ISSUED APRIL 30, 1996

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

OMAR M. ALZGOUL dba Hillside Market 1165 Hillside Boulevard Colma, CA 94014 Appellant/Applicant, v. ABRAHAM ANGELES Protestant/Respondent, and THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6543 File: 21-293453 Reg: 94007405 Administrative Law Judge at the Dept. Hearing: Jerry Mitchell Date and Place of the Appeals Board Hearing: March 6, 1996 San Francisco, CA

Omar M. Alzgoul, doing business as Hillside Market (appellant), appealed from a decision of the Department of Alcoholic Beverage Control[1] which denied his application for an off-sale general license and sustained the protest of Abraham Angeles on the grounds that the normal operation of the premises would interfere with the quiet enjoyment of residents residing within 100 feet of the premises, being contrary to the

[1]The decision of the department dated June 6, 1995 is set forth in the appendix.

general public welfare and morals provisions of the California Constitution, Article XX, Section 22, and the California Code of Regulations, Title 4, §61.4.

Appearances on appeal included appellant Omar M. Alzgoul through his counsel Eduardo Sandoval; the Department of Alcoholic Beverage Control through its counsel Robert M. Murphy; and Abraham Angeles, protestant.

FACTS AND PROCEDURAL HISTORY

Appellant had been licensed at the Hillside Boulevard location with an off-sale beer and wine license since 1982. On February 18, 1994, appellant applied for the transfer of an off-sale general license to this location. Abraham Angeles filed a verified protest with the department.

An administrative hearing was held on the protest on September 19, 1994, at which time protestant Angeles failed to appear. As the department had not rejected appellant's application for the license and the burden was on protestant Angeles to prove the license should not be issued, the hearing was closed with no decision issued.[2]

It was thereafter ascertained by the department that protestant Angeles had been given an incorrect address for the hearing. Thereafter, the department rescheduled the hearing. The new hearing was set for November 28, 1994, at which time oral and documentary evidence was received.

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[2]As we understand the processing of applications, if the department does not reject an application for a license, the license will automatically issue unless protests are filed and found by the department to be sufficient to deny the license.

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The record shows that the premises was in a mixed commercial and residential area, located on a triangle-shaped "island" between Villa Street and Hillside Boulevard. The premises was at the base end of the triangle, with a parking lot at the acute end.

Protestant Angeles lived in a condominium complex approximately 50 feet from the premises--across Villa Street, with the entrance to the condominium complex across from the Villa Street entrance to the parking lot of the premises. There were approximately 22 residents within 100 feet of the premises.

Protestant Angeles raised an issue that "Furthermore, the neighborhood does not wish to see an increase in traffic in the area that such privilege can bring in." Two other additional protest issues were found not to be credibly proven.

Subsequent to the hearing, the ALJ issued his proposed decision sustaining the protest and denying the application.[3] The department then rejected the proposed decision pursuant to Government Code §11517(c), which allows the department to reject a proposed decision in whole or in part. The department issued its own decision sustaining the protest and denying the application. Thereafter, appellant filed a timely notice of appeal.

In his appeal, appellant raised the following issues: (1) appellant established his right to the applied-for license at the September 19, 1994 administrative hearing, arguing the department abused its discretion in continuing the September hearing; (2) the appeals board does not have a full and complete record on appeal; and

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[3]A copy of the proposed decision is set forth in the appendix.

(3) findings of fact V, VI, and VII in the department's decision were not supported by substantial evidence.

DISCUSSION

I

Appellant contended that he had established his right to the applied-for license at the September 19, 1994 administrative hearing, arguing that the department abused its discretion in continuing the September hearing.

Protests are accepted by the department pursuant to Business and Professions Code §24013.[4] Section 24015 allows for a hearing to determine the merits of any protest filed, and §24015.5 sets forth the discretion of the department to set the hearing at such times and places as is convenient to the parties. A verified protest from Abraham Angeles was received by the department on March 3, 1994, and on August 22, 1994, a notice of hearing on protest was sent to all parties. The record shows that the department used an incorrect address for the hearing, so the matter was originally rescheduled for November 23, 1994, but then changed to November 28, 1994.

No decision was issued by the ALJ concerning the September 19, 1994 hearing. Appellant failed to consider that even though the word "default" had been used from time to time in various documents, the matter of September 19 was not a default hearing. The protest was still an impediment to the issuance of the license, as the

[4]All further references to code sections will be to the Business and Professions code unless otherwise indicated.

protest was still, even after the hearing of September 19, a legitimate protest which only a hearing on the merits could resolve. The only default in the matter was that the non-appearing protestant defaulted in his obligation under the law to prove that the license should not be issued. Since the protestant failed to appear and the issues raised by the protest were not proven, the normal course of events would be that the license would issue, because no blockage was before the department.

