ISSUED MARCH 1, 2001

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

GMRI, INC. dba The Olive Garden 5526 Philadelphia Street Chino, CA 91710, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7336a File: 47-243016 Reg: 98043001 Administrative Law Judge at the Dept. Hearing: None Date and Place of the Appeals Board Hearing: December 12, 2000 Los Angeles, CA

This is an appeal from a Decision Following Appeals Board Decision of the Department[1] directing that the matter be remanded to Administrative Law Judge Rodolfo Echeverria for decision and clarification as he deems appropriate including the submission of any further evidence he may require in his exclusive discretion.

Appearances on appeal include Ralph Barat Saltsman and Stephen Warren Solomon on behalf of appellant GMRI, Inc., and John W. Lewis on behalf of the Department.

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[1] A copy of the Department's Decision Following Appeals Board Decision, dated June 13, 2000, is set forth in the appendix.

DISCUSSION

When this matter first visited the Appeals Board, it was in the context of an appeal from a Department decision which found that appellant, through one of its employees, had violated Business and Professions Code §25658, subdivision (a),[2] by selling an alcoholic beverage to a minor who, at the time, was acting as a police decoy. One of the issues raised by appellant was whether the decoy operation was conducted in violation of Rule141(b)(2) (4 Cal. Code Regs. §141(b)(2)) because the decoy did not display the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to the seller of alcoholic beverages at the time of the alleged offense.

It was appellant's contention, with which the Appeals Board agreed when it reversed the Department's decision, that the administrative law judge erred in limiting his assessment of the decoy's appearance solely to physical characteristics, ignoring such other indicia of age as demeanor, poise, manner of dress, and the like.[3] The order of the Appeals Board stated: "The decision of the Department is reversed for the reasons stated in part I, supra."

The Department decision which is the subject of this present appeal refers to and quotes from that Appeals Board decision, stating that the Board "determined

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[2] All statutory references herein are to the Business and Professions Code unless otherwise noted.

[3] The Appeals Board decision also concluded that appellant had failed to establish a violation of Rule 141(b)(5), which requires the police officer directing the decoy to have the decoy make a face to face identification of the alleged seller of alcoholic beverages, and that the penalty which had been imposed was not an abuse of the Department's discretion.

this to be a case ‘in which the focus of the Department upon the appearance of the minor has been limited to his physical appearance.’” By remanding this case to the administrative law judge for “decision and clarification as he deems appropriate,” it would appear that the Department expects the administrative law judge to issue a new proposed opinion in light of the Appeals Board ruling regarding Rule 141(b)(2).[4]

Appellant contends that the Department has acted beyond its statutory and constitutional powers in directing the remand. Appellant contends that the Department’s sole remedy once the Appeals Board has entered an order of unqualified reversal is to seek review in a district court of appeal, and has supplied the Board with an extensive brief on the subject.

This issue has been considered by the Appeals Board on a prior occasion. In Circle K Stores, Inc. (1999) AB-7080a, the Board affirmed a similar decision and order of the Department. Circle K Stores, Inc. filed a petition for writ of review of the Board’s decision with the Court of Appeal for the Second Appellate District. That court, having reviewed the petition and the preliminary opposition filed by the Department, denied the petition on April 18, 2000.

The parties, in their briefs to the Board in AB-7080a, did not address the question whether the Department decision which was the subject of that appeal was one which the Board was empowered to review, and the Board did not address the issue in its decision. Once it appeared in the present appeal that there may be some question in that respect, the Board’s concern was communicated to the

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[4] See note 5, infra.

parties, and additional briefs were requested. We have now reviewed the briefs which were filed in response to our request, and have concluded that our initial concern that we lacked jurisdiction has not been dissipated.

Article XX of the California Constitution provides, in part:

> "When any person aggrieved thereby appeals from a decision of the department ordering any penalty assessment, issuing, denying, transferring, suspending or revoking any license ..., the board shall review the decision subject to such limitations as may be imposed by the Legislature."

Section 23077 of the Business and Professions Code provides that the Appeals Board "shall exercise such powers as are invested in it by Section 22 of Article XX of the Constitution ... ."

