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

AB-7794

File: 41-355108 Reg: 00048564

JAMES LISSNER, Appellant/Protestant
v.
JUDY L. PICETTI and STEVEN PICETTI dba Barnacles Bar & Grill
837 Hermosa Avenue, Hermosa Beach, CA 90254,
Respondents/Applicants

and

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: February 7, 2002
Los Angeles, CA

ISSUED APRIL 18, 2002

James Lissner (appellant/protestant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which granted the application of Judy L. Picetti and Steven Picetti, doing business as Barnacles Bar & Grill (respondents/applicants), for a conditional on-sale beer and wine public eating place license.

Appearances on appeal include appellant/protestant James Lissner; respondents/applicants Judy L. Picetti and Steven Picetti, appearing through their counsel, Jeffrey Goldfarb; and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

On March 3, 2000, applicants petitioned for issuance of an on-sale beer and wine public eating place license, with conditions, for their restaurant. The Department

[1]The decision of the Department, dated March 22, 2001, is set forth in the appendix.

investigator assigned to review the petition recommended that the petition be granted. Protests were filed by appellant and others against issuance of the license.

An administrative hearing was held on February 21, 2001, at which time documentary evidence was received and testimony was presented by appellant, the applicants, Hermosa Beach police officer Raul Saldana, Diane Reddish (a customer of applicants' restaurant), and Department investigator Dwight Pickens.

Subsequent to the hearing, the Department issued its decision which denied appellant's protest and dismissed the protests of other protestants who did not appear.

Appellant thereafter filed a timely notice of appeal in which he raises the following issues: 1) the finding of public convenience or necessity is not supported by substantial evidence in light of the whole record; 2) the decision is unenforceable and deprives protestant and the community of their right to due process; and 3) the Department's definition of public convenience or necessity is unconstitutionally vague, depriving protestants and applicants of their right to due process.

DISCUSSION

I

Appellant contends the determination that granting the license would serve public convenience or necessity is not supported by the findings and the findings are not supported by substantial evidence in light of the whole record.

Appellant argues that the applicants, whose burden it is to demonstrate public convenience or necessity, did not do so. The applicants provided evidence that their restaurant provided a "family atmosphere" unique among the surrounding licensed premises, and the decision includes a finding to that effect (Finding VI). Appellant

contends, however, that this is not substantial evidence in light of the whole record and that it is "irrelevant" because nothing requires that the premises must continue to provide a family atmosphere.

Under Business and Professions Code[2] §23958.3, subdivision (b)(1), the Department may issue a license to applicants if they show "that public convenience or necessity would be served by the issuance." Determination of Issues III states that, based on Finding VI (that the restaurant provides a family atmosphere), public convenience or necessity would be served by issuance of the applied for license.

When, as here, 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 [95 L.Ed. 456, 71 S.Ct. 456]; Toyota Motor Sales USA, Inc. v. Superior Court (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].)

Appellant is really asking this Board to substitute its judgment of the evidence for that of the ALJ and the Department. However, 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

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[2]Unless otherwise noted, all statutory references in this opinion are to the Business and Professions Code.

are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. The 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.[3]

Appellant argues that the finding of a family atmosphere does not support granting the license because it does not include any mention of "objective or statistical information as to demand for that atmosphere." (App. Br. at 4.) Statistical evidence is not necessary. One of applicants' customers testified that she frequented applicants' restaurant because it is family oriented, and more than 50 of applicants' customers signed statements that their patronage of this restaurant was due in large part to its family atmosphere. (Exhibit D.) This is substantial evidence of a demand for the atmosphere applicants provide and a sufficient justification for a determination of public convenience or necessity.

Appellant also argues that "The lack of objection by local law enforcement does not establish the affirmative concept of 'public convenience or necessity'." While that may be true, it does not negative that concept.

The fact that appellant may believe that public convenience or necessity would not be served by issuance of the license does not mean that the Department must defer to the protestant. When there are conflicting interests that must be balanced, the

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[3]The 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].

Appeals Board will generally uphold the Department's exercise of discretion in determining public convenience or necessity when issuance is beneficial to some, even if it might be adverse to others. (See Lissner v. Hennessey's Tavern, Inc. (1998) AB-6911; Adcock v. Uthman, (1992) AB-6175.)

II

Appellant contends the decision deprives protestant and the community of their right to due process and is contrary to public welfare and morals. The decision violates due process, according to appellant, because once the license is issued conditions can be removed without notice to the public and an opportunity for objections to be heard. It is contrary to public welfare and morals, appellant argues, because there is no provision in the decision to prevent removal of the conditions shortening the patio hours and prohibiting live entertainment and dancing after the license is issued, and the ALJ found that it would be contrary to public welfare and morals for the license to issue without those conditions.

