

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

AB-8353

File: 20-396376 Reg: 03055598

LOU BLANAS, SHERIFF, SACRAMENTO COUNTY SHERIFF'S DEPARTMENT
Appellant/Protestant

v.

99 CENTS ONLY STORES, dba 99 Cents Only Store
2868 Zinfandel Drive, Rancho Cordova, CA 95670
Respondent/Applicant

and

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: July 7, 2005
San Francisco, CA

ISSUED OCTOBER 17, 2005

Lou Blanas, Sheriff, Sacramento County Sheriff's Department (appellant/protestant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which granted the application of 99 Cents Only Stores, doing business as 99 Cents Only Store (respondent/applicant), for an off-sale beer and wine license.

Appearances on appeal include appellant/protestant Lou Blanas, Sheriff of Sacramento County, appearing through his counsel, Adam U. Lindgren and Kyle W. LaLonde; respondent/applicant 99 Cents Only Stores, appearing through its counsel, Russell F. Wolpert; and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean Leuders.

¹The decision of the Department, dated October 7, 2004, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

On January 2, 2003, applicant applied for an off-sale beer and wine license. The Sacramento County Sheriff filed a protest alleging that issuance would result in an undue concentration of licenses and/or create or aggravate a local law enforcement problem. At the administrative hearing held on January 28 and July 1, 2004, oral and documentary evidence was presented concerning the application and the protest.

Applicant has applied for an alcoholic beverage license for its store located on Zinfandel Drive in Rancho Cordova.² The applicant operates discount merchandise stores, carrying all kinds of goods and food, which it acquires as seconds or closeouts or the like, and sells for 99 cents or less. Sometimes applicant is able to acquire beer or wine advantageously that it also sells for 99 cents. Applicant would like to sell such beer and wine, when available, at its Rancho Cordova store.

The applicant's policy is to sell alcoholic beverages unrefrigerated, and it has agreed to a condition on its license requiring that it do so. It has also agreed to restrict the hours for alcoholic beverage sales, to not give away cups or other drinking containers, and to regularly police the area for litter and loiterers.

Department licensing representative MaryAnne Gilchrist testified that, pursuant to statutory formula, four off-sale licenses are allowed in the census tract in which the proposed premises is located, and only three currently exist in that census tract. She found that there were few calls for police services at the proposed premises for the years 2000, 2001, 2002, and part of 2003. The calls for service increased beginning in

²Rancho Cordova was not incorporated as a city until about July 2003. Prior to that time, including when the application for license was filed, Rancho Cordova was an unincorporated area of Sacramento County.

June 2002, when applicant first began operating its store at the proposed premises, but none involved alcoholic beverages. In addition, applicant has been licensed at various locations throughout California for about 20 years, and currently has about 50 active licenses. In all the years and at all the locations applicant has been licensed, only about 15 accusations have been filed against applicant.

The protestant presented crime statistics showing that the census tract in which the proposed premises is located contains about 10 percent of the population of Rancho Cordova, but between January 2002 and August 31, 2003, generated approximately 20 percent of the "reported crimes." In addition, he presented the testimony of two officers regarding their efforts and observations in connection with crime in the area of the proposed premises.

The decision issued by the Department concluded that neither an undue concentration of licenses nor creation or aggravation of a law enforcement problem would occur if the license were to be issued. The decision ordered appellant's protest overruled and the license issued. Appellant filed an appeal contending the Department erred in concluding that neither an undue concentration of crime nor a law enforcement problem exists in the area.

DISCUSSION

I

Business and Professions Code³ section 23958 provides, in part, that the Department "shall deny an application for a license if issuance of that license would tend to create a law enforcement problem, or . . . would result in or add to an undue concentration of licenses, except as provided in Section 23958.4." Section 23958.4,

³Unless otherwise indicated, statutory references in this decision are to the Business and Professions Code.

subdivision (a)(1) (hereafter section 23958.4(a)(1)), provides that undue concentration is deemed to exist where:

[t]he applicant premises are located in a crime reporting district that has a 20 percent greater number of reported crimes, as defined in subdivision (c),⁴ than the average number of reported crimes as determined from all crime reporting districts within the jurisdiction of the local law enforcement agency.

Alternatively, undue concentration is also present where "the ratio of off-sale retail licenses to population in the census tract or census division in which the applicant premises are located exceeds the ratio of off-sale retail licenses to population in the county in which the applicant premises are located." (Bus. & Prof. Code, § 23958.4, subd. (a)(3) [hereafter section 23958.4(a)(3)].)

