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COMMENTS

ALCOHOLIC BEVERAGE CONTROL: The Department, The Appeals Board, and Judicial Review

By RICHARD W. JOHNSON*

Introducing the Problem

In the state of California the Beverage Department determines whether or not one shall have the right to sell alcoholic beverages.¹ The problems involved in the Department's decisions are typical of those of all administrative bodies performing quasi-judicial, quasi-legislative functions. The demands of modern government are such that agencies of this type are more and more utilized to bridge the gap between the regulatory needs of the community and the right of the individual to pursue the enterprise of his choice. The importance of this function thereby becomes evident.

Prior to January 1, 1954, the issuance and control of liquor licenses was governed by the State Board of Equalization (hereinafter referred to as the State Board). On that date a state constitutional amendment, section 22, article XX, became operative. It provided for the creation of the Department of Alcoholic Beverage Control (hereinafter referred to as the Department) to assume the powers and duties of the State Board of Equalization, as well as the Alcoholic Beverage Control Appeals Board (hereinafter referred to as the Appeals Board) to which decisions of the Department could be appealed. It further provided that the decisions of the Appeals Board were subject to judicial review.

The state legislature, in conformity therewith, enacted sections of the Business and Professions Code² implementing the constitutional amendment.

A hypothetical example will best illustrate the new procedure.

X applies for a license at the local Office of the Department. A Department investigator views the premises and submits his recommendation. If the recommendation is favorable and adopted, the license is issued without further inquiry.

If the investigator submits an unfavorable report or a protest is filed by anyone who feels its issuance would be contrary to public welfare and good morals, X may petition for a license or have a hearing on the protest. A petition or hearing is before an officer of the Department and X may be represented by counsel. At this hearing the Department must determine

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¹ The right to sell intoxicating liquor is not one of the rights growing out of citizenship in the United States. *Wylie v. State Board of Equalization of California*, 21 F. Supp. 604 (S.D. Cal. 1938).

² CAL. BUS. & PROF. CODE §§ 23000-25762.

from the evidence if granting the license would be contrary to the good morals of the community.

If X is denied the license, his *only* appeal is to the Appeals Board.³ At this hearing the Appeals Board will review the order of the Department for abuse of discretion and errors of law, and the Board will decide whether there is substantial evidence to support the denial.⁴ Both X and the Department may be represented by counsel. If the Appeals Board reverses the order of the Department, the Director of the Department or any aggrieved party may have the Appeals Board's order *judicially* reviewed.⁵

It is at this point that a problem appears because the constitution does not spell out the scope of *court* review of orders of the Appeals Board. The result has been confusion in the courts. For example, the District Court of Appeal, Third District,⁶ interpreted the constitutional amendment to provide that, in a mandate proceeding, the decision of the *Department* should be reviewed; just as the supreme court would review a decision of the superior court, *i.e.* to determine if there is substantial evidence to support the Department's decision.

The District Court of Appeal, Second District,⁷ reached a contrary conclusion by interpreting the same amendment to compel court review of the *Appeals Board's decision* to determine if it is supported by substantial evidence.

Both courts agreed that the Department performs a legislative function in determining whether or not the issuance of a particular license would be contrary to the public welfare.

It is conceded that the Appeals Board exercises a judicial function in reviewing decisions of the Department for abuse of discretion, errors of law, and substantial evidence. The crucial difference of opinion is whether the Appeals Board shares with the Department its peculiar *legislative* function of determining the public policy toward the issuance or continuance of a particular license. The beginning of the answer to this question is found in the California constitution which grants the Department and the Appeals Board their power.

Functions of the Beverage Department

The constitution provides that:⁸

The department of Alcoholic Beverage Control shall have the *exclusive power*, except as herein provided and in accordance with the laws enacted by the Legislature, to license the manufacture, importation and sale of alcoholic beverages in this State. . . . The department shall have the power, in its

³ CAL. CONST. art. XX, § 22; CAL. BUS. & PROF. CODE § 23091.

⁴ CAL. CONST. art. XX, § 22.

⁵ CAL. BUS. & PROF. CODE § 23091.

⁶ 329 P.2d 758 (Cal. 1958), *vacated sub nom.* Martin v. Alcoholic Beverage Control Appeals Board, 52 Cal. 2d, 340 P.2d 1 (1959).

