

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

AB-9285

File: 21-388483 Reg: 11075792

RAFIQALI R. HEMANI,
dba Steve's Liquors
1145 West Tennyson Road, Hayward, CA 94544,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Nicholas R. Loehr

Appeals Board Hearing: October 3, 2013
Sacramento, CA

ISSUED NOVEMBER 18, 2013

Rafiqali R. Hemani, doing business as Steve's Liquors (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which denied his petition to remove certain conditions from the license.

Appearances on appeal include appellant Rafiqali R. Hemani, appearing through his counsel, Richard D. Warren, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kelly Vent.

FACTS AND PROCEDURAL HISTORY

Appellant acquired his off-sale general license on October 3, 2002, via a person-

¹The decision of the Department, dated July 26, 2012, is set forth in the appendix.

to-person transfer pursuant to Business & Professions Code section 24070. Before that date, the license included no operating conditions.

Prior to the transfer, however, Department Licensing Representative Monica Chan² advised appellant that the Hayward Police Department (HPD) wished to place restrictions or conditions on the license. The HPD never filed a valid, verified protest against appellant's license application; nevertheless, Representative Chan directed appellant to contact the HPD and resolve the matter.

Over the course of two or three months, appellant negotiated with the HPD regarding the proposed restrictions. During an initial telephonic meeting, an HPD officer told appellant that the restrictions would be mailed to him. Appellant reviewed the proposed restrictions and found many of them "unbelievable." Appellant objected to these restrictions and arranged a face-to-face meeting with HPD officials.

At the meeting, appellant told the officials "no way" to the proposed conditions, but agreed to work with the city provided the restrictions were fair to both sides. The HPD requested additional time to consider appellant's position.

Appellant called Licensing Representative Chan and informed her that the proposed conditions were unfair. Chan told him resolve the issue with the HPD and call her back.

A month or two later, appellant met with the HPD Chief of Police and two officers. The HPD officials showed appellant a "big stack of papers" allegedly indicating that the premises was a law enforcement problem. Appellant asked to see the documents, but the HPD officials told him it was "not necessary" at the time. The HPD

²Representative Chan is deceased.

then provided a revised set of proposed conditions, which amended or deleted the provisions appellant had found objectionable.

Appellant accepted the proposed conditions because he believed he would not get an alcoholic beverage license if he did not agree to them.

The Department sent appellant a Petition for a Conditional License (PCL) embodying seven conditions set forth by the HPD. Appellant executed the PCL on September 24, 2002. The PCL read as follows:

WHEREAS, the Hayward Police Department has provided substantial evidence of an identifiable problem which exists at the premises or in its immediate vicinity; and,

WHEREAS, transfer of the existing an [sic] unrestricted license would be contrary to public welfare and morals; and,

WHEREAS, pursuant to Business and Professions Code Section 23800(e) the Department may grant a license transfer where the transfer with condition [sic] will mitigate problem [sic] by the local governing body or its designee; and,

WHEREAS, petitioner stipulates that by reason of the existence of substantial evidence of identifiable problems at the premise or its immediate vicinity, grounds exist for denial of said license transfer

Appellant testified that he did not read these clauses because he wanted to get the store "up and running." Appellant executed the PCL on September 24, 2002. The Department approved transfer of the license subject to the seven new conditions.

On May 11, 2011, appellant petitioned the Department for removal of the conditions because the legal basis for imposition, section 23800(e),³ does not apply to

³In 2002, the relevant portions of section 23800(e) read as follows:

(e)(1) At the time of transfer of a license pursuant to section 24071.1, 24071.2, or 24072 and upon written notice to the licensee, the department may adopt conditions that the department determines are reasonable pursuant to its investigations or that are requested by the local governing body

person-to-person transfers under section 24070.

The Department ultimately denied appellant's petition, asserting that removal of the conditions

would render the continuance of your license contrary to the public welfare and morals within the meaning and intent of Article XX, Section 22 of the Constitution of the State of California and Sections 23800-23801 of the Alcoholic Beverage Control Act in that the grounds that cause [sic] the imposition of the conditions continue to exist.

(State's Exhibit 1, Notice of Denial of Petition for the Removal of Conditions.) Appellant requested a hearing to refute the reasons for the denial.

At the administrative hearing held on January 18, 2012, documentary evidence was received and testimony concerning the violation charged was presented by appellant; by April Liang, a Department Licensing Representative; and by Ryan Cantrell, an HPD Detective.

