

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

AB-9680

File: 21-542593; Reg: 17085386

MINHE, INC.,
dba Rose & Mike Liquors
12622 San Pablo Avenue, Richmond, CA 94805,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: David W. Sakamoto

Appeals Board Hearing: July 12, 2018
South San Francisco, CA

ISSUED JULY 27, 2018

Appearances: *Appellant:*, Richard D. Warren, as counsel for Minhe, Inc.,

Respondent: Matthew Gaughan, as counsel for the
Department of Alcoholic Beverage Control.

OPINION

Minhe, Inc., doing business as Rose & Mike Liquors, appeals from a decision of the Department of Alcoholic Beverage Control¹ denying its Petition to Remove Conditions.

FACTS AND PROCEDURAL HISTORY

The conditions at issue in this matter were originally imposed on a previous license at this location held by Chang Il Lim and Jeong Ok Lim (the Lims). In

¹The Decision of the Department under Government Code section 11517, subdivision (c), dated January 16, 2018, is set forth in the appendix, as is the Proposed Decision of the administrative law judge (ALJ), dated July 18, 2017.

September 2003, Jong Hee Cho and Soo Sun Cho (the Chos) applied to the Department for a person-to-person transfer of the license. As part of the Lim to Cho transfer in 2003, the Chos signed a Petition for Conditional License that added 16 conditions to the license. These conditions were imposed following receipt of a letter from the Richmond Police Department (RPD) requesting that conditions be placed on the license to mitigate concerns about potential problems at this location. (Exh. 4.) The Lim to Cho transfer was approved, subject to those conditions.

In 2014, appellant applied for a person-to-person transfer — to transfer the license from the Chos to itself. (Exh. D.) The transfer was approved subject to the same conditions, which were carried forward from the Chos' license to appellant's license as a matter course by the Department. (Exh. 5.)

Since being licensed, appellant has suffered two disciplinary actions — one in 2015 for dealing in counterfeit goods and violating license conditions, and a second in 2016 for improper posting of signs during a suspension. (Findings of Fact, ¶¶ 9-10.) In addition, there is a pending misdemeanor criminal charge against appellant's corporate president which is being held in abeyance — pending the final resolution of appellant's petition to remove conditions — for the violation of one of the conditions on the current license. (Finding of Fact, ¶ 17; Exh. F.)

In 2016, appellant petitioned the Department for removal of all 16 license conditions. Administrative hearings were held on May 11, 2017 and May 22, 2017. Documentary evidence was received and testimony concerning the petition was presented by Department Licensing Representative Riselwyn Melodias; attorney Roger Fox; as well as RPD representatives, Sergeant Nicole Abetkov and Detective Mark Shanks.

Testimony established that an investigation was conducted by Licensing Representative Melodias to determine whether the conditions should be removed. As part of the investigation, a letter was sent to the RPD, notifying them of the petition. The RPD responded with a letter, dated July 27, 2016, stating they were protesting the removal of the conditions. (Exh. 6.) The letter, and testimony about it, referenced incidents of violence at the premises, condition violations, an ABC license suspension and other problems. (RT at pp. 31-32; exh. 7-8.) The RPD also provided documentation and testimony regarding calls for service at the premises and in the surrounding area. (*Ibid.* at pp. 36-41; exh. 10-12.)

Appellant presented evidence and testimony to support its position that all 16 conditions should be stricken as void because they were originally imposed on the license in 2003 — at a time when the statute did not provide for the imposition of conditions during a person-to-person license transfer.

As a result of his investigation and the documentation received, Licensing Representative Melodias presented his recommendation that the conditions not be removed from the license.

On July 18, 2017, the ALJ submitted a proposed decision, denying appellant's petition to remove the conditions on its license. The ALJ found that even though the original conditions may have been imposed during a period when the statute did not yet provide for the imposition of conditions, he also found that by the time of the transfer of the license to appellant in 2014, Business and Professions Code section 23800(e) had been amended and permitted conditions to be placed on a license at the time of a transfer, and that appellant waived its right to object to the conditions when it signed the petition for conditional license. In addition, the ALJ found that there was no change in

circumstances to justify removal of the current conditions on the license. He therefore denied appellant's request to remove the conditions.

Thereafter, on July 24, 2017, the Department's Administrative Hearing Office sent a letter from its Chief ALJ to the parties, inviting the submission of comments on the proposed decision, stating that the proposed decision and any comments would be submitted to the Director of ABC in 14 days. Appellant submitted comments, making essentially the same arguments raised in this appeal. The Department did not submit comments.

The Department initially rejected the proposed decision. It advised the parties that the Department had considered but did not adopt the proposed decision, and that it would decide the case pursuant to section 11517(c). The Notice Pursuant to Government Code Section 11517(c)(E)(I), dated September 6, 2017, invited the parties to submit written argument. Both appellant and Department counsel submitted briefs.

On January 16, 2017, the Department issued its Decision Under Government Code Section 11517(c), adopting the proposed decision in its entirety and denying appellant's request to remove the conditions.

Appellant then filed a timely appeal raising the following issues: (1) the conditions were improperly imposed at the time of the person-to-person transfer in 2003, therefore the conditions were void and improperly carried over to appellant in 2014; (2) appellant did not waive its right to object to the imposition of the conditions when it signed the Petition for Conditional License; (3) the 2003 RPD letter was insufficient to satisfy statutory requirements in 2014; (4) testimony by the RPD regarding circumstances in 2016 and 2017 was irrelevant and inadmissible; and (5) section 23803 is inapplicable and does not justify denial of appellant's petition.