⁷ 330 P.2d 642 (Cal. 1958), *vacated sub nom.* Martin v. Alcoholic Beverage Control Appeals Board, 52 Cal. 2d, 341 P.2d 291 (1959).

⁸ CAL. CONST. art. XX, § 22.

discretion, to deny, suspend or revoke any specific alcoholic beverage license if it shall determine for *good cause* that the granting or continuance of such license would be contrary to public welfare or morals. (Emphasis added.)

The Department's power to issue or revoke a license is then based on whether the Department determines, for good cause, that the issuance or continuance of the license is contrary to public welfare or morals.

The Department succeeds to all the powers, duties, purposes, responsibilities and jurisdiction of the State Board.⁹ So cases construing the State Board's powers are in point.

The State Board had broad discretionary power to control the issuance or continuance of licenses.¹⁰ The extent of this power was passed upon in *Covert v. State Board of Equalization*.¹¹ The question presented was whether the premises was a bona fide eating place. The court pointed out that there were no legislative requirements for this determination and that the Board has the sole power to set the determining standards. The State Board had this legislative function in *setting* the standards but this function was not absolute and its discretion had to be exercised in accordance with the law. The supreme court in *Stoumen v. Reilly*¹² stated that when the State Board denies or revokes a license for good cause the decision should not be arbitrary and should be based on sufficient evidence.

The decision of the State Board to issue or revoke the license was *final*, except that the decision was subject to judicial review for excess of jurisdiction, errors of law, abuse of discretion, and insufficiency of evidence.¹³ But, the State Board determined exclusively what was "good cause," *i.e.* the public policy. Then review was on whether the facts of a given case came within their determination of what was good cause.

Since the Department succeeds to the State Board's functions, the same rules should apply to the jurisdiction of the Department—to determine exclusively what is "good cause" and whether the facts come within this cause.

Of course, *judicial* review of Department decisions would be the same review given the State Board decisions as previously stated.

Functions of the Appeals Board

It appears, however, that the legislative intent was to change the scope of review given the State Board decisions because the constitutional amendment that established the Department simultaneously established an Appeals Board with the power to review Department decisions.

This power to review is expressed as follows:¹⁴

⁹ CAL. BUS. & PROF. CODE § 23051.

¹⁰ *Irvine v. State Board of Equalization*, 40 Cal. App. 2d 280, 104 P.2d 847 (1940).

¹¹ 29 Cal. 2d 125, 173 P.2d 545 (1956).

¹² 37 Cal. 2d 713, 234 P.2d 969 (1951).

¹³ *Covert v. State Board of Equalization*, *supra* note 11.

¹⁴ CAL. CONST. art. XX, § 22.

Review by the board of a decision of the department shall be limited to the questions whether the department has proceeded in the manner required by law, *whether the decision is supported by the findings, and whether the findings are supported by substantial evidence in the light of the whole record*. . . . The board shall enter an order either affirming or reversing the decision of the department, the board may direct the reconsideration of the matter *in the light of its order* and may direct the department to take such further action as is specially enjoined upon it by law, but the order shall not limit or control in any way the discretion vested by law in the department. Orders of the board shall be subject to judicial review upon petition of the director or any party aggrieved by such order. (Emphasis added.)

This general grant of power is particularized in the Business and Professions Code.¹⁵ There, the Appeals Board is given the express power to set their own rules for appeals and other matters within their jurisdiction as may be required.¹⁶ A subsequent section provides that the Appeals Board make its determination from the record of the Department and upon briefs which may be filed by the parties.¹⁷

The constitution seemingly provides that the Appeals Board in its appellate proceedings is an administrative tribunal empowered to exercise a discretion similar to that of the Department in its original consideration of a particular case.

Consistent with this view is the fact that procedurally the Appeals Board hearing is similar to a "trial de novo." At this hearing both parties may question and re-examine all the witnesses, including the Department's investigating officer.¹⁸ The Appeals Board apparently is to *re-evaluate* the evidence.¹⁹

The Appeals Board determines if there is substantial evidence in light of the *entire* record to support the Department's decision. This was not a review power that the superior court had in reviewing the old Board decisions.²⁰

The existence of some substantial discretion in the Appeals Board is further evidenced by the fact that judicial review lies only from decisions of the Appeals Board.²¹ And the Appeals Board acting in its quasi-judicial capacity (distinguish legislative discretion) is the final "administrative" body to pass on the facts.

