

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

AB-9270

File: 41-500177 Reg: 11074265

ROBERT B. GARCIA, Appellant/Protestant

v.

JOSEPH YOUSEF DABIT, dba Cup A Joe Coffee House
896 Sutter Street, San Francisco, CA 94109,
Respondent/Applicant

and

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: April 4, 2013
Sacramento, CA

ISSUED MAY 20, 2013

Robert B. Garcia (appellant/protestant) appeals from a decision of the Department of Alcoholic Beverage Control¹ which granted the application of Joseph Yousef Dabit, doing business as Cup A Joe Coffee House (respondent/applicant), for an on-sale beer and wine public eating place license.

Appearances on appeal include appellant/protestant Robert B. Garcia, appearing in propria persona; respondent/applicant Joseph Yousef Dabit, also appearing in propria persona; and the Department of Alcoholic Beverage Control, appearing through its counsel, Heather Hoganson.

¹The decision of the Department, dated May 2, 2012, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

This case, vintage 2000,² comes to us with layers of complexity. There were three days of hearing in this matter in 2011 and 2012, and two decisions in favor of the applicant were adopted by the Department: the first was ultimately rescinded; the second is the subject of this appeal. At the heart of the matter is the applicant's desire since the year 2000 to serve beer and wine to guests seated at tables and chairs located on a public sidewalk outside his coffee shop/restaurant, and protestant Robert Garcia's determined opposition to his doing so.

The first two days of hearing in 2011 were followed by a decision adopted by the Department on August 31, 2011. Following an Order on Reconsideration which: granted the motions for consideration filed by the Department and protestant Robert Garcia; rescinded the certificate of decision issued August 31, 2011; and rejected the underlying proposed decision, the Department, pursuant to Government Code section 11517, subdivision (c)(2)(d), remanded the matter for a further hearing for the taking of additional evidence and such further action as may be necessary consistent with the comments in the order (essentially, that the ALJ should have addressed the issues raised by the protestants).

After an abbreviated third day of hearing, Judge Lo issued his second proposed decision. Now, 13 years after applicant's odyssey began, the dispute has finally reached the Appeals Board.

²The license which is the subject of the transfer application which gives rise to the protest that is the subject of this appeal was issued in the year 2001, after protests against an application filed in the year 2000. The records which relate to that matter cannot be located. Mr. Garcia was then, as now, one of the protestants.

DISCUSSION

We are guided by the standard of review expressed in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826] (*Masani*):

Certain principles guide our review. We review the Department's decision, not the Board's. [Citation]. We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. [Citation]. We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor this 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. [Citation]. 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.

Administrative Law Judge Lo's findings summarize the events beginning in the year 2000 that ultimately led to this appeal, events in which protestant Robert Garcia was active throughout.³ We quote those findings in full:

Joseph Dabit ("Petitioner") is the owner of a coffee-house restaurant located at the address indicated above [896 Sutter Street, San Francisco, CA 94109]. In July 2000, Petitioner applied to the Department of Alcoholic Beverage Control for the issuance of a type 41 (on-sale beer and wine public eating place) license for his restaurant.

In support of his application, Petitioner on July 12, 2000 submitted to the Department a Diagram of Licensed Premises. The document shows chairs and tables on the 75 feet of sidewalk outside of the restaurant on Sutter Street and on the 25 feet of sidewalk outside of the restaurant on Leavenworth Street. On the Planned Operation document with the same date, Petitioner checked the "No" box with reference to the word "patio."

On August 1, 2000, Petitioner submitted another Diagram of Licensed Premises to the Department with similar drawings of tables on the Sutter Street sidewalk and the Leavenworth Street sidewalk outside of the

³See fn. 2, supra.

restaurant. The words "Outside Dining" are also written on the document. On the Planned Operation document dated August 1, 2000, Petitioner also wrote the words "Sidewalk dining with permission to serve beer and wine outdoors. See diagram for tables and chairs outside."

There were residences within 100 feet of Petitioner's restaurant. By signing a Petition for Conditional License containing nine conditions, Petitioner satisfied the Department that the operation of his business would not interfere with the nearby residents' quiet enjoyment of their properties.

There was an "undue concentration of licenses," as that phrase is defined in Business and Professions Code Section 23958.4, in the census tract and the crime reporting district in which Petitioner's restaurant was located. The Department determined that the issuance of an alcoholic beverage license for Petitioner's restaurant would serve public convenience and necessity, thereby permitting the Department to issue an alcoholic beverage license to Petitioner.

On November 1, 2000, the city of San Francisco gave approval to Petitioner to have sidewalk seating for his restaurant.

On August 21, 2001, the Department issued a Type 41 license to Petitioner. The license contained nine conditions, but was silent on the subject of whether sale, service, or consumption of alcoholic beverages on the sidewalk outside of the restaurant was permitted.

Petitioner contends that because of the information provided in the two Diagram of Licensed Premises documents and on the two Planned Operations documents, his license permits him to sell and serve alcoholic beverages on the Sutter Street sidewalk and the Leavenworth Street sidewalk outside of his restaurant. Petitioner's contention has merit.