DISCUSSION

Appellant contends the conditions imposed on its license were contrary to statute and thus improperly imposed at the time of the person-to-person license transfer in 2003 — therefore the previous conditions were void from the beginning, and improperly carried over to appellant in 2014.

Business and Professions Code section 23800 outlines the circumstances in which the Department may impose conditions on a license. Subdivision (e) of that section was amended to allow local law enforcement to request conditions (effective January 1, 2001) but was applicable only to transfers under sections 24071.1 and 24071.2. Person-to-person transfers are governed by section 24070. Section 23800(e) was amended in 2012 (effective January 1, 2013) to allow conditions to be added to a license during a person-to-person transfer under section 24070.

Prior to section 23800(e) being amended to permit the imposition of conditions during a person-to-person transfer, the Appeals Board reversed several Department decisions in which conditions had been imposed during such transfers. (see e.g., *Hermosa Pier 20, LLC* (2013) AB-9284; *Hermani* (2013) AB-9285.) In those decisions, the appellants argued that since the Department lacked the power, prior to 2013, to impose conditions in connection with a person-to-person transfer, established law required that those conditions be stricken as void. The Board agreed, and based its decisions on several California Supreme Court cases which addressed an obligation on the part of the courts to declare void any attempts by administrative agencies to enlarge their statutory 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 awards. In so doing, the Court cited its earlier decision in *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379 [241 Cal.Rptr. 67], that "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"].

Appellant argues that the conditions which have been placed on this license are void because they were initially imposed during the Lim to Cho transfer in 2003, prior to the amendment of section 23800(e) to give the Department the authority to impose conditions at the time of a person-to-person transfer. Therefore, it argues, the conditions were void at the time they were imposed on the original license, and continue to be void now.

At the time of the person-to-person transfer to appellant in 2014, section 23800(e) had been amended to permit the imposition of conditions at the time of a person-to-person transfer. The statute lays out the requirements for imposing conditions as follows:

At the time of transfer of a license pursuant to Section 24070, 24071.1, or 24071.2, and upon written notice to the licensee, the department may adopt conditions that the department determines are reasonable **pursuant to its investigation or that are requested by the local governing body, or its designated subordinate officer or agency, in whose jurisdiction the license is located. The request for conditions shall be supported by substantial evidence that the problems either on the premises or in the immediate vicinity identified by the local governing body or its designated subordinate officer or agency will be mitigated by the conditions.** Upon receipt of the request for

conditions, the department shall either adopt the conditions requested or notify the local governing body, or its designated subordinate officer or agency, in writing of its determination that there is not substantial evidence that the problem exists or that the conditions would not mitigate the problems identified. **The department may adopt conditions only when the request is filed.** Any request for conditions from the local governing body or its designated subordinate officer or agency pursuant to this provision shall be filed with the department within the time authorized for a local law enforcement agency to file a protest or proposed conditions pursuant to Section 23987.

(Bus. & Prof. Code § 23800(e)(1), emphasis added.) Appellant contends:

[t]here was neither a request for conditions from Richmond Police Department (RPD) nor any Department investigation when the conditions were imposed on Petitioner's license in 2014. By imposing the conditions on MINHE's license, the Department acted beyond its statutory authority and the conditions are void and must be struck down.

(AOB at p. 2.) We agree. There is no evidence in the record that the Department did its own investigation in 2014, or that the RPD requested conditions in 2014 as required by section 23800(e)(1). The conditions imposed were simply carried forward from the original license, based on an old letter from the RPD drafted in 2003. (Exh. 4.) This is clearly not in compliance with the requirements of the statute.

The ALJ made the following observations in his decision, which support appellant's position that the conditions are void:

5. . . . Most relevant to Petitioner's current request is that in 2003, section 23800(e)(1) did not include imposing conditions on the occasion of person-to-person license transfers pursuant to 24070.

[¶ . . . ¶]

10. In 2003, when the license was transferred from the Lims to the Chos and the operating conditions were initially added to the license, such was done under the authority of 23800(e)(1). . . . However, at that time, section 23800(e)(1) did not expressly permit imposition of conditions on the occasion of a section 24070 person-to-person transfer. . . . In this instance, by analogy, **as the Department originally imposed conditions on the license in 2003 under a statute that did not give it such authority, those conditions should be deemed invalid and**

unenforceable.

11. Section 23802 indicates that conditions imposed on a license shall be binding upon any transfer of the license. . . . However, as noted above, those license conditions were not validly imposed in 2003 when the Department transferred the license from the Lims to the Chos. Therefore, despite section 23802's directive, **as those 16 conditions could not be deemed properly imposed when the Chos became the licensees in 2003, they could not properly be carried forward on the license in 2014 when the Department transferred the license from the Chos to Petitioner.**

(Determination of Issues, ¶¶ 5-11, emphasis added.)

