

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

ADOLFO LOPEZ and HARRY MOSS	)	AB-6578
dba Cavanaugh's)	
3309 Mission Street	)	File: 48-297172
San Francisco, CA 94110	)	Reg: 95032776
Appellants/Applicants,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Robert R. Coffman
ANTHONY RIBERA, Chief of Police,)	
San Francisco Police Department, et al.,	)	Date and Place of the
Protestants/Respondents, and	)	Appeals Board Hearing:
	)	April 3, 1996
THE DEPARTMENT OF ALCOHOLIC	)	Los Angeles, CA
BEVERAGE CONTROL,)	
Respondent.)	

Adolfo Lopez and Harry Moss, doing business as Cavanaugh's (appellants), appealed from a decision of the Department of Alcoholic Beverage Control¹ which sustained the protests and denied appellants' application for the transfer of an on-sale general public premises license on the grounds that the issuance of the license would tend to aggravate an existing law enforcement problem; result in an undue concentration of licenses in the immediate vicinity of the proposed premises; and interfere with the quiet enjoyment of nearby residents' property, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, Article XX, §22, and as

¹The decision of the department dated September 21, 1995 is set forth in the appendix.

provided in Business and Professions Code §23958, and the California Code of Regulations, Title IV, §61.4.

Appearances on appeal included appellants Adolfo Lopez and Harry Moss, appearing through their counsel, John Hinman and Richard D. Warren; the Department of Alcoholic Beverage Control, appearing through its counsel, Thomas Allen and John P. McCarthy; and protestants Anthony Ribera, San Francisco Chief of Police; Dennis Goodman, Donald Huntley, Jack Shella, Jerry Stamper, and Juliet Valerio.

FACTS AND PROCEDURAL HISTORY

The premises was located in a mixed commercial and residential area. Commercial establishments in the immediate area were mainly located on the ground floor with residential dwellings above. The proposed premises was no exception. Some of the residents lived within 10 feet of the proposed premises as their adjacent buildings shared common walls with the premises.

The prior licensee of the premises closed his operation sometime between May and July 1993, and surrendered his license to the department in accordance with California Code of Regulations, Title IV, §65 (rule 65)² on November 10, 1993 [exhibit A]. At some time during 1993 or 1994, the license was seized by the California State Board of Equalization for taxes.

Appellants thereafter applied for the transfer of an on-sale general public premises license on June 2, 1994. The license sought to be transferred to appellants was the license owned by the prior licensee at the proposed premises and which license was seized by the

²All further references to rules of the department will be to the California Code of Regulations, Title IV.

Board of Equalization.

Seven verified protests against the transfer of the license, including one from the San Francisco Police Department, were received by the department. The protests alleged crime, noise, parking, over-concentration of licenses in the immediate area, and creation of a public nuisance.

The department denied the issuance of the license on May 18, 1995, on the following grounds: rule 61.4 applied, as there were residents within 100 feet of the premises; there was an undue concentration of licenses; and issuance would tend to aggravate an existing law enforcement problem. On May 19, 1995, appellants requested a hearing.

An administrative hearing was held on August 2 and 31, 1995, at which time oral and documentary evidence was received. Subsequent to the hearing, the department issued its decision, which sustained the protests and denied the application for transfer of the license. The department's decision listed the grounds for the denial of the license, on the issues raised by the department and the protestants: (I) rule 61.4 applied and appellants failed to sustain their burden of proof that the intended operation would not interfere with the rule 61.4 residents, with discussion of why the rule applied; (II) the department was not estopped from denying the license; (III) undue concentration of licenses under Business and Professions Code §23958³ and rule 61.3; (IV) tendency to aggravate an existing law enforcement problem; (V) undue concentration of licenses and appellants' failure to show public convenience and necessity; (VI) interference with the quiet enjoyment of nearby residents; (VII) rule 61.4 applied; and (VIII) general references to the

³All further references to code sections will be to the Business and Professions Code unless otherwise indicated.

Constitution and §23958. Appellants filed a timely notice of appeal.

