ISSUED APRIL 28, 1997

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

JOHN GEORGE LEOUSIS, GRETHE & THOMAS G. VOURNAS dba Coral Cafe 3321 West Burbank Boulevard Burbank, California 91505, Appellants/Petitioners, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6697 File: 41-287779 Reg: 96036024 Administrative Law Judge at the Dept. Hearing: Sonny Lo Date and Place of the Appeals Board Hearing: February 5, 1997 Los Angeles, CA

John George Leousis, Grethe Vournas and Thomas G. Vournas, doing business as Coral Cafe (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which denied their petition to modify a condition on their license to permit an extension of the hours of operation during which they may sell wine and beer at their restaurant, on the ground that granting the petition would render the continuance of the license contrary to public welfare and morals under article XX, §22, of the California Constitution and Business and Professions Code §§23800 and 23801 in that the grounds which gave rise to the condition

[1]The decision of the Department dated July 18, 1996, is set forth in the appendix.

continue to exist.

Appearances on appeal include appellants John George Leousis, Grethe Vournas and Thomas G. Vournas; and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellants acquired their beer and wine license in 1993, pursuant to a petition for transfer from the original owners. Their petition for conditional license included language which stated that pursuant to the provisions of Rule 61.4, it was requested that the license be subject to the condition prohibiting the sale, service or consumption of alcoholic beverages prior to 11:00 a.m. or after 9:00 p.m. This condition was also in the original license which was issued in 1982. In their petition for modification, appellants requested that they be permitted to sell alcoholic beverages between the hours of 6:00 a.m. and 2:00 a.m. the following morning. The Department denied the petition on the ground that the conditions which gave rise to the limitation on hours of operation continued to exist.

An administrative hearing was held on June 20, 1996, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the investigation conducted by a Department investigator; noise complaints from a nearby resident; and the views of appellants and appellants' patrons regarding the need and desirability of extending the hours during which wine and beer may be sold and consumed at the restaurant.

Subsequent to the hearing, the Department issued its decision which once again determined that the conditions which gave rise to the condition in the original license and which existed at the time the license was transferred to appellants continued to exist, in that there were still residents within 100 feet of the premises. Appellant thereafter filed a timely notice of appeal.

In their appeal, appellants raise the following issues: (1) the Department acted unfairly by taking advantage of appellants' lack of financial resources; (2) the investigator, John Weldon, lied under oath and was not impartial; (3) the Administrative Law Judge's (ALJ's) ruling was based upon false information regarding the reasons for the restrictions on hours of operation; and (4) as applied to appellant's premises the conditions are unreasonable.

DISCUSSION

I

Appellants contend that the Department "does not play a fair game in settling this case for the benefit of all parties concerned." (App.Br., p. 1). They argue that the Department is taking advantage of their lack of financial resources; that appellants' requests to the Department's office in Van Nuys were either ignored or responded to in an inadequate manner, and appellants were given misleading statements regarding the likely outcome of their petition. Further, they contend that they were denied a fair hearing by reason of the nature of the case the Department presented.

The entire case presented by the Department consisted of (1) the testimony of the Department investigator who conducted the investigation in response to appellants' petition for modification, and (2) that of a neighbor, who expressed concerns about noise and a potential change in the character of the neighborhood. The investigator determined that there were still four residences within 100 feet of appellants' premises.[2]

Appellant Leousis testified that the restaurant is a positive addition to the neighborhood, that it enhances neighborhood safety because it attracts law enforcement personnel, but that customers are unhappy because they cannot buy beer or wine after 9:00 p.m. Leousis claimed [RT 29-30] to have no idea what the reference "pursuant to the provisions of 61.4" on his 1993 petition for a conditional license meant.

Appellants also presented the testimony of a city official of Burbank, who was a regular patron of the restaurant, to the effect that the later hours of operation would not present a problem, and that there were other businesses where alcoholic beverages were served at the later hour which did present problems.

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[2] Appellant John Leousis, who represented appellants at the hearing, declined to ask the investigator any questions, stating "the only problem I have with the investigator here is he paints a picture that's more or less of a negative reaction in the neighborhood, and I got just the opposite when we went around to collect some signatures" [RT 13].

The only question appellant Leousis asked the neighbor, John K. Mahoney, on cross-examination was whether he was certain he had heard noise coming from the restaurant at 2:00 a.m.

There is nothing in the record that supports the claim of unfairness. Appellants contended that the evidence at the hearing could not be relied upon because the investigator had not even begun his investigation until only a few days before the hearing was to commence. Appellants are mistaken. The investigation to which they refer was the standard follow-up investigation preceding a hearing. The actual investigation which led to the Department's denial of the application was conducted months earlier.

II

Appellants' brief accuses Department investigator Weldon of having lied under oath. They charge that his testimony that the same conditions exist as when the original license was issued is untrue since only one of the original residents living within 100 feet of the premises continues to reside there. They also allege that, after the hearing, Weldon told appellants he had done what he did "to defeat the case because the license is transferable," and, while Coral Cafe's current management ran a clean operation, future management might not. (App.Br., p. 3.) Finally, appellants allege, without any substantiation, that Weldon offered witness Mahoney money to testify.