In spite of supporting appellant's position that the 2003 conditions were invalid and unenforceable, and that they could **not** be carried forward to appellant's license in 2014, the ALJ goes on to say:

13. In 2014, when Petition applied to have the Cho's license transferred to it, Petitioner executed its own separate Petition for Conditional License that included a preamble that set forth certain specific acknowledgments and findings regarding the imposition of the conditions. Petitioner's Petition did not indicate the conditions were merely being carried forward from the prior licensee to Petitioner under authority of section 23802. Rather, Petitioner's preamble stated:

Whereas, petitioner(s) has/have filed an application for the issuance of the above-referred-to-license(s) for the above-mentioned premises; and,

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

Whereas, pursuant to Business and Professions Code Section 23800(e) the Department may grant a license transfer where the transfer with conditions will mitigate problems identified by the local governing body or its designee; and,

Whereas, petitioner(s) stipulate that by reason of the existence of substantial evidence of identifiable problems at the premises or its immediate vicinity, grounds exist for denial of said license transfer; and,

Whereas, transfer of the existing unrestricted license would be contrary to public welfare and morals; and,

Now, Therefore, [*sic*] the undersigned petitioner(s) do/does hereby petition for a conditional license as follows, to-wit:

Following the preamble, 16 specific restrictions on use of the license were listed.

(*Id.*, at ¶ 13.) In short, the ALJ characterizes this not as a transaction which carried forward invalid conditions, but as an entirely new transaction between appellant and the Department in which the parties agreed to terms.

The ALJ goes on to conclude:

14. . . . any claim of error based on a lack of specificity or precision in the wording used in its Petition for Conditional License should have been raised by Petitioner in 2014, and **any objections to its form should now be considered waived.**^[m.] . . . Therefore, as the Department had the express authority to impose conditions under section 23800(e)(1) in 2014, and Petitioner agreed to the additional of those conditions based upon the grounds set forth in its Petition for Conditional License, it is determined that those conditions were validly imposed when the Department transferred the license to petitioner in 2014.

(*Id.*, at ¶ 14, emphasis added.)

Appellant maintains, however, that this attempt by the ALJ to save void conditions by determining that appellant waived its right to object by not objecting in 2014 must fail. (AOB at p. 4.)

Waiver requires the intentional relinquishment of a known right upon knowledge of the facts. The burden is on the party claiming a waiver of right to prove it by clear and convincing evidence that does not leave the matter to speculation. As a general rule, doubtful cases will be decided against the existence of a waiver. [Citations.]

(*Ringler Associates Inc. v. Maryland Casualty Co.* (2000) 80 Cal.App.4th 1165, 1188 [96 Cal.Rptr.2d 136].) Appellant contends there is no evidence that it intended to waive its right to object to the conditions. It maintains the Department exceeded its authority

by carrying over the previous license conditions without doing an investigation and without any request for such conditions from law enforcement at the time of the person-to-person transfer in 2014 — as required by the clear language of the statute.

Appellant argues that the Board should rule as it did in *Hermosa Pier*, where it remarked on a very similar situation:

We are not persuaded by the Department's argument that appellant should be denied relief because it "voluntarily" accepted the conditions in order to gain an expeditious processing of the desired transfer.

(*Hermosa Pier 20, LLC, supra* at p. 7.) As the Board noted in *Hermani*,

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.

(*Hermani, supra* at pp. 8-9.)

In both the *Hermosa* and *Hermani* cases, where the Board reversed decisions upholding conditions imposed in the course of a person-to-person transfer, the determinative factor was the fact that the Department did not have authority to impose the conditions to begin with. Accordingly, these decisions held the conditions void in spite of the appellants' agreement or acquiescence, because the agreements were elicited through reliance on nonexistent authority. The situation here is identical.

Appellant argues that it is questionable whether there can be a voluntary relinquishment of a right to object to conditions when faced with the take-it-or-leave-it approach of the Department in regards to the imposition of conditions. We agree. We see no clear and convincing evidence in the record that the appellant waived its right to object to the conditions. Consequently, case law requires us to rule against the existence of any waiver.

Appellant further objects to the Department finding justification for the conditions based on testimony by RPD officers who were not involved in the 2014 person-to-person transfer at issue here, but who testified only about events in 2016 and 2017. Appellant maintains their testimony is irrelevant and inadmissible, as is the Department's conclusion based on that testimony, that the reasons for the conditions have not changed since they were originally requested by the RPD in 2003 — thereby justifying the carrying forward of otherwise void conditions.

Appellant contends the crucial question is whether conditions which were void in 2003 could legally be carried forward in 2014 — without an investigation by the Department and without a petition to impose conditions from local law enforcement, as required by statute. We believe that question must be answered with a resounding “no.” As explained in the ALJ's own analysis:

those 16 conditions could not be deemed properly imposed when the Chos became the licensees in 2003, they could not properly be carried forward on the license in 2014 when the Department transferred the license from the Chos to Petitioner.

(Determination of Issues, ¶ 11.) The conditions at issue here are void because they have been void from the beginning.

The Department's decision cites Business and Professions Code section 23803, and appellant's failure to comply with it, as the final justification for denying appellant's petition, in spite of having found that the conditions were void in 2003 and that they could not be carried forward in 2014. Section 23803 states, in relevant part:

The department, upon its own motion or upon the petition of a licensee or a transferee who has filed an application for the transfer of the license, if it is satisfied that the grounds which caused the imposition of the conditions no longer exist, shall order their removal or modification . . .

