

ISSUED JUNE 11, 1998

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

KENNETH TAB,	)	AB-6928
Appellant/Protestant,)	
	)	File: 41-323115
v.	)	Reg: 97039764
)	
MALIBU COUNTRY INN CORP.	)	Administrative Law Judge
dba Malibu Country Inn	)	at the Dept. Hearing:
6506 Westward Beach Road	)	John P. McCarthy
Malibu, CA 90265,)	
Respondent/Applicant,	)	Date and Place of the
	)	Appeals Board Hearing:
and	)	April 1, 1998
	)	Los Angeles, CA
DEPARTMENT OF ALCOHOLIC)	
BEVERAGE CONTROL,)	
Respondent.)	
)	
)	

Kenneth Tab, appellant/protestant, appeals from a decision of the Department of Alcoholic Beverage Control¹ which denied his protest against the issuance of a conditional on-sale beer and wine public eating place license to Malibu Country Inn Corp., doing business as Malibu Country Inn.

Appearances on appeal include appellant/protestant Kenneth Tab; Malibu

¹ The decision of the Department, dated August 21, 1997, is set forth in the appendix.

Country Inn Corp., appearing through its counsel, Jeffrey F. Gersh, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Malibu Country Inn Corp. applied for a conditional on-sale beer and wine public eating place license. Appellant Kenneth Tab's protest was denied.²

Appellant's protest was the subject of an administrative hearing which took place on June 20, 1997, at which time testimony and documentary evidence was introduced in support of and in opposition to the application.

Department investigator Dwight Perkins described the investigation which the Department conducted prior to its decision to issue the license, including review of the application itself, a criminal background and fingerprint check, an interview with the Los Angeles County Sheriff's office, and a review of letters of reference submitted by third parties on behalf of the applicant. Perkins testified that his review considered the disclosure by the applicant of a prior criminal conviction in 1989, and the fact that applicant had successfully completed probation and paid the fine ordered by the court.³

² Applicant was issued an interim permit on May 2, 1997, and, according to the testimony in the record, had operated the restaurant without incident while the protest was pending.

³ According to Perkins, Abdul Wali, appellant's sole shareholder, was convicted of conspiracy to import heroin and hashish, but the conviction was set aside on appeal, following which a plea bargain was reached pursuant to which Wali pleaded guilty to one count of conspiracy, was sentenced to five years

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In denying Tab's protest, the Administrative Law Judge concluded that Tab's protest was prompted by an unrelated financial dispute between Tab and Wali, and that none of Tab's claims - that Wali was a citizen of Afghanistan, had spent most of his life in prison, is a well-known international drug dealer, had given false information to the United States government, and has as a silent partner in the business a person presently in prison - were supported by any properly admissible evidence.

Appellant filed a timely notice of appeal, and raises the following issues:

(1) Department investigator Perkins was not qualified to testify; (2) the ALJ erred in finding that Wali is the sole or principal shareholder in the applicant corporation; (3) the ALJ abused his discretion in refusing to permit protestant to submit declarations in cases involving Wali; (4) the Department failed to properly investigate Wali's background; and (5) Wali and his attorney, who wrote a letter of recommendation for Wali, are not credible.

DISCUSSION

Before addressing the specific issues raised in this appeal, it will be helpful to reiterate the respective functions of the Department and the Appeals Board and

³(...continued)
probation, and fined \$200,000.

Wali testified that although he was innocent of any crime, he agreed to the plea bargain to avoid another trial and to be able to travel freely to and from the United States. The Administrative Law Judge disclaimed any reliance on Wali's protestation of innocence, but found that the evidence showed Wali had been sufficiently rehabilitated since his conviction, based upon his early release from probation, payment of a substantial fine, and a clean record since.

how that affects this appeal.

When protesting the issuance of a license, a protestant has the burden of establishing the grounds of his protest. On appeal, the protestant must demonstrate that the decision of the Department overruling the protest was itself an abuse of discretion. The imposition of these burdens on a protestant is the logical consequence of the allocation of jurisdictional responsibilities between the Appeals Board and the Department.

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 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. 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.⁴

⁴ The California Constitution, article XX, §22; Business and Professions Code §§23084 and 23085; and Boreta Enterprises, Inc. v. Department of Alcoholic

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It must be kept in mind that it is not the Department's initial decision that applicant is qualified for a license which is being reviewed, but its decision to deny appellant's protest. This is because the Department considers a number of factors in determining, in its discretion, that a license shall issue, and those factors may or may not be reflected in the record generated during the hearing on the protest. The Department having in the first instance purported to exercise its discretion, the protestant must now demonstrate that the Department abused that discretion.

We do not believe appellant has met that burden.

