

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

AB-7422a

File: 21-27245 Reg: 98044822

DANIEL B. WONG, dba Food Fair Market
611 Bush Street, San Francisco, CA 94108,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Lee Tyler

Appeals Board Hearing: July 11, 2002
San Francisco, CA

ISSUED SEPTEMBER 16, 2002

Daniel B. Wong, doing business as Food Fair Market (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ after remand which again revoked his license for appellant's clerk selling an alcoholic beverage to a person under the age of 21, the third such sale in 25 months, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, section 22, arising from a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Daniel B. Wong, appearing through his counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean R. Lueders.

¹The decision of the Department, dated November 15, 2001, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

This is the second appeal in this matter. The first appeal was taken from the Department's order revoking appellant's off-sale general license for a third sale-to-minor violation within 25 months. The Appeals Board affirmed the decision of the Department in all respects except with regard to discovery, and remanded the matter to the Department "for such further proceedings as are necessary and appropriate."² In its Decision Following Appeals Board Decision, the Department remanded the matter to the Administrative Law Judge (ALJ)³ for compliance with the discovery request as directed by the Board, and to "take further evidence and argument, by way of affidavit and briefing only, as to what new evidence [appellant intends] to offer at any further hearing on this matter and how such evidence is relevant to the proceeding." Thereafter, the ALJ was to "hold any further proceedings as he determines are necessary and appropriate, in his exclusive discretion."

The ALJ directed the Department to provide to appellant the discovery ordered by the Appeals Board. The Department identified three other licensees who sold alcoholic beverages to the same decoy on the same night that appellant's clerk did.

Appellant filed an offer of proof requesting further proceedings and the Department filed a reply. The ALJ's decision, adopted by the Department, found appellant's offer of proof inadequate because it "did not identify any new evidence that would be presented should additional hearing time be provided." Additionally, the decision rejected appellant's contention that the Department was obligated to produce

²*Wong* (2001) AB-7422.

³ALJ Lee Tyler, who heard this matter originally, had retired, and the remanded case was assigned to Chief ALJ Michael B. Dorais.

the minor decoy for further cross-examination. The decision concluded that no further proceedings were appropriate or necessary and again ordered the license revoked.

Appellant filed a timely appeal from the Department's decision in which he argues that the Department violated the Order of the Appeals Board by first requiring, and then rejecting, his offer of proof and, in doing so, denied him his right to cross examination.

DISCUSSION

This is one of a number of similar appeals arising from decoy operations where, after the Appeals Board had ordered the disclosure of the identities of other licensees charged with selling to that same decoy, the Department reaffirmed its original order after finding that the licensee's offer of proof did not warrant further proceedings.

In several of the subsequent appeals, it appeared from the record that the licensee in question had already, through its counsel, possessed the identities of the other licensees by whom sales were made. Therefore, the Board did not address the question of the adequacy of the offer of proof. Instead, it concluded that the licensees in those cases had not suffered any prejudice from not having obtained the discovery permitted by the Board until after the administrative hearing.

In this case, there is nothing in the record that would indicate that appellant possessed such information, either directly or through his counsel. Consequently, we must address the issue posed by appellant, i.e., that the Department abused its discretion by ordering appellant to file an offer of proof, and after he had done so, finding the offer insufficient to justify further proceedings.

It is appellant's position that his ability to cross-examine the decoy and the police officer accompanying the decoy was impaired by the lack of such information. We can understand how it may have been. We know from the many appeals we have heard

arising from decoy operations that it is often the case that the decoy will visit a large number of premises in the course of an operation. Appellant contends that, at times, the decoy will confuse events which occurred in one location with what took place at another, and that cross-examination is the only way to ferret out such possible confusion.

It seems to us that requiring an appellant to identify specific elements of proof, as the Department required, places too great a burden on appellant. Cross-examination seeks testimony which will reduce the persuasive value of the witness's direct testimony, and does not readily lend itself to preliminary delineation to the extent the Department has required.

When the Board concluded that licensees were entitled to discover the identities of other sellers to the decoy in question, it was because it was persuaded that those licensees had not been given an opportunity to conduct a full and complete cross-examination of the Department's witnesses. We are still of that view. Consequently, we believe the only way that full effect can be given to our earlier ruling on discovery is to order this case remanded to the Department to permit appellant the opportunity to cross-examine the witnesses against him armed with the information obtained through discovery.

We are not unaware of the possible difficulties the Department may encounter in presenting its witnesses for further cross-examination, or even its inability to do so, as a result of the passage of time while these appeals were pending. However, had the Department not been so adamant in its refusal to provide discovery until required to do so by this Board, and only then after futile attempts to overturn the Board's discovery decisions, this case might have been concluded long ago.

ORDER

The decision of the Department is reversed and the case is remanded to the Department for such further proceedings as may be necessary in light of our comments herein.⁴

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

⁴ This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate district court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.