

ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

STAFF REPORT

TELEPHONIC BOARD MEETING

September 3, 2021

SUBJECT:

Alcoholic Beverage Control Appeals Board (ABCAB) Proposed Regulations

BACKGROUND:

At the Board's hearing on April 9, 2019, the Board voted on, and approved, proposed regulations adding, amending, or revoking rules 176-178, 181.1, 183-184, 187-190, 193-197.1, and 198-199. The Board filed its proposed regulations with the Office of Administrative Law ("OAL") and published its Notice of Proposed Rulemaking on June 25, 2021. The 45-day public comment period allowed any interested persons to submit written comments to the Board until 5:00 p.m. on August 10, 2021. Initially, the Board did not schedule a public hearing. However, a public hearing was requested by Mr. Roger Diamond on June 29, 2021. Mr. Diamond also submitted a written comment on the Board's proposed rulemaking on June 29, 2021.

The Board noticed a public hearing on July 8, 2021 to be held on July 29, 2021. At the public hearing, the Board was represented by Attorney III, Sean O'Dowd, Executive Officer, Taryn Kinney, and Legal Secretary, Maria Sevilla. Mr. Roger Diamond, an attorney who appears before the Board, and Julie Weng-Gutierrez, Chief Counsel for the Department of Alcoholic Beverage Control (the "Department") attended and spoke at the hearing. The hearing was recorded, and a written transcription of the hearing was completed.

ANALYSIS:

In Mr. Diamond's written comment submitted on June 29, 2021, he voiced his displeasure with the Department, accused the Board of colluding with the Department, discussed past appeals where he appeared before the Board, and brought up a pending appeal before the Board.

Board staff determined that Mr. Diamond's comment was not relevant to the proposed regulatory action, and that it did not require a response under Government Code section 11346.9(a)(3). No regulatory change was made as the result of Mr. Diamond's written comment.

At the public hearing, Mr. Diamond stated that he believes the Board is “too cozy” with the Department, that there is no necessity for the proposed regulations, and that the brief lengths, deadlines, and extensions for hearings are “extremely harsh.”

Again, Board staff determined that no changes to the proposed regulations were needed based on Mr. Diamond’s comment. The Department receives no special treatment under the proposed regulations. In fact, the substantive portions of the proposed regulations do not reference the Department, but rather appellants and respondents, respectively.

Further, the justification for the proposed regulations is set out in the Board’s Initial Statement of Reasons. The Board also notes that the brief deadlines are more generous under the proposed rules than under existing regulations. Finally, the brief deadlines and hearing extensions were amended or added to balance the need of parties to adequately describe the basis and argument for their appeal or response, with the Board’s need to limit the amount of material to review. In addition, the ability to stipulate to an extension gives ownership of the appeals process to the parties, not the Board.

In short, the Board has complied with the Administrative Procedures Act in all aspects of the rulemaking process to this point. If approved, Board staff will submit the proposed rulemaking file to OAL for review, and ultimately, publication.

ATTACHMENT:

1. Proposed ABCAB regulations

STAFF RECOMMENDATION:

Approve the proposed ABCAB regulations (Attachment 1) and transmit the regulatory package to OAL for final review/approval.

STAFF CONTACT:

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ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD
ATTACHMENT 1
PROPOSED REGULATIONS
September 3, 2021

4 CCR § 176

§ 176. Location of Offices.

(a) Any reference to the Board's "principal office" means the Board's physical mailing address as listed at abcab.ca.gov.

(b) Any reference to the Department's "principal office" means the Department's headquarters and its physical mailing address as listed at abc.ca.gov.

Note: Authority cited: Section 23077, Business and Professions Code; and Article XX, Section 22, California Constitution. Reference: Sections 23050 and 23075, Business and Professions Code.

4 CCR § 177

§ 177. Tenses, Gender, and Number.

For purposes of these rules and regulations, any reference to gender shall extend to all genders and any reference to the singular number shall extend to and include the plural number also.

Note: Authority cited: Section 23077, Business and Professions Code; and Article XX, Section 22, California Constitution. Reference: Sections 23081 and 23083, Business and Professions Code.

4 CCR § 178

§ 178. Definitions.

For the purpose of these rules and regulations:

(a) "Board" means Alcoholic Beverage Control Appeals Board.

(b) "Department" means Department of Alcoholic Beverage Control.