In their appeal, appellants raised the following issues: (1) the appeals board should direct the department to process the application for the license immediately; (2) the California Administrative Procedure Act barred the application of the department's interim 90-day policy; and (3) department rule 65 allowed for a transfer of a surrendered license within a period of one year; therefore, §23958 does not apply.

DISCUSSION

I

Appellants contended that the appeals board should direct the department to process the application for the license immediately, and command that no weight be given to the prior licensee's misconduct.

It is the department, and not the appeals board, which is authorized by the California Constitution to exercise its discretion whether to issue or deny an alcoholic beverage license, if the department shall reasonably determine for "good cause" that the granting of the license, or the denial of the license, would be in harmony with or contrary to public welfare and morals.

The department, in its role of protecting the public welfare and morals, must consider a myriad of factors that may impact the question whether any particular license should be issued. The court in Koss v. Department of Alcoholic Beverage Control (1963) 215 Cal. App.2d 489, 30 Cal.Rptr. 219, 222, enumerated several considerations the department may consider in determining if a license would endanger welfare or morals: "...the integrity of the applicant as shown by his previous business experience; the kind of business to be conducted on the licensed premises; the probable manner in which it will be

conducted; the type of guests who will be its patrons and the probability that their consumption of alcoholic beverages will be moderate; the nature of the protest made, which primarily were directed to previously existing conditions attributed to an unlicensed premises...."

The appeals board's scope of review is limited by the California Constitution, by statute, and by case law. In reviewing a department's decision, the appeals board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the department are supported by substantial evidence in light of the whole record, and whether the department's decision is supported by the determination of issues. The appeals board is also authorized to determine whether the department has proceeded in the manner required by law, or has proceeded in excess of its jurisdiction (or without jurisdiction).⁴

"Substantial evidence," which the appeals board must use as a gauge to test the department's findings of fact, is defined as 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). The appeals board, after considering the entire record, must determine whether there is substantial evidence, even if contradicted, to reasonably support the findings (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

⁴The California Constitution, Article XX, Section 22; Business and Professions Code §§23084 and 23085; and Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal.3d 85, 84 Cal.Rptr. 113.

reasonably deducible from the evidence..." (Brookhouser v. State of California (1992) 10 Cal.App.4th 1665, 1678, 13 Cal.Rptr. 658).

The appeals board does not have the jurisdiction to order the department to follow a given course of conduct in the processes of licensing and its decision-making discretion. The board likewise is not authorized to counsel the department as to any weight it should impart to a given set of facts. This review will proceed by considering whether the findings of fact were supported by substantial evidence, and whether the department's determination of issues were proper as provided by law. As to each of the contentions raised by appellants, the appeals board will consider if the contentions have merit and raise valid questions against the department's determinations of issues, as well as the determinations' supporting findings.

II

Appellants contended that the California Administrative Procedure Act barred the application of the department's 90-day policy. Appellants argued that Government Code §11340.5 essentially provides that no agency may enforce a policy unless that policy has been adopted as provided by law. Appellants further cited determination of issues I which decided that rule 61.4 applied. The application of the rule was based on

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the "policy" of the department's San Francisco district office that if a premises had not been in operation for 90 days prior to the filing of an application, the rule did not apply.

Rule 61.4 is a major hurdle for any applicant, as the rule essentially shifts the

burden of proof from the department, and any protestants, to the applicant for the license.⁵

The license which appellants seek to transfer to their ownership at the premises was the surrendered license of a former licensee, making appellants' transfer a person-to-person transfer. The department accepted appellants' application for the transfer. The application showed that the prior licensee approved the transfer of his license (through the State Board of Equalization). On appellants' application, the department designated the application as a person-to-person transfer and charged appellants the specified fee for a person-to-person transfer.⁶

The department found that rule 61.4 applied, based on a policy of the department's district office, which policy in pertinent part states:

"It has been the policy of this district to apply the provisions of Rule 61.4 to those per-per [person-to-person] applications where the business has not operated for a period exceeding 90 days."

The department's district office's policy memorandum cites a department decision called "Meftah" for its authority to so designate contrary to rule 61.4 [exhibit C]. We consider the question of the legality of the "policy" from a procedural standpoint as moot, considering the intended disposition of this contention.

