ISSUED DECEMBER 20, 1999

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

DAHDAH TRADING CORPORATION dba Strawberry Patch Café 1332 Hermosa Avenue, Suite 1 Hermosa Beach, CA 90254, Appellant/Applicant,	)	AB-7304 File: 47-136091 Reg: 97039387
v.	)	Administrative Law Judge at the Dept. Hearing: George S. Avila
James Lissner, Respondent/Protestant,	)	
and	)	Date and Place of the Appeals Board Hearing: November 5, 1999 Los Angeles, CA
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	

Dahdah Trading Corporation, doing business as Strawberry Patch Café (appellant/applicant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which denied its application for the person-to-person and premises-to-premises transfer of an on-sale general public eating place.

Appearances on appeal include appellant Dahdah Trading Corporation, appearing through its counsel, Jaquelynn Pope, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellant has operated the premises under an on-sale beer and wine eating

[1]The decision of the Department, dated December 3, 1998, and its order on Petition for Reconsideration, dated December 22, 1998, are set forth in the appendix.

place (Type 41) license since April 19, 1983. On July 18, 1996, appellant applied for the person-to-person and premises-to-premises transfer of an on-sale general public eating place (Type 47) license to the premises. The Department approved an interim conditional Type 47 license for the premises on March 5, 1997.

Seven verified protests were filed against issuance of the license and an administrative hearing was held on May 27, 1998. At that hearing, testimony was presented by Department investigator Joanne Aguilar; one of the owners of applicant corporation, Steve Dahdah; and by James Lissner, the sole protestant at the hearing.

Subsequent to the hearing, the Department issued its decision which sustained the protest and denied the application.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) the determination of the Department that issuance of the license would add to an undue concentration of licenses under Business and Professions Code §23958 is unsupported by the findings and the evidence; (2) even if that determination were correct, the decision is contrary to law in its application of Business and Professions Code §23958.4, applying a stricter standard than that set forth in the statute; and (3) alternatively, a remand is required because there is relevant evidence, which in the exercise of reasonable diligence could not have been produced at the hearing.

DISCUSSION

I

Appellant contends the Department erred in determining that issuance of this license would add to an undue concentration of licenses. Therefore, the issue of public convenience or necessity did not have to be addressed.

Section 23958 requires the Department to "deny an application for a license . . . if issuance would result in or add to an undue concentration of licenses, except as provided in Section 23958.4." Section 23958.4, subdivision (a), states that "'undue concentration' means the case in which the applicant premises for an original or premises-to-premises transfer of any retail license are located in an area where" there exist greater than average numbers of reported crimes or certain specified ratios of licenses to population.[2] It is undisputed that the census tract in which the premises is located is an area of undue concentration, containing 23 on-sale retail licenses where the statutory computation allows only 6 such licenses [RT 31].

Appellant already holds an on-sale retail license (type 41) at the premises, one of the 23 on-sale licenses in the census tract.[3] Simultaneous with the issuance of the type 47 license to appellant, appellant would surrender to the Department its present type 41 license. Issuance of the type 47 license would cause no change in the number of on-sale retail licenses in the census tract and, therefore, could not "result in or add to" an undue concentration of licenses.

Since issuance of the applied-for license in this case would cause no change in the existing undue concentration of licenses, the ALJ erred in determining that "Evidence established that issuance of the license would add to an undue concentration

---

[2] "Undue concentration" in the present case was determined pursuant to §23958.4, subdivision (a)(2), which provides;

> "As to on-sale retail license applications, the ratio of on-sale retail licenses to population in the census tract or census division in which the applicant premises are located exceeds the ratio of on-sale retail licenses to population in the county in which the applicant premises are located."

[3] Section 23958.4 does not differentiate between type 41 and type 47 licenses in computing the applicable ratios. Subdivision (a)(2) simply refers to "on-sale retail license applications" and subdivision (c)(5)(B) defines on-sale retail licenses as "All retail on-sale licenses, except [types 43-46, 53-56, and 62]."

of licenses. (See Findings of Fact VII.)" (Det. of Issues IV.)

II

Appellant contends the ALJ erred in using a standard that was stricter than that called for under §23958.4. Because there would be no increase in undue concentration by issuance of this license (see discussion above), the §23958.4 requirement that the applicant show public convenience or necessity does not apply. Even if it did, the ALJ used the wrong standard here.

In the next-to-last paragraph of Determination of Issues IV, the ALJ stated:

> "There is an insufficient amount of evidence to support a finding that public convenience and necessity requires an additional type 47 license based on the number of visitors to the area who request alcoholic beverages. The census tract 6210.02 has a population of 5,585 of which 23 on-sale licenses exist. Only six licenses are required or allowed for the population. Clearly, public convenience and necessity does not require another type 47 license for the existing residents and tourists."

First, the requirement is with regard to public convenience ***or*** necessity, not public convenience ***and*** necessity. The latter is clearly a stricter requirement. Second, the applicant only needs to show that public convenience or necessity ***would be served*** by issuance of the license, not that public convenience or necessity ***requires*** issuance of the license. This is also a stricter standard than is used in the statute.

III

Appellant contends, in the alternative, that the matter should be remanded to consider evidence which could not have been produced at the hearing, namely the decision of the City of Hermosa Beach, made nine months after the hearing, that issuance of the license would serve public convenience or necessity.

Section 23085 provides that

> "where the board finds that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before the department, it may enter an order remanding the matter to the department for reconsideration in the light of such evidence."

The statute generally contemplates evidence which exists at the time of the hearing, but was unknown or unavailable then. Evidence that comes into existence after the fact, such as the city's decision regarding this premises, would not usually come within the statute.

ORDER

The decision of the Department is reversed and remanded to the Department for reconsideration in accordance with the views expressed in this opinion.[4]

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

---

[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.