

## **THE IGNOMINIOUS ABC APPEALS BOARD: Point of Last Resort**

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All is not lost. There is still the Appeals Board.

The following scenario is repeated ever so frequently throughout California: Some time ago the Alcoholic Beverage Control Board (ABC or the Department) conducted an investigation at your licensed premises and found alleged violations. The Department filed an Accusation in order to suspend or revoke your license. You filed your notice of Defense and showed up at a hearing to defend yourself. At that hearing you were shocked to find the Administrative Law Judge (ALJ) was an employee of the ABC, and the ABC was represented by a very competent attorney. You lost.

The Proposed Decision was adopted by the Department in a notice that set forth a date for your license to be picked up. But all is not lost. You have a statutory right to appeal, and very importantly the effective date of the decision will be put off as long as an appeal is pending. When an appeal is filed, until the Alcoholic Beverage Control Appeals Board (the Board) rules, there will be no fine, no suspension and no revocation of the license.

But what is the Appeals Board? It is not the Superior Court. The ABC is one of a handful of state agencies whose decisions are not subject to review by the Superior Court. The Board is not part of the Department. It is a separate state agency given authority by the State Constitution. Article XX, Section 22 of the California Constitution as amended in 1954 created the Department and the Appeals Board. The Board consists of three members appointed by the Governor who are subject to State Senate confirmation.

The mandate for the Board states: “When any person aggrieved thereby appeals from a decision of the department ordering any penalty assessment, issuing, denying, transferring, suspending or revoking any license...the board shall review the decision subject to such limitations as may be imposed by the Legislature.”

Both by Constitutional limit and by statute, the Board is “...limited to the questions of whether the department has proceeded without or in excess of its jurisdiction, of whether the department has proceeded in the manner required by law, of whether the decision is supported by the findings, and of whether the findings are supported by substantial evidence in the light of the whole record. “Further, the Board can remand a case back to the Department when there is newly discovered evidence or evidence that was improperly excluded during a hearing.

In addition, Decisions rendered by the Board are subject to review by the Courts of Appeal and by the California Supreme Court by Petition for Writ of Review by any person, including the Department, affected by such Board decision. Such review is wholly discretionary with the court.

The Court of Appeal described the broad reach of the Appeals Board in Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (Safeway) in 1987 when the court found that the Board had a constitutional and statutory authority to review all decisions of the Department and was not limited to review of “quasi-judicial” decisions following formal hearing. The Board has authority to review even purely administrative decisions issued by the Department.

Many believe the Appeals Board is the first, best, and last opportunity for a fair determination of Department action, since the ABC Administrative Law Judges are employees of the Department and preside over cases only so long as the Director desires to maintain their office (the Administrative Hearing Office). The only available judicial review is found in the Courts of Appeal or Supreme Court and only by the court’s discretion to hear a case.

While there are limits to the scope of the Appeals Board’s review, the Board has the power, jurisdiction and authority to reverse decisions of the Department where the Department failed to proceed in the manner required by law. Imposition of penalty by the Department, for example, is not to be overturned by the Board. The Board, however, can and does determine when such penalty constitutes an abuse of discretion. In that instance, the Board can reverse that penalty.

The Board cannot substitute its wisdom for the Department's as to witness credibility. The Board, nonetheless, can determine that certain testimony is so inherently unbelievable that reliance on that witness's statements would abuse the Department's discretion, and the Department would not be proceeding in the manner required by law. The Board must affirm the Department's decisions where the evidence supports the Department's findings. The Board, however, can determine that the evidence does not support a Department finding or that a finding does not sufficiently support a Departmental Decision.

Of utmost importance, the Board can determine when the Department has violated its own rules. For example, in sales to minor decoy cases, the Appeals Board has repeatedly reversed decisions by the Department based upon violations of the Department's rule (Rule 141). Rule 141 requires, among other things, that the decoy display the expected general appearance of a person under 21 years of age under the actual circumstances presented to the seller at the time of the alleged offense.