Two types of applications are controlled by the rule: original (generally, a license applied for by a new owner at a new location) and a premises-to-premises application (an

⁵Rule 61.4, in pertinent part, provides: "No original issuance of a retail license or premises-to-premises transfer of a retail license shall be approved for premises at which either of the following conditions exist: (a) The premises are located within 100 feet of a residence.... [¶] This rule does not apply where the premises have been licensed and operated with the same type license within 90 days of the application...."

⁶Specified fees for different types of licenses and transfers are contained in the department's Instructions, Interpretations and Procedures Manual, page L47.

existing license transferred from another person and another location, or a licensee's transfer of its license to a new location).⁷ The person-to-person transfer (the transfer of an existing license at its original location to another owner at that location) is not mentioned in the rule and therefore is not included under the rule.⁸

The district office's "policy" essentially means that that portion of rule 61.4 which states that the rule does not apply if the premises had not been in operation within 90 days of the new application causes the rule to be applied to a person-to-person transfer. Therefore, the crucial question before the appeals board is whether the language within the rule ("This rule does not apply where the premises have been licensed and operated with the same type of license within 90 days of the application...") can cause the rule to apply to a type of transfer which is not included in the rule, or essentially change the status of the application from a person-to-person transfer to an original application for a new license, thus enabling the rule to then legitimately apply. The rule, on its face, cannot be used in those cases where it is not applicable.

⁷Business and Professions Code §24070 speaks to the concept that each license is separate and distinct, and specifically mentions that licenses are transferable from one person to another, and from one location to another.

Business and Professions Code §24072 speaks to transfer fees and in that section states the different fees due for person-to-person transfers, as well as premises-to-premises transfers.

A transfer may be a person-to-person and premises-to-premises transfer at the same time.

⁸The rule does not include person-to-person transfers. The rule in its last paragraph states: "Notwithstanding the provisions of this rule, the department may issue an original retail license or transfer a retail license premises-to-premises where the applicant establishes that the operation of the business would not interfere with the quiet enjoyment of the property by residents."

We conclude that the department has not acted in a manner required by law and has acted in excess of its jurisdiction. This conclusion applies to determinations of issues I and VII.

III

Appellants contended that department rule 65 allowed for a transfer of a surrendered license within a period of one year. The rule, in pertinent part, states that if a surrendered license is not reactivated or transferred within one year, the department shall revoke the license (by proper proceedings). The rule, as we view the record, has no determinative effect in this review. The department's decision does not raise the rule as a ground for denial of the application.

Appellants argued that undue concentration of licenses was not a proper issue. Determination of issues III properly states that rule 61.3 did not apply for evidentiary reasons, but determined that §23958 was applicable. Section 23958 states in pertinent part: "The department further shall deny an application for a license if issuance of that license...would result in or add to an undue concentration of licenses...." Exhibit 4 is a map of the area which shows the existing licenses within the area. Of the 20 licenses shown within one block of the premises, there were 12 restaurant-type premises and four similar (bar) type licenses as that sought by appellants. This is the heaviest concentration of licenses in the area as shown on the exhibit.

Section 23958 does not apply, not as argued by appellants that the section did not apply to person-to-person transfers, but because this is a person-to-person transfer of the present license at the same premises. The number of licenses therefore would not

increase⁹ if the applied-for transfer was approved, and no mischaracterization of the applied-for license can change its true status.

The administrative law judge (ALJ) cited the case of Torres v. Department of Alcoholic Beverage Control (1961) 192 Cal.App.2d 541, 550, 13 Cal.Rptr. 531, for the proposition that the case supports the department's denial of appellants' application. The Torres court used the term "replacement"--apparently considered by the present matter's ALJ to mean a person-to-person transfer. A full reading of the Torres case shows that the application was for a new license at a location which, at some unknown time, had previously been licensed. The Torres case, 13 Cal.Rptr. at 535, states: "...the addition of one more license..." and at page 536: "...involve merely the granting of an additional license..." The reliance by the ALJ on the phrase found at page 537 that "...the subject premises previously were licensed; this license came to an end as the result of what might be termed a natural business cause; and the instant decision denies a replacement" does not support the theory that the case sanctioned the department's denial of a person-to-person type application by appellants under a theory that even though no new license would be issued, a "replacement" license would be barred. In essence, the ALJ appears to have been groping for the idea raised in this decision's footnote 10, supra.