Appellant raised this issue in another appeal and the Board rejected it, saying:

> "We must reject appellant's contentions. Appellant is arguing about things that have not happened yet and may never happen. In addition, notice is provided to the community, at least technically, because §23803 provides that written notice of the intention to remove or modify a condition must be given to 'the local governing body of the area in which the premises are located.' This body then has 30 days to object to the modification or removal of the condition, and, if an objection is filed, the Department must hold a hearing. Appellant's remedy, if a petition should be filed at some time to modify or remove conditions, lies with the local governing body."

(Lissner v. Pierview LLC (2001) AB-7650.)

III

Appellant contends the Department's definition of public convenience or necessity is unconstitutionally vague and therefore deprives applicants and protestants of their right to notice, violates due process, and is void as a matter of law.

This is essentially an attack on the constitutionality of §23958 and 23958.4, both of which use, without definition, the term "public convenience or necessity." The California Constitution, article III, section 3.5, prohibits an administrative agency, such as the Appeals Board, from holding an Act of the Legislature unconstitutional except in specified circumstances, none of which are present here. Consequently, the Board declines to consider this issue.

We note, however, that appellant made similar attacks on "public convenience or necessity" in other appeals, contending that use of the term without a specific definition made the Department's decision arbitrary and capricious. This Board has consistently rejected this argument when considering it on the merits. A full discussion of the issue was included in the Board's decision in Vogl v. Bowler (1997) AB-6753.

Even if the Board were to consider this issue, it would in all likelihood reject appellant's contention that the statutes are unconstitutionally vague. Case law appears to hold that these statutes are not generally subject to review for vagueness, and if reviewed, the standard is not as strict. "The constitutional requirement of definiteness is violated by a *criminal* statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute (*United States* v. *Harriss*, 347 U.S. 612, 617 [98 L.Ed. 989, 996, 74 S.Ct. 808])." (Original italics.) (Katz v. Department of Motor Vehicles (1973) 32 Cal.App.3d 679, 682 [108 Cal.Rptr. 424].)

In Katz, the appellant auto owner argued that the language of the statute allowing DMV to refuse to issue a license plate "that may carry connotations offensive to good taste and decency," while containing no criminal sanctions, was "so vague and indefinite as really to be no standard at all." (Katz v. Department of Motor Vehicles, supra, 32 Cal.App.3d at 684.) The court responded:

> "We cannot agree. In order to be valid, a legislative standard for administrative action need be sufficiently definite only to provide directives of conduct for the administrative body in exercising its delegated administrative or regulatory powers [citation]. Accordingly, legislative standards for administrative acts may be expressed in general terms and need not precisely detail the factors that are to govern the administrative agency and its employees [citation]."

(Ibid.)

The court then noted several instances of statutory language held valid for administrative action, such as "authority to deny a public permit for a roller skating rink if the operations 'would not comport with the "peace, health, safety, convenience, good morals, and general welfare of the public"'" and "authority to lay out and construct all state highways on *the most direct and practicable locations*, as determined by the administrative agency." (Ibid.) It concluded that "connotations offensive to good taste and decency" provided a standard "no less definite than those set forth above." (Ibid.)

In Goldin v. Public Utilities Commission (1979) 23 Cal. 3d 638, 659 [153 Cal. Rptr. 802], the PUC ordered Goldin's telephone service disconnected pursuant to a regulation. The California Supreme Court rejected Goldin's argument that the rule involved was unconstitutionally vague:

> "Although enactments outside the criminal area have occasionally been subjected to scrutiny on grounds of vagueness -- especially in cases involving the right to practice a recognized profession [citations], or the exercise of other fundamental rights [citations] -- we have normally limited such examination to

> situations in which First Amendment rights have been at stake [citations]. In the circumstances of the instant case, where neither the protections of the First Amendment nor any other fundamental right of similar stature is directly involved, we do not deem such an examination appropriate."

In the present case, no First Amendment or other fundamental right is at stake, so examining this non-criminal statute for vagueness is not appropriate. Even if it were to be examined, the standard to be applied is not as high as that applied in the case of a criminal statute. The standard to which the Department must adhere in determining public convenience or necessity is "the standard set by reason and reasonable people, bearing in mind that such a standard may permit a difference of opinion upon the same subject." (Sepatis v. Alcoholic Beverage Control Appeals Board (1980) 110 Cal.App.3d 93, 102 [167 Cal.Rptr. 729] quoting Koss v. Dept. of Alcoholic Beverage Control (1963) 215 Cal.App.2d 489, 495 [30 Cal.Rptr. 219].) The Department has adhered to that standard in this case.

ORDER

The decision of the Department is affirmed.[4]

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

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[4]This 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.