In the present case, investigator Gilchrist testified she had determined that the applicant's premises was not located in an area of undue concentration as defined by section 23958.4(a)(3), because four off-sale licenses are allowed in the census tract and only three exist there now. Gilchrist said she was not able to determine if the area met the "high crime" definition of undue concentration found in section 23958.4(a)(1) because the Sacramento County Sheriff's Department (SCSD), which provides law enforcement services for Rancho Cordova,⁵ did not maintain crime statistics in a manner that permitted application of the subdivision (a)(1) formula.

⁴Section 23958.4, subdivision (c)(2), defines "reported crimes" as the most recent yearly compilation by the local law enforcement agency of reported offenses of criminal homicide, forcible rape, robbery, aggravated assault, burglary, larceny, theft, and motor vehicle theft, combined with all arrests for other crimes, both felonies and misdemeanors, except traffic citations.

⁵Before incorporating, Rancho Cordova was under the county-wide law enforcement jurisdiction of the Sheriff's Department. After Rancho Cordova incorporated, the Sheriff's Department had a contract to provide law enforcement services for the city.

Appellant contends the evidence it submitted mandates denial of the license because of an "undue concentration of crime." It argues that the Department did not proceed in accordance with law as set forth in section 23958.4(a)(1) and its findings are not supported by substantial evidence.

The scope of the Appeals Board's review of a Department decision is limited. The Board may not exercise its independent judgment on the effect or weight of the evidence, but must determine whether the Department's findings of fact are supported by substantial evidence in light of the whole record, and whether the 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. (Cal. Const., art. XX, § 22; Bus. & Prof. Code, §§ 23084, 23085; *Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control* (1970) 2 Cal.3d 85, 94-95 [84 Cal.Rptr. 113].)

"Substantial evidence" is relevant evidence which reasonable minds would accept as reasonable support for a conclusion. (*Universal Camera Corp. v. Labor Bd.* (1951) 340 U.S. 474, 477 [95 L.Ed. 456, 71 S.Ct. 456]; *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].) When an appellant charges that a Department decision is not supported by substantial evidence, the Appeals Board's review of the decision is limited to determining, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. In making this determination, the Board must resolve any evidentiary conflicts in favor

of the Department's decision and accept all reasonable inferences that support the Department's findings. (*Kirby v. Alcoholic Bev. Control App. Bd.* (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857] (in which 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, 51 [248 Cal.Rptr. 271]; *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925]; *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734]; *Gore v. Harris* (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

Appellant contends that the Department failed to proceed in accordance with law because it imposed additional standards, without legal foundation, for meeting the "high crime" designation of section 23958.4(a)(1). He takes issue with the statement in Conclusion of Law, paragraph 6 (CL6), that "None of the crime analysis presented by the Protestant was established to have considered crime reporting districts as defined, whether within the recently incorporated City of Rancho Cordova or within unincorporated Sacramento County." Appellant argues that, since subdivision (c)(1) defines "reporting districts" as "geographical areas within the boundaries of a single governmental entity . . . that are identified by the local law enforcement agency," and census tracts are "geographical areas within the boundaries of a single governmental entity," the census tracts used by SCSD as its "reporting districts" come within the definition of "crime reporting districts" in the statute.

Appellant also takes issue with Finding of Fact, paragraph 19 (FF 19):

All of the analysis contained in Exhibits I-A, IX or X appears to have been prepared on an *ad hoc* basis, *i.e.*, specifically for this case, and after the conclusion of the Department's investigation, in order to support

Protestant's allegations. The usual procedure is for the policing agency to report crime statistics, using the definitions in Section 23958.4, for all geographic areas within the policing agency's jurisdiction on a regular calendar or other fiscal year basis. The failure of SCSD to report its crime statistics on such a basis is what Gilchrist meant when she said that SCSD does not report crime statistics in the format necessary to apply the statute. [Fn. omitted.]

Appellant argues that annual submission of crime data to the Department is not a requirement of law, it is unreasonable to believe that a not-yet-incorporated city would maintain and submit such data to the Department on an annual basis, and SCSD submitted the crime data required by section 23958.4(a)(1).

We believe appellant misapprehends the significance of the language he objects to. The crucial part of CL6 is the first two sentences:

A preponderance of the credible evidence failed to establish that the 'high crime' prong (Section 23958.4(a)(1)) of "undue concentration" of licenses exists. Despite a valiant effort, through Exhibits I-A, IX and X, Protestant failed to carry his burden of establishing application of the statute at the Proposed Premises[] geographical location.

