

ISSUED MAY 1, 1998

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

TEXACO REFINING and MARKETING, INC.)	AB-6996
Appellant/Licensee,)	File: 20-312886
v.)	Reg: 97040993
DEPARTMENT OF ALCOHOLIC)	Motion Re: Discovery
BEVERAGE CONTROL,)	Appeals Board Hearing:
Respondent.)	April 1, 1998
)	Los Angeles, CA
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JAE D. CHU and JUNG KI KIM,)	
Appellants/Licensees,)	AB-6998
v.)	File: 21-197974
DEPARTMENT OF ALCOHOLIC)	Reg: 97041318
BEVERAGE CONTROL,)	
Respondent.)	
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EL JAY CORPORATION,)	
Appellant/Licensee,)	AB-6999
v.)	File: 41-277632
DEPARTMENT OF ALCOHOLIC)	Reg: 97041736
BEVERAGE CONTROL,)	
Respondent.)	
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DUET, LLC,)	
Appellant/Licensee,)	AB-7005
v.)	File: 47-326536
DEPARTMENT OF ALCOHOLIC)	Reg: 97041050
BEVERAGE CONTROL,)	
Respondent.)	
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AB-6996, 6998, 6999, 7005, 7007, 7008,
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THE SOUTHLAND CORPORATION and)	
DAVID SAVILLE)	AB-7007
Appellants/Licensees,)	File: 20-214647
v.)	Reg: 97041365
DEPARTMENT OF ALCOHOLIC)	
BEVERAGE CONTROL,)	
Respondent.)	
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PRESTIGE STATIONS, INC.)	
Appellant/Licensee,)	AB-7008
v.)	File: 20-238573
DEPARTMENT OF ALCOHOLIC)	Reg: 97041553
BEVERAGE CONTROL,)	
Respondent)	
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THE SOUTHLAND CORPORATION and)	
McHERRON,)	AB-7020
Appellants/Licensees,)	File: 20-215158
v.)	Reg: 97041826
DEPARTMENT OF ALCOHOLIC)	
BEVERAGE CONTROL,)	
Respondent)	
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PRESTIGE STATIONS, INC.)	
Appellant/Licensee,)	AB-7021
v.)	File: 20-273481
DEPARTMENT OF ALCOHOLIC)	Reg: 97041640
BEVERAGE CONTROL,)	
Respondent.)	
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THE SOUTHLAND CORPORATION and)	
FLASTER,)	AB-7022
Appellants/Licensees,)	File: 20-226845
v.)	Reg: 97041885
DEPARTMENT OF ALCOHOLIC)	
BEVERAGE CONTROL,)	
Respondent.)	
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THE SOUTHLAND CORPORATION and)	
ATWAL,)	AB-7023
Appellants/Licensees,)	File: 20-329169
v.)	Reg: 97041572
DEPARTMENT OF ALCOHOLIC)	
BEVERAGE CONTROL,)	
Respondent.)	
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PRESTIGE STATIONS, INC.)	
Appellant/Licensee,)	AB-7024
v.)	File: 20-324410
DEPARTMENT OF ALCOHOLIC)	Reg: 97041804
BEVERAGE CONTROL,)	
Respondent.)	
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TEXACO REFINING and MARKETING, INC.)	
Appellant/Licensee,)	AB-7025
v.)	File: 20-295429
DEPARTMENT OF ALCOHOLIC)	Reg: 97041756
BEVERAGE CONTROL,)	
Respondent.)	
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THE SOUTHLAND CORPORATION and)	
GAUTHIER,)	AB-7026
Appellants/Licensees,)	File: 20-214181
v.)	Reg: 97041573
DEPARTMENT OF ALCOHOLIC)	
BEVERAGE CONTROL,)	
Respondent.)	
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THE SOUTHLAND CORPORATION and)	
ROGERS,)	AB-7030
Appellants/Licensees,)	File: 20-305505
v.)	Reg: 97041701
DEPARTMENT OF ALCOHOLIC)	
BEVERAGE CONTROL,)	
Respondent.)	
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THE CIRCLE K CORPORATION,)	
Appellant/Licensee,)	AB-7031
v.)	File: 20-117228
DEPARTMENT OF ALCOHOLIC)	Reg: 97041261
BEVERAGE CONTROL,)	
Respondent.)	
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PRESTIGE STATIONS, INC.)	
Appellant/Licensee,)	AB-7048
v.)	File: 20-187855
DEPARTMENT OF ALCOHOLIC)	Reg: 97042163
BEVERAGE CONTROL,)	
Respondent.)	
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TEXACO REFINING and MARKETING, INC.)	
Appellant/Licensee,)	AB-7053
v.)	File: 20-314977
DEPARTMENT OF ALCOHOLIC)	Reg: 97041800
BEVERAGE CONTROL,)	
Respondent.)	
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TEXACO REFINING and MARKETING, INC.)	
Appellant/Licensee,)	AB-7054
v.)	File: 20-277411
DEPARTMENT OF ALCOHOLIC)	Reg: 97041728
BEVERAGE CONTROL,)	
Respondent.)	
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THE SOUTHLAND CORPORATION and INDU)	
and PARVEEN SOOD)	AB-7055
Appellants/Licensees,)	File: 20-323606
v.)	Reg: 98042185
DEPARTMENT OF ALCOHOLIC)	
BEVERAGE CONTROL,)	
Respondent.)	
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Appellants in the above captioned cases appeal orders entered by administrative law judges in Department of Alcoholic Beverage Control disciplinary proceedings involving accusations of sales of alcoholic beverages to minors, denying motions to compel discovery. These orders denied a motion to compel discovery as to certain information concerning documentation and records in the possession of the Department.

Appellants appear through their counsel, Ralph Barat Saltsman, and the Department of Alcoholic Beverage Control appears through its counsel, David B. Wainstein and Nicholas R. Loehr.

It was stipulated by counsel for each of the parties that all the cases raise the same legal issue, that is, whether the Appeals Board has jurisdiction to rule on discovery orders made by administrative law judges sitting for the Department, prior to a final decision of the Department in a particular case. It was further stipulated that the appeal entitled Texaco Refining and Marketing, Inc. (AB-6996) would be the lead case, with all the other cases captioned in abbreviated form.¹ The matters are, therefore, consolidated for hearing before the Appeals Board.

¹ The Order on Motion to Compel Discovery and the Motion to Compel are set forth in the appendix.

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DISCUSSION

Government Code §11507.7 was amended in 1995, effective July 1, 1997.

The statute modified a previous procedure pursuant to which motions to compel discovery were filed by way of petition to, and heard in, the superior courts. The amended statute provides that the administrative law judge in the administrative hearing process shall hear and rule upon motions to compel discovery².

The motion in the lead case (Texaco Refining and Marketing, Inc., AB-6996) was heard by an administrative law judge on December 8, 1997. Appellant requested the names, addresses, and telephone numbers of all Department licensees who allegedly sold an alcoholic beverage to the same minor,³ a decoy acting under the control and supervision of peace officers in appellant's case, for a 30-day period before, and after, the alleged sale charged against appellant. The motion was denied by the administrative law judge, and appellant filed a timely notice of appeal. Appeals in the remaining cases were filed seriatim thereafter.

The Department has filed motions to dismiss the appeals on the grounds that

² Government Code §11507.5 states that the provisions of section 11507.6 contain the "exclusive right to and method of discovery." Section 11507.6 sets forth the areas of discovery that are allowed in the administrative process.

³ The word minor as used in this decision refers to a person under the age of 21 years, who is precluded from purchasing, and to whom a licensee is precluded from selling, an alcoholic beverage, pursuant to Business and Professions Code §25658.

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the Appeals Board does not have jurisdiction to hear them prior to entry of a final decision of the Department. The Department cites a number of court decisions which conclude that discovery rulings and interlocutory decisions should not be appealable until a final judgment has been entered. These cases, as a whole, although not squarely on point, suggest that appeals of pre-hearing discovery orders will prohibit an orderly and expeditious procedure in the administrative process. The Department also cites Lorraine Jacobs-Zorne v. Superior Court of Los Angeles County (1996) 46 Cal.App.4th 1064, 1070 [54 Cal.Rptr. 385], which states:

“California is governed by the ‘one final judgment’ rule which provides ‘interlocutory or interim orders are not appealable, but only “reviewable on appeal” from the final judgment.’ [Citation.] The rule was designed to prevent piecemeal dispositions and costly multiple appeals which burden the courts and impede the judicial process. ”

The Jacobs-Zorne case involved an appeal from a summary adjudication in a dispute concerning a will. Defendants in the Jacobs-Zorne case argued that the trial court determined there was no merit to their claim and affirmative defense, hence effectively disposing “of the entire case by leaving no issues for further consideration.” The Jacobs-Zorne court, at 46 Cal.App.4th 1071, stated:

“This argument fails, however, because following the summary adjudication, there was a trial on the merits of the Petition itself. Thus, this court finds the order granting summary adjudication to be interlocutory.”

