ISSUED DECEMBER 27, 1999

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

JAMES LISSNER, Appellant/Protestant, v. RENATO BASILE dba Paisano's Pizza & Pasta 1132 Hermosa Avenue Hermosa Beach, CA 90254, Appellant/Applicant, and DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7041a File: 41-330416 Reg: 98042593 Administrative Law Judge at the Dept. Hearing: John P. McCarthy Date and Place of the Appeals Board Hearing: December 2, 1999 Los Angeles, CA

James Lissner (appellant/protestant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which denied his protest against issuance of an on-sale beer and wine public eating place license to Renato Basile (applicant), doing business as Paisano's Pizza & Pasta.

Appearances on appeal include appellant/protestant James Lissner, applicant Renato Basile, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Applicant applied for an on-sale beer and wine public eating place license on April 16, 1997. An interim operating permit was issued to him on February 28, 1998.

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[1]The decision of the Department, dated January 7, 1999, is set forth in the appendix.

The present appellant brought an appeal to this Board in which he sought to overturn the Department's issuance of the interim operating permit. The Appeals Board dismissed that appeal on the ground the Department's decision to issue an interim permit was not appealable (AB-7041, issued 8/27/98). The present appeal is from the Department's decision, after an administrative hearing was held on November 3, 1998, to issue the license and overrule appellant's protest.

Appellant thereafter filed a timely notice of appeal and now raises the following issues: (1) the Department lacked jurisdiction to proceed with the application because the applicant failed to notify all residents within 500 feet of the proposed premises of the application; (2) the Department erred in refusing to grant protestant's request to disqualify the administrative law judge; (3) protestant was deprived of his constitutional rights to be fairly and impartially heard; and (4) the definition of public convenience or necessity is unconstitutionally vague and therefore deprives applicants and protestants of their right to notice, violates due process, and is void as a matter of law.

DISCUSSION

I

Appellant contends the applicant failed to comply with the requirement of Business and Professions Code §23985.5 that notice of the application be mailed to residents of real property within a 500-foot radius of the proposed premises, and, as a result, the Department lacked jurisdiction to issue the license.

Section 23985.5 provides as follows:

> "Notwithstanding any other provision of this article, in any instance affecting the issuance of any retail license at a premises which is not currently licensed or for a different retail license, the department shall require that the applicant mail notification of the application to every resident of real property within a 500-foot radius of the premises for which the license is to be issued. The applicant shall submit proof of compliance to the department prior to license approval."

Appellant argues that §23985.5 is jurisdictional, and a license cannot issue until it is complied with. He states that at the time of his previous appeal to this Board regarding the 500-foot notice requirement, he had presented the Department with proof that applicant did not comply with §23985.5, but at the hearing, the ALJ refused appellant's evidence on this issue.

The evidence the ALJ "refused" was apparently Exhibits II and III. Exhibit II is appellant's brief and accompanying exhibits that appellant submitted at the hearing. As to that exhibit, the ALJ said, "Number II is not evidence. That's a brief, so that's just marked" [RT 75].

Exhibit III consists of the notifications sent by applicant (ABC-207E); the declarations of service by mail (ABC-207F) accompanying each notification; three unnumbered pages apparently from a "plat book" showing lots in Hermosa Beach along part of Hermosa Avenue, Palm Drive, and Manhattan Avenue; and 18 photographs (designated "A" through "R") depicting 6 residential buildings on Manhattan Avenue and Bayview Drive. Exhibit III was "received without objection" [RT 76]. Exhibit C of appellant's brief (Exhibit II) explains the photographs as graphic evidence of the existence of residences within 500 feet of the premises which are not included in appellant's declarations of service.

The ALJ specifically discussed these exhibits in Finding XII. There was no "refusal" of appellant's evidence on this issue.

In Finding XII, the ALJ noted that appellant sent the Department notice of residences within 500 feet that had not been notified four or five times, "on a piecemeal basis, which apparently continued up to the time of the hearing." The ALJ found that applicant had responded to each of the notices given by appellant, and that his "efforts to comply fully with the statute were made in good faith. The finding concluded that "It was not established at the hearing by competent evidence that any particular resident residing, or residence located, within 500 feet of the proposed premises had not at some point been mailed the notification required by statue."

Appellant's allegation that not all residents within 500 feet were notified is based on his perusal and measurement of maps of the area and his "spot checks" in which he walked around the neighborhood noting addresses on buildings he believed to be within 500 feet. The ALJ was right in rejecting appellant's allegation. There is no assurance that appellant was accurate in his measurements, since the maps used to calculate the 500-foot distance were not presented. Nor is there any evidence that there were actually *residents* in the buildings that appellant alleges were left out of the mailing at the time the original mailing was required, or at any other time. Appellant presented no evidence, by affidavit or testimony, that any particular resident was not notified as required by the statute.

Appellant cites the appeal of Nasr Masarweh (1994) AB-6494, in which the Board concluded that the Department exceeded its authority when it denied a license application because, among other things, not all residents within 500 feet of the premises had been properly notified. The Board pointed out that "the statute does not give any sanction for non-compliance," and reversed the Department determination. Appellant, however, relies on a footnote in the Board's decision which states:

> "Since a license cannot be issued without a full compliance to the intent as well as the letter of the statute, it would appear that cessation of all proceedings would be the appropriate course of action until there is complete conformity. ¶ In the present matter, the administrative hearing should have been continued (during or after completion of the taking of testimony) until the department was satisfied that there was full conformity to the requirements of the statute."