Appellant, however, insists it never sought to have the conditions removed under

section 23803, but, rather, has from the beginning sought to have the conditions removed because their original imposition was void. (AOB at p. 6.) The ALJ — having dismissed the issue of voidness, by finding that appellants waived their right to make such an objection — goes on to conclude:

15. Section 23803 provides that removal or modification of conditions can occur if it is shown to the Department that the grounds which caused the imposition of conditions no longer exist. In this instance, as Petitioner was seeking removal of the conditions, Petitioner must make that evidentiary showing to the Department. . . . There was evidence that from 2003 up to 2017, the RPD opposed issuance or transfer of the license without the conditions specified in the Petition for Conditional License and still favors their continued attachment on the license.^[fn.] At the hearing, Petitioner presented no witnesses or evidence of any kind in support of showing any changed circumstances whatsoever with respect to the licensed premises, its operations, or the immediate area around Petitioner's licensed premises to justify removal of the conditions.^[fn.] Petitioner presented no evidence that the RPD supported its effort to remove or modify the conditions in any fashion. Petitioner did not even attempt to make any showing that based on the current operation of [the] licensed premises and/or the conditions in the immediate area there was no rational need for the conditions to continue on the license. As no change of any relevant circumstances related to the premises or the immediate area were established by Petitioner, it did not fulfill its burden of proof under section 23803.

(Determination of Issues, ¶ 15.)

In *Hermani*, the Board addressed an almost identical situation and said:

Throughout his petition, briefing, and oral argument, appellant made it clear that he sought removal because the original imposition of the conditions was void. . . . In fact, the only documents that characterize appellant's petition as falling under section 23803 are documents produced by the Department itself. . . . 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.

(*Hermani*, *supra* at p. 7.)

We agree with appellant that section 23803 has no bearing on the outcome of this case, and that, as in *Hermani*, that the standards of that statute do not apply.

Furthermore, we disagree with the ALJ's assessment that appellant waived its right to object to the conditions when presented with the Department's take-it-or-leave-it presentation of a petition for conditional license containing "whereas" clauses. The conditions imposed in 2003 were contrary to statute and therefore void. These conditions continued to be void when carried over by the Department during the person-to-person transfer in 2014 and must be stricken — accordingly, the matter must be reversed.

ORDER

The decision of the Department is reversed.²

BAXTER RICE, CHAIRMAN
PETER J. RODDY, MEMBER
MEGAN McGUINNESS, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

²This 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.

APPENDIX

**BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA**

**IN THE MATTER OF THE PETITION
FOR REMOVAL OF CONDITIONS BY:**

MINHE, Inc.
Dbas Rose & Mike Liquors
12622 San Pablo Ave.
Richmond, CA 94805

Petitioner(s)

File No.: 21-542593

Reg. No.: 17085386

DECISION UNDER GOVERNMENT CODE SECTION 11517(c)

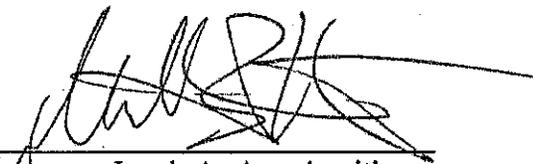
The above-entitled matter having regularly come before the Department on January 16, 2018, for decision under Government Code Section 11517(c) and the Department having considered its entire record, including the transcript of the hearing held on May 11, 2017, and June 22, 2017, before Administrative Law Judge David W. Sakamoto, and the written arguments of the parties, and good cause appearing, the following is hereby adopted:

ORDER

The proposed decision of the Administrative Law Judge dated July 18, 2017, is hereby adopted as the decision of the Department.

Sacramento, California

Dated: January 16, 2018


per Jacob A. Appelsmith
Director

Pursuant to Government Code section 11521(a), any party may petition for reconsideration of this decision. The Department's power to order reconsideration expires 30 days after the delivery or mailing of this decision, or on the effective date of the decision, whichever is earlier.

Any appeal of this decision must be made in accordance with Chapter 1.5, Articles 3, 4 and 5, Division 9, of the Business and Professions Code. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005.

**BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA**

IN THE MATTER OF THE PETITION OF:

MINHE, INC.
ROSE & MIKE LIQUORS
12622 SAN PABLO AVE
RICHMOND, CA 94805

**FOR THE REMOVAL OF CONDITIONS ON THE
OFF-SALE GENERAL - LICENSE**

Respondent(s)/Licensee(s)
Under the Alcoholic Beverage Control Act

OAKLAND DISTRICT OFFICE

File: 21-542593

Reg: 17085386

CERTIFICATE OF DECISION

NOTICE CONCERNING PROPOSED DECISION

To the parties in the above-entitled proceedings:

You are hereby advised that the Department considered, but did not adopt, the Proposed Decision in the above titled matter and that the Department will itself decide the case pursuant to the provisions of Section 11517(c)(2)(E). A copy of the Proposed Decision has previously been sent to all parties.

The Department has requested that a transcript of the hearing be prepared. A copy of the record will be made available to you. Upon receipt of the hearing transcript, the Department will notify you of the cost of a copy of the record. At that time you all also be advised of the date by which written argument if any, is to be submitted.

Sacramento, California

Dated: September 6, 2017



Matthew D. Botting
General Counsel

**BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA**

IN THE MATTER OF THE PETITION OF:

Minhe, Inc.
Db: Rose & Mike Liquors
12622 San Pablo Ave.
Richmond, CA 94805

} FILE: 21-542593
}
} REG: 17085386
}
} LICENSE TYPE: 21
}
} Word Count Est.
} 5-11-2017: 18,532
} Angela M. Rodriguez, CSR 14060
}
} 6-22-2017: 12,747
} LaCreisha Vaughn, CSR 13945
}
} **PROPOSED DECISION**

For the Removal of Conditions From It's Off-Sale
General License

Under the Alcoholic Beverage Control Act.

