

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

AB-8109

File: 21-294777 Reg: 02052463

AKBAR MOININAZERI dba A M N Market
1152 Valencia Street, San Francisco, CA 94110,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Motion to Dismiss by the Department

Appeals Board Hearing: June 12, 2003
San Francisco, CA

ISSUED OCTOBER 3, 2003

Akbar Moininazeri, doing business as A M N Market (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which revoked his license for failure to adhere to the conditions previously agreed to by appellant.

Appearances on appeal include appellant Akbar Moininazeri, and the Department of Alcoholic Beverage Control, appearing through its chief counsel, Matthew Botting, and its counsel, Nicholas R. Loehr.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on May 19, 1994. Thereafter, the Department instituted an accusation against appellant charging that appellant had, previously thereto, surrendered his license and had failed to reactivate or transfer the license, or obtain an extension of the surrender period. On March 11, 2002, appellant signed a Stipulation and Waiver form agreeing to the facts as set forth in an accusation

¹The decision of the Department, dated March 12, 2003, is set forth in the appendix.

filed by the Department, which agreement allowed for conditional revocation of the license, but staying revocation for an additional period of 180 days (to September 28, 2002), to allow appellant time to either activate or transfer the license.

The license was not activated or transferred during this extended period to September 28, 2002. On March 12, 2003, the Department ordered the license revoked.

On March 25, 2003, appellant mailed his Notice of Appeal, which was received by the Appeals Board office on March 26, 2003. In his appeal, appellant raises the issue that appellant had unsuccessfully attempted to transfer the license , and he was still looking for a new location for the license.

On May 15, 2003, the Department filed its Motion to Dismiss stating that the Notice of Appeal was untimely, as the Notice of Appeal was filed on March 26, instead of the proper date of March 24, 2003.

Ali Moininazeri, a brother of appellant, appeared at the oral argument hearing and presented the concerns of appellant. He indicated that the Appeals Board's staff had been contacted on March 24, 2003, and was advised to file a Notice of Appeal by fax that date.

No faxed Notice of Appeal was received by the Board's staff office.

DISCUSSION

The sole issue before the Appeals Board is whether the appeal was filed in a timely manner, a question which goes to the jurisdiction of the Appeals Board to hear the appeal.

The time in which a Notice of Appeal may be filed is set by statute. Such time limits are "jurisdictional" and may not be liberally construed or waived. Business and Professions Code section 23081 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

The question of the time allowed for the Department to order reconsideration, is set forth in Government Code section 11521, which states in pertinent part:

The agency itself may order a reconsideration of all or part of the case on its own motion or on petition of any party. The power to order a reconsideration shall expire 30 days after the delivery or mailing of the decision to respondent, or on the date set by the agency itself as the effective date of the decision if that date occurs prior to the expiration of the 30-day period

The Department's Order notes that its Order was "effective immediately." Under the terms of Government Code section 11521, since the Order of the Department was effective "immediately," the power of the Department to order reconsideration terminated on the date the decision was issued.

Pursuant to Business and Professions Code section 23081, the appeal should have been filed within the jurisdictional 10 days, or on March 24, 2003. (*Cheung & Wu* (1999) AB-7348.) The *Cheung & Wu* matter, supra, is supported by Court of Appeal cases, *Harris v. Alcoholic Beverage Control Appeals Board* (1963) 223 Cal.App.2d 563 [35 Cal.Rptr. 865, 869-870]; *Reimel v. Alcoholic Beverage Control Appeals Board* (1967) 254 Cal.App.2d 340 [62 Cal.Rptr. 54]; and *Reimel v. House* (1968) 264 Cal.App.2d 173 [70 Cal.Rptr. 224].

ORDER

The appeal is dismissed.

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