

ISSUED OCTOBER 3, 1997

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

| | | |
|-------------------------|---|--------------------------|
| FLOYD CARL WILTZ |) | AB-6732 |
| dba Expose Theater |) | |
| 2845 Cordoba Court |) | File: 42-283240 |
| Ceres, CA 95307, |) | Reg: 95033808 |
| Appellant/Licensee, |) | |
| |) | |
| v. |) | Motion by the Department |
| |) | to Dismiss the Appeal |
| DEPARTMENT OF ALCOHOLIC |) | |
| BEVERAGE CONTROL, |) | Date and Place of the |
| Respondent. |) | Appeals Board Hearing: |
| |) | September 3, 1997 |
| |) | Sacramento, CA |
| |) | |

Floyd Carl Wiltz, doing business as Expose Theater (appellant), appealed from a decision of the Department of Alcoholic Beverage Control¹ which ordered his on-sale beer and wine license suspended for 25 days, and the Department subsequently filed a motion to dismiss the appeal.

Appearances on appeal include appellant Floyd Carl Wiltz, appearing through his representative, Edward Apicella, and the Department of Alcoholic Beverage Control, appearing through its counsel, Nicholas R. Loehr.

¹ The decision of the Department, dated September 19, 1996, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine license was issued on April 30, 1993. Thereafter, on September 7, 1995, the Department instituted an accusation alleging violations of Rule 143.3.

An administrative hearing was held on August 1, 1996, and the Department's decision was issued on September 19, 1996, ordering a 25-day suspension of appellant's license. Appellant thereafter filed a timely notice of appeal.

The Department filed a Motion to Dismiss dated July 28, 1997, based on the appeal being moot. The Department alleges that appellant's license-renewal date was March 31, 1997, and that appellant was sent his first renewal notice on February 10, 1997. On February 11, 1997, appellant voluntarily surrendered his license to the Department pursuant to Rule 65. (Cal.Code Regs., title 4, §65.) The Department further alleges that no renewal or penalty fees were paid by appellant, and that the license was automatically canceled pursuant to Business and Professions Code §24048, subdivision (d), on May 31, 1997.

On June 16, 1997, the Department alleges that it sent appellant a "Final License Revocation Notice" notifying him that his license would be automatically revoked if the renewal and penalty fees were not paid by July 2, 1997. Payment was not received, and appellant's license was automatically revoked pursuant to Business and Professions Code §24048, subdivision (f), on July 3, 1997. Appellant appealed the revocation for failure to pay renewal fees on August 1,

1997. The Appeals Board accepted the appeal and assigned it an appeal number, AB-6915 ("the second appeal").

The Department's motion to dismiss AB-6732 states that appellant's license was revoked for failure to pay license renewal fees and, therefore, the appeal is moot. Briefs were requested from the parties with regard to the motion, the motion was set for hearing, and oral argument on the motion took place before the Appeals Board on September 3, 1997.

DISCUSSION

The Department argues that, because appellant's license has been revoked by operation of law, there is no subject matter to be adjudicated; therefore, the matter is moot and must be dismissed.

Appellant argues that the revocation could not be effective until the time allowed for filing an appeal had elapsed (approximately 40 days), and the Department's motion, filed before that time had elapsed, was premature. Additionally, appellant argues, he filed a timely appeal of the revocation, which the Appeals Board accepted, and the automatic stay provisions of Business and Professions Code §23082 prevent the revocation from becoming final.

Appellant also argues that, even if the license is revoked, the appeal is not moot because Stanislaus County has filed suit against appellant in superior court. The damages and injunctive relief being sought in that case, according to appellant, "are based wholly on the affirming or reversal of the proposed decision of the

Department." (App. Br. at 6.) Therefore, appellant concludes, a material question remains to be determined, and the case is not entirely moot.

License renewal and the payment of renewal fees is required annually by Business and Professions Code §24048. A license expires if the renewal application is not made and the renewal fee is not paid by the annual license expiration date. However, the licensee is still given 60 days following the expiration date, during which time the premises may continue to operate, in which to pay the renewal fee and a penalty fee equal to one-half the renewal fee. If the licensee pays, the license is renewed; if not, the license is canceled at the end of the 60-day period. The license can still be reinstated after cancellation if the licensee pays the renewal fee and a penalty fee equal to the renewal fee within 30 days of the cancellation date. If fees are still not paid, the license is then revoked by operation of law at the end of the 30-day period. A licensee, therefore, has up to 90 days following the annual expiration date to renew his license and pay the renewal fee (plus any applicable penalties).