Administrative Law Judge David W. Sakamoto heard this matter on May 11, 2017 and June 22, 2017, in Martinez, California. Oral and documentary evidence was received at the hearing. The matter was submitted for decision on June 22, 2017.

Matthew Gaughan, Attorney, represented the Department of Alcoholic Beverage Control. (hereafter "the Department")

Rick Warren, Esq., represented the licensee, Minhe, Inc. (hereafter "Petitioner") Petitioner's corporate president, Michael Yang, was also present at the hearing.

In June 2016, Petitioner requested the Department remove all 16 conditions currently imposed on its license based upon its contentions that: 1) in 2003, the conditions were originally invalidly imposed under California Business and Professions Code 23800(e) on the previous license holder and could not properly be carried forward in 2014 when that license was transferred to Petitioner, and; 2) the reasons set forth Petitioner's 2014 Petition for Conditional License for adding license conditions were too vague and ambiguous.¹ After its investigation, the Department recommended Petitioner's request be denied because the circumstances that justified imposition of the conditions had not changed so as to permit their removal. Petitioner requested a hearing on the Department's denial.

¹ All future section references are to the California Business and Professions Code unless noted otherwise.

FINDINGS OF FACT

1. Through most of 2003, Chang Il Lim and Jeong Ok Lim (hereafter "the Lims") held the Type 21 Off-Sale general license at the above captioned premises.²

2. In September 2003, Jong Hee Cho and Soo Sun Cho (hereafter "the Chos") applied to the Department to have the license held by the Lims transferred to them for the very same licensed premises. (Exhibit E-Report on Application for License) This is commonly referred to as a "person-to-person" license transfer in that while the license holder changes, the license will be used at the same licensed premises.

3. In 2003, as part of that person-to-person license transfer application, the Department received a letter from Sergeant J. Silva of the Richmond Police Department. (Exhibit 4) The letter basically detailed a description of the general area and also of the store's then current operation and offerings. The letter included paragraphs stating,

My general opinion is that the store offers a convenience for the area. But, I am concerned about the sale of singles and high alcoholic content beverages at this location. There is a high potential for customers to obtain these beverages at this market and consume them in the immediate area.

Should a decision be made to grant the ABC license transfer, I would suggest the following conditions listed in appendix "A" be placed on the business to limit any adverse effects in the community.

The letter included a list of numerous conditions, some of which appeared to have been circled to indicate they should be added to the license as a part of the person-to-person license transfer.

4. The Department's Licensing Representative Riselwyn Mellodias (hereafter "L.R. Mellodias") reviewed the Department's records regarding the licensing history of the premises.³ He testified that 16 conditions were added to the license when the Chos applied for their person-to-person license transfer in 2003. The conditions were imposed under authority of section 23800(e) and based on Sergeant Silva's letter on behalf of the Richmond Police Department. (hereafter "RPD") (Exhibit 4) The letter was deemed substantial evidence of an identifiable problem under section 23800(e) warranting the imposition of the conditions. The Department's records concerning the Lim to Cho license transfer did not contain any further reports, memos, or other recommendations from RPD other than Sergeant Silva's letter. (hereafter "Sgt. Silva")

² A Type 21 Off-Sale general license permits the licensee to retail in beer, wine, and distilled spirits for consumption off the licensed premises.

³ Mellodias testified at the hearing on behalf of the Department.

5. As part of the 2003 Lim to Cho person-to-person license transfer, the Chos executed a Petition for Conditional License that added 16 specific conditions to the license, among which included: the sales of alcoholic beverages were restricted to 9:00 a.m. to 11:00 p.m. Sunday through Thursdays, 9:00 a.m. to midnight on Friday and Saturdays; no selling of single containers of malt beverages; the alcoholic content of beverages sold should not exceed 6% by volume; wine should not be sold in bottles smaller than 750 ml, except for wine based coolers; no wine sold shall be in excess of 15% alcohol by volume; no amusement devices were permitted on the premises; no pay telephones were permitted on the premises or adjacent property; and no exterior advertising of alcoholic beverages was allowed. (Exhibit 3-Cho Petition for Conditional License)

6. Ultimately, the Department approved the transfer of the license to the Chos subject to and limited by the 16 conditions contained in their Petition for Conditional license.

7. Eleven years later, in 2014, Petitioner herein, Minhe Inc, applied to the Department to transfer the license from the Chos to Petitioner pursuant to another person-to-person transfer. (Exhibit D-Report on Application for License)

8. L.R. Mellodias testified that, in 2014, the Department granted Petitioner's request and it became the licensee at the premises subject to the same conditions the Chos had and as reflected in Petitioner's own Petition for Conditional License. (Exhibit 5-Minhe Inc. Petition for Conditional License) L.R. Mellodias testified that he could not locate in the Department's records a separate request from RPD to maintain or impose conditions on Petitioner's license nor any related reports in support thereof. L.R. Mellodias testified the Department's records reflected that the conditions were carried forward from the Chos' license to Petitioner's license as a matter of course.⁴

9. Since Petitioner was licensed, it suffered two disciplinary accusations by the Department. Under Registration number 16083725, it suffered a 2016 accusation for dealing in counterfeit goods and violating license conditions. The matter was resolved by a revocation, stayed for one year, and a 20 day license suspension. (Exhibit 13)

10. Also in 2016, Petitioner suffered a second accusation under Registration number 16084415 for violation of California Code of Regulation, Title 4, Division 1, Section 108.⁵ That matter was ultimately resolved by payment of \$2,166.25 in lieu of serving a 5 day license suspension. (Exhibit 14)

⁴ Section 23802 provides that conditions are "...binding upon all persons to whom the license is transferred." Therefore, L.R. Mellodias' assessment that the conditions were carried forward from the Chos' license to Petitioner's license is consistent with fulfilling this statutory mandate.

