

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

AB-8403

File: 21-399702 Reg: 04058381

EZ STOP DELI, INC., dba EZ Stop Deli
2233 Shattuck Avenue, Berkeley, CA 94704,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: none

Appeals Board Hearing: July 7, 2005
Hearing on Motion to Dismiss: October 6, 2005
San Francisco, CA

ISSUED DECEMBER 13, 2005

The Department of Alcoholic Beverage Control filed a motion to dismiss the appeal of EZ Stop Deli, Inc., doing business as EZ Stop Deli (appellant), from a decision of the Department¹ suspending appellant's license for 25 days for a sale-to-minor violation. (Bus. & Prof. Code, § 25658, subd. (a).)

Appearances on appeal include appellant EZ Stop Deli, Inc., appearing through its counsel, Richard D. Warren, and the Department of Alcoholic Beverage Control, appearing through its counsel, John Peirce.

¹The decision of the Department, dated January 28, 2005, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on July 17, 2003. On November 23, 2004, the Department filed an accusation against appellant charging the unlawful sale of an alcoholic beverage to a police minor decoy on September 27, 2005, its second such violation in less than seven months. On January 19, 2005, Ali Ereikat, a corporate officer of appellant, signed a Stipulation and Waiver, agreeing to disciplinary action and waiving all rights to a hearing, reconsideration, and appeal. Ereikat indicated on the form that appellant wished to pay a fine in lieu of serving a suspension.²

On January 28, 2005, the Department issued a decision based on the Stipulation and Waiver. The decision orders a suspension of 25 days, but stays the beginning of the suspension to consider appellant's request to pay a fine in lieu of serving the suspension. At the end of the decision is a certification that the Department "adopted the foregoing as its decision in the proceeding therein described effective immediately."

On March 9, 2005, appellant filed a notice of rescission with the Department and a notice of appeal with the Appeals Board. The rescission states that appellant "rescinds and cancels its Stipulation and Waiver" and "requests a hearing on the merits." By letter dated March 10, 2005, the Department advised appellant that it did not accept the purported rescission "since the Stipulation and Waiver was adopted as the Decision of the Department on January 28, 2005."

The Appeals Board accepted the appeal and heard oral argument on the matter on July 7, 2005. On July 21, 2005, the Department filed its motion to dismiss the

²A copy of the Stipulation and Waiver is included in the appendix.

appeal, contending the Appeals Board does not have jurisdiction to hear the appeal because it was filed after the appeal period had ended.

DISCUSSION

Business and Professions Code section 23081 provides that an appeal to the Appeals Board may be filed "[o]n or before the tenth day after the last day on which reconsideration of a final decision of the department can be ordered." The Department has the power to order reconsideration of a decision, but that power expires "30 days after the delivery or mailing of a decision to respondent, or on the date set by the agency itself as the effective date of the decision if that date occurs prior to the expiration of the 30-day period." (Gov. Code, §11521, subd. (a).) Since the Department made the decision "effective immediately," its power to order reconsideration expired on the effective date of the decision, January 28, 2005.

Appellant had 10 days after January 28, or until February 7, 2005, to file an appeal. Appellant did not file its appeal until March 9, 2005. The appeal was clearly untimely.

The time for appealing a judgment is jurisdictional; once the deadline expires, the appellate court has no power to entertain the appeal. (*Hollister Convalescent Hosp., Inc. v. Rico* (1975) 15 Cal.3d 660, 674 [125 Cal. Rptr. 757, 542 P.2d 1349].)

(*Van Beurden Ins. Services, Inc. v. Customized Worldwide Weather Ins. Agency, Inc.* (1997) 15 Cal.4th 51, 56 [931 P.2d 344; 61 Cal.Rptr.2d 166].)

Because the appeal was not filed within the requisite time, the Board never acquired jurisdiction over the matter. Although the Department did not raise this issue until after briefing on the merits, oral argument, and submission of the appeal, a jurisdictional question such as this may be raised at any time during the proceedings.

The California Supreme Court has held that a court faced with an appeal that turns out to be untimely, "lacks all power to consider the appeal on its merits and must dismiss, on its own motion if necessary, without regard to considerations of estoppel or excuse." (*Hollister Convalescent Hosp., Inc. v. Rico, supra*, 15 Cal.3d at p. 674.) The Appeals Board never had legal jurisdiction in this matter, and the appeal must be dismissed.

ORDER

The appeal is dismissed.³

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

³This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 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 section 23090 et seq.