One of the major differences between the present case and Masarweh is that in Masarweh, it was the Department that was not satisfied that the applicant had complied with the statute, while in the present case, the Department was, and is, satisfied that compliance was accomplished. Therefore, even the enigmatic footnote in Masarweh has been satisfied.

II

Appellant contends the ALJ erred in refusing to grant protestant's request to disqualify himself. Appellant's request was pursuant to Government Code §11512, subdivision (c), which states, in pertinent part:

> "Any party may request the disqualification of any administrative law judge or agency member by filing an affidavit, prior to the taking of evidence at the hearing, stating with particularity the grounds upon which it is claimed that the administrative law judge or agency member is disqualified. . . ."

Appellant contends that the ALJ in this matter was "predisposed to rule against appellant," since the same ALJ, in a prior case in which appellant was a prominent witness, had ruled against appellant based on the same evidence appellant would present in this case. (App. Br. at 8.)

Government Code §11512, subdivision (c), provides, in relevant part:

> "An Administrative Law Judge . . . shall voluntarily disqualify himself or herself and withdraw from any case in which there are grounds for disqualification, including disqualification under Section 11425.40. . . . Any party may request the disqualification of any ALJ . . . by filing an affidavit, prior to the taking of evidence at a hearing, stating with particularity the grounds upon which it is claimed that the Administrative Law Judge . . . is disqualified. . . . Where the request concerns the Administrative Law Judge, the issue shall be determined by . . . the Administrative Law Judge."

Government Code §11425.40, subdivision (a), provides that an Administrative Law Judge "is subject to disqualification for bias, prejudice, or interest in the proceeding." Subdivision (b)(2) then provides that, without further evidence of bias, prejudice, or interest, an Administrative Law Judge is not subject to disqualification simply because he or she "has in any capacity expressed a view on a legal, factual, or policy issue presented in the proceeding."

The ALJ denied appellant's motion at the beginning of the hearing, saying:

> "And I'm going to deny your motion, and I'm going to deny it largely on the basis that 11425.40 Subsection B, Subsection 2 sets forth what I believe are your grounds for my disqualification and sets forth those as not being a reason for disqualification." [RT 8.]

Appellant's affidavit merely states that the same ALJ had "heard previous cases for approval of alcohol licenses in downtown Hermosa Beach;" that the protestants, witnesses, issues, evidence and testimony at the hearing would be the same or similar as at previous hearings; that in the previous cases, this ALJ had ruled against the protestants; and, "based on these prior decisions, this administrative law judge is predisposed to a ruling in this case in favor of the licensee and cannot accord a fair and impartial hearing."

This Board sees nothing in the affidavit that would be grounds for disqualifying the ALJ. The affidavit merely makes unsupported, general statements about

unidentified "previous cases." Simply ruling against a party in a previous case (or even several previous cases) does not constitute grounds for concluding that the ALJ is unable to render a fair and impartial decision based on the law and facts presented. (See Gov. Code §11425.40, subd. (b)(2), supra.)

Appellant's argument that the statute exempts an ALJ from disqualification when he has stated his "views," but not when he has "determined the issues," is a mere quibble. There was no evidence whatsoever that this ALJ could not fairly hear the evidence, whether or not it was the same as some previously presented in another case, and impartially decide this case.

III

Protestant contends he was deprived of his constitutional rights to be fairly and impartially heard because the ALJ "believed the Protestant was wasting the Administrative Law Judge's time and was predisposed to rule against him." (App. Opening Br. at 11.) Protestant cites as evidence of the ALJ's bias the ALJ's questioning of witnesses after the Department had asked all its questions and the ALJ's disallowance of appellant's evidence unless it was specific to the applied-for license.

This contention is related to the previous one regarding the petition to have the ALJ disqualify himself. Here again, protestant has not been specific about the instances that he believes demonstrate the ALJ's bias. The few references to the transcript are not helpful to protestant's argument, showing only that the ALJ made efforts to keep the testimony restricted to relevant issues and to clarify testimony with regard to the requirements of the various statutes at issue. We find no basis for

concluding that protestant was deprived of any constitutional rights during the administrative hearing.

IV

Appellant contends the definition of public convenience or necessity is unconstitutionally vague and therefore deprives applicants and protestants of their right to notice, violates due process, and is void as a matter of law. He refers to the case of Sepatis v. Alcoholic Beverage Control Appeals Board (1980) 110 Cal.App. 3d 93 [167 Cal.Rptr. 729], in which, he says, the court advised the Department to define "public convenience or necessity."

This is essentially an attack on the constitutionality of §23958 and 23958.4, both of which use, without definition, the term "public convenience or necessity." The California Constitution, article III, section 3.5, prohibits an administrative agency, such as the Appeals Board, from holding an Act of the Legislature unconstitutional except in specified circumstances, none of which are present here. Consequently, the Board declines to consider this issue.

We note, however, that appellant has made similar attacks on "public convenience or necessity" in prior cases, contending that use of the term without a specific definition made the Department's decision arbitrary and capricious. In those appeals he also relied on the Sepatis case. This Board has consistently rejected this argument when considering it on the merits. A full discussion of the issue was included in the Board's decision in Vogl v. Bowler (1997) AB-6753.

ORDER

The decision of the Department is affirmed.[2]

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[2]This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this order as provided by §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 §23090 et seq.