~~(c) Unless the context otherwise requires, the words "appellant" or "party," include the attorney or other authorized agent of such person.~~

~~(d) "Party" includes the department, the appellant and any person, other than an officer or an employee of the department in his official capacity, who has been allowed to appear in the proceeding before the department.~~

(c) "Appellant" means any person or entity who files an appeal with the Board.

(d) "Respondent" means any person or entity who responds to an appeal filed with the Board.

(e) "Party" includes the Department, appellant(s), and respondent(s).

(f) "Person or entity" includes the attorney or authorized agent of a party.

(g) "Day" refers to a calendar day, unless otherwise stated.

(h) "File" or "filed" refers to when a document is received by the Board, except when a document is mailed to the Board via registered or certified mail, in which case, the document is deemed "filed" on the date of registry or certification with the United States Post Office.

(i) "Section" or "subsection" refers to these rules and regulation unless otherwise specified.

Note: Authority cited: Section 23077, Business and Professions Code; and Article XX, Section 22, California Constitution. Reference: Sections 23077 and 23081, Business and Professions Code; and Article XX, Section 22, California Constitution.

4 CCR § 181

§ 181. ~~Administration.~~ Proof of Service.

(a) A proof of service shall be attached to any documents filed or served under sections 175 through 200.1.

(b) A proof of service shall include all of the following:

(1) The address where the document was served;

(2) the date of service;

(3) the manner of service;

(4) a statement that the person making service is over the age of 18 years, and;

(5) signature of the person making service, under penalty of perjury.

Note: Authority cited: Section 23077, Business and Professions Code; and Article XX, Section 22, California Constitution. Reference: Sections 23081 and 23081.5, Business and Professions Code.

4 CCR § 181.1

§ 181.1 Manner of Service.

(a) A party may serve a document to the Board using any of the following means of service:

(1) in-person service, or;

(2) service by mail (regular or certified).

(b) A party may serve a document to the Department or other party using any of the following means of service:

(1) in-person service, or;

(2) service by mail (regular or certified).

Note: Authority cited: Section 23077, Business and Professions Code; and Article XX, Section 22, California Constitution. Reference: Sections 23081, 23081.5, and 23088, Business and Professions Code.

4 CCR § 183

§ 183. ~~Form~~ Notice of Appeal.

Any person or entity aggrieved by the decision of the Department as defined in Business and Professions Code section 23080 may appeal the Department's decision to the Board as follows:

(a) The appellant shall file a Notice of Appeal with the Board in accordance with Business and Professions Code section 23081.5.

(b) The appellant must file the Notice of Appeal with the Board on or before the tenth day after the last day on which reconsideration of the underlying decision of the Department can be requested pursuant to Government Code section 11521(a).

(c) An appellant shall also serve a copy of the Notice of Appeal upon all parties, including the Department at its principal office.

(d) Failure to comply with the provisions in this section shall result in dismissal of the appeal pursuant to section 199.

Note: Authority cited: Section 23077, Business and Professions Code; and Article XX, Section 22, California Constitution. Reference: Sections 23081 and 23084, Business and Professions Code.

4 CCR § 184

§ 184. Contents of Notice of Appeal.

~~(a)~~ The Notice of Appeal shall be signed by the appellant or his its authorized agent. ~~(b)~~ The Notice of Appeal should state the general grounds for appeal ~~(see Business and Professions Code Section 23084)~~ and the specific questions to be considered by the Board on review. The original and three copies of the Notice of Appeal shall be filed with the Board and a copy shall also be served upon all parties to the proceeding before the Department, including the Department at its principal office. ~~Such service shall be made by delivering or mailing a copy of the Notice of Appeal to each party.~~ Proof of service shall be filed with the original Notice of Appeal.

~~(c)~~ ~~The Notice of Appeal should be typewritten or printed upon paper 8 1/2 x 11 inches in size and be double spaced.~~

Note: Authority cited: Section 23077, Business and Professions Code; and Article XX, Section 22, California Constitution. Reference: Sections 23081 and 23084, Business and Professions Code; and Article XX, Section 22, California Constitution.

4 CCR § 187

§ 187. Filing Record. Preparation, Payment, and Filing of the Record of Appeal.

(a) Upon the filing of the Notice of Appeal, the Department shall calculate the estimated cost of the record of appeal, notify appellant thereof, and demand payment in accordance with the fee schedule provided in Section 69950 of the Government Code.

