

ISSUED MARCH 5, 1997

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

ADOLFO LOPEZ and HARRY MOSS,	)	AB-6578a
dba Cavanaugh's)	
3309 Mission Street	)	File: 48-297172
San Francisco, CA 94110,	)	Reg: 950321776
Appellants/Licensees)	
)	
v.	)	Administrative Law Judge
	)	at the Dept. Hearing:
Anthony Ribera, Chief, San Francisco	)	Robert R. Coffman
Police Department, et al.,	)	(ALJ at hearing preceding first
Respondents/Protestants, and	)	appeal)
)	
DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	December 4, 1996
	)	Sacramento, California
)	

Adolfo Lopez and Harry Moss, doing business as Cavanaugh's (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which sustained the protests against, and denied appellants' application for, the transfer of an on-sale general public premises license on the ground that the transfer would tend to

¹ The decision of the Department Following Appeals Board Decision, dated July 8, 1996, is set forth in the appendix.

aggravate an existing law enforcement problem and disturb the quiet enjoyment of nearby residents.

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

FACTS AND PROCEDURAL HISTORY

Appellants applied for the transfer to them from the Board of Equalization a type 48 on-sale public premises license. Following an administrative hearing which took place on August 2 and 31, 1995, the Department denied the application. On appeal, this Board ruled that the Department had erred in concluding that Rule 61.4 and Business and Professions Code §23958 were applicable and thereby warranted denial of the application on the grounds of undue concentration and disturbance of quiet enjoyment of nearby residents. On remand, the Department entered a new order, again denying the application.

In their appeal, appellants raise the following issue: the Department's reliance on the existing record and its refusal to conduct new hearings denied appellants due process and was an abuse of discretion.

DISCUSSION

Appellants contend that they were denied due process as a result of the Department's failure and/or refusal to grant new hearings following this Board's decision of June 11, 1996, and its order of remand.² Appellants argue that is the result of the Department's reliance on findings made in the initial hearing, where, appellants contend, they were improperly saddled with the burden of proof on the issues. Appellants ask this Board to "reverse the Decision below, and give the clearest direction possible to the Department to apply its customary and lawful standards" to appellants' application, "and to do so quickly." (App.Br. 10). The focus of appellants' attack is directed at the effect the burden of proof requirements of Rule 61.4 allegedly influenced the overall course of the prior proceedings.³

In order to address appellants' contentions, it is necessary to consider, briefly,

² Appellants have submitted a declaration from counsel to the effect that their request that the Department conduct a new investigation or new hearings with respect to appellants' application went ignored and unanswered. Appellants also submitted, shortly before the hearing, a letter from the new police chief of the City of San Francisco setting forth his views regarding whether or not the premises present a law enforcement problem. In light of our approach to this matter, we need not determine whether, as appellants suggest, the declaration and letter are properly before us by virtue of Business and Professions Code §23083 or §23085. We note, however, that the Department has stated that it reconsidered this matter. That it did not respond to appellants' application is irrelevant.

³ Appellants make passing reference to the Department's application of Business and Professions Code §23958 as having been found to have been improper. While that is correct in so far as the finding of undue concentration is concerned, it is not correct with respect to the determination regarding law enforcement problems.

the events leading up to this second appeal.

Appellants sought a person-to-person transfer of an on-sale general public premises license they had purchased from the Board of Equalization. The prior licensee had been cited for the operation of a disorderly house, and had surrendered his license to the Board of Equalization some time in 1993.

Protests were filed against the transfer application, hearings were held, and the Department ultimately adopted the proposed decision of the Administrative Law Judge which sustained the protests and denied the application on several grounds: issuance of the license would tend to create a law enforcement problem, result in an undue concentration of licenses, and interfere with the quiet enjoyment of nearby residents' property. On appeal, the Board did not disturb the Department's factual findings. The Board reversed the Department's determinations of issues which were based on interference with the quiet enjoyment of residential property applying the standards of Rule 61.4, undue concentration, and Business and Professions Code §23958 insofar as it provided a basis for an undue concentration finding, and affirmed those determinations regarding the aggravation of an existing law enforcement problem and interference with the quiet enjoyment of their property by nearby residents. The Board remanded the proceeding to the Department for such action as the Department deemed appropriate in light of the Board's decision. In so doing, the Board was well aware that those portions of the Department's decision which it left standing were independently

capable of supporting a decision by the Department to deny appellants' application for transfer. The extent to which the Department might reconsider its decision in its entirety, and the manner in which it might do so, were, as they must be, left to the discretion of the Department.

