

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

AB-7506a

File: 20-295720 Reg: 99046276

CIRCLE K STORES, INC., dba Circle K Store #5246
3350 College Boulevard, Oceanside, CA 92056,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: June 4, 2002
Los Angeles, CA

ISSUED AUGUST 8, 2002

Circle K Stores, Inc., doing business as Circle K Stores #5246 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ following remand which again suspended its license for 25 days for appellant's employee selling an alcoholic beverage to a minor decoy, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code §25658, subdivision (a).

Appearances on appeal include appellant Circle K Stores, Inc., appearing through its counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

¹The decision of the Department, dated September 27, 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 suspending appellant's off-sale beer and wine license for 25 days for a sale-to-minor violation. 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 Amended Decision Following Appeals Board Decision, the Department remanded the matter to Administrative Law Judge (ALJ) Rodolfo Echeverria 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 one other licensee (the 7-Eleven store located at 1749 Pacific Coast Highway in Oceanside, California) which sold an alcoholic beverage 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 was too general and failed to "establish the actual existence of any new and relevant evidence to support its request for further proceedings." The decision concluded that no further proceedings were appropriate or

²Circle K Stores, Inc. (2001) AB-7506.

necessary and again ordered the license suspended for 25 days.

Appellant filed a timely appeal from the Department's decision in which it argues that it was denied its right to cross examination by the Department's actions.

DISCUSSION

Appellant contends that it did not have all the information it needed to fully cross-examine at the initial hearing because the Department failed to provide the discovery appellant had requested. Having received the requested discovery, appellant argues that the ALJ improperly prevented it from calling newly-discovered witnesses and conducting further cross-examination of the decoy based upon such discovery. Its brief attacks at length the procedure followed by the Department, arguing that it was improper to require an offer of proof with respect to new evidence gained as a result of the Department's discovery response.

Appellant's contention that it did not have all the information it needed to fully cross-examine at the initial hearing is disingenuous. It possessed the same information the Department provided in its discovery response *