However, the constitutional amendment states that the Appeals Board order "shall not limit or control in any way the discretion vested by law in the department." This seems inconsistent with the vast powers of review

¹⁵ CAL. BUS. & PROF. CODE §§ 23075-23086.

¹⁶ CAL. BUS. & PROF. CODE § 23077.

¹⁷ CAL. BUS. & PROF. CODE § 23083.

¹⁸ Brief for Appellant, Appendix, p. 1. *Munro v. Alcoholic Beverage Control Appeals Board*, *supra* note 6.

¹⁹ *Ibid.*

²⁰ *Covert v. State Board of Equalization*, *supra* note 11.

²¹ CAL. CONST. art. XX, § 22; CAL. BUS. & PROF. CODE § 23085.

given the Appeals Board in the amendment read as a whole. This language may be an unconscious carry-over from cases judicially reviewing State Board decisions.²² In those early State Board cases, there was no judicial re-evaluation of the evidence by the superior court.²³

The Appeals Board does apparently re-evaluate the evidence upon which the Department's decision is based.²⁴ Does this mean that the Appeals Board is empowered to re-evaluate the public policy indicated by the Department's decision? And, since the Appeals Board's decision is itself subject to review by the superior court in a mandate proceeding, the further question arises: Whose discretion (*i.e.* the Department's or the Appeals Board's) is under attack in the superior court proceeding?

If it should be decided that the Appeals Board has no "discretion" in its review, then what valuable function is there for the Appeals Board to perform?

Munro Case, Third District

In *Munro v. Alcoholic Beverage Control Appeals Board*²⁵ the Department denied a license on the grounds, alleged in a protest, that the area was residential and the parking facilities were not adequate.

The Appeals Board reversed. They found there were adequate parking facilities, that the area was only semi-residential, and that the issuance of the license would not be contrary to public morals. (In effect then the Appeals Board made a quasi-legislative determination regarding the policy of issuing a license in this case.) The Department filed and got a writ of mandamus in the superior court directing the Appeals Board to reverse its decision. Thereafter, the District Court of Appeal, Third District, first reversed the superior court,²⁶ but then on rehearing reinstated the decision of the Department.²⁷

In first affirming the decision of the Appeals Board and the subsequent reversal of its own decision, the district court stated that the decision of the Department was under attack in a mandate proceeding (*viz.* not the decision of the Appeals Board.) Judicial review is limited, it was declared, to determining whether or not the decision of the Department is supported by substantial evidence in the light of the entire record.²⁸

Since the constitution provides that the Appeals Board reviews the Department's decisions,²⁹ it seemingly follows that the superior court should review the Appeals Board decision rather than the Department's decision.

The District Court further stated:³⁰

²² *Irvine v. State Board of Equalization*, *supra* note 10.

²³ *Ibid.*

²⁴ CAL. BUS. & PROF. CODE § 23091.

²⁵ *Munro v. Alcoholic Beverage Control Appeals Board*, *supra* note 6.

²⁶ *Munro v. Alcoholic Beverage Control Appeals Board*, 325 P.2d 533 (Cal. 1958).

²⁷ *Munro v. Alcoholic Beverage Control Appeals Board*, *supra* note 6.

²⁸ *Id.* at, 329 P.2d at 760.

²⁹ CAL. CONST. art. XX, § 22.

³⁰ *Munro v. Alcoholic Beverage Control Appeals Board*, 329 P.2d 758, 760 (Cal. 1958).

The rule of law applicable to the review of the decisions of the Department of Alcoholic Beverage Control is stated in *Brice v. Department of Alcoholic Beverage Control* . . . as follows:³¹

"* * * That agency is a constitutional agency that has succeeded to some of the powers of the State Board of Equalization in alcoholic beverage control matters. Being an agency upon which the constitution has conferred limited judicial powers, its decisions on *factual matters* must be affirmed if there is substantial evidence to support them. . . ." Thus, the Appeals Board was simply called upon to determine whether the *findings* of the department were supported by substantial evidence in the light of the whole record. *It was not permitted to exercise an independent judgment on the facts as contended for by appellant.* (Emphasis added.)

If the district court was attempting to distinguish between factual matters and findings then, of the two concepts, good cause is more in the nature of a finding. That is, "good cause" is not a "factual matter." One may say good cause is either present in a given situation or not, but it is a judgment from the facts and it is not itself an event.