The Department argues that because Petitioner indicated the licensed premises would not include a patio, he represented to the Department that he did not intend for his licensed premises to include the sidewalks.

If Petitioner exercises what he believes is his privilege, pursuant to his license, to sell alcoholic beverages on the sidewalks, he risks another Accusation against him for violating Business and Professions Code Sections 23300 and 23355. (A 2003 Accusation for such a violation is discussed in Paragraph IV of the Determination of Issues.)

Therefore, pursuant to advice from a Department District Administrator, Petitioner on June 3, 2010 applied for a "premises-to-premises" transfer of his own license. The new license would be the same as his current license, with the exception that it specifically would permit the sale,

service, and consumption of alcoholic beverages on the sidewalks where the City of San Francisco permits Petitioner's restaurant to have tables and chairs.

Many of Petitioner's neighbors/customers, including those who live in the apartments above Petitioner's restaurant, and others who live within 100 feet of the restaurant enthusiastically support Petitioner's application for a new license. Approximately 1400 people signed petitions supporting the application.

[The cover page for the petitions states in part as follows: "There is one man, "ONE" in the neighborhood that does not like people enjoying alcohol outside on our sidewalk."

[Protestant Garcia correctly notes that there are at least fifteen persons who oppose Petitioner's application. However, the evidence is not clear that, at the time Petitioner was collecting signatures for the petitions, he knew about their opposition.

[Moreover, the fact that there are fifteen persons who oppose Petitioner's application does not change the fact that approximately 1400 persons signed the petitions in support of the application.

[Finally, it should be noted that the petitions were admitted into evidence, not as proof that all 1400 persons who signed the petitions support the application, but as administrative hearsay to supplement the direct testimonies of the witnesses who support the application. Government Code Section 11513 (d)].

None of the residents who lives within 100 feet of Petitioner's restaurant protested against Petitioner's application.

On October 14, 2010, Petitioner filed with the Department a Petition for Conditional License which would add Conditions 10 to 13, should his application for the transfer of his license be granted. The conditions read as follows:

10. Petitioner(s) have been issued and will comply with the provisions of the Department of Public Works Table and Chairs Permit issued pursuant to Article 5.2 of the Public Works Code.

11. Petitioner(s) will maintain the Department of Public Works Permit, and keep a copy of same and any revisions therefore, on the premises at all times and will make said permit available for immediate inspection by any law enforcement personnel upon request.

12. Petitioner(s) will provide the Department with a copy of Department of Public Works Table and Chairs Permit and any approved revisions to the permit prior to the effective date of the revision.

13. Sales, service and consumption of alcoholic beverages shall only be allowed on the sidewalk area of the premises to patrons seated at tables and chairs authorized by the Department of Public works Tables and Chairs (permit).

If the Department grants the Petitioner the new license, Petitioner will surrender his current license.

The Department initially denied Petitioner's application on four grounds: issuance of the license would result in overconcentration; there are residences within 100 feet of the restaurant; issuance of the license would result in law enforcement problems; and, in 2003, petitioner's license was suspended for 15 days for an employee having sold an alcoholic beverage without holding a license authorizing the sale of an alcoholic beverage on the outdoor sidewalk dining area.

By its adoption of Judge Lo's proposed decision, with its added conditions, the Department has acquiesced in the issuance of the license, and expressed its satisfaction with the new conditions. The only remaining obstacle for appellant is the protest of Robert Garcia, the sole appellant.

Mr. Garcia's brief in this appeal was due on February 15, 2013. In response to his untimely request for an extension of the time within which to file his brief, he was advised that his brief, if any, had to be filed by February 25, 2013.

Mr. Garcia did not file a formal opposition brief. Instead, he submitted as his opening "brief" a copy of a Motion for Reconsideration he filed with respect to the May 2, 2012, decision which is the subject of this appeal. The "brief" consists of three pages, cites no case or statutory authority, and contains only two record citations [RT

114, 120].⁴ It asserts there was a "settlement" in 2001 pursuant to which protestants withdrew their protests in return for "conditions on the license which clearly confined the sale of alcohol to the inside restaurant premises." While he is correct that there were protests in the year 2000 that were ultimately withdrawn, and conditions imposed on the license, there is nothing but the claim of protestants Garcia and Oberdorf that the privilege of serving wine and beer on outside tables had been bargained away. (See Determination of Issues V.)

Mr. Garcia also argues that Judge Lo gave too much weight to a petition signed by supporters of applicant (in numbers estimated at 1400) compared to only fifteen protestants. Although we are inclined to agree with Mr. Garcia that too much could be made of the disparity in numbers between supporters and opponents, we think Judge Lo's decision was more controlled by his legal conclusions and detailed, albeit unnumbered, findings on the issues of Rule 61.4 quiet enjoyment, public convenience, law enforcement problems, license over-saturation, and the weight given to applicant's disciplinary problem in 2003, all of which were the subject of conflicting testimony. There were approximately 270 residence addresses within 100 feet of appellant's premises. Letters were sent to all such residents, and not a single one filed a protest. The only protestant pursuing this appeal, Mr. Garcia, does not live in one of those residences.⁵ His residence is one-half mile away.