We conclude that the department has not acted in a manner required by law and in excess of its jurisdiction. This conclusion applies to determination of issues III and V.

IV

⁹We decline to consider the specific wording of the code's phrase "...would result in...an undue concentration of licenses..." as separate from the phrase "...or add to an undue concentration of licenses..." as the question of whether the two phrases are one idea or two, as it has not been raised in this appeal.

As set forth above,¹⁰ appellant argued that no weight should be given to the prior problems of the premises which included aggravation of law enforcement problems and noise and other detrimental conditions on or about the premises which adversely affected the nearby residents' quiet enjoyment of their property (some of the residents are protestants in the present matter). We find no law or statute that precludes protestants from raising and litigating whether an issuance of a license, either a person-to-person transfer or any other transfer, would detrimentally impact the protestants' quiet enjoyment of their property.

If appellants considered the questions of aggravation of law enforcement problems and quiet enjoyment as questions of fact demanding a full review of whether the findings of fact were supported by substantial evidence, appellants apparently considered such questions either unassailable or not of sufficient importance to appellants' cause.¹¹

We view the questions posed by appellants as questions of law--whether §23958

¹⁰See page 4 of this decision, first paragraph, under the heading "Discussion."

¹¹Law enforcement problems were raised by a protestant, and noise amounting to detrimental interference with residential quiet enjoyment were raised by citizen protestants. Conclusionary statements concerning these issues are not adequately raised by the AOB, page 17, lines 11-12 and 15-18.

The appeals board is not required to make an independent search of the record for error not pointed out by appellant. It was the duty of appellant to adequately show to the appeals board that the claimed error existed. Without such assistance by appellant, the appeals board may deem the general contentions waived or abandoned. See Horowitz v. Noble (1978) 79 Cal.App.3d 120, 129, 144 Cal.Rptr. 710; and Sutter v. Game! (1962) 210 Cal.App.2d 529, 531, 26 Cal.Rptr. 880, 881. We do not believe a mere sentence without analysis and authorities adequately raises a contention.

could be used in support of the question as to law enforcement problems. Contrary to appellants' arguments, §23958 applies to these questions and in no manner, as we view the statute, limits consideration by the department of law enforcement problems (see the second and final paragraph of the statute).

Other than the errors in misapplication of various statutes and rules discussed in this decision, we can find no law, statute, or rule that precludes the department from inquiry into the areas of public peace (aggravation of law enforcement problems) and private peace (residential quiet enjoyment). These inquiries must in the final analysis answer in the affirmative whether the decision of the department concerning these two questions supports the demand of the California Constitution for enhancement of the public welfare and morals. While a dissimilar factual matter, the Supreme Court in the case of Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal.3d 85, 99, 84 Cal.Rptr. 113, defined the term "public welfare and morals" as:

"It seems apparent that the 'public welfare' is not a single, platonic archetypal idea, as it were, but a construct of political philosophy embracing a wide range of goals including the enhancement of majority interests in safety, health, education, the economy, and the political process, to name but a few. In order intelligently to conclude that a course of conduct is 'contrary to the public welfare' its effects must be canvassed, considered and evaluated as being harmful or undesirable...."

The constitutional mandate concerning public welfare and morals, together with §§23001 and 23958, imposes on the department its rather obvious duty in protecting such public welfare and morals for all Californians. This duty entails the investigation of the determination concerning law enforcement problems and a citizen's right to peace and comfort in his or her own home, i. e., residential quiet enjoyment. The department issued findings of such, supported by evidence we view as substantial. Any attempted limitation

on inquiry by the department and the protestants would frustrate that constitutional mandate. We conclude that determinations of issues IV and VI were properly supported by the findings of fact.

CONCLUSION

The decision of the department concerning determinations of issues I, II, III, V, VII, and VIII, as VIII applies to the determinations noted, is reversed; and the decision of the department concerning determinations of issues IV, VI, and VIII, as VIII applies to the determinations noted, is affirmed, and remanded for such further proceedings as the department may feel appropriate.¹²

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

¹²This 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.