearby school.

An administrative hearing was held on May 20, 2014. Documentary evidence was received and testimony concerning the application was presented by Kathryn Sandberg, a Supervising Agent with the Department of Alcoholic Beverage Control, and by appellants Balvinder Singh Sarai and Ranjit Kaur Sarai.

After the hearing, the Department issued its decision which denied appellants' application for a premises-to-premises transfer.

Appellants raise the following arguments: (1) the County of Sacramento's determination regarding public convenience or necessity was not timely made; (2) the ABC investigator who visited the proposed premises, Laura Meeks, was not present at the administrative hearing, thus depriving appellants of the opportunity to examine her; (3) the Department's decision is not supported by substantial evidence; (4) the "consideration point" cited is no longer in operation as a school for minors, but is now operated as a day program for disabled adults, and appellants could not have produced this evidence at the administrative hearing; and (5) appellants were not treated fairly.

DISCUSSION

I

The Department alleges in its brief that this case comes down to a single issue — the fact that the County of Sacramento denied appellants' request for a finding of public convenience or necessity, as required by Business and Professions Code section 23958.4, subdivision (b)(2). That code section requires such a finding by the local governing body — in this case, the County of Sacramento — as a prerequisite for issuing a license in an area with an undue concentration of licenses.

Nick v. Department of Alcoholic Beverage Control (2014) 233 Cal.App.4th 194, 205 [182 Cal.Rptr.3d 182] clarified the procedure regarding the finding of public convenience or necessity:

> [Business and Professions Code] section 23958 prohibits the Department from issuing a license that would result in or add to an undue concentration of licenses unless "the local governing body of the area in which the applicant premises are located … determines within 90 days of notification of a completed application that public convenience or necessity would be served by the issuance." (§ 23958.4, subd. (b)(2).) If the local governing body makes this determination, the Department "may" issue the license despite an undue concentration. (§§ 23958, 23958.4, subd. (b)(2).) *Nothing in the plain language of either section 23958 or section 23958.4 requires the Department to independently determine whether issuing the license would serve public convenience or necessity if the local governing body already made that determination*.

(Emphasis added.) The opinion further explained:

> [I]n making a public convenience or necessity determination a local governing body does not license the sale of alcoholic beverages; it merely makes a determination to aid the Department in exercising its constitutional authority. The Department still retains the discretion and final decision on whether to issue the license. Indeed, the Department still must determine whether the applicant and the premises for which a license is sought satisfy the Act's other requirements, and whether issuing the license would be contrary to public welfare or morals.

(*Id.* at p. 207.) As the Department notes, the County of Sacramento did *not* find public

convenience or necessity would be served, thereby ending the discussion so far as the Department is concerned — none of the other points raised by appellants were addressed in the Department's brief.

Appellants counter that the County of Sacramento failed to make a public convenience or necessity determination within the 90-day time period allotted for that determination, implicitly making its reliance on that decision impermissible. They submitted their application for a premises-to-premises transfer on May 22, 2012, and the County's decision — finding against public convenience or necessity — was made on December 12, 2012, almost seven months later. The record reflects that the Department was aware of negotiations going on between the applicants and the County, and that the Department's policy was to step back and let the negotiations go forward without interference until a decision regarding public convenience or necessity was reached. (RT at pp. 33-34.) The Department's order, denying the application, was not sent to appellants until March 12, 2014 — fifteen months after the County's decision.

The Department maintains there is no evidence that the County of Sacramento exceeded the 90-day period, but the Board believes the dates speak for themselves. No justification has been given for allowing the County to take almost seven months to make a decision, when the law permits only three months; and, the Board finds no explanation in the record for the fifteen month delay by the Department in notifying appellants that their application had been denied.

We believe the applicants deserve an explanation of these unconscionable delays, and an opportunity to have the Department consider, at an evidentiary hearing, whether public convenience or necessity exists — independent from the findings of the

County of Sacramento.

II

Appellants contend the ABC investigator who visited the premises, Laura Meeks, was not present at the administrative hearing, depriving appellants of the opportunity to examine her. Appellants maintain that ABC Agent Kathleen Sandberg — the supervising agent for the Sacramento field office who appeared at the administrative hearing — had never visited the proposed premises, and therefore lacked the knowledge to answer questions about the premises. (App.Br. at p. 2.)

This issue was not raised at the administrative hearing — appellants did not object to the testimony of Agent Sandberg, subpoena the original investigator, or raise this issue in any fashion during the hearing.

It is settled law that the failure to raise an issue or assert a defense at the administrative hearing level bars its consideration when raised or asserted for the first time on appeal. (*Araiza v. Younkin* (2010) 188 Cal.App.4th 1120, 1126-1127 [116 Cal.Rptr.3d 315]; *Hooks v. Cal. Personnel Bd.* (1980) 111 Cal.App.3d 572, 577 [168 Cal.Rptr. 822]; *Shea v. Bd. of Med. Examiners* (1978) 81 Cal.App.3d 564, 576 [146 Cal.Rptr. 653]; *Reimel v. House* (1968) 259 Cal.App.2d 511, 515 [66 Cal.Rptr. 434]; *Wilke v. Holzheiser, Inc. v. Dept. of Alcoholic Bev. Control* (1966) 65 Cal.2d 349, 377 [55 Cal.Rptr. 23]; *Harris v. Alcoholic Bev. Control Appeals Bd.* (1961) 197 Cal.App.2d 182, 187 [17 Cal.Rptr. 167].)