However, when the department found that the protestant "said" he did not appear for the hearing due to an address error by the department, the department owed a due process right to protestant, a party, for a fair hearing on the merits.

There was no continuance under Government Code §11524, but a due process rescheduling so that all the parties would have equal opportunity to a full and fair hearing.

II

Appellant contended that the appeals board does not have a full and complete record on appeal. The appeals board may review only final decisions of the department (§23081). The only final decision in the present matter was that of June 6, 1995.

Because there was no issue litigated and therefore no determination or order made, the relevancy of the September 19 hearing is doubtful, and appellant has not shown the relevancy of the proceedings of that date.

III

Appellant contended that findings of fact V, VI, and VII in the department's decision were not supported by substantial evidence.

"Substantial evidence" is relevant evidence which reasonable minds would accept as a reasonable support for a conclusion (Universal Camera Corporation v. National Labor Relations Board (1950) 340 US 474, 477, 95 L.Ed. 456, 71 S.Ct. 456, and Toyota Motor Sales USA, 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 conflict[s] 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. 658).

The appeals board on its own motion raises the issue of the applicability of rule 61.4 in the present matter upon the ground that the issue is related to the only protest issue before the department.

The department's determination of issues sustained the protest and denied the application for the license upon the general grounds of being contrary to the public welfare and morals provisions of the Constitution, supra, and rule 61.4.

In its notice of the first hearing, the department set forth a statement of issues

of those issues to be determined at the pending hearing. The department listed the generally-applied welfare and morals issues and §23958 (which was not included in the department's decision as a basis for denial--most likely because the section was not applicable). Additionally, the protest set forth only one issue: "Therefore, the neighborhood does not wish to see an increase in traffic in the area that such privilege can bring in."[5] The only issue at the hearings was the issue raised by the protestant [see Prestige v. Chambers (1992) AB-6247].

Mr. Angeles testified at the administrative hearing that on a few occasions customers of the store blocked his driveway. His conclusion that these people were customers of the premises was based on a passenger's comment that the driver was in the store [R.T. 27-29].[6]

Marie Esther Pali, a resident of the same condominium complex, testified at the behest of Mr. Angeles. She testified that on one particular day, she asked the occupant of a parked car to move and was refused. Also, she testified that on one occasion when the "Lotto jackpot" was $60 million, cars were blocking the condo driveway (R.T. 50-51).

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[5]The department's Instructions, Interpretation and Procedure Manual at page L435 states:

"Since the protest becomes a statement of issues, it is necessary that the statement specify the statutes and rules with which the applicant must show compliance, and, in addition, must specify any particular matters which are to be made issues at the public hearing."

[6]The answer was at best ambiguous, as there were other stores in the immediate area. The statement by the passenger was objectionable hearsay (Evidence Code §1200).

The rule 61.4 issue was improperly raised by the ALJ at the hearing. While the evidence was presented at the hearing that would raise the 61.4 issue, it was prejudicial error to base the decision on the rule when the rule was not at issue, and appellant had no notice of that issue prior to the hearings. Additionally, finding VII placed an improper burden on appellant, that of proving non-interference with quiet enjoyment, where that issue was not properly before the ALJ.

Therefore, while there is substantial evidence to support findings V, VI, and VII, there is a due process problem where the decision is based on issues of which appellant had no notice.[7]

The parking problem was a valid concern for the department, but is usually considered in conjunction with police problems, as it is up to law enforcement officials to police public highways for infractions [Sacramento Co-op v. Domich (1992) AB-6248--a matter where the Co-op instructed its employees to park on the streets where local residential parking was at a premium, and Argentine Association v. Becaria (1992) AB-6238--a matter where inadequate on-site parking could have created a police problem].

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[7]Portions of findings VI and VII were erroneous. The second paragraph of finding VI states that appellant signed a conditional license and listed the five conditions. In finding VII, it is alleged that the conditional license "does not address the concern of the protestant [Angeles] regarding customers parking on Villa Street and blocking the entrance to the condominium complex."

The true facts were that the conditions listed were signed in 1993 at the time the original beer and wine license was issued. This faulty statement in finding VII makes it appear that appellant failed to be concerned about the parking problem.

Notwithstanding, the protest raised only one viable issue, that of increased traffic. Parking could be a part of that issue, but parking in front of residential

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driveways appears to be more a matter that a licensee could never control and one better left to the guardians of the public streets--the police.

CONCLUSION

The decision of the department is reversed.[8]

RAY T. BLAIR, JR.,CHAIRMAN
BEN DAVIDIAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

ABSTAIN:
JOHN B. TSU, MEMBER

[8]This final order is filed as provided by Business and Professions Code §23088, and shall become effective 30 days following the date of this filing of the final order as provided by §23090.7 of said statute for the purposes of any review pursuant to §23090 of said statute.