⁵ Rule 108 indicates that when a licensed premises is posted for a suspension, "Advertising or posting signs to the effect that the premises have been closed or business suspended for any reason other than by order of the department suspending alcoholic beverage license, shall be deemed a violation of this rule."

11. In 2016, after being licensed for about two years, Petitioner requested the Department remove all 16 license conditions alleging the conditions were improperly imposed and that the grounds stated in Petitioner's own Petition for Conditional License was too vague to justify imposition of the conditions. (Exhibit 1-pre-hearing pleadings including Petitioner's request to void conditions) L.R. Mellodias investigated Petitioner's request to remove the conditions.

12. In response to Petitioner's request, RPD sent the Department a July 27, 2016 letter opposing Petitioner's request to delete all 16 license conditions. (Exhibit 6-Police letter) In essence, the police opposed the request because Petitioner had already suffered a 20 day license suspension and operated in violation of several of its license conditions. The latter even resulted in a criminal complaint against Petitioner's corporate president, Michael Yang. Lastly, it indicated that Michael Yang had been expressly and repeatedly reminded by RPD of the license conditions yet violations of them occurred.

13. The RPD also sent L.R. Mellodias two 2016 police reports wherein police officers detected ABC license condition violations in Petitioner's store. (Exhibit 7 and Exhibit 8) RPD also sent L.R. Mellodias several call for service logs for the premises and neighboring area. (Exhibit 9, Exhibit 10, Exhibit 11, and Exhibit 12)

14. RPD Sergeant Nicole Abetkov (hereafter Sgt. Abetkov), a 16 year RPD veteran, currently leads the RPD's regulatory unit that focuses on over-seeing licensed businesses in Richmond, including those merchants with alcoholic beverage control licenses.⁶ Petitioner's premises is on a main commercial street in police beat #7 in the northern district, which is one of the largest and most populous police beats in Richmond. Due to its size and law enforcement activity, it is regularly assigned two police officers while other districts are only assigned one. Sgt. Abetkov also testified regarding Exhibit 10, which evidenced 7 police responses to the premises from January 4, 2016 through July 10, 2016. She also testified regarding Exhibit 12 that indicated in the 12 months from February 2016 to the end of January 2017, there were 313 police responses for various calls to locations within 500 yards of Respondent's premises.

15. Sgt. Abetkov opposed removal of Petitioner's license conditions. She based that, in part, upon RPD's initial request to impose conditions in 2003. She was also aware that, despite several warnings to Petitioner's president, Michael Yang, he was not adhering to the existing license conditions, especially the ban on selling single containers of alcoholic beverages. (hereafter "Yang") She also noted that Yang had even been charged criminally for not adhering to Petitioner's license conditions. She testified that, in Richmond, permitting single container sales of alcoholic beverages created or aggravated loitering, public drinking, public urination, littering, begging, general blight of the area, and other disturbances of the public

⁶ Sgt. Abetkov testified at the hearing. The regulatory unit also over-sees such licensed businesses as tow companies, cabs, marijuana dispensaries, alarm companies, and tobacco retailers.

peace. She added that due to a combination of several factors, it seemed this premises was somewhat less of a problem than it had been under the prior owner. Those factors included a general reduction of crime city wide, the removal/absence of a payphone at the premises, and the regulatory unit's ability to focus on licensed businesses activity.

16. RPD Detective Mark Shanks, a 10 year RPD veteran and now a member of its regulatory unit, testified that since March 2016 to May of 2017, he had been to the premises no less than four times to monitor Petitioner's compliance with its license conditions. On March 7, 2016, he found an operable slot machine and certain alcoholic beverages Petitioner should not have available for sale, in violation of the license conditions. (Exhibit 7-police report). On April 21, 2016, he again found certain alcoholic beverages offered for sale that were contrary to the license conditions. (Exhibit 8-police report) He also described how permitting sales of single containers of alcoholic beverages can easily prompt begging by persons, who, once a modest sum is raised, buy and immediately consume the drink adjacent to or nearby licensed businesses. This leads to related problems such as loitering, litter, and public urination. He had seen this pattern of activity at other sites in Richmond and did not want that to develop in Petitioner's area.

17. Currently, there is a misdemeanor criminal charge pending against Michael Yang, Petitioner's corporate president, for violation of section 25607, essentially for carrying types of alcoholic beverages the premises was banned from retailing in, under the conditions on Petitioner's license. (Exhibit F-Misdemeanor criminal documents) That misdemeanor criminal matter is being held in abeyance pending the outcome of Petitioner's request to the Department to remove all license conditions.⁷

18. Based upon his review and analysis of the Department's records and information received from the RPD, L.R. Mellodias concluded that Petitioner's request to remove all of the conditions was not warranted because there was no evidence that the reason(s) the conditions were originally imposed no longer exist(s).