Initially Police Departments were of the opinion that sending in a decoy in the obvious company of an older police officer would be acceptable. In these cases the licensees argued that the presence of the officer should be included as "circumstances presented to the seller." The analysis of the decoy's apparent age must then include the appearance of the officer. The Department's ALJ rejected the argument. The Board reversed stating that the Department was in violation of its own rule and therefore had not proceeded in the manner required by law. [See *Hurtado v. Department*, March 2000].

In subsequent decisions, the Board has found that the active participation of an additional, but unknown decoy who did not appear at the hearing might have the same impact as the presence of the aforementioned officer as to the issue of whether the decoy operation was "fair" under the ABC Rule. [See *7-Eleven/Smith v. Department*, December 2001].

It should be clear that the Appeals Board takes its job seriously as watchdog over the Department. There is a very complex specific framework that must be followed to timely and adequately file an appeal from an ABC decision:

After the appeal is filed, the Board will order the Department to prepare the Administrative Record for the Board's review. The record includes the transcript of the hearing. To go forward with the appeal, it will be necessary for the appellant to pay the State the estimated cost of the

transcript. The Board will set a briefing schedule and date for oral argument. Both Appellant and the Department are expected to state their respective legal theories and arguments in written form. Argument will typically take place before the Board in San Francisco or Los Angeles. With some exceptions for newly discovered evidence, argument is limited to the record as it exists from the administrative hearing.

Following oral argument, the Board will issue its written opinion, affirming the Department's decision, reversing it or remanding the case back to the Department for some further proceedings. The Board's decision is final when filed. Any Petition for Writ from the decision to the Courts of Appeal or Supreme Court must be filed within 30 days of the Board's decision.

Armed with the knowledge of the scope of the Appeals Board's Constitutional jurisdiction, you now know that the Department's decision to impose discipline against your license, or to deny you issuance of a license is not the final word. There is still the Appeals Board, and beyond that there is direct appeal to the Courts Appeal and potentially the Supreme Court of California.

*Solomon Saltsman & Jamieson are attorneys practicing in the areas of ABC law, ABC Appeals Board cases, and all related Land Use Matters such as City and County Conditional Land Use Permits, Variances, Police and Fire Permits, Entertainment Law, Gaming Law, as well as Personal Injury litigation. Solomon Saltsman & Jamieson can be contacted at 800-405-4222.*

*Articles posted by Solomon, Saltsman, & Jamieson were to the best of our knowledge correct at the time they were written, but laws change continuously so no one should rely on what is written in any article as the current state of the law. The reader should always consult a practicing lawyer for an evaluation of how the current law affects any particular factual situation at the time when it occurs.*

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Endnote #1: Website Page of ABC

You must notify the Alcoholic Beverage Control Appeals Board ("the Appeals Board") that you are appealing from a decision of the Department of Alcoholic Beverage Control ("the Department") by filing a document with the Appeals Board. The document may be in the form of a legal pleading or a letter.

The appeal document must:

- be in writing, preferably typewritten or word processed;
- state that an appeal is being filed;
- include the name of the appellant, the registration and file numbers, and the date of the decision; and
- state at least one ground for the appeal, that is, a statement of why you believe the Department's decision is wrong.

You must send ***an original and three copies*** of the appeal document to the Appeals Board. You must also send a copy to the Department of Alcoholic Beverage Control and a copy to any other party involved in the proceeding.

The appeal document must be filed at the Appeals Board office within ***40 days*** from the date of the Department's decision (usually the date mailed to the recipient).

***However,***

if the Department's decision states it is to be "effective immediately," you must file an appeal ***within 10 days***

after the date of the Department's decision. Documents not filed with these time limits are untimely and cannot be accepted by the Appeals Board.

A document is ***filed*** when it is ***received*** at the Appeals Board office if it is delivered in person, by regular mail, or by a delivery service. However, an appeal document is considered filed on the date it is mailed if it is sent by certified or registered mail.

There is no charge for filing an appeal, but you will receive a bill from the Department for transcript costs.

The rules for filing an appeal may be found in the Business and Professions Code in Sections 23080-23083.