Weldon did not testify that the residents who lived within 100 feet of the premises still lived there when the license was transferred. His focus was on the fact that there were still four residences. In response to questions from the ALJ, Weldon testified as follows [RT 14]:

"Q. Investigator, how many residences were there within a hundred feet of the premises at the time of the transfer?

A. Four. Actually, since the premises has been licensed, the original four are still there.

Q. So it's the same four since the original licensing in '82?

A. That's correct.

Q. And there were the same four since the time of the transfer in 1990 [sic].

A. Although on a transfer we don't go out and verify, but I assume that they were the same ones throughout the years.

Q. There's nothing to indicate that those residences have changed in terms of numbers or size or anything like that; is that correct?

A. Correct."

There is nothing in the record with regard to appellants' assertion that Weldon's motives for opposing the petition were his concern over what might happen in the future, nor is there any suggestion anywhere in the record below or here that Weldon offered Mahone money to testify. At the oral hearing, appellants contended that this evidence was obtained following the administrative hearing, but did not identify its nature. With nothing more to support such a charge, we are unwilling to accept appellants' unverified accusation that a witness was improperly offered money to testify.

III

Appellants contend that the decision of the ALJ is based on false information regarding the restrictions on the hours of operation during which alcoholic

beverages may be sold, contending that since Weldon's testimony was not worthy of belief, the ALJ could not rely on it. As such, appellant's contentions lack merit.

The credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. (Brice v. Department of Alcoholic Beverage Control (1957) 153 Cal.2d 315 [314 P.2d 807, 812] and Lorimore v. State Personnel Board (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640, 644].)

Where there are conflicts in the evidence, the Appeals Board is bound to resolve them in favor of the Department's decision, and must accept all reasonable inferences which support the Department's findings. (Kirby v. Alcoholic Beverage Control Appeals Board (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857] (substantial evidence supported both the Department's and the license-applicant's position); Kruse v. Bank of America (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 271]; Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control (1968) 261 Cal.App.2d 181 [67 Cal.Rptr. 734, 737]; Gore v. Harris (1964) 229 Cal.App.2d 821 [40 Cal.Rptr. 666].) This rule is particularly applicable here, where there is only an unsupported allegation that the witness's testimony is untrue or not worthy of belief, and where, as here, no real attempt was made to cross-examine either of the two witnesses.

IV

Appellants' brief sets forth a number of reasons why, in appellants' opinion, the condition restricting the hours during which they may sell alcoholic beverages is

unreasonable. They assert: (1) they did not anticipate operating 24 hours a day when accepting the conditions; (2) there is no documentation demonstrating that the condition was due to objections from the neighborhood; (3) the rear parking lot should not be considered in determining the 100-foot radius; (4) the Coral Cafe is willing to negotiate any neighborhood problem, but the Department is not; (5) appellants are being penalized for what may happen in the future; (6) the Department is applying a double standard, in that there are other businesses in the neighborhood which can sell alcoholic beverages until 2:00 a.m.; (7) the businesses referred to as selling until 2:00 a.m., with one exception, are a liability and eyesore to the neighborhood; and (8) the restrictions had their origin when the character of the City of Burbank was different. (App.Br., pp. 4-5.)

Most of these contentions are without any record support. The only contention as to which there is even a reference in the record has to do with the distances from the premises to the residences within 100 feet, and as to those, contained on Exhibit 2, prepared by Weldon, appellants concede the estimates "are fairly accurate." (App.Br. 2.)

Appellants essentially disagree with the ALJ's determination of the issues, arguing that the factors recited in their brief should control. Appellants barely address the concerns of Rule 61.4, which was the basis for the denial of their petition. In effect, appellants offer evidence and arguments not part of the record

below in an attempt to show the decision was incorrect.[3]

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].)

"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]; Toyota Motor Sales USA, Inc. v. Superior Court (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].)

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].) This is a case for the application of the rule that where, as here, there is substantial evidence in support of the Department's decision, it must be affirmed. The ALJ chose to accept the essentially unrefuted testimony of the Department's witnesses. We are

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[3] Appellants have made numerous arguments that are outside the record, unsupported by the evidence in the record, or simply without merit. However, we glean from comments made at the oral hearing that appellants' primary objective in seeking longer hours of operation was to serve their dinner patrons, and that they had no strong interest in being able to offer alcoholic beverages before 11:00 a.m. If this is the case, appellants may wish to consider seeking a more conservative extension of the hours during which they may sell alcoholic beverages. As their request was presented, the Department had little choice but to deny it.

not permitted to substitute our views for his simply because we think they might also be reasonable.

CONCLUSION

The decision of the Department is affirmed.[4]

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

[4] This final order is filed as provided in 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.