DETERMINATION OF ISSUES

1. Article XX, Section 22 of the California Constitution provides that the Department of Alcoholic Beverage Control has the power, in its discretion, to deny an application for an alcoholic beverage license if it determines for good cause that the granting of the license would be contrary to public welfare or morals.

2. Section 24070 states, in part, "Each license is separate and distinct and is transferable upon approval by the department from the licensee to another person and from one premises to another premises."

⁷ Roger Fox, Esq., Michael Yang's criminal defense attorney, testified regarding the status of Mr. Yang's criminal case.

3. Section 23800 provides that “[t]he department may place reasonable conditions upon retail licensees or upon any licensee in the exercise of retail privileges . . . [i]f 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. . . .”

4. When conditions are imposed on a license, they are to be carried forward to any new holder of the license. Section 23802 states, “Such conditions shall be endorsed upon the license and any renewal thereof and shall be binding upon all persons to whom the license is transferred.”

5. In 2003, when the Department transferred the license at this premise from the Lims to the Chos, section 23800(e)(1) stated conditions could be added to an existing license, “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 investigation or that are requested by the local governing body, or its designated subordinate officer or agency, in whose jurisdiction the license is located. . . .” Most relevant to Petitioner’s current request is that in 2003, section 23800(e)(1) did not include imposing conditions on the occasion of person-to person license transfers pursuant to 24070.

6. In 2012, section 23800(e)(1) was amended to provide that conditions could thereafter be added to an existing license, “At the time of transfer of a license pursuant to Section 24070, 24071.1, or 24071.2, and upon written notice to the licensee, the department may adopt conditions that the department determines are reasonable pursuant to its investigation or that are requested by the local governing body, or its designated subordinate officer or agency, in whose jurisdiction the license is located. . . .” Therefore, in 2014, when Petitioner applied for a section 24070 person-to-person license transfer, *conditions* could lawfully be imposed on the license.

7. Once conditions are on a license, the Department may remove them under section 23803 that states, “The department, upon its own motion or upon the petition of a licensee or a transferee who has filed an application for the transfer of the license, if it is satisfied that the grounds which caused the imposition of the conditions no longer exist, shall order their removal or modification, provided written notice is given to the local governing body of the area in which the premises are located. The local governing body has 30 days to file written objections to the removal or modification of any condition. The department may not remove or modify any condition to which an objection has been filed without holding a hearing as provided in Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.”

8. In this matter, Petitioner argued all 16 conditions set forth in Petitioner's 2014 Petition for Conditional License should be stricken as void because they were originally imposed on the Cho's license in 2003 when section 23800(e)(1) did not provide for the imposition of conditions upon a section 24070 person-to-person license transfer. As those conditions were improperly imposed on the Chos' license, Petitioner contends they could not be kept on the license when the Department transferred the license from the Chos to Petitioner in 2014. Petitioner also argued that the language used in the preamble in its own 2014 Petition for Conditional License was so vague as to warrant voiding those conditions.

9. The Department primarily argued that in 2012, section 23800(e)(1) was amended to expressly permit the imposition of conditions upon a person-to-person license transfer as described under section 24070. Therefore, the Department had the express authority to impose conditions on Petitioner's license in 2014 when the Department transferred the license to Petitioner subject to and contingent upon Petitioner's own Petition for Conditional License. (Exhibit 5, Petitioner's Petition for Conditional License) The Department asserted Petitioner remains bound by those conditions unless it can show a change of circumstances as described in section 23803, which it did not do.

10. In 2003, when the license was transferred from the Lims to the Chos and the operating conditions were initially added to the license, such was done under the authority of 23800(e)(1). (Exhibit 3-Cho Petition for Conditional License) However, at that time, section 23800(e)(1) did not expressly permit imposition of conditions on the occasion of a section 24070 person-to-person transfer. In *Dyna-Med, Inc. v. Fair Employment and Housing Com.* (1987) 43 Cal.3d 1379 [241 Cal.Rptr.67], the California Supreme Court "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[63Cal.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 this instance, by analogy, as the Department originally imposed conditions on the license in 2003 under a statute that did not give it such authority, those conditions should be deemed invalid and unenforceable.

11. Section 23802 indicates that conditions imposed on a license shall be binding upon any transfer of the license. In this instance, it appears at least one purpose ^{of the} Petitioner's 2014 Petition for Conditional License was submitted was to carry out that objective. L.R. Mellodias indicated the Department's records collectively reflected this was a situation of a routine carry-forward of existing license conditions to Petitioner, as the successor licensee of the Chos. However, as noted above, those license conditions were not validly imposed in 2003 when the Department transferred the license from the Lims to the Chos. Therefore, despite section 23802's directive, as those 16 conditions could not be deemed properly imposed when the Chos became the licensees in 2003, they could not properly be carried

forward on the license in 2014 when the Department transferred the license from the Chos to Petitioner.

12. The Department argued that since a 2012 amendment to section 23800(e)(1) gave the Department authority to impose conditions on the occasion of a section 24070 person-to-person license transfer, Petitioner's 2014 Petition for Conditional License validly added the conditions listed therein to the license at that time, and that the Department relied on those conditions being on the license as a pre-requisite of approving the transfer of the license to Petitioner.