Munro Case, Second District

The District Court of Appeal, Second District, disagreeing with the Third District, recognized this line of reasoning in a similar situation.

In *Munro v. Department of Alcoholic Beverage Control Appeals Board*³² the Department denied the transfer of a liquor license. The Appeals Board reversed the decision of the Department by concluding that the failure to mention an arrest in another state, when filing for a license transfer, does not constitute "good cause" for denial of a transfer of a license under section 22, article XX of the constitution. Such a decision is clearly an exercise of a quasi-legislative power.

Upon appeal, the superior court reviewed the Department's decision and found the Appeals Board decision to be arbitrary and a substitution of its discretion for that of the Department.

In reversing this mandate order of the superior court, the district court said:³³

The question here presented is *not* whether the decision of the department is supported by the findings or whether the findings of the department are supported by substantial evidence in the light of the whole record. *It is the function of the appeals board, acting in a quasi-judicial capacity, to determine those questions.* The appeals board reviews the decision of the department; *the court in a mandate proceeding reviews the order of the appeals board.* The question before the superior court was whether the appeals board abused *its* discretion in reversing the decision of the department . . . (Emphasis added.)

³¹ *Brice v. Department of Alcoholic Beverage Control*, 153 Cal. App. 2d 315, 320, 314 P.2d 807, 810 (1957).

³² *Munro v. Alcoholic Beverage Control Appeals Board*, *supra* note 7.

³³ *Id.* at 647.

This opinion clearly stated that the Appeals Board had some discretion, and that the superior court, in a mandate proceeding, or the district court, on appeal therefrom, is without authority to reweigh the evidence.³⁴ And, the opinion apparently recognized that the Appeals Board may reweigh the evidence and use its discretionary power to decide the matter in the light of the entire record. That is, the Appeals Board is to exercise its own discretion in determining what is "good cause" for the denial of a specific license. If such is the case, the Appeals Board is obviously not limited to the customary scope of appellate review.

The Supreme Court Answer to the Conflict

The supreme court granted hearings in both *Munro cases*.³⁵ In each of them the decisions of the respective superior courts were reinstated. This would indicate that the superior court is to review the Department's decisions, ignoring any exercise of discretion in the Appeals Board.

Taken on its face this reduces the hearing before the Appeals Board to an administrative detour or blind alley that must be pursued in the process exhausting administrative remedies. Under this view the hearing becomes a numb proceeding with form and no substance; it would only prolong the judicial process and the Appeals Board would have no purpose except to act as a pre-trial hearing for the appellate department of the superior court.

The supreme court, aware of this criticism, stated:³⁶

We therefore conclude that the judicial review here was properly directed at the decision of the Appeals Board reversing the decision of the Department. In this connection, however, it would appear obvious that any judicial determination of whether the Appeals Board had exceeded its "limited" powers would *incidentally* require a review of the decision of the Department and of the record upon which the Department's decision had been based. (Emphasis added.)

The connection between the two administrative courts seems to be more than "*incidental*." The writer believes that the supreme court has done no more than adopt the decision of the third district *Munro case* (viz. recognizing no discretion in the Appeals Board).

As the supreme court sees it, the function of the Appeals Board in deciding whether the findings are supported by substantial evidence in the light of the whole record, is limited to an application of the substantial evidence rule.³⁷

In view of our conclusion that the 1954 amendment gave the Appeals Board no greater powers than those previously exercised by the *courts*, it follows

³⁴ 5501 Hollywood, Inc. v. Department of Alcoholic Beverage Control, 155 Cal. App. 2d 748, 318 P.2d 820 (1957).

³⁵ *Martin v. Alcoholic Beverage Control Appeals Board*, *supra* note 6; *Martin v. Alcoholic Beverage Control Appeals Board*, *supra* note 7.

³⁶ *Martin v. Alcoholic Beverage Control Appeals Board*, 52 Cal. 2d _____, _____, 340 P.2d 1, 5 (1959).

³⁷ *Id.* at _____, 340 P.2d at 7.

that the same rule is applicable to the review of the Department's decision by the Appeals Board. (Emphasis added.)

