

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

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| BONG OK LEE |) | AB-6573m |
| dba 8 Ok Liquor |) | |
| 749 S. Western Ave. |) | File: 21-275389 |
| Los Angeles, CA 90005 |) | Reg: 95031737 |
| Appellant/Licensee, |) | |
| |) | Administrative Law Judge |
| v. |) | at the Dept. Hearing: |
| |) | [none] |
| DEPARTMENT OF ALCOHOLIC |) | |
| BEVERAGE CONTROL, |) | Date and Place of the |
| Respondent. |) | Appeals Board Hearing: |
| |) | May 1, 1996 |
| |) | Los Angeles, CA |

Bong Ok Lee, doing business as 8 Ok Liquor (appellant), appealed from an order of the Department of Alcoholic Beverage Control¹ which vacated a prior stay from a decision² revoking appellant's off-sale general license with the penalty stayed for a period of 180 days to allow transfer of the license to other persons, for violating a condition or conditions of his license, contrary to the universal and generic public welfare and morals provisions of the California Constitution, Article XX, §22, and in accordance with the Business and Professions Code §§23804 and 24200(a).

¹The order of the department dated September 29, 1995, is set forth in the appendix.

²The decision dated March 2, 1995, and the stipulation and waiver form dated December 9, 1994, upon which the March 2, 1995 decision was predicated, are set forth in the appendix.

Appearances on appeal included appellant Bong Ok Lee, appearing through his counsel, Andreas Birgel, Jr.; and the Department of Alcoholic Beverage Control, appearing through its chief counsel, Kenton P. Byers, and senior counsel, David B. Wainstein.

FACTS AND PROCEDURAL HISTORY

On December 9, 1994, appellant signed a stipulation and waiver form with the department, waiving appellant's right of appeal and consenting to having his license revoked, with the penalty stayed for 180 days to allow the transfer of the license to another person or persons. Thereafter, on March 2, 1995, the department issued its decision under the stipulation and waiver form, revoking the license and staying the execution in accordance with the terms of the stipulation and waiver form.

On September 29, 1995, the department entered an order vacating the stayed penalty, and imposed the penalty of revocation, as appellant had failed to transfer his license within the 180 days allowed. Appellant thereafter filed a timely notice of appeal.

Subsequently, the department filed a motion to dismiss the appeal as untimely, arguing that the March 2, 1995, decision was the only appealable decision--and the statutory time for an appeal had run, and the September 29, 1995, order of revocation was only a ministerial act.

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The California Constitution states that any aggrieved person may appeal a

decision of the department revoking (or suspending) a license. Whether the department calls the revocation document an "order" or a "decision," it is the same. The board has used the case of Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (1987) 195 Cal.App.3d 812, 817, 240 Cal.Rptr. 915--a case where the department filed a motion to dismiss an appeal concerning the proper fees due for a transfer of a license, as authority to consider any action by the department which would substantially alter the rights of a licensee. Therefore, the appeals board may review any action by the department which would adversely affect the license, if an appeal is timely made. Review will be only to that decision where an appeal was taken within the time provided by law--the order of September 29, 1995.

During that period which the board can review, appellant opened an escrow with a buyer (dated 4/17/95). The department notified appellant that a problem (a new violation) had arisen in the operation of the premises (5/2/95). Appellant cancelled the escrow (dated 5/10/95). The department initiated a new accusation (5/16/95).

By filing a new accusation on May 16, 1995, the department effectively foreclosed any transfer of the license to a buyer, who had to be informed that there was a 180-day limit on the time to transfer, and that the new accusation, if processed to completion, could terminate appellant's right to sell and transfer that license. Rhetorical arguments notwithstanding, the department created (properly under the law) a situation in which appellant realistically could not conform to the probationary terms which the department instituted, having lost the essential power to sell the license free

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of impediments.³ The consideration is not the technical rule of law, but the fundamental law of substantial justice.

While the department may proceed against any license as it so chooses, it may not do so in such a manner as to thwart substantial fair play and justice. The department may not foreclose appellant's right to conform to the terms of his or her probation, and yet execute penalties because appellant failed to so comply.

CONCLUSION

We acknowledge that the department may proceed with its duties under the law as to appellant's license. The department's motion to dismiss the appeal is denied. The matter will proceed as calendared.

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

³While it is common knowledge that an accusation filed against a license must be resolved before any transfer of that license would be approved (attested to by the department's counsel in many proceedings before the board), the board has not found official statements to that effect.

We have reviewed the department's Instructions, Interpretations and Procedures manual (Pages P24.1, 24.4, 24.12, 111.1, 111.2, and 111.3) which essentially notes that accusations filed during any transfer of the license are to be carefully noted for supervisory review after the investigation process had been concluded, and that in rule 65 cases, penalties may be imposed on a newly transferred license where the licensee is the same person.