Because this issue was not raised at the administrative hearing, it would be impossible for this Board to find error in its omission from the decision. As the Board has noted elsewhere, an appellant must actually *make* an argument if it wishes to see that argument addressed. (See, e.g., *Semaan* (2014) AB-9419, at p. 5; *7-Eleven,*

Inc./Samra (2014) AB-9387, at p. 9; *7-Eleven, Inc./Kidane* (2008) AB-8528a, at pp. 5-6.) We must consider this issue waived.

III

Appellants contend the findings of the administrative law judge (ALJ) — that issuance of the applied-for license would be contrary to public welfare and morals, would tend to aggravate an existing law enforcement problem, and would result in undue concentration — are not supported by substantial evidence.

This Board is bound by the factual findings in the Department's decision as long as they are supported by substantial evidence. The standard of review is as follows:

> We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. [Citations.] We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor [an appellate] court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. [Citations.] The function of an appellate Board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

When findings are attacked as being unsupported by the evidence, the power of this Board begins and ends with an inquiry as to whether there is substantial evidence, contradicted or uncontradicted, which will support the findings. When two or more competing inferences of equal persuasiveness can be reasonably deduced from the facts, the Board is without power to substitute its deductions for those of the Department. (*Kirby v. Alcoholic Bev. Control Appeals Bd.* (*Kirby*) (1972) 25 Cal.App.3d

331, 335 [101 Cal.Rptr. 815]; see also 6 Witkin, Cal. Procedure (2d ed. 1971) *Appeal*, § 245, pp. 4236-4238.)

The issue of substantial evidence, when raised by an appellant, leads to an examination by the Appeals Board to determine, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. (Bus. & Prof. Code § 23084; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113].)

In Finding of Fact III, the ALJ determined that issuance of the license would be contrary to public welfare and morals because the proposed premises is in an area with an undue concentration of licenses, and the County of Sacramento had denied the applicants' request for a finding of public convenience or necessity. Appellants presented no evidence to refute this finding.

In Finding of Fact IV, the ALJ determined that the issuance of the license would tend to aggravate an existing law enforcement problem, based on evidence of crime in the area and an objection by the Sheriff's Department to the issuance of the license. Appellants presented no evidence to refute this finding.

In Finding of Fact V, the ALJ determined that the issuance of the license would result in or add to the undue concentration of licenses in the area, because there are already eight licenses in an area which is only supposed to have three — according to the formula provided in Business and Professions Code section 23958.4(a)(3). Appellants presented no evidence to refute this finding.

This Board has stated many times that, in the absence of compelling reasons, it will ordinarily defer to the ALJ's findings on factual matters. Having reviewed the entire

record in this matter, we see no flaw in the ALJ's findings or determinations. Ultimately, appellants are asking this Board to consider the same set of facts and reach a different conclusion, despite substantial evidence to support those findings. This the Board declines to do.

IV

Appellants contend the consideration point cited in the denial of their application — Aero Haven Elementary — is no longer in operation as a school for minors, but is now operated as a day program for adults with cerebral palsy, and that appellants could not have produced this evidence at the administrative hearing.

The ALJ made the following finding on this issue:

> a. The Aero Haven Elementary School is currently operating between 0800 and 1500 hours as a charter school for children suffering from cerebral palsy. The children attending are between the ages of 8 and 18 years old. The Petitioners disputes [*sic*] the school is open and operating. However, a representative of the SCSD advised Supervising Agent Sandberg the school was open and operating. Supervising Agent Sandberg contacted the Twin Rivers School District and the district verified the charter school was open and operating.

(Findings of Fact ¶ VI(a).)

Appellants purport to offer evidence that the school is closed, and offer Exhibit F, attached to their Opening Brief, to support their allegation. The Department of Education website page contained in this exhibit does show that Aero Haven Elementary, at 5450 Georgia Drive in North Highlands, is "closed." The following page, Exhibit G, a website page from the Department of Social Services, shows an Adult Day Program being offered at that same address.

The Board would like to see this issue clarified at an evidentiary hearing.

V

Appellants contend they were not treated fairly and equally under the law because another applicant for a license, Walmart, was granted a license in the same census tract where appellants' application was denied.

The ALJ addressed this issue accordingly:

> Petitioners complain that they are being treated unfairly and unequally under the law. The genesis of this grievance is the granting of an alcoholic beverage license to Wal-Mart [*sic*], which is in the nearby area. (Petitioner's Exhibit A — Annex D) However, the issuance of a Department license to another entity, even in close proximity, is only marginally relevant to the current petition. A general comparison like this serves little, if any purpose. Each alcoholic beverage license application is unique, and the facts pertaining to each potential licensee may vary significantly on the type of operation envisioned, the qualifications of each licensee, the training of its employees in the service of alcoholic beverages, and the conditions or operating restrictions agreed upon by the licensee for its premises. These are just some of the factors the Department must consider for each application. To predicate license approval to the Petitioner on the concept of license issuance to another entity in the near vicinity, without regard to the factual basis for such approval, would undermine the essence of the Department's discretionary authority and powers in alcoholic beverage licensing. To grant the Petitioners [*sic*] license simply because another entity was licensed in the nearby vicinity would result in "carte-blanche" licensing for all applicants regardless of the facts surrounding the applied-for license.

(Findings of Fact ¶ VII.)

We agree. It would open a Pandora's box to follow the path that appellants have requested. Each application must be considered on its own merits, independent of determinations regarding other applications.

ORDER

The decision of the Department is remanded for an evidentiary hearing on issue I — whether public convenience or necessity would be served — and issue IV — whether or not a consideration point currently exists at Aero Haven Elementary School.[2]

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
PETER J. RODDY, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD ORDER

[2]This order of remand is filed in accordance with Business and Professions Code section 23085, and does not constitute a final order within the meaning of Business and Professions Code section 23089.