

**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

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.

license at this location held by Chang Il Lim and Jeong Ok Lim (the Lims). In 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**.^[fn.] . . . 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.