

ISSUED SEPTEMBER 11, 1998

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

Edwardo Ruggieri	)	AB-6948
dba Money Tree	)	
10149 Riverside Drive	)	File: 47-322053
Toluca Lake, CA 91602,	)	Reg: 97039726
Appellant/Licensee,	)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Rodolpho Echeverria
	)	
DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	July 8, 1998
	)	Los Angeles, CA
	)	

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Edwardo Ruggieri, doing business as Money Tree (appellant), appeals from a decision of the Department of Alcoholic Beverage Control<sup>1</sup> which revoked his on-sale general public eating place license, but stayed the revocation for three years, and suspended his license for 10 days and indefinitely thereafter until appellant provides satisfactory proof to the Department that the licensed premises are being regularly and in a bona fide manner used and kept open for the serving of meals to guests, have suitable kitchen facilities, and are in full compliance with Business and

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<sup>1</sup>The decision of the Department, dated September 18, 1997, is set forth in the appendix.

Professions Code §23038, for appellant serving alcoholic beverages other than beer at a time when the premises were not regularly and in a bona fide manner used and kept open for the serving of meals, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from violations of Business and Professions Code §§23038 and 23396.

Appearances on appeal include appellant Edwardo Ruggieri, appearing through his counsel, Louis Mittelstadt, and the Department of Alcoholic Beverage Control, appearing through its counsel, David Wainstein.

#### FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on November 6, 1996. Thereafter, the Department instituted an accusation against appellant charging that he was selling alcoholic beverages other than beer at a time when there were no meals being served as required by his license.

An administrative hearing was held on July 28, 1997, at which time oral and documentary evidence was received. Testimony was presented by two Department investigators concerning their discovery of the violation. On several different occasions, investigators entered the premises and were served mixed drinks, but were told the kitchen was closed and that no food was available. No patrons were seen eating and the tables were not set for dining. One investigator inspected the kitchen and found a stove and utensils, but no refrigerator, freezer, or food.

Appellant testified concerning the reason meals were not being served at that time. He said that his landlord received an Order to Comply (Exh. A) from the Los Angeles Department of Building and Safety indicating that the kitchen on the premises was not in compliance and needed to be corrected. Appellant testified that the repairs were done and inspected, and meals were again served beginning sometime in March 1997.

Subsequent to the hearing, the Department issued its decision which determined that the allegations of the accusation were proven.

Written notice of the opportunity to file briefs in support of the appellant's position was given on March 24, 1998. No brief has been filed by appellant. We have reviewed the notice of appeal and have found insufficient assistance in that document which would aid our review.

#### DISCUSSION

The Appeals Board is not required to make an independent search of the record for error not pointed out by appellant. It was the duty of appellant to show to the Appeals Board that the claimed error existed. Without such assistance by appellant, the Appeals Board may deem the general contentions waived or abandoned. (Horowitz v. Noble (1978) 79 Cal.App.3d 120, 139 [144 Cal.Rptr. 710] and Sutter v. Game! (1962) 210 Cal.App.2d 529, 531 [26 Cal.Rptr. 880, 881].) A review of the transcript does not reveal any obvious issues that could be raised.

Appellant's counsel, although originally indicating that he would waive oral argument, appeared at the hearing and asked that the Appeals Board modify the penalty. The Department, which had no notice that appellant would appear at the oral argument, had no opportunity to prepare a formal response to appellant's contention, but Department counsel responded orally at the hearing.

Appellant's counsel made assertions of fact at oral argument. The Appeals Board is not a trier of fact, and is limited to consideration of matters in the record. In any case, the Appeals Board is not empowered to modify a penalty imposed by the Department. It is the Department that is vested with the discretion to impose a penalty, and the Appeals Board will not disturb that penalty in the absence of an abuse of discretion on the part of the Department. No abuse of discretion having been alleged, much less proven, we must sustain the action of the Department.

#### CONCLUSION

The decision of the Department is affirmed.<sup>2</sup>

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

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<sup>2</sup>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 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.