(b) Appellant shall make payment to the Department within fifteen days after the date of the Department's demand for payment.

(c) Cost of the record of appeal shall include the preparation and filing of the record of appeal with the Board.

(d) Such statement of costs shall also include the cost of preparing and servicing a copy of the record of appeal on appellant, should it be requested.

(e) ~~Where~~ Where the Department has previously ordered an original copy of the reporter's transcript because of action taken by it pursuant to Government Code Section 11517(c), the appellant need only pay the fee for a first copy of the reporter's transcript, plus the fee for each additional copy, as provided by Section 69950, for the record on appeal furnished to the Board and appellant.

(f) Upon receipt of payment from appellant, the Department shall immediately arrange for the preparation of the record of appeal and file it with the Board.

~~When a Notice of Appeal has been filed with the Board, the Board shall request the Department to furnish appellant an itemized statement of the estimated cost of the record on appeal in accordance with the fee schedule provided in Section 69950 of the Government Code. Cost of the record on appeal shall include the filing of an original and three copies of the reporter's transcript and file transcript, accompanied by the original exhibits, with the Board. Such statement of costs shall also include the cost of preparing and delivering to appellant a copy of the reporter's transcript, exhibits and file transcript, should any or all be requested by appellant. In those instances, however, where the Department has previously ordered an original copy of the reporter's transcript because of action taken by it pursuant to Government Code Section 11517(c), the appellant need only pay the fee for a first copy of the reporter's transcript, plus the fee for each additional copy, as provided by Section 69950, for the record on appeal furnished to the Board and appellant. Upon receipt of payment from appellant, the Department shall forthwith arrange for the preparation and delivery of the record on appeal.~~

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Note: Authority cited: Section 23077, Business and Professions Code; and Article XX, Section 22, California Constitution. Reference: Section 23083, Business and Professions Code; and Article XX, Section 22, California Constitution.

4 CCR § 188

§ 188. Contents of Record.

The record on appeal filed with the Board shall consist of:

(a) The Department's file transcript, which shall include:

- (1) all notices and orders issued by the administrative law judge and the Department, including any proposed decision by an administrative law judge and the final decision issued by the Department;
- (2) pleadings and correspondence by a filed by any party;
- (3) any filed notices, orders, or pleadings ~~and correspondence~~ pertaining to reconsideration;

(b) the hearing reporter's transcript of all proceedings;

(c) exhibits admitted or rejected.

Note: Authority cited: Section 23077, Business and Professions Code; and Article XX, Section 22, California Constitution. Reference: Section 23083, Business and Professions Code; and Article XX, Section 22, California Constitution.

4 CCR § 189

§ 189. Documents Filed with Board.

In addition to the Notice of Appeal and the record on appeal, other documents which may be legally filed with and received by the Board in connection with the appeal, shall also become part of the record.

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Note: Authority cited: Section 23077, Business and Professions Code; and Article XX, Section 22, California Constitution. Reference: Sections 23083 and 23085, Business and Professions Code; and Article XX, Section 22, California Constitution.

4 CCR § 190

~~§ 190. Cost of Record and Payment Therefor.~~

~~The Department shall calculate the cost of the record on appeal as provided by Section 187, shall notify appellant thereof, and demand payment. Payment shall be made by appellant to the Department within fifteen days after the date of issuance of such demand.~~

~~Note: Authority cited: Section 23077, Business and Professions Code; and Article XX, Section 22, California Constitution. Reference: Section 23083, Business and Professions Code; Section 69950, Government Code; and Article XX, Section 22, California Constitution.~~

4 CCR § 193

§ 193. Filing of Briefs by Parties.

(a) Appellant may file an opening brief, respondent may file a reply brief, and appellant may thereafter file a closing brief.

(b) The opening brief shall be filed with the Board and served on all parties to the appeal within 30 days of the date the record of appeal is filed with the Board. The reply brief shall be filed with the Board and served on all parties within 20 days after the opening brief is served. Any closing brief shall be filed with the Board and served on all parties within seven days after the reply brief is served. A proof of service shall be included with each brief indicating the date it was served.

(c) A party to the appeal may request an extension of time to file a brief. Any objections to an extension request may be filed with the Board within three days of the request. The extension request will be decided by the Board, or its executive director if so authorized, without hearing and will only be granted upon a showing of good cause.

