

ISSUED NOVEMBER 25, 1996

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

WILLIAM R. MURCHISON, Superintendent	)	AB-6642
Rio Linda Union School District,)	
Appellant/Protestant,	)	File: 20-304996
	)	Reg: 95034704
v.)	
	)	Administrative Law Judge
HARBHAJAN S. DHALIWAL	)	at the Department Hearing:
dba Quickmart	)	Sonny Lo
6935 Walerga Road)	
Sacramento, CA 95842,	)	Date and Place of the
Respondent/Applicant, and	)	Appeals Board Hearing:
	)	September 4, 1996
DEPARTMENT OF ALCOHOLIC	)	San Francisco, CA
BEVERAGE CONTROL,)	
Respondent.)	
_____)	

William R. Murchison, Superintendent of the Rio Linda Union School District (protestant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which refused to sustain his protest against the issuance of an off-sale beer and wine license to Harbhajan S. Dhaliwal, doing business as Quickmart (applicant).

Appearances on appeal include applicant Harbhajan S. Dhaliwal; the Department of Alcoholic Beverage Control, represented by its counsel, Robert M. Murphy; and

¹The decision of the Department dated February 29, 1996, is set forth in the appendix.

protestant William R. Murchison, Superintendent of the Rio Linda Union School District, represented by his counsel, Treaver K. Hodson and Ophelia H. Zeff.

FACTS AND PROCEDURAL HISTORY

Applicant Harbhajan S. Dhaliwal applied for an off-sale beer and wine license on January 18, 1995. Appellant and protestant William R. Murchison, Superintendent of the Rio Linda Union School District, filed a protest against the issuance of the license which was received by the Department on February 24, 1995.

An administrative hearing was held on February 8, 1996, at which time oral and documentary evidence was received. At that hearing, it was determined that (1) since there was no school located within 600 feet of the proposed premises, proximity to a school was not a basis for denial; and, (2) the evidence in the case did not support either a determination of undue concentration of licenses or the creation of a law enforcement problem.

Subsequent to the hearing, the Department issued its decision which did not sustain the protest. Appellant filed a timely notice of appeal.

In his appeal, appellant raises the issue that the Department proceeded in excess of its jurisdiction by accepting an application for an off-sale beer and wine license and by its decision which essentially allowed the issuance of the license, which actions are prohibited by the provisions of Business and Professions Code §23817.5 (a moratorium on the issuance of off-sale beer and wine licenses).

DISCUSSION

An appellate review will not ordinarily consider procedural defects or erroneous

rulings if such were not raised before the Department in the administrative hearing. (See 9 California Procedure, Witkin, §311 for complete listing of authorities and texts). However, this general policy does not apply to matters which concern noncurable defects in the record or questions of law and matters "involving the public interest or the due administration of justice". (9 California Procedure, Witkin, §315--citations are omitted).

The contention raised by appellant concerns Business and Professions Code §23817.5 which, in pertinent part, states: "No application for an original retail off-sale beer and wine license may be made nor any original retail off-sale beer and wine license issued until January 1, 1998. . . ."

Appellant has submitted to the Appeals Board a declaration which includes a letter from a declarant (counsel for appellant) to the Department concerning the applicable contention. In response, the Department forwarded a copy of the Department's memorandum, dated November 1, 1994, concerning the moratorium, the counties affected, and the Department's policy concerning implementation.

We accept the declaration as a proper showing under the Appeals Board's rule 198 (California Code of Regulations, Title IV, §198), which allows the board to remand a matter back to the Department where apparently newly discovered evidence needs to be considered by the Department.

The Appeals Board is not a fact finding tribunal and must defer all such evidentiary inquiries to the Department. It is the Department which is authorized by the California Constitution to exercise its discretion whether to deny an

alcoholic beverage license, if the Department shall reasonably determine for "good cause" that the granting of such license would be contrary to public welfare or morals. The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing a Department 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 findings.²

CONCLUSION

The decision of the Department is remanded to the Department pursuant to Business and Professions Code section 23085, for such further proceedings as is deemed just and proper, including a review of the applicability of Business and Professions Code §23817.5.³

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

²The California Constitution, article XX, §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].

³This 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.