Section 23080 provides:

> "**'Decision.'** As used in this article 'decision' means any determination by the department imposing a penalty assessment or affecting a license which may be appealed to the board under Section 22 of Article XX of the Constitution."

Section 23081, which governs when an appeal may and must be filed, 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 from such decision."

Thus, only a final decision of the Department is one which may be appealed to the Board - a party must be one "aggrieved by a final decision of the department." The Board is not authorized to entertain interlocutory appeals, that is, appeals from interim rulings by the Department which are not final in nature. For example, this Board has ruled that it lacks jurisdiction to hear appeals from

discovery rulings, thus requiring that any review of such rulings must wait until a final decision has been rendered by the Department.

Can it be said that the decision which is the subject of this appeal is one which is properly appealable? Is it a final decision? We do not think so. It clearly is not a decision "ordering any penalty assessment, issuing, denying, transferring, suspending or revoking any license." It is, instead, one which simply directs a remand of the matter to an administrative law judge for further consideration. Given the present stage of the matter, there is no certainty there will ever be a final decision by which appellant is aggrieved.

We note appellant's claim that the Department, by sending the matter back to the administrative law judge, may allow him to "rewrite his original decision and thereby artificially 'correct' the errors found by the Appeals Board in its reversal of the Department's decision."[5]

But, to accept that contention is to question, simply on appellant's say-so, the integrity of the Department and the administrative law judge to whom the case is remanded. We are unwilling to do so. Instead, we must assume that if the record does not support whatever action is taken by the Department and the administrative law judge, appellant will tell us so in still another appeal, once an appealable order has been entered by the Department. Unless and until that

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[5] In this regard, we note that appellant's counsel has recently filed an appeal on behalf of another client in which an administrative law judge issued a revised proposed decision, which the Department adopted, in which he spelled out the considerations which led him to determine that the decoy in that case presented the requisite appearance under Rule 141(b)(2). (See Circle K Stores, Inc., AB-7080b, notice of appeal filed September 21, 2000.)

occurs, there is nothing this Board may consider.

Appellant, nevertheless, argues that the remand order of the Department may be considered a final decision because the Department could have reconsidered and withdrawn its remand order subsequent to its entry. We do not agree. Simply because the order of remand could have been withdrawn does not make it a final order, anymore than it was to begin with. Indeed, so long as the case resides with the Department, it could still be withdrawn. This, it would seem, is even stronger evidence of its lack of finality.

Appellant cites and quotes from In re Fain (1977) 65 Cal.App.3d 376, 390 [135 Cal.Rptr. 543, 551]. We have reviewed In re Fain, and find it of no help to appellant. The case involved the question whether the Adult Authority[6] could direct a rescission hearing after having granted a parole and set a date for an actual release of a prisoner. The court held that the Authority retained the right to reconsider its action; therefore, the parole order was not final, and the trial court lacked jurisdiction to issue a writ of habeas corpus.

Appellant also cites Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (1987) 195 Cal.App.3d 812, 817 [240 Cal.Rptr. 915], a case involving the right of Safeway to appeal an administrative decision of the Department that it could charge a transfer fee of $50 per store in connection with a Safeway corporate reorganization. Finding that there was no factual dispute, and that the issue involved a question of law, the court held the

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[6] Now known as the Board of Prison Terms. (See Penal Code §5078.)

Department's action to be a reviewable decision, even though it was not the product of a quasi-judicial hearing.

Here, of course, the facts are in dispute - did the minor decoy possess the requisite appearance under Rule 141(b)(2). That issue must be resolved, and until that occurs, the case is not ripe for review.

Appellant's position appears to rest upon the arguments this Board rejected in Circle K Stores, Inc. (1999) AB-7080a, when it held that the Department does have power to take further action after an Appeals Board reversal that was not accompanied by an express remand order. So long as that continues to be the rule this Board believes controlling, appellant's jurisdictional contentions must be rejected.

ORDER

The appeal is dismissed for lack of jurisdiction.[7]

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[7] 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.