While we agree that rejecting a census tract as a reporting district elevates form over substance, this does not provide a basis for reversing the decision. Similarly, we agree with appellant that SCSD is not required to submit crime statistics annually or in any particular format, but the Department's decision does not hold to the contrary; it merely explains that failure to do so prevents the Department from determining whether "high crime" exists as defined by the statute.

The Department was unable to determine if undue concentration existed under section 23958.4(a)(1) during the investigation, because SCSD did not provide crime statistics until after the investigation was concluded. Even then, the statistics provided were not those that could be used to make a determination under section 23958.4(a)(1). Subdivision (a)(1) requires a comparison of the number of reported crimes in a reporting

district with the average number of reported crimes in the law enforcement geographical jurisdiction. SCSD presented comparisons of the number of crimes per capita in a census tract with the number of crimes per capita on a citywide or countywide basis. This simply is not the comparison called for by the statute, nor is it comparable to the statutory comparison. The Department proceeded in accordance with law in this instance; it was SCSD that did not.

Appellant also contends that the Department's findings are not supported by substantial evidence "and disregarded relevant, undisputed evidence that established an undue concentration of crime." (App. Br. at p. 16.) These contentions merely dress appellant's previous contentions, discussed above, in different garb. As we explained, *ante*, appellant's statistics did not make the appropriate comparison required by the statute. With only one insignificant exception, the challenged findings are not erroneous.⁶

II

Appellant alleges the Department erred when it failed to find that a law enforcement problem would be created, or aggravated, if the license were issued at the proposed premises. The decision deals with the alleged law enforcement problem in Conclusion of Law 8:

8. It was not established that issuance of the applied-for conditional license to Applicant at the Proposed Premises will create, or aggravate, a law enforcement problem. The analysis presented by the Protestant in his

⁶Appellant asserts it was error for the Department to find appellant's crime statistics did not comport with the definition of "reported crimes" in section 23958.4, subdivision (c)(2). He contends that the Sheriff's crime analyst, Greg Garcia, testified that the crime statistics he presented used "reported crimes" as defined in section 23958.4, subdivision (c)(2). Although the questions and answers recorded in the hearing transcript could be clearer, it appears that Garcia's testimony supports appellant's contention. [RT (01/28/04) at pp.56-57.]

effort to establish "high crime" undue concentration suffers from the same flaws when an attempt is made to use it to establish law enforcement problems. Absent consistent comparisons and proof that crimes and arrests are related to alcoholic beverages, it is impossible to conclude that the area around the Proposed Premises suffers today from a sort of high crime sufficient to deny the applied-for license. The witnesses presented by the Protestant believed the immediate area of the Proposed Premises to be no worse, though no better, than most other areas in the city/county. (Findings of Fact, ¶¶ 20 and 24.) That is not the sort of evidence that will support license denial. The analysis of crime information provided her by SCSD performed by Licensing Representative Gilchrist showed virtually no alcoholic beverage component to existing crime. (Findings of Fact, ¶¶ 13, 14 and 15.) Applicant has shown itself to be a responsible operator throughout California. (Findings of Fact, ¶ 15.) The type of operation proposed and the conditions already agreed upon go a long way toward ensuring that the Proposed Premises will not create or add to a local law enforcement problem. (*Id.*) Absent far more credible evidence than was presented on this subject, it is impossible to support license denial based on law enforcement problems.

Appellant reads this part of the decision as concluding that "because there was a general crime problem in the city, the issuance of an additional license would not exacerbate the existing law enforcement problem in the area surrounding the applicant's store," a conclusion, appellant asserts, that flies in the face of case law.

Appellant has taken one sentence out this lengthy paragraph and portrayed it as the sole basis for concluding that issuance would not cause a law enforcement problem. However, the rather vague comment of appellant's witness is only one of the bases for concluding that appellant did not establish that a law enforcement problem would result from issuance of the license. The primary emphasis in this paragraph is the lack of sufficient "credible evidence . . . to support license denial based on law enforcement problems." In other words, the preponderance of the evidence on this issue did not show that the license should be denied.

The ALJ evaluated and weighed all the testimony and other evidence and concluded that appellant did not carry his burden of establishing this basis for denying

the license. This Board is not authorized to re-evaluate and reweigh the evidence; it may only look at the record to see if the findings are supported by substantial evidence. In this case, we clearly can say that they are.

ORDER

The decision of the Department is affirmed.⁷

FRED ARMENDARIZ, ACTING CHAIRMAN
SOPHIE C. WONG, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁷This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 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 section 23090 et seq.