I

Appellant states that investigator Perkins did not personally perform any of the investigation preceding the decision to issue the license, and, although he reviewed the record, did not present most of it to the court. For that reason, appellant asserts, Perkins' testimony was hearsay. However, appellant does not identify the portion of Perkins' testimony which is supposedly hearsay, and, in any event, it does not appear that any of the ALJ's findings are based on Perkins' testimony.

Appellant also claims that, although Perkins testified that the Malibu Country Inn was owned by Wali, the only evidence which was produced, the articles of incorporation, do not include Wali's name. The record shows that when Perkins made the statement to which appellant has referred, he was reviewing his notes.

⁴(...continued)
Beverage Control (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

This suggests he was relying on information obtained during the investigation other than the corporate articles. In any event, the applicant clearly testified to his ownership interest.

Appellant challenges the ALJ's finding (Finding V) that Wali is the sole owner or principal shareholder of applicant corporation.

Appellant cites Wali's testimony that the money he used to purchase the premises was transferred to him for business purposes, given in response to the ALJ's question whether the money was a gift. Appellant implies that the ALJ should not have been satisfied with what appellant characterizes as a non-responsive answer. The answer may, indeed, have been non-responsive to the particular question which was asked, but the ALJ also had Wali's direct testimony that the money came from Wali's family in Pakistan and Japan, and that he is the sole shareholder in the corporation [RT 44-45].

Appellant's brief correctly points out that in the financial declaration Wali placed in evidence (Exhibit II), Wali does not disclose his ownership interest in Malibu Country Inn. However, Exhibit II is simply a statement of income and expenses, and there is no place on the form for a disclosure of assets.

Appellant complains that the ALJ improperly prevented him from introducing declarations of Wali's former wife and former girlfriend, and a copy of the sentencing statement made by the United States attorney in the criminal proceeding, because they were not certified copies.

The ALJ declined to receive the sentencing statement because it related to a

conviction which was reversed on appeal. He did say that if the statement involved the plea agreement and appellant obtained a stipulation that he has a true copy of the statement, or a certified copy, he would consider it. Appellant obtained neither.

Nor did appellant have original or certified copies of the alleged statements of Wali's former wife and former girlfriend, being offered to show a lack of moral character. The ALJ excluded these documents as hearsay and without foundation.

We believe the ALJ's evidentiary rulings were clearly correct.

II

Appellant contends that the Department erroneously relied on statements contained in an attachment to the personal affidavit Wali filed with the Department (Exhibit B), failed to check the writers of the reference letters, and failed to interview Richard Chesterfield or his wife to determine whether Chesterfield is a "silent partner," as appellant contends.

Appellant has offered nothing but his own unsupported assertions concerning alleged misrepresentations in the Wali affidavit. Nor does he identify the writers of the reference letters that he implies are suspect, and his claims that Chesterfield is a silent partner, unaccompanied by any evidence of such, were flatly denied by Wali [RT 75].

III

Appellant argues that neither Wali nor Gersh, Wali's attorney, testified credibly, arguing that Gersh's office prepared, and Wali signed, a false financial statement for the purpose of paying only minimal child and spousal support, and

that they falsely denied that Wali had any involvement with Chesterfield.

Again appellant has substituted rhetoric for proof.

Appellant makes much of the fact that Wali states in a declaration opposing an increase in child support that he is "currently unemployed and, therefore [has] no salary or wages from employment." However, the same declaration goes on to say that Wali's source of income is from investments he manages for his family, and discloses that his monthly income - an income he describes as "extraordinarily high" - during the past 12 months has exceeded \$20,000. This does not suggest that Wali was submitting false information to the court, and appellant has offered nothing else showing that Wali did so.

The ALJ determined, and we believe correctly so, that the preponderance of the credible evidence did not establish that Wali and the corporate applicant were not qualified to hold the license in question. The ALJ carefully considered the issue of Wali's prior conviction, and concluded that Wali had established to the satisfaction of the Department prior to the hearing, and to the ALJ at the hearing that he has been rehabilitated since the time of the 1989 conviction, as evidenced by his clean record since then, his payment of a substantial fine, and his early completion of the probation to which he had been sentenced.

The ALJ also correctly assessed the true basis for appellant's opposition to Wali as stemming from an unrelated business dispute:

"Tab's unhappiness with Wali is understandable. Nevertheless, Tab tried to use his personal difficulty with Wali in a wholly collateral matter to bring claims against Wali without evidentiary support."

Appellant has made serious accusations regarding Wali's criminal history, and we have not taken them lightly. However, this Board can only assume that the Department, as it has represented to us, has thoroughly investigated Wali's suitability as a licensee in spite of a criminal conviction ten years ago, and has satisfied itself that Wali has been fully rehabilitated. Unsupported claims of criminal behavior are not enough to persuade us the Department has not done its job.

CONCLUSION

The decision of the Department is affirmed.⁵

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

⁵This 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 decision as provided by §23090.7 of said code.

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