Appellant does not deny that he has failed to pay the renewal fees. He also does not argue that the renewal fees were waived or otherwise not due because he had surrendered his license.² He also does not argue that he did not receive the notices regarding cancellation and revocation that the Department alleges it sent.

² The form that appellant filled out when he surrendered his license states clearly that "the license must be renewed at the time renewal fees are due or the license will be automatically revoked." (Dept. Br., Ex. D.)

Appellant's arguments in opposition to the Department's motion are based on the provisions of Business and Professions Code §23082:

"No decision of the department shall become effective during the period in which an appeal may be filed and the filing of an appeal shall stay the effect of the decision until such time as a final order is made by the board."

Under this provision, appellant argues, the Department's motion was premature, since no decision could be effective before the approximately 40-day period for filing an appeal had passed. Appellant states that, if the decision date was July 3, 1997, it could not become effective until August 12, 1997. Therefore, the revocation could not be effective, and the appeal moot, until that date. Before that date, appellant continues, he filed an appeal with this Board (AB-6915) that served to further postpone the effective date of the revocation until this Board issues its final decision in that second appeal.

The pivotal factor in appellant's argument is his appeal of the Department "decision" revoking his license. The Appeals Board has a limited jurisdiction, set by the California Constitution and by statute, which it cannot exceed. One of its limitations is that it may only deal with appeals made from "decisions" of the Department.

The Department, in its discretion, may revoke or suspend a license in many instances, such as those described in Business and Professions Code §24200. Under some circumstances, the Alcoholic Beverage Control Act makes it mandatory for the Department to revoke or suspend a license. (See, e.g., Bus. & Prof. Code

§25602.3.) In a few situations, revocation or suspension occurs without any action or exercise of discretion on the part of the Department. (See, e.g., Bus. & Prof. Code §24205 [providing automatic suspension of a license for failure to pay certain enumerated taxes and penalties required by the Rev. & Tax. Code].)

Section 24048 is a statute that provides for automatic revocation of a license upon the passage of the allotted time without payment by the licensee of his renewal fees. The Department has no power or authority to make any decision with regard to the revocation or to exercise its discretion in any way under those circumstances.

We find that the revocation by operation of law involved here was not an appealable "decision" of the Department and, therefore, the provisions of §23082 are not applicable. Both of the two prerequisites to automatic revocation under §24048 unquestionably have been met: the passing of the due date for payment and the failure of appellant to pay. The revocation of appellant's license occurred automatically, and was effective, on July 3, 1997. Appellant's attempted appeal could not in any way affect the revocation that had already become final. This Board's acceptance of the "appeal" does not give it any added validity, since the Appeals Board cannot expand its subject matter jurisdiction.

Appellant also argues that "despite the issue of license revocation this appeal is not moot because the underlying liability in the Superior Court action will be determined on the outcome of the instant appeal." (App. Br. at 5.) Appellant is in error. The determination that appellant's license has been revoked forecloses

consideration of any other issue in this appeal. There is no license against which discipline can be imposed and, even if the substantive issues were to be considered and determined in appellant's favor, he no longer has a license, so he would no longer be able to serve alcoholic beverages at his business. The decision of this Board in the instant matter has nothing to do with the substantive issues involved in the underlying accusation which generated this matter. The Board's decision is not to affirm the Department's action or to reverse it; it is to dismiss the appeal as moot. This matter falls squarely within the definition of a moot action quoted by appellant in his brief at page 5: "In general, an action is considered moot when it no longer presents a justiciable controversy because the issues have become academic or dead." (Sigma Chi Fraternity v. Regents of University of Colorado, 258 F.Supp. 515, 523 (D.C. Colo.)) The substantive issues in this case are "academic or dead" since appellant no longer holds an alcoholic beverage license. While the superior court may still have issues to deal with, this Board does not.

Since appellant's license was finally revoked effective July 3, 1997, there is no subject matter for this Board to adjudicate and the appeal is moot. Therefore, the Department's motion to dismiss must be granted.

CONCLUSION

The motion of the Department to dismiss this appeal is granted and the appeal is dismissed as moot.³

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

³This 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.