Representative Liang testified that she investigated appellant's petition and drafted a Report of Licensing Investigation. In doing so, she advised the HPD of the petition. The HPD objected to the removal of the conditions, and provided two Computer Aided Dispatch (CAD) reports containing information about criminal activity in the vicinity of the licensed premises. While the CAD reports do not directly implicate the licensed premises, Representative Liang consulted with HPD Detective Cantrell who told her that the incidents in the CAD reports occurred in the immediate vicinity of appellant's storefront, and that it constituted a "problem premise."

Liang conceded, however, that section 23800(e) did not apply to the 2002 person-to-person transfer, as that section does not address transfers falling under

section 24070. Liang testified that she believed section 23800(a) ought to have been cited in the "whereas" clauses of the PCL, and that the citation to subdivision (e) was an error. According to Liang, a law enforcement protest would generate the ability to investigate claims of law enforcement problems associated with a license application under section 23800(a). Liang believed that CAD reports showed substantial evidence of criminal activity sufficient to justify the conditions.

Detective Cantrell testified that the licensed premises is located in a high crime area – so much so that it is used as a "field training" location for new officers. During store hours, people congregate and loiter around the premises. When it closes, they disperse within 20 or 30 minutes. Cantrell testified that he has seen people drinking alcohol outside the premises. According to Cantrell, the level of criminal activity has remained unchanged over the years. The HPD prefers that the conditions remain on the license because they help mitigate problems in the area.

Subsequent to the hearing, the Department issued its decision which denied the petition. The ALJ acknowledged that the Department lacked the authority to impose conditions under section 23800(e). The ALJ concluded that the appellant is not entitled to relief under section 23803, because the law enforcement problems that provided grounds for imposition of conditions still exist. The ALJ emphasized that appellant's decision to negotiate the conditions and compromise, rather than litigate, indicated that acceptance of the conditions was voluntary.

Appellant filed a timely appeal contending that the Department had no authority to impose the conditions.

DISCUSSION

I

Appellant contends that the original imposition of the conditions was void because the Department had no authority to impose conditions in the course of the person-to-person transfer. Appellant argues that under California Supreme Court precedent, the conditions must be struck down as an invalid enlargement of the scope of the Department's administrative powers.

In *American Federation of Labor v. Unemployment Ins. Appeals Bd.* (1996) 13 Cal.4th 1017, 1035-1036 [56 Cal.Rptr.2d 109], the Court held that the Unemployment Insurance Appeals Board lacked the statutory authority to award prejudgment interest on benefit award. In doing so, the Court cited its earlier decision in *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379 [241 Cal.Rptr. 67], which "specifically affirmed the rule that administrative regulations purporting to enlarge the scope of administrative powers are void, and that courts are obligated to strike them down." (See also *Morris v. Williams* (1967) 67 Cal.2d 733, 748 [63 Cal.Rptr. 689] ["Administrative regulations that alter or amend the statute or impair its scope are void and courts not only may, but it is their obligation to strike down such regulations"].)

In the decision below, the ALJ avoided reaching a decision as to whether the Department had any statutory authority to impose the conditions, calling the issue "moot" by reason of the appellant's failure to litigate the matter in 2002, coupled with his acceptance of the PCL. (Determination of Issues IX.) Additionally, the ALJ held that the circumstances justifying the original conditions had not changed, and that relief was therefore not merited under section 23803. (*Ibid.*)

In its brief, the Department characterizes appellant's petition for removal of

conditions as "an untimely appeal of a Department denial from 2002, disguised as a section 23803 petition." (Reply Br. at p. 2.) That section permits the removal of conditions at a licensee's request, provided the Department "is satisfied that the grounds which caused the imposition of the conditions no longer exist." It places the burden of proof squarely on the licensee to establish the change in circumstances.

A review of the record, however, reveals that appellant never sought relief under that statute. Throughout his petition, briefing, and oral argument, appellant made it clear that he sought removal because the original imposition of the conditions was void. (See, e.g., Petitioner's Exhibit D, Petitioner's Hearing Brief; State's Exhibit 3, Attorney Warren Letter dated May 11, 2011.) In fact, the only documents that characterize appellant's petition as falling under section 23803 are documents produced by the Department itself. (See, e.g., State's Exhibit 2, Report of Licensing Investigation; State's Exhibit 4, Department Reply Brief.) It is the Department, not the appellant, that attempts to characterize this as a 23803 petition.

This is clearly not a petition to remove conditions pursuant to section 23803. The standards of that statute do not apply. Appellant did not need to prove a change in circumstances to warrant removal of the conditions.