So that there could be no doubt regarding the existence of any faint trace of discretion in the Appeals Board, the supreme court further stated:³⁸

Even if it be conceded that reasonable minds might differ as to whether granting would or would not be contrary to public welfare, such concession merely shows that the determination of the question falls within the broad area of discretion which the *Department* was empowered to exercise. (Emphasis added.)

In the hearing on the Second District case the court was consistent in this view.³⁹

It follows that if the Department makes a finding that the granting of the application "would be contrary to public welfare," and *there is substantial evidence to show "good cause"* for such determination, then the finding of the Department must be sustained. (Emphasis added.)

Proposed Functions for the Appeals Board or Any Other Administrative Appellate Review Body

The supreme court's decision makes the function of the Appeals Board a mere duplication of the superior court hearing.⁴⁰ On the other hand, if the proposal of the Second District Munro case was strictly followed, review by the Appeals Board would be a duplication of the Department's hearing.⁴¹ Since neither of these extremes leaves the Appeals Board any useful administrative function, its review power must be found somewhere between that of the Department and the superior court.

The purpose of the Appeals Board is not questioned by anyone. It was established to prevent the Department from acting arbitrarily in controlling the sale of beverages. This purpose cannot be accomplished if the Appeals Board must apply the "substantial evidence rule." "Good cause" is a legislative or policy consideration. *Some* facts can always be found to support even the remotest direction of policy. Operating under the "substantial evidence" rule the Appeals Board would have to affirm the Department's decision if there were *any evidence* in the report that could sustain this policy decision. This test then leaves the Appeals Board helpless and unable to carry out its intended purpose.

The test utilized by the United States Supreme Court in testing the constitutionality of a state legislative act, to wit; "the rational legislator

³⁸ *Id.* at, 340 P.2d at 7.

³⁹ *Martin v. Alcoholic Beverage Control Appeals Board*, 52 Cal. 2d,, 341 P.2d 291, 294 (1959).

⁴⁰ The court justifies the duplication by saying that it gives applicants another review, therefore many are satisfied and do not resort to the over crowded judicial courts. *Martin v. Alcoholic Beverage Control Appeals Board*, 52 Cal. 2d, 340 P.2d 1 (1959).

⁴¹ The court says it is following a strict interpretation of the constitutional amendment. *Munro v. Alcoholic Beverage Control Appeals Board*, *supra* note 7.

test" is similarly inadequate.⁴² Applying this test the Appeals Board could rarely reverse a Department decision because a rational Department *could* reasonably find *some* danger to the public morals in *any* situation where alcoholic beverages are sold to the public. Therefore, if the Appeals Board is to have any substantive purpose, a standard is needed whereby one legislative body reviews the legislative acts of another legislative body—not a strict *judicial* review.

To understand better the writer's proposal consider these two basic premises:

- (1.) The function of the trier of the facts is to determine *which facts* are material and relevant.
- (2.) The *final* legislative body produces the finished legislative product.

The Department is the administrative trial court sitting without a jury empowered with discretion to determine the facts, then in light of these facts render their decision regarding the policy involved in the particular case. The second step is the first legislative decision.

Then if the applicant appeals the decision of the Department, the Appeals Board (the higher quasi-legislative body) must make the *final* determination of the public policy involved regarding the continuance or issuance of this particular license.

The Department's decision should raise a presumption that good cause for the denial is established and the denial warranted. This would place the entire burden on the applicant to show that the decision of the Department was arbitrary and there would be no public detriment if the license were continued or issued. But the higher quasi-legislative body (*viz.* the Appeals Board) must have the *final* word on the legislative determination.

Of course the *courts* are ill prepared to formulate legislative standards, for this, under our doctrine of separation of powers, has traditionally been left to the legislature. But since the court must interpret the functions of the Department and the Appeals Board from the constitutional amendment, it is unfortunate that the supreme court did not recognize the type of function the Appeals Board should perform. If it had been recognized that this final legislative determination should be made by the Appeals Board, the courts could have handled the situation without the need of additional legislation. They could have adopted the view of the Second District Munro case, and in the tradition of Anglo-American Law, let the Appeals Board determine each new situation—case by case. As things now stand, only legislative amendment can provide any real substance into the function of the Alcoholic Beverage Control Appeals Board.

⁴² The test is whether a rational legislator could reasonably find that the statute will accomplish a proper state control. *Olsen v. Nebraska*, 313 U.S. 236, 246 (1941).