ISSUED JULY 14, 2000

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

JAMES LISSNER, Appellant/Protestant, v. HAMILTON GREGG BREWWORKS, INC. 58 - 11th Street Hermosa Beach, CA 90254, Respondent/Applicant, and DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7435 File: 23-345542 Reg: 99045726 Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria Date and Place of the Appeals Board Hearing: June 6, 2000 Los Angeles, CA

James Lissner (protestant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which dismissed his protest against the issuance of a small beer manufacturer license to Hamilton Gregg Brewworks, Inc.

Appearances on appeal include appellant/protestant James Lissner; applicant Hamilton Gregg Brewworks, Inc.; and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

[1]The decision of the Department, dated June 18, 1999, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Applicant filed for a small beer manufacturing license on August 11, 1998. Thereafter, protestant filed on September 18, 1998, a protest against the issuance of the license.

An administrative hearing was held on April 21, 1999, at which time oral and documentary evidence was received. The license applied for is a type 23, which allows for on-sale consumption, and for off-sale purchases (selling sealed containers for later consumption) [RT 30-39]. Subsequent to the hearing, the Department issued its decision which determined that the license should be issued and the protest filed should be overruled. Protestant thereafter filed a timely notice of appeal.

In his appeal, protestant raises the following issues: (1) the Department's determination that public convenience or necessity will be served by issuance of the license is not supported by the findings or substantial evidence; (2) the determination that the issuance of the license would not violate the moratorium against issuance of an off-sale license is not supported by the findings or substantial evidence; (3) the definition of public convenience or necessity is vague and is void as a matter of law; (4) the Administrative Law Judge (ALJ) erred in not disqualifying himself from hearing the matter; and (5) the matter should be remanded for further proceedings as there is newly discovered evidence the Department should consider. Issues 1 and 3 will considered together.

DISCUSSION

I

Protestant contends the Department's determination that public convenience or necessity will be served by issuance of the license is not supported by the findings or substantial evidence, and the definition of public convenience or necessity is vague and is void as a matter of law.

The Department appears to have no objective criteria concerning the term "public convenience or necessity." As set forth in the case of Burgreen v. C.B.& D.M. Entertainment, Inc. (1994) AB-6375, the Department's investigator's testimony stated:

> "... [w]e have a whole manual that tells us how to do almost everything, but public convenience and necessity is a bit subjective because it changes according to the society's dictates ... sometimes public convenience and necessity is served - mostly is served where these's a huge influx of people for food and beverages ...."[2]

As we observed in the case of Vogl v. Bowler (1997) AB-6753:

> "... while a 'definitive' definition of 'public convenience or necessity' might be helpful in some instances, a lack of one does not make the Department's decision arbitrary or capricious, as long as it is one within reason. The fact that it 'does not meet the standards the protestants [in that case] would choose' ... does not mean that there are 'no standards susceptible of meaningful review for invoking the exception.' The standard to which the

[2]A footnote in the decision stated that there were only 933 residents within the census tract, but thousands of workers come daily into that area. The Burgreen case was the "flip side" of the present matter, in that the Department had stated in its decision that the applicant had failed to prove public convenience, etc., to which this Board reversed the decision as it concluded that with no criteria to address, any applicant would have to "divine" what evidence would be necessary to prove such a nebulous standard.

> Department must adhere is 'the standard set by reason and reasonable people, bearing in mind that such a standard may permit a difference of opinion upon the same subject.'"

The ALJ in the present appeal found that: "The premises are located in a mixed commercial and residential area near the Hermosa Beach Pier which is a highly visited and well traveled area and which is visited by tourists on a daily basis" [Finding 1-C]. Determination of Issues III-B states: "... it has been established that the granting of the applied-for license will serve public convenience or necessity because the Applicant's premises are located in a heavily traveled beach and tourist area and because the premises offers freshly brewed beers as well as unusual types of beers not readily available elsewhere ...."

Findings 1-C, IV-B and C, and Determination of Issues III-B, basically state that the area is a tourist center with many daily visiting the area. The premises brews beer in many varieties and is the only such premises in the area, except for a combined restaurant and brewery.

The findings and determinations appear to come within a reasonable view of the area and the services provided by applicant to the tourists and customers of the area. The Department's use of its expertise in this matter appears to be a reasonable exercise of its discretion. The Board concludes that such discretion exercised was not abusive or arbitrary, and therefor the conclusion of the Department that public convenience or necessity was shown must be upheld.

Protestant also seems to contend that the definition of public convenience or

necessity is unconstitutionally vague and therefore deprives applicant and protestant of their right to notice, violates due process, and is void as a matter of law. 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 Appeals Board declines to consider this issue of constitutionality.

II

Protestant contends the determination that the issuance of the license would not violate the moratorium against issuance of an off-sale license is not supported by the findings or substantial evidence.

The ALJ found that the moratorium against the issuance of off-sale licenses would not be violated as the applied-for on-sale license is considered a wholesale license with retail privileges [Finding IX and Determination of Issues VI].

From a reading of Business and Professions Code §§23817.4, 23817.5, and 23817.7, it appears the moratorium concerns off-sale licenses only, a distinct type of license issued by the Department. Additionally, Section 23357, referring to beer manufacturers, shows that such manufacturers have the rights of off-sale and on-sale licenses. Protestant's contention is not well taken.

III

Protestant contends that the Administrative Law Judge (ALJ) erred in not disqualifying himself from hearing the matter. Protestant'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 …."

Protestant contends that the ALJ in this matter was predisposed to rule against protestant, since the same ALJ, in prior cases in which protestant was a prominent witness, had ruled against protestant on the same evidence protestant would present in this case. 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 protestant's motion at the beginning of the hearing, saying:

> "In 14 Hermosa Beach application cases over the last, I guess, two or three years (sic). I don't think that there is any judge in our agency that has not heard one of your protests. (¶) And we decide cases on the evidence that is presented to us at the hearing. As I indicated, one of those was a year ago. Another, which I have a vague recollection of (sic). The other one was two years ago that I don't even recollect, so be assured that I will decide this case based only on the testimony that I hear today. (¶) So I'm going to deny your request to disqualify myself. However, the affidavit is part of the record, and if, in fact, there is an appeal in this matter, then your right will be preserved …." [RT 10.]

Protestant'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 protestant; 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 [Exhibit I].

There appears to be nothing in the affidavit of protestant that would be grounds for disqualifying the ALJ. The affidavit merely makes unsupported, general statements about 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.)

IV

Protestant contends that the matter should be remanded for further proceedings as there is newly discovered evidence the Department should consider. Protestant argues that there was another type 23 "beer manufacturer's" license which was excluded from the hearing testimony as that premises at the time was operating under an interim license and no hearing had yet been held as to the permanent issuance of a license [RT 97]. Protestant also argues that the determination of public convenience or necessity was tied to the "unusual beer" the premises would produce. Protestant alleges that there are off-sale premises that offer a "variety" of beers and therefore the offerings of the premises are not so

unique.

It appears irrelevant whether there are one, or two, "beer manufacturing" licenses in the area. The area is a tourist "Mecca," and variety is probably more conducive to public convenience than having only one such specialized license.

Also, whether there are off-sale premises which have a "variety" of beers, is not the same as the "unusual beers" which applicant proposes to supply, from its capacity to manufacture beer, some 45 different varieties [RT 113].

ORDER

The decision of the Department is affirmed.[3]

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

---

[3]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.