Nevertheless, the ALJ proceeded largely under that statute. He concluded:

Section 23803 permits a licensee to seek removal or modification of license restrictions by proving that the grounds which caused the imposition of the conditions no longer exist. Section 23803 does not authorize a trial de novo on the original license application after a licensee has negotiated and executed a Petition for Conditional License, even if the underlying statutory section is incorrectly applied. The grounds for imposition of conditions originally, a law enforcement problem in and around Steve's Liquors, still exist today.

(Determination of Issues IX.) The ALJ committed reversible error. Section 23803 was

irrelevant to this case.

Additionally, we are not convinced that appellant's acceptance of the conditions was, in fact, voluntary. In a recent and markedly similar case, this Board observed that it was

not persuaded that appellant should be denied relief because it "voluntarily" accepted the conditions in order to gain an expeditious processing of the desired transfer. Appellant was confronted with an expense and delay that could well have cost it its existence. The choice it made was in all probability the only choice it could have made to survive.

(Hermosa Pier 20, LLC (2013) AB-9284, at p. 7.)

We face the same troubling facts here. There is strong evidence that the Department represented to appellant that he had no choice but to compromise with law enforcement in order to proceed with the transfer:

Prior to the transfer, Department Licensing Representative Monica Chan advised the Licensee that the Hayward Police Department (HPD) wanted to place restrictions or conditions on the license. The license being transferred to Hemani had no operating conditions. The HPD never filed a valid, verified protest against Hemani's license application. Licensing Representative Chan directed the Petitioner to the HPD because they generated the request for license conditions.

¶ . . . ¶

Hemani telephoned Licensing Representative Chan following this initial meeting and said the proposed conditions were unfair. Chan purportedly advised Hemani to resolve the issue with HPD and call her back.

¶ . . . ¶

The HPD representatives told Hemani that the premises was a law enforcement problem and showed him a "big stack of papers" concerning the same. Hemani did ask to see the documents, but they told him it was "not necessary" at the time. . . . Hemani accepted the new proposed conditions because he thought he would not get the alcoholic beverage license if he did not agree.

(Findings of Fact II, V, VI.) A compromise on conditions cannot truly be called voluntary

where the Department, in conjunction with law enforcement, has led a licensee to believe his business is at stake. The Department simply held a metaphorical gun to the licensee's head – a gun the Department was not legislatively authorized to possess.

Moreover, neither the Department nor the ALJ cited any statutory authority for limiting the time frame in which an appellant may appeal unlawfully imposed conditions. The Department rests its present case on the theory of laches, and cites a case denying an appeal of an administrative personnel decision to the superior court following a three-year delay. (Reply Br. at pp. 6-7, citing *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61 [99 Cal.Rptr. 316].) That decision, however, was explicitly limited to appeals of administrative personnel decisions, and turned largely on statutes relevant to those facts, but not to the present case. (*Ibid.*)

Moreover, the court in that case noted that laches requires either acquiescence or prejudice: "The defense of laches requires unreasonable delay plus either acquiescence in the act about which plaintiff complains or prejudice to the defendant resulting from the delay." (*Johnson, supra*, at p. 88.) In its brief, the Department argues that appellant acquiesced when he accepted the conditions in the PCL. As discussed above, we decline to find acquiescence where the licensee's compromise was the direct result of the Department's abuse of its statutory authority.

At oral argument, the Department also alleged prejudice, because the original Licensing Representative, Monica Chan, is no longer available to testify, and because the Department may have disposed of investigatory records in the interim. However, Chan's inability to testify alone is insufficient to show prejudice; Representative Liang testified regarding the contents of the file – which, according to her, lacked any documentation of a law enforcement problem in 2002. The Department then asserted

that perhaps these documents were discarded. We decline to accept, however, that the Department's potentially careless treatment of important investigative reports is sufficient grounds to bar this appeal.⁴

Most importantly, the policy of striking down attempts by administrative agencies to expand their power is so intrinsic to maintaining a government free of corruption that it would be improper for an administrative board to impose arbitrary deadlines on appeals from such violations. Again, the ALJ committed reversible error.

This Board is left to determine whether, as a matter of law, the Department had the authority to impose the conditions at all.

The Department concedes that it did not have authority to impose the conditions under section 28300, subdivision (e). In its brief, it argues that it "merely cited to the incorrect subdivision" in the PCL. (Reply Br. at p. 2.) Instead, it argues, the conditions were properly imposed under subdivision (a). In fact, during the administrative hearing, counsel for the Department suggested that it need not have cited any statutory authority whatsoever. [RT at p. 32, ll. 6-7; p. 62, ll. 3-5.]