13. In 2014, when Petitioner applied to have the Cho's license transferred to it, Petitioner executed its own separate Petition for Conditional License that included a preamble that set forth certain specific acknowledgments and findings regarding the imposition of the conditions. Petitioner's Petition did not indicate the conditions were merely being carried forward from the prior licensee to Petitioner under authority of section 23802. Rather, Petitioner's preamble stated:

Whereas, petitioner(s) has/have filed an application for the issuance of the above-referred-to license(s) for the above-mentioned premises; and,

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

Whereas, pursuant to Business and Professions Code Section 23800(e) the Department may grant a license transfer where the transfer with conditions will mitigate problems identified by the local governing body or its designee; and,

Whereas, petitioner(s) stipulate that by reason of the existence of substantial evidence of identifiable problems at the premises or its immediate vicinity, grounds exist for denial of said license transfer; and,

Whereas, transfer of the existing unrestricted license would be contrary to public welfare and morals; and,

Now, Therefore, the undersigned petitioner(s) do/does hereby petition for a conditional license as follows, to-wit:

Following the preamble, 16 specific restrictions on use of the license were listed.

14. The language used in the preamble is basically taken from the language used in section 23800(e)(1) in terms of what ultimately justifies imposition of conditions in a person-to-person license transfer. That section did not mandate any more precision was required to describe the nature of the "identifiable problem" in a Petition for Conditional License or any other licensing document when the Department exercised its discretion to add conditions under that section.⁸ Further, in that Petitioner executed its Petition for Conditional license, any claim of error based on a lack of specificity or precision in the wording used in its Petition for Conditional License should have been raised by Petitioner in 2014, and any objections to its form should now be considered waived.⁹ Petitioner should not be able to void the conditions and simultaneously eliminate the opportunity for the RPD to seek addition of the conditions under section 23800(e)(1) as that opportunity closed three years ago when the license was transferred to Petitioner. Petitioner would effectively receive a windfall of being released of all license conditions when it had the opportunity in 2014 to seek further specificity or clarification in the preamble's text, to possibly negotiate a different set of conditions more to its satisfaction, to refuse imposition of the conditions and fully litigate the issue of conditions at that time, or to merely withdraw its application and seek a more suitable business opportunity. Therefore, as the Department had the express authority to impose conditions under section 23800(e)(1) in 2014, and Petitioner agreed to the addition of those conditions based upon the grounds set forth in its Petition for Conditional license, it is determined that those conditions were validly imposed when the Department transferred the license to Petitioner in 2014.

15. Section 23803 provides that removal or modification of conditions can occur if it is shown to the Department that the grounds which caused the imposition of conditions no longer exist. In this instance, as Petitioner was seeking removal of the conditions, Petitioner must make that evidentiary showing to the Department. While the Petition for Conditional license could have been more precise in describing the "objectionable" conditions causing the imposition of the conditions, as discussed above, Petitioner bound itself to abide by the conditions based upon the preamble stated therein. There was evidence that from 2003 up to 2017, the RPD opposed issuance or transfer of the license without the conditions specified in the Petition for Conditional License and still favors their continued attachment on the license.¹⁰ At the hearing, Petitioner presented no witnesses or evidence of any kind in support of showing any changed circumstances whatsoever with respect to the licensed premises, its operations, or the immediate area around Petitioner's licensed premises to

⁸ Certainly, the Petition for Conditional License could have included a more precise description of the "identifiable problem" as assessed by the Richmond Police Department and ABC. However, the more general phraseology used should not deem the Petition for Conditional license a nullity.

⁹ Petitioner presented no evidence at the hearing about the facts and circumstances surrounding its execution of the Petition for Conditional License or otherwise established any confusion on its part of why conditions were being imposed.

¹⁰ This assertion is based upon RPD's original request for conditions in 2003, Petitioner's Petition for Conditional License, and RPD's current opposition to their removal in 2017, as testified to at the hearing.

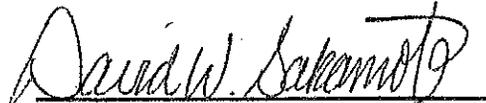
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justify removal of the conditions.¹¹ Petitioner presented no evidence that the RPD supported its effort to remove or modify the conditions in any fashion. Petitioner did not even attempt to make any showing that based on the current operation of licensed premises and/or the conditions in the immediate area there was no rational need for the conditions to continue on the license. As no change of any relevant circumstances related to the premises or the immediate area were established by Petitioner, it did not fulfill its burden of proof under section 23803.

ORDER

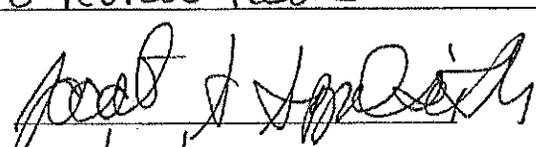
The Petitioner's request to remove all license conditions is denied.

Dated: July 18, 2017


David W. Sakamoto
Administrative Law Judge

<input type="checkbox"/> Adopt
<input checked="" type="checkbox"/> Non-Adopt:

To review record.

By: 
Date: 8/15/17

¹¹ The only witness offered by Petitioner at the hearing, but refused by the ALJ, was to be testimony from Petitioner's witness, Ms. Jae Eun Chang, daughter of Michael Yang, that the inability to sell single containers of alcoholic beverages has resulted in lost sales. This was ruled irrelevant as whether or not sales were or were not lost was not relevant to the grounds for imposition of or removal of conditions under the ABC Act.