

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

AB-7743

File: 20-362656 Reg: 00049258

HENRY BOOKSPAN, RUBY MORAD, and SABAH TOMA
Appellants/Protestants

v.

7-ELEVEN, INC. dba 7-Eleven Store
525 C Street, San Diego, CA 92101,
Respondent/Applicant

and

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: August 17, 2001
Los Angeles

ISSUED OCTOBER 24, 2001

Henry Bookspan, Ruby Morad, and Sabah Toma (protestants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which granted the application of 7-Eleven, Inc. doing business as 7-Eleven Store (applicant), for an off-sale beer and wine license.

Appearances on appeal include protestants Henry Bookspan, Ruby Morad, and Sabah Toma, appearing through their counsel, John J. McCabe, Jr.; 7-Eleven, Inc., appearing through its counsel, William A. Adams; and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

¹The decision of the Department, dated November 30, 2000, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Applicant filed an application for the issuance of an off-sale beer and wine license in a central part of the City of San Diego. Fifteen protests were filed against the issuance of the license.

An administrative hearing was held on September 21, 2000, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which overruled the protests with the license to be issued. Three protestants thereafter filed a timely notice of appeal.

In the appeal, protestants raise the issue that the Department abused its discretion by overruling the protests, thereby rejecting testimony of prior inconsistent Department actions, not considering the testimony of protestants, and not allowing protestants to command the presence of witnesses.

DISCUSSION

Protestants argue that the San Diego Police Department had filed a protest which was later withdrawn, and testimony as to the reasons should have been permitted; there was a recent Department decision concerning a premises near the proposed premises, with the Department taking an inconsistent position; and the Department ignored the area's homeless problem.

The Department is authorized by the California Constitution to exercise its discretion whether to grant or deny an alcoholic beverage license, if the Department shall reasonably determine for "good cause" that the granting or the denial of such license would not be, or 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 the 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 findings.²

"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 [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].)

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 conflicts 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.2d 658].)

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

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].

inferences which support the Department's findings. (Kirby v. Alcoholic Beverage Control Appeals Board (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857] (a case where the positions of both the Department and the license-applicant were supported by substantial evidence); 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]; and Gore v. Harris (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

Protestants allege that on August 17, 2000, approximately one month before the administrative hearing in this matter, the Department denied an application for the same type license to a location a short distance from the proposed premises in this matter. Protestants requested the Administrative Law Judge (ALJ) in this matter, to take official notice of that decision, to which the ALJ refused, stating that he was not bound by other decisions of other ALJ's [RT 199-201].

We determine the ALJ did not abuse his discretion. Protestants have not cited any authority showing such as an abuse, and we find none. We have read the other decision and find nothing from that reading, and a reading of the present decision and record, to raise any concerns. We find protestants' contention without merit.

Protestants contend that protestant Toma's testimony was ignored by the ALJ. Protestants cite no references to the record, or the decision as to this allegation. It only appears the ALJ decided the matter based on criteria he thought were more substantial than that of the testimony of Mr. Toma. 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].)

Protestants also contend the ALJ failed to allow the testimony of Sergeant Davis or a representative of the San Diego police department. Apparently, the police department filed a protest and later withdrew that protest presumably on the ground the police department felt the conditions would resolve their concerns. According to the statements of applicant's counsel in opposition, protestants filed subpoenas for the police officer the day before the hearing [RT 45].

We cannot ascertain exactly the premise of protestants' contention, or their view of the resolution of the problem. Sergeant Davis was on vacation, and the information protestants seek is why the protest was withdrawn. What the significance of that testimony would be and its relevance, since the police department withdrew its protest, is conjecture and without some in-depth explanation in their brief and the record, the whole of the contention seems without merit.

A full review of the record convinces us that the hearing proceeded in a reasonable manner, and the issues concerned were fully litigated, and resolution made. We see no abuse of discretion in this matter. 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 protests made, which primarily were directed to previously existing conditions attributed to an unlicensed premises...."

ORDER

The decision of the Department is affirmed.³

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

³This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this order as provided by §23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code §23090 et seq.