We need not address the applicability of section 23800(e), because the Department recognizes that it had no authority under that statute. We will observe, however, that the Department's misguided citation to section 23800(e) is disturbingly common. (See, e.g., *Hermosa Pier 20, LLC* (2013) AB-9284.) Given concerns of fairness toward licensees, the Department should be certain it is proceeding under and

⁴We note, in particular, that investigative records surrounding licensing or the imposition of conditions are particularly important, as they establish the grounds for the Department's action, as required by statute. It is imperative that the Department treat these records with care, and refrain from casually disposing of them.

Based on the testimony and evidence in this case, however, we are inclined to believe that the records in question simply never existed.

has cited the proper statutory authority, or risk reversal.

The Department's alternative reliance on section 23800(a), however, is also misplaced. Section 23800(a) provides:

The Department may place reasonable conditions upon retail licensee or upon any licensee in the exercise of retail privileges in the following situations:

(a) If grounds exist for the denial of an application for a license or where a protest against the issuance of a license is filed and if the department finds that those grounds may be removed by the imposition of those conditions.

As a matter of law, the statute is inapplicable to person-to-person transfers. If it were, it would render subdivisions (e) and (f) superfluous, since they grant the Department authority to impose conditions in specific types of person-to-person transfers.⁵ As the California Supreme Court has observed, "courts must strive to give meaning to every word in a statute and to avoid constructions that render words, phrases, or clauses superfluous." (*Klein v. United States* (2010) 50 Cal.4th 68, 80 [112 Cal.Rptr.3d 722].)

However, even if section 23800(a) does apply to person-to-person transfers – and we emphasize that it does not – the Department failed to investigate as required by the statute. The ALJ found that "[t]he HPD never filed a valid, verified protest against Hemani's license application." (Findings of Fact II.) Additionally, the record suggests that the Department did not investigate the alleged law enforcement problem in 2002, and did not determine whether the requested conditions would remedy the problem.

Form ABC-220, Report on Application for License, completed by Representative Chan

⁵This is particularly true of section 28300(f), which was introduced in 2009 (and therefore does not apply to the present case). That subdivision grants the Department the explicit authority to impose conditions in person-to-person transfers. If subdivision (a) already granted the Department that authority, then subdivision (f) would have been unnecessary.

on October 3, 2002, indicates that the Department waived inspection of the premises, and gave no indication that Chan reviewed any documentation other than section 23800(e) and a letter from the HPD. (State's Exhibit 2, Attachment A.) Testimony from Licensing Representative Liang indicated that the HPD submitted no evidence of a law enforcement problem during the course of the 2002 transfer. [RT at pp. 30-31.] In fact, the only relevant documentation in the record from the HPD is a letter outlining the conditions the HPD "would like to see" on the license.⁶ (Petitioner's Exhibit C.)

If the Department did indeed intend to proceed under 28300(a), rather than 23800(e) – and we are not convinced it did – then it failed to conduct the necessary investigations to establish grounds for denial,⁷ and simply deferred to the wishes of the HPD. In any event, section 23800(a) is inapplicable to a person-to-person transfer, and the Department had no authority to impose conditions under it.

The Department concedes it had no authority to impose the conditions under section 23800(e). Section 23800(a) is inapplicable, and in any event, the Department

⁶The CAD reports discussed at length in the ALJ's opinion and entered into evidence were produced following appellant's 2011 petition for removal of conditions, and only provide information back to 2008. There is no similar report in the record documenting incidents relevant in 2002, when the conditions were imposed.

⁷We find this apparent failure particularly troubling in light of the Department's insistence at oral argument that it is bound by section 23958, which requires:

Upon receipt of an application for a license or for a transfer of a license . . . , *the department shall make a thorough investigation* to determine whether the applicant and the premises for which a license is applied qualify for a license and whether the provisions of this division have been complied with, and shall investigate all matters connected therewith which may affect the public welfare and morals.

(Emphasis added.) In the case before us, the Department appears to have conducted no investigation whatsoever during the course of the 2002 license transfer, and instead relied on an informal, unsupported letter from the HPD. We believe this violates section 23958 and represents an impermissible abdication of the Department's statutory responsibilities.

failed to conduct any investigations to support conditions under that provision. The findings indicate that the Department led the appellant to believe he had no choice but to compromise on the conditions or risk denial of the license. We cannot call this voluntary, or say that he simply acquiesced.

The California Supreme Court is emphatic that attempts by administrative agencies to expand their powers are void and must be struck down. It imposes no time limitation on this Board's obligation to do so. The Department exceeded its authority in this case, and did not proceed according to law. Its refusal to remove the conditions unlawfully imposed on appellant's license constitutes an abuse of discretion – one that compels reversal.

ORDER

The decision of the Department is reversed.⁸

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
PETER J. RODDY, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁸This 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.