Thus, on this appeal, the Board must determine whether the Department abused its discretion in simply issuing a new decision based on the previous record, excising those portions this Board found improper.

Appellants contend that the unfairness follows from their having been required, in the earlier hearings, to bear the burden of proof on the issues of disturbance of quiet enjoyment, because of the improper injection of Rule 61.4. Appellants argue (App.Br., p.3):

"The Board has already ruled that the Department acted unlawfully in this matter. To pretend that such unlawful actions did not poison the entire process is to ignore the fact that the applicants were forced to devote their efforts and attention to fighting against the application of an illegal policy and standards. The Department too was distracted by its unlawful attempt to expand its power to treat this person-to-person transfer application as if it were an original license. Thus, unlike virtually every other person-to-person transfer situation, it never proposed or even offered to discuss conditions on the license to meet the concerns of the protesters."

Appellants assert (App.Br., p.7) that by merely incorporating Determination of Issues IV (aggravation of existing law enforcement problem) and VI (interference with quiet enjoyment), the Department denied appellants due process. In effect, appellants contend, the Department's reliance on Rule 61.4 required appellants to focus their

energies on their challenge to Rule 61.4, thereby preventing them from adequately addressing the other issues.

Appellants' argument is overblown. While it may be true that appellants had the burden of proof as to the Rule 61.4 issues, there is no suggestion in the Department's decision that, as to the law enforcement issue, appellants bore the burden of proof. And, as to interference with quiet enjoyment, it must be noted that there were two determinations that addressed this issue, one applying the standards of Rule 61.4, and one broadly addressing the issue under conventional standards. In the prior appeal, the Department cited Kirby v. Alcoholic Beverage Control Appeals Board (Schaeffer) (1972) 7 Cal.3d 433, 441 [102 Cal.Rptr.857], where, even though it was not a Rule 61.4 case, the court upheld the Department's determination that issuance of a license would interfere with residential quiet enjoyment.

It is undeniable that the Board intended the Department to exercise its discretion on remand. The Board lacks the power to tell the Department how to exercise that discretion.

On remand, the Department was presented with a Board decision telling it that two of the grounds of its decision, which were capable of supporting the denial of a license, survived on appeal. Neither of those grounds involved a reallocation of the

traditional rule that the Department has the burden of proof on those issues.⁴ The Department suggests that an applicant for a license always has the burden of proof. While that may be true in a technical sense, it does not extend to all of the issues the Department is entitled to raise.

The Department was also looking at a record where the ALJ had made a specific and detailed finding that appellant Moss lacks credibility. This would seem to be a factor the Department would be entitled to take into account in assessing the need or desirability of new hearings. Appellants dispute this, but their position is unpersuasive.

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].)

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

⁴ The fact that the ALJ made separate determinations on the issue of residential quiet enjoyment, and in one of those two made specific reference to appellants' burden of proof, indicates that he was well aware that the burden of proof should not, and did not, shift on all issues.

nature of the protests made, which primarily were directed to previously existing conditions attributed to an unlicensed premises...."

In its brief on the first appeal, the Department launched a vigorous attack on appellant Moss's credibility. One can fairly assume that the Department is going to be extremely reluctant to grant an application from an applicant it has formally adjudicated as lacking credibility. When there are other grounds to support the Department's decision, we are not prepared to say that the Department's doubts about the integrity of the applicant tainted an otherwise proper decision.

The Department is authorized by the California Constitution to exercise its discretion whether to deny, suspend, or revoke an alcoholic beverage license, if the Department shall reasonably determine for "good cause" that the granting or the continuance 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. The Appeals Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded

relevant evidence at the evidentiary hearing.⁵

The Department's decision on remand recites that it has reviewed the entire record, including the decision of the Board. In the absence of evidence to the contrary, or where the Department's action on its face contradicts that recital, or other extraordinary circumstances, it would be improper for this Board to suggest that the Department did otherwise.

CONCLUSION

The decision of the Department is affirmed.⁶

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

⁵The 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].

⁶ 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.