There appears to be a substantial degree of personal animosity on the part of

⁴These references to the hearing transcript deal with testimony of a witness that he drank beer on the sidewalk sometime in 2002 or 2003, "before the permit thing." The import of this fragment of evidence, culled from a voluminous transcript, eludes us.

⁵Only Mr. Garcia and one other protestant attended any of the hearings in this matter.

Mr. Garcia directed at Mr. Dabit's business. Illustrative of this is his assertion that "I'm opposed to the [expansion] because it hasn't been a good operation all the way through. There's been problem after problem" [I RT 33]. In contrast, Department licensing investigator Cindy Gilbert testified on cross-examination that, except for two noise complaints and the 2003 incident involving a sale at an outside table, there was nothing in her file to indicate there were problems with the premises during its ten-year operation [I RT 70-74].

Mr. Garcia called a single witness at the hearing which followed his (and the Department's) motion for reconsideration. Steven Matthias, a San Francisco police officer, testified about numerous complaints to the police about the Cup A Joe premises referring to the complainants as "neighbors." He also testified that on two occasions in April and October 2010 that he observed beer being served at outside tables. He reported these incidents to SFPD vice and the ABC. His report concerning the April 20 incident (Exhibit I, p.2) states:⁶

Upon further investigation, I learned that the Cup of [sic] Joe license does permit outside use. The ABC paper work states: " Sidewalk dining with permission to serve beer & wine outdoors. See diagram for tables and chairs outside." (See attached supporting document.)

Officer Matthias acknowledged in his testimony on cross-examination that he later changed his mind, and conveyed that to Mr. Dabit. Fairly read, his testimony

⁶Although the copy of the hearing exhibit in the record includes only two of the six pages it says it contains, the attached supporting document would appear to account for two of the missing pages, in all likelihood Exhibit C. Exhibit C consists of a hand-drawn "Diagram of Licensed Premises" together with a document entitled "Planned Operation" dated August 1, 2000 regarding the planned operation of the premises. The completed form contains the statements quoted in the officer's April 21 report. Interestingly, both pages reflect a fax transmission from the Department's San Francisco office on April 21, 2010, the same date of Officer Matthias's report.

demonstrates that there was a period of confusion regarding the scope of Mr. Dabit's licensing privileges. [RT III 394-398]. The Department never instituted an accusation with respect to those sales, suggesting, perhaps, its own uncertainty over Mr. Dabit's license privileges.

Finally, Mr. Garcia argued that Judge Lo erred by placing on protestants the burden of proof on the issue whether the application for a premises-to-premises transfer should be granted, citing the case of *Coffin v. Department of Alcoholic Beverage Control* (2006) 139 Cal.App.4th 471. The argument is without merit.

Mr. Garcia's argument was little more than a passionate plea to this Board to disregard Judge Lo's factual findings and make its own. Of course, the Board cannot do this. The factual findings of the Department are binding on the Appeals Board, and all conflicts in the evidence must be resolved in favor of the Department's decision. (*Harris v. Alcoholic Beverage Control Appeals Board* (1963) 212 Cal.App.2d 106 [28 Cal.Rptr.74]. The Appeals Board cannot disregard or overturn a finding of fact by the Department merely because a contrary finding would be equally or more reasonable. (*Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control* (1970) 2 Cal.3d 85, 94 [465 P.2d 1]; *Harris, supra*, at 114.

Judge Lo was well aware who bore the burden of proof. He was reminded of that during the Department's argument [at RT II 345] prior to his first proposed decision, and acknowledged that it was Mr. Dabit's burden in the arguments following the third day of hearing, after the ruling on the motions for reconsideration:

[Judge Lo]: All right. This is now time for closing argument. Mr. Dabit, since you have the burden of proof, you get to go first and last.
[RT III 418].

The Department has broad discretion with respect to the issuance or denial of a license. In *Koss v. Department of Alcoholic Beverage Control* (1963) 215 Cal. App.2d 489, 496 [30 Cal.Rptr.2d 219], that discretion was described this way:

[T]he Department exercises a discretion adherent to a standard set by reason and reasonable people, bearing in mind that such a standard may permit a difference of opinion on the same subject. If the decision is reached without reason under the evidence, the action of the Department is arbitrary, constitutes an abuse of discretion, and may be set aside. Where the decision is the subject of a choice within reason, the Department is vested with the discretion of making the selection which it deems proper; its action constitutes a valid exercise of that discretion; and the Appeals Board or the court may not interfere therewith.

We have thoroughly reviewed the extensive record in this matter. Judge Lo's factual findings and legal conclusions are supported by the evidence, are reasonable in nature, and deserve to be affirmed. There has been no abuse of discretion.

ORDER

The decision of the Department is affirmed.⁷

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁷ 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.