

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

AB-8478

File: 48-414630 Reg: 05059248

PAUL JORGE RODRIGUES CARVALHO dba Big Jorges Sports Bar
21628 Mission Boulevard, Hayward, CA 94541,
Appellant/Applicant

v.

CHARLES C. PLUMMER, Sheriff, Alameda County, and LINDA PRATT
Respondents/Protestants

and

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Stewart A. Judson

Appeals Board Hearing: July 6, 2006
San Francisco, CA

ISSUED OCTOBER 6, 2006

Paul Jorge Rodrigues Carvalho, dba Big Jorges Sports Bar, appeals from an order of the Department denying his application for the transfer of his on-sale general public premises license from 21110 Mission Boulevard, Hayward, California, to 21628 Mission Boulevard, Hayward, California.¹

Appearances on appeal include appellant Paul Jorge Rodrigues Carvalho, appearing through his counsel, Richard Harper; protestant Charles C. Plummer, Sheriff, Alameda County, appearing through his representative, Deputy Sheriff Margaret Shindelus, and protestant Linda Pratt, representing herself; and the Department of

¹ A copy of the Department's decision, dated August 19, 2005, is set forth in the Appendix.

Alcoholic Beverage Control, appearing through its counsel, Nicholas R. Loehr.

The Department denied the application on several grounds:

(a) Department Rule 66² and Business and Professions Code section 24013.5, subdivision (a),³ prohibit the issuance of a license for any premises for which a license has been revoked unless one year has elapsed from the time of revocation. Appellant filed his application for transfer on July 4, 2004. The previous license for this premises was ordered revoked on May 7, 2004, with the order stayed 180 days until November 7, 2004.

(b) Issuance of a license would violate a zoning ordinance adopted by Alameda County which requires a conditional use permit that appellant lacks.

(c) A new license could not be issued for the premises because the previous license was still in existence.⁴

² Department Rule 66 (4 Cal. Code Regs., §66) provides, in pertinent part:

No license shall be issued for any premises for which an application for a license has been denied, or at which a license has been revoked, for reasons pertaining to the premises, unless one year has elapsed from the date the order becomes final.

...

Notwithstanding the provisions of this rule, the department may at any time in the reasonable exercise of its discretion issue a license for any premises which was originally denied or at which a license has been revoked

³ Section 24013.5, subdivision (a), provides:

No license shall be issued for any premises for which a license has been denied or revoked, for reasons pertaining to the premises, unless one year has elapsed from the date the order becomes final.

⁴ The premises in question was licensed previously to Frankie Y.R. Woo, doing business under an on-sale general public premises license. The Department ordered this license revoked after Woo stipulated to having received stolen property at the

(continued...)

Appellant contends that none of the grounds relied upon by the Department are valid, and argues that the Department's interpretation of its Rule 66, the provisions of the Business and Profession Code, and the county zoning ordinance unfairly deny the owner of the property where the premises are located the opportunity to obtain a return on his investment.

Appellant argues that, once a year had elapsed from the date of the Department's order, the Department was obligated to consider his application even though it was filed only one month after the date of the order. Since a year has elapsed, he argues, the grounds that the Department relied upon for its initial denial no longer exist.

The Department, citing *Rice v. Alcoholic Bev. Control Appeals Bd.* (1978) 79 Cal.App.3d 372 [144 Cal.Rptr. 851], contends that the premature filing of the application warranted its automatic denial, and that it is not obligated to consider whether the grounds that led to the initial denial continue to exist.

Referring to the language in Rule 66 that reserved to the Department the discretion to issue a license under certain circumstances even though a year had not elapsed, the court in *Rice* stated:

The fact that this paragraph establishes an exception to the general rule, to be exercised in the department's discretion, if the reasons which caused the original denial no longer exist, demonstrates that the applicability of the first paragraph, requiring denial within one year, does not depend upon a determination that

⁴(...continued)
premises. The order of revocation was stayed for 180 days to permit the sale of the license, and the license was suspended for 20 days and indefinitely thereafter until transferred to a person or persons and location acceptable to the Department. Protests which had been filed against an application for the transfer of the license to another location were still pending at the time of the administrative hearing in the present matter.

conditions have not changed. Rather, it authorizes *automatic denial* within one year, to permit the department to protect against having to devote resources to handling unreasonably early reapplications. [79 Cal.App.3d at p. 377] [Emphasis supplied.]

Business and Professions Code section 24013.5, effective January 1, 1977, contains in subdivision (a) language identical to that in the first paragraph of Rule 66, but does not include the language of the rule reserving discretion in the Department to by-pass the one-year requirement. (See fn. 3, *ante*.) Since appellant's application was filed only one month after the decision ordering the revocation of the Woo license, it would appear that it was denied automatically, by virtue of the holding in *Rice, supra*.

Appellant also argues that the Department improperly applied retroactively the Alameda County zoning ordinance. The ordinance provides, in pertinent part:

A. Any establishment with a non-conforming alcoholic beverage sales use that does not retain the same type of retail liquor license within a license classification or does not remain in continuous operation with no substantial change in mode or character of operation or both shall lose its non-conforming status and shall not thereafter be reestablished, and any subsequent use of the premises shall be in conformity with all the regulations of this title.

B. 'Substantial change in mode or character' includes: (I) closure, abandonment, discontinuance or suspension of the business for more than 180 consecutive days ; (ii) ...; (iii) revocation or suspension of the license by the Department of Alcoholic Beverage Control for more than 30 days... .

The Department contended that the ordinance was not applied retroactively, citing Business and Professions Code section 23790. That section provides that a license may not be issued "for any premises which are located in any territory where the exercise of the rights and privileges conferred by the license is contrary to a valid zoning ordinance of any county or city." A premises claiming to be a non-conforming use must demonstrate that it retains the same type of retail liquor license within a license classification and remains in continuous operation with no substantial change in

mode or character of operation. The premises in question have been closed for more than a year, so cannot meet that requirement.

Finally, appellant contends that the Department's determination that a license cannot issue where there is already a license for the premises in question is without authority. Appellant cites no authority to the contrary, and we have no difficulty in seeing the illogical consequences which would flow if two separate licensees held licenses for the same premises.

We have considered appellant's remaining arguments, and find them unpersuasive.⁵

ORDER

The decision of the Department is affirmed.⁶

FRED ARMENDARIZ, CHAIRMAN
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁵ We note that appellant did not favor this Board with a brief in support of his appeal. We have reviewed the briefs filed at the administrative level, which, unfortunately, antedate the Department's decision presented to this Board for its review.

⁶ This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate district 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.