ISSUED JANUARY 3, 1997

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

HENNESSEY'S TAVERN, INC. dba Que Pasa 4275-4287 Mission Boulevard San Diego, CA 92109, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6605 File: 47-280391 Reg: 95033595 Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria Date and Place of the Appeals Board Hearing: August 7, 1996 Los Angeles, CA

Hennessey's Tavern, Inc., doing business as Que Pasa (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which denied its petition to modify conditions on its on-sale general public eating place license because appellant failed to show that the circumstances which caused the imposition of the original conditions had changed, with the modification being contrary to the universal and generic public welfare and morals provisions of the California Constitution, Article XX, §22, arising from the applicability of Business and Professions Code §§23800 and

[1]The decision of the Department dated December 7, 1995, is set forth in the appendix.

23958.

Appearances on appeal include appellant Hennessey's Tavern, Inc., appearing through its counsel, Ralph B. Saltsman; and the Department of Alcoholic Beverage Control, appearing through its counsel, John P. McCarthy.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued in the early summer months of 1993. Appellant on June 3, 1993, signed a Petition For Conditional License which imposed nine conditions on the to-be issued license. The stated grounds for the imposition of the conditions were that there were residents within 100 feet of the premises, an existing police problem in the area, and an undue concentration of licenses in the area.

Thereafter, on July 27, 1994, counsel for appellant filed a petition for modification to eliminate all of the conditions. On May 17, 1995, counsel for appellant modified the petition by requesting that only conditions 1, 2, and 3 be removed (conditions concerning limitation of hours of sale, prohibition of game machines, and prohibition of live amplified entertainment). The Department on July 31, 1995, denied the petition for the modification on the grounds that the original circumstances continued to exist: undue concentration of licenses as determined by the California Code of Regulations, Title IV, §61.3 (rule 61.3), police problems and excessive licenses as set forth in Business and Professions Code §23958,[2] and the applicability of the California Code of

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

Regulations, Title IV, §61.4 (rule 61.4).

An administrative hearing was held on October 25, 1995, at which time oral and documentary evidence was received. At that hearing, appellant requested that all the conditions be removed. Testimony was presented concerning the applicability of rule 61.3 and 61.4, and the issues of high crime and excessive licenses in the area. Appellant testified extensively as to the circumstances surrounding the imposition of the conditions and that the conditions had caused the premises to be closed [RT 68].

Subsequent to the hearing, the Department issued its decision which denied the petition. Appellant filed a timely notice of appeal.

In its appeal, appellant raised the following issues: (1) the original conditions were improperly imposed, and (2) findings concerning the applicability of rules 61.3 and 61.4 were improper as they were not supported by substantial evidence.

DISCUSSION

I

Appellant contended that the original conditions were improperly imposed. While an aggrieved party may appeal to the Appeals Board on any matter which the aggrieved believed adversely affected the license, and the imposition of conditions as a precondition to the issuance of a license is an appealable grievance, the Appeals Board may not consider that contention in this case.

The law concerning the filing of an appeal is set forth in §§23080 to 23089. Section 23081 sets forth the time in which the appeal may be taken. The time for appellant filing an appeal in the matter of the original issuance of the conditions has

long passed. The Board is not able to review a problem which should have been appealed over two years ago.

II

Appellant contends that the findings concerning the applicability of rules 61.3 and 61.4 were improper as they 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 [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].)

In the matter of Park (1995) AB-6495, we went into detail as to the burden which appellants in a modification matter must overcome, and the duty of the department to present a prima facie case in order to shift the whole burden to the appellant seeking

the modification. One of the factors observed by the board was that in the department's investigation to determine that it was satisfied that the circumstances had not changed, that investigative information must be presented so that appellants would not be deprived of their right of cross examination of the evidence which would be contrary to their cause. (Las Hadas (1991) AB-6070).

The Department attempted to conformed to this duty in the present matter, and presented the testimony of Paul J. Haynes, who investigated the petition to modify. The two reasons under rule 61.3 for the denial of the petition to modify, were that there was still an undue concentration of licenses, and high crime.[3]

There was no substantial evidence presented concerning crime or undue concentration of licenses. While the investigator testified he, in some manner not specified, verified the crime statistics and, we infer, the population statistics as well, no competent testimony was presented showing that §§23958 or 23958.4, and rule 61.3 still applied. We have over the years examined properly authenticated crime statistics placed into evidence by the custodian of records of the same, and the written evidence of the proper population statistics, all of which we have been informed in

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[3]Rule 61.3's applicability is based on the finding that the two prongs of the rule exist: (1) a high crime area (crime statistics that show 20 percent higher crime over the average total reporting districts' statistics), and (2) the number of same type licenses to population in the specific area (census tract) that are higher than a specified ratio in the county.

Business and Professions Code §23958 forbids issuance of licenses if issuance would create an undue concentration of licenses, or a law enforcement problem. Section 23958 gives no real criteria for determining what constitutes undue concentration, and §23958.4 offers no additional assistance, due to the improper admission of evidence in the present matter.

hearings are kept by the Department in current form.[4]

Notwithstanding, competent testimony was presented that there were a total of 11 residences (possibly 25) located within 100 feet of the premises [RT 38]. Rule 61.4 therefore was still applicable. We note that rule 61.4 is nearly absolute; the Department shall not issue any license where there are residents within 100 feet of the premises, absent an applicant's satisfactory demonstration that the issuance will not interfere with the quiet enjoyment of their property by those residents.

The only exception to the rule is for an applicant or petitioner to show that the proposed operation would not interfere with residential quiet enjoyment. This exception admittedly places a heavy burden of proof on an applicant or petitioner. Appellant has failed to meet this burden. Testimony of supporters ordinarily will not suffice, nor will the fact that no 61.4 resident filed a protest or objection. The Department must from its past experience consider the rights of all residents, those who opposed, supported, or by indifference failed to consider the impact of the operation, as well as the nature of the operation itself.

We fail to find substantial evidence that removal of conditions and thereby allowing live entertainment, dancing, pool tables, billiard tables, and other game machines, and enlargement of the times of sales from the times now imposed, to 2:00 a.m. daily, inside the premises and on the outdoor patio (which has a direct view of the

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[4] The Board remains unconvinced that requiring the Department to come forward with admissible evidence of the statistical bases guiding its determinations imposes an intolerable burden on it. There are procedural ways by which the evidence the Department believes that it needs can be developed and presented with a minimum of difficulty.

apartments [RT 39), would not adversely impact nearby residential quiet enjoyment.

CONCLUSION

The decision of the Department is affirmed as to that portion of Determination of Issues I which concerns rule 61.4 and that portion of Determination III (the general public welfare and morals provision) to the extent it concerns rule 61.4. As to all other determinations, the decision of the Department is reversed. [5]

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

[5] 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.