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Appellants argue that, following the amendment which transferred the discovery motions in administrative proceedings from the superior court to the administrative law judge, appellants now have no access to the writ process in the court of appeal until there has first been an exhaustion of their administrative remedies, which would include hearings before the Appeals Board.

Appellants cites Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (1987) 195 Cal.App.3d 812 [240 Cal.Rptr. 915], which considered whether the Appeals Board had jurisdiction over an issue of a fee-for-transfer dispute, where there had been no administrative hearing and decision. The appellant in that case had appealed a letter setting forth a fee schedule for the transfer of licenses in connection with a corporate reorganization. The Department contended the matter was not appealable because there had been no hearing. The court held that a hearing was unnecessary, since there existed a sufficient record for an appeal. The court, strongly influenced by the absence of any factual dispute, held, in essence, that the Appeals Board could review the Department's letter as a final decision. Not mentioned by the court, but worthy of consideration here, is the fact that, until an appeal was heard, or until one of the two parties yielded in their position, matters were at a standstill.

Appellants argue that the jurisdiction of the Appeals Board to accept the

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present appeal comes from the wording “affecting a license” in Business and Professions Code §23080. Section 23080 states:

“As used in this article ‘decision’ [of the Department] means any determination of the department imposing a penalty assessment or affecting a license which may be appealed to the board”

The jurisdiction of the Appeals Board to consider appeals derives in the first instance from the California Constitution, article XX, §22, which, in pertinent part, states:

“When any person aggrieved ... 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”

Business and Professions Code §23081, which is premised on the “finality” aspect of the Department’s decision, states, in pertinent part:

“On or before the tenth day after the last day on which reconsideration of a final decision of the department can be ordered, any party aggrieved by a final decision of the department may file an appeal with the board for such decision”

In the case of Hollywood Sunset, Inc. (1995) AB-6447a, the Board held that a decision of the Department is final when it is issued and mailed to the parties.

CONCLUSION

The parties have vigorously and effectively argued from two very much opposing points of view.

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The Department has focused on the devastation which “piece-meal” appeals would cause to the orderly process of the administrative hearing.

Appellants have stressed their frustration over being required to wait until a decision has been entered following a hearing on the merits before they can appeal an ALJ’s discovery ruling.

In balancing these competing interests, we find no persuasive reason to abandon the traditional rule that an interlocutory discovery ruling may not be appealed until a final decision of the Department has been entered, and several reasons which weigh in favor of adhering to it. These include the following: (1) if appellants prevail on the merits, the discovery ruling will have become moot, eliminating the need for any appeal; (2) the delay and disruption which would result would effectively cripple the Department’s enforcement efforts to a far greater extent than might be offset by an early resolution of the discovery issue; and (3) such a procedure would invite numerous marginal, perhaps frivolous, appeals from licensees seeking only delay while they continue to operate free of any threat of timely discipline.⁴ This Board does not believe the Legislature intended to make

⁴ It is worth noting that under the procedure which governed before Government Code § 11507.7 was amended, there were built-in time limitations which expedited the review process in the particular superior court which a licensee selected as the forum. Under appellants’ approach, there would only be the resources of the Appeals Board; it is painfully clear how the impact of countless

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such a drastic change in the appellate processes of this Board, one that would generate considerable mischief with little countervailing benefit.

We conclude, therefore, that the Appeals Board does not have jurisdiction to consider an adverse order for discovery until such time as that issue is raised in an appeal of a final decision of the Department.

The captioned appeals filed with the Appeals Board, are dismissed, without prejudice to appellants' opportunity to seek review of the issues here presented following a final decision of the Department.⁵

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

appeals could overwhelm the Appeals Board and effectively paralyze the process of appellate review.

⁵ 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.