

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

AB-8283

File: 21-183303 Reg: 99047082

FRANK M. GRAY, Sr. dba Gray's Liquor
2007 South El Dorado Street, Stockton, CA 95206,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Jeevan S. Ahuja

Appeals Board Hearing: January 11, 2007
Sacramento, CA

ISSUED JUNE 12, 2007

Frank M. Gray, Sr., doing business as Gray's Liquor (appellant), has appealed from a decision of the Department of Alcoholic Beverage Control which revoked his license for his having purchased cigarettes and liquor believing them to have been stolen, a violation of Penal Code sections 664 and 496 in conjunction with Business and Professions Code section 24200, subdivision (a). Appellant has, by motion, asked the Appeals Board to enter an order dismissing the underlying accusation as a sanction for the Department's failure to prepare the record in a timely manner.

Appearances include appellant Frank M. Gray, Sr., appearing through his counsel, Todd R. Corren, and the Department of Alcoholic Beverage Control, appearing through its counsel, Thomas M. Allen.

FACTS AND PROCEDURAL HISTORY

The Department instituted an accusation against appellant on August 20, 1999, charging that he and/or agents on his behalf purchased cigarettes and distilled spirits

believing them to have been stolen. An administrative hearing began on April 19, 2000, and continued 13 days - April 20, 2000; January 17, 2001; May 8-10, 2001; May 15-17, 2001; May 22, 2001; June 1, 2001; and February 25 and 26, 2003. Four separate court reporter firms were utilized. The events at issue were said to have occurred during the period November 1997-March 1998.

On April 29, 2004, the Department issued its decision which determined that the charges of the accusation had been established, and ordered appellant's license revoked. Appellant filed a timely notice of appeal on May 14, 2004. The motion under consideration was filed on August 16, 2006.

DISCUSSION

This case is somewhat extraordinary when compared to a typical appeal heard by the Board, in terms of the number of days of hearings and the time which elapsed in the course of those hearings. Not until an appeal is filed does it become known that a transcript must be prepared. The transcripts are, of course, a critical part of an appellate record.

The Department ordered the preparation of the transcripts in question (May 8-10 and 15-17, 2001) on August 12, 2004.¹ The Appeals Board was informally advised by Department counsel in March 2005, and at various times thereafter that the Department was encountering difficulties in obtaining the transcripts of the hearing. The complete record was finally lodged with the Appeals Board on October 6, 2006, and a copy furnished to appellant's representative. It is apparent from the exhibits accompanying

¹ The Board is unaware of any problems encountered by the Department in obtaining transcripts for those hearing days other than the ones in question.

the Department's brief that the delay was caused by the failure of one of the court reporting firms to provide transcripts for the days it provided its services. Transcripts for the days in question were ultimately obtained only after the issuance of an Order to Show Cause For Contempt by the Superior Court for San Joaquin County to the court reporter in question

Appellant now contends that the long delay in the preparation of the record has prejudiced his appeal and caused him financial hardship by preventing him from selling his business. The Department asserts that the Appeals Board has no power to dismiss the appeal in the absence of any statute, rule or regulation empowering it to do so, that the delay in providing the record was due to circumstances beyond the Department's control, and, in any event, appellant was not prejudiced by the delay.

The appeal has been bifurcated, the parties having been advised that the Board would consider briefs and hear argument only on appellant's motion to dismiss, and only if the motion is denied will the case be heard on the merits at a later date.

When the Department prepares the record for an appeal, it must, among other things, notify an appellant of the estimated cost to the appellant of preparing the court reporter transcript. Upon payment, the court reporter (or, as in this case, reporters plural) transcribes the testimony taken at the administrative hearing and delivers the original transcript to the Department. The Department then furnishes copies of the transcript and exhibits to the Appeals Board and to the appellant. Ordinarily, this process takes only two or three months from the time a notice of appeal is filed. In this case, approximately 28 months elapsed before the record was furnished to appellant.

Appellant asserts that he has a buyer for his business, and wants to retire, but has been prevented from selling the business because of the pendency of the

underlying action. The Department, on the other hand, contends that appellant's motion is moot, pointing out that the delay was caused by the inability of one of the court reporters to fulfill her obligations, and was not through any fault of its own. The Department also contends appellant did not suffer any prejudice, because he has been able to operate the business while his appeal has been pending, despite the order of revocation. Appellant, in turn, contends that the Department did not act with sufficient diligence once it learned there was a problem with a particular court reporter.

Appellant acknowledges that the Appeals Board has no specific rule empowering it to grant appellant the relief he seeks. He cites authorities which discuss generally the powers of administrative agencies to adopt rules to "fill in the missing gaps," and argues that Business and Professions Code section 23077² gives the Board specific power to adopt a rule providing for the relief he seeks.

The adoption of a rule is not the simple matter appellant suggests. He overlooks the fact that Government Code section 11340 and the sections which follow place limits on the manner in which an agency may adopt a new rule. We agree with the Department that it would be inappropriate and unfair for the Board to adopt such a rule after the fact, even if the Board could otherwise do so in compliance with the requirements of section 11340 et seq.

While it may be said that the Department could have acted with greater alacrity, we do not believe justice would be served by granting the drastic relief appellant seeks. Much time and money has been spent by the parties in the many days of hearing

² Section 23077 provides, in pertinent part, that the Board "shall exercise such powers as are vested in it by Section 22 of Article XX of the Constitution, and may adopt such rules pertaining to appeals and other matters within its jurisdiction as may be required."

leading up to the decision now on appeal. There is a recognized policy that encourages that appeals be heard on their merits. (see, e.g., *Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (1969) 169 Cal.App.2d 785, 790 [338 P.2d 50].)

This Board adheres to that policy.

ORDER

Appellant's motion is denied.

FRED ARMENDARIZ, CHAIRMAN
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD