

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

HIROKO Y. FORREST	)	AB-7174
2765 Wagon Wheel Road)	
Oxnard, California 93030,	)	File: 41/47-127791 Reg:
Appellant/Licensee,	)	None
)	
v.	)	Administrative Law Judge
	)	at the Dept. Hearing:
	)	None
)	
DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	February 3, 1999
	)	Los Angeles, CA
_____)	

Hiroko Y. Forrest appeals from a decision of the Department of Alcoholic Beverage Control¹ which denied her application for license fees which she claims were paid in error.

Appearances on appeal include appellant Hiroko Y. Forest, appearing through her counsel, Kenneth I. McDonald, and the Department of Alcoholic Beverage Control, appearing through its counsel, Nicholas R. Loehr.

FACTS AND PROCEDURAL HISTORY

¹The "decision" of the Department which appellant seeks to review is set forth in a letter (Exhibit F) dated June 16, 1998, from Nicholas R. Loehr, Staff Counsel, Department of Alcoholic Beverage Control, to Kenneth L. McDonald, counsel for appellant. In a subsequent letter to McDonald dated July 14, 1998, Loehr describes his earlier letter as "a final decision of the Department of Alcoholic Beverage Control."

Appellant was issued an on-sale beer and wine public eating place license (hereinafter “on-sale beer and wine license”) (type 41) in 1983. Approximately one month later, she was issued an on-sale general public eating place license (hereinafter “on-sale general license”) (type 47), for the same business, operated at the same location. Apparently in anticipation of the issuance of the on-sale general license, appellant, on January 10, 1983, executed a request to surrender the on-sale beer and wine license, effective upon issuance of the on-sale general license.² For the next fifteen years, according to appellant, she was billed for and paid, and the Department accepted, the fees required to maintain both licenses. Appellant now seeks to recover the license fees paid to the Department in connection with the on-sale beer and wine license, claiming that she did not know until late 1997 or early 1998 that the on-sale general public eating place license rendered it unnecessary that she also have the on-sale beer and wine license.

Appellant’s claim was initially presented to the Department by a January 21, 1998, letter from her attorney, Kenneth L. McDonald.³ An exchange of letters followed, initially between McDonald and Judy Gabrielli, a Department licensing officer, and concluding with exchanges between McDonald and Nicholas Loehr, Department staff counsel in its Sacramento office.

² In hindsight, it seems probable that, had appellant specified on the form that the on-sale beer and wine license be canceled upon issuance of the on-sale general license, the events giving rise to this appeal would not have occurred.

³ Since there was no formal administrative hearing, there is, of course, no formal record. Appellant has attached to its brief what appear to be copies of all of the correspondence between appellant and the Department leading up to the Department’s decision to deny appellant’s claim. Since we have been given no reason to doubt the authenticity of these documents, and since they do provide helpful background, we will resort to them to the extent necessary in order to consider this appeal.

The Department ultimately rejected appellant's refund claim. Its letter stated that the request was untimely under Government Code §905, asserting that none of the exceptions spelled out in that section were applicable, and rejecting appellant's contention that Government Code §13140, et seq., controlled. The Department letter also argued that the payments made over the years could not be characterized as either erroneous or excessive.

Appellant now argues that, since there is nothing in the Alcoholic Beverage Control Act authorizing the refund of erroneous or excessive payments, her claim is governed by Government Code §13143, which, in pertinent part, provides:

“Whenever any law which provides for fees or payments to a state agency does not authorize, as provided in this article, the refund of erroneous or excessive payments thereof, refunds may be made by the state agency which collected the fee or payment of any or all amounts received by the state agency in consequence of error, either of fact or law, as to:

“(a) The proper amount of such fee or payment;

“(b) The necessity of making such payment or making or securing a permit, filing, examination or exception. ... “

Government Code §13142 provides that a refund is not authorized in certain circumstances, one of which is where the person making the payment has, before or after the issuance of a permit, exercised or enjoyed, or was not prevented by law from exercising or enjoying, the rights and privileges conferred by such permit. Appellant argues that this cannot apply because, under Department Rule 65, the surrendered license was revoked by operation of law once a year passed and it had not been transferred or reactivated.