~~(a) Form and Filing of Briefs. Briefs shall be typewritten or printed upon paper 8 1/2 x 11 inches in size. Reproduction thereof may be by any process, provided all copies are clear and permanently legible. Only one side of the paper shall be used, unless printed, and the margins shall not be less than one inch on all sides of the page. The lines shall be double spaced. Headings shall be capitalized. An original and three copies of all briefs shall be filed with the Board. The original of each brief shall contain a certification that copies have been served upon or mailed to each party, his attorney or agent, as well as the Department, and the Attorney General's office.~~

~~(b) Time for Service and Filing. The opening brief shall be served and filed within fifteen days after the date on the notice issued by the Board stating that the record on appeal has been filed with the Board. The reply brief shall be served and filed within fifteen days after the filing date of the opening brief with the Board. The closing brief shall be served and filed within five days after the filing date of the reply brief with the Board. An extension of time within which to file a brief will be granted only upon a showing of good cause.~~

Note: Authority cited: Section 23077, Business and Professions Code; and Article

XX, Section 22, California Constitution. Reference: Sections 23081 and 23083, Business and Professions Code; and Article XX, Section 22, California Constitution.

4 CCR § 194

§ 194. ~~Briefs by Other Interested Persons.~~ Requirements for Briefs.

(a) All briefs shall be double-spaced on paper 8 1/2 x 11 inches in size. Only one side of the paper shall be used, and the margins shall be at least one inch on all sides of the page. Headings shall be capitalized, in bold, or underlined.

(b) Briefs shall comply with the following length restrictions:

(1) Opening briefs shall be no more than 20 pages in length.

(2) Reply briefs shall be no more than 15 pages in length.

(3) Closing briefs shall be no more than 10 pages in length.

(c) The page limitations set forth in subsection (b) do not include exhibits, appendices, tables of contents, or cover or title pages.

(d) Any party to the appeal may request a waiver of the page length restrictions in subsection (b). The waiver request will be decided by the Board, or its executive director if so authorized, without hearing and will only be granted upon a showing of good cause.

Note: Authority cited: Section 23077, Business and Professions Code; and Article XX, Section 22, California Constitution. Reference: Sections 23081 and 23083, Business and Professions Code; and Article XX, Section 22, California Constitution.

4 § CCR 195

§ 195. Motions.

(a) A party may file a motion with the Board as follows:

(1) A motion shall follow the same formatting requirements for briefs set forth in section 194(a).

(2) A motion shall be no more than 10 pages in length unless accompanied by a declaration showing good cause for additional pages, but in no case shall be more than 15 pages in length.

(3) A motion filed to the Board shall include proof of service that the motion was served on all parties to the appeal.

(b) Any party opposing a motion may file a written opposition with the Board within 7 days of service of the initial motion. The opposition shall follow the same requirements described in subsections (a)(1) through (3).

(c) The Board may place any motion on the calendar for a hearing or may otherwise elect to rule on the motion without oral argument.

~~The provisions of Section 193(a) as to form and filing of briefs shall apply to a motion filed with the Board. Any showing in opposition to the motion of a party shall be served and filed within ten days after the date on the notice by the Bboard providing therefor. The Board may place any motion on the calendar for hearing or the Bboard may otherwise dispose of the motion.~~

Note: Authority cited: Section 23077, Business and Professions Code; and Article XX, Section 22, California Constitution. Reference: Sections 23081 and 23083, Business and Professions Code; and Article XX, Section 22, California Constitution.

4 CCR § 196

§ 196. Hearing.

(a) After the Record of Appeal is filed with the Board, the Board shall set a hearing date and time, and serve notice to all parties.

(b) Any party wishing to present oral argument before the Board shall notify the Board and all parties in writing at least 21 days before the scheduled hearing date. Failure to timely request oral argument may result in submission of the appeal on the pleadings.

(c) Notwithstanding subsection (b), the Board may direct for oral argument to be conducted on the appeal even if no party requests it. If oral argument is directed by the Board, a separate notice shall be set by the Board to all parties.

(d) A party seeking a continuance of the hearing shall first attempt to stipulate to an alternative hearing date with all other parties to the appeal, and then make a request to the Board to reschedule. If any other party will not stipulate to continuance, the requesting party can submit a request to the Board to continue the hearing. A party may object to the continuance request within five days of such request.

(e) Requests by any party for a continuance of oral argument may be granted by the Board, or its executive director if so authorized, without a hearing and upon a showing of good cause.