At our request, the parties filed additional briefs addressing the question whether this Board had jurisdiction to hear this appeal, which involves appellant's claim that she

is entitled to a refund of fees mistakenly paid to the Department. A review of those briefs has fortified our conclusion that we do not have such jurisdiction.

The carefully circumscribed jurisdictional grant which empowers the Board to act is contained in article XX, §22 of the California Constitution:

“Where any person aggrieved thereby appeals from a decision of the department **ordering any penalty assessment, issuing, denying, transferring, suspending or revoking any license** for ... the sale of alcoholic beverages, the board shall review the decision subject to such limitations as may be imposed by the Legislature. ...”

The Legislature, in the Alcoholic Beverage Control Act, Business and Professions Code §23000, et seq., has, consistent with the constitutional directive, authorized the Appeals Board “to exercise such powers as are vested in it by Section 22 of Article XX of the Constitution.” (Bus. & Prof. Code §23077).

Both appellant and the Department rely on a decision of the 2nd District Court of Appeal in Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (1987) 195 Cal.App.3d 812 [240 Cal.Rptr.915]. The issue in that case was whether the Appeals Board had jurisdiction to review the decision of the Department which determined the applicable fee for the transfer of certain Safeway licenses in connection with a corporate reorganization.

Appellant and the Department also quote, in their respective briefs, language from that decision reciting the provision of the California Constitution from which the Board derives its jurisdiction, as well as the court’s summary of the pertinent provisions of the Alcoholic Beverage Control Act further defining the Board’s jurisdiction:

“Consistent with the constitutional mandate, the Legislature has provided for appeal to the Appeals Board by ‘any person aggrieved by a final decision of the department.’ (section 23081.) ‘Decision’ is defined as ‘any determination of the department imposing a penalty assessment or affecting a license which may be appealed to the board under Section 22 of Article XX of the Constitution.’

(section 23080.) The scope of review by the board is limited to those questions specified in the Constitution. (section 23084.)”

The court rejected the Department’s argument that its decision setting the amount of fees which were required to be paid in connection with the license transfers was purely administrative, since no formal hearing had been conducted. Instead, the court observed that the Department’s decision was an adjudicatory or quasi-judicial action in nature, because it was a determination of specific rights in regard to a specific fact situation. Further, as the court noted, the case was one in which an aggrieved party was seeking review of a decision of the Department transferring a license, and, thus, within the constitutional grant of jurisdiction.

In this case, appellant has sought a license fee refund. To the extent the Department’s refusal to honor the claim can be said to be a decision, it does not strike us as one involving “a decision of the department ordering any penalty assessment, issuing, denying, transferring, suspending or revoking any license.”

Appellant’s counsel stresses language in the surrender form utilized by the Department in which appellant was required to acknowledge that the Department would cancel the license at the expiration of the one year period if it were not transferred or reactivated, none of which events occurred. Appellant seems to suggest that the absence of any action by the Department is itself an appealable decision in the context of her refund claim, asserting: “... Hiroko has appealed the decision of the Department regarding the question of whether or not her type 41 license was automatically revoked one year after it was voluntarily surrendered.” We find this argument unpersuasive. Inaction of the Department in neglecting to revoke a surrendered license, does not, in our opinion, translate into a final decision of the kind which invokes our constitutional

jurisdiction.

In this case, the Department refused a request for a refund of fees allegedly paid by mistake. Its decision was not a penalty assessment, nor was it a decision made in conjunction with the issuance, denial, transfer, suspension or revocation of any license. It was a decision not to return money paid to it. That is not the kind of decision specified in the California Constitution.

The Legislature has created certain procedures for the assertion of monetary claims against the State, which direct their filing with the State Board of Control. (See Government Code §§905.2 and 900.2.) We think this is the path appellant must follow to pursue her claim.

In light of our belief that this Board lacks jurisdiction to hear this matter, we express no views as to the merits or timeliness of the claim appellant has asserted.

ORDER

This matter is dismissed for lack of jurisdiction, in accordance with the foregoing comments.⁴

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
JOHN B. TSU, 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.