Note: Authority cited: Section 23077, Business and Professions Code; and Article XX, Section 22, California Constitution. Reference: Sections 23081 and 23083, Business and Professions Code; and Article XX, Section 22, California Constitution.

4 CCR § 197

§ 197. Oral Argument.

(a) In the event oral argument is requested or ordered:

(1) Each side shall be allowed a maximum of 15 minutes for oral argument;

(2) not more than one person for a party may be heard;

(3) the appellant, or moving party, shall have the right to open and close; however, both statements shall count towards the 15-minute total limit;

(4) No evidence, other than what is contained in the administrative record, shall be referenced by any party.

(b) Additional time for oral argument may be granted upon a showing of good cause.

~~(a) Unless otherwise ordered by the Board: (1) A party shall be allowed a maximum of 30 minutes for oral argument; (2) not more than one person on a side need be heard; (3) the appellant, or moving party, shall have the right to open and close.~~

~~(b) Continuances. Requests for continuances of oral argument will be granted only upon a showing of good cause.~~

Note: Authority cited: Section 23077, Business and Professions Code; and Article XX, Section 22, California Constitution. Reference: Section 23083, Business and Professions Code; and Article XX, Section 22, California Constitution.

4 CCR § 197.1

§ 197.1. Quorum.

(a) The Board may decide an appeal so long as there is a quorum of at least two members present for:

(1) oral argument and deliberation in closed session, or;

(2) deliberation in closed session where an appeal has been submitted on the pleadings.

(b) In the event there are three members appointed to the Board, and a two-member quorum cannot reach a unanimous decision, oral argument and deliberation in closed session will be continued for a time when the third member can be present.

(c) In the event there are only two members appointed to the Board, and the Board cannot reach a unanimous decision, the Department's decision shall stand.

Note: Authority cited: Section 23077, Business and Professions Code; and Article XX, Section 22, California Constitution. Reference: *Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, 1176 [56 Cal.Rptr.2d 223]; *Lopez v. Imperial County Sheriff's Office* (2008) 165 Cal.App.4th 1, 4 [80 Cal.Rptr.3d 557, 559].

4 CCR § 198

§ 198. ~~Nature of New Evidence and Showing.~~

(a) When the Board is requested to remand the case to the Department for reconsideration upon the ground that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced at the hearing before the Department, the party making such request must, in the form of a declaration or affidavit, set forth:

(1) The substance of the newly-discovered evidence;

(2) Its relevancy and that part of the record to which it pertains;

(3) Names of witnesses to be produced and their expected testimony;

(4) Nature of any exhibits to be introduced;

(5) A detailed statement of the reasons why such evidence could not, with due diligence, have been discovered and produced at the hearing before the Department.

(b) Merely cumulative evidence or exclusion of evidence shall not constitute a valid ground for remand.

Note: Authority cited: Section 23077, Business and Professions Code; and Article XX, Section 22, California Constitution. Reference: Sections 23084 and 23085, Business and Professions Code; and Article XX, Section 22, California Constitution.

4 CCR § 199

§ 199. Dismissal of Appeal.

The Board ~~may~~ shall issue an order dismissing an appeal:

(a) Upon appellant filing a request to dismiss the appeal with the Board ~~with the Board a request to dismiss the appeal~~;

(b) Upon motion of a party, or ~~the Board itself~~ upon the Board's own notice to the parties, that appellant has failed to timely file the Notice of Appeal or pay for the record on appeal as set forth in sections 183 and 187 ~~perfect his appeal by failure to timely file same or to pay the amount specified pursuant to Sections 187 and 190 of these rules~~;

(c) Upon certification by the Department that reconsideration has been granted in the case after the Notice of Appeal has been filed, and dismissal on this ground shall be without prejudice to the submission of a subsequent appeal in the same case; ~~or, said dismissal to be without prejudice to the filing of a subsequent appeal~~

(d) Upon a motion by ~~the Department or other any~~ party, or upon the Board's own ~~motion~~ notice to the parties, where sufficient cause exists for dismissal. In such an instance, the Board's order shall set forth the sufficient cause for the dismissal.

(e) Stipulation of the parties.

Note: Authority cited: Section 23077, Business and Professions Code; and Article XX, Section 22, California Constitution. Reference: Sections 23081, 23083 and 23087, Business and Professions Code; Section 11521, Government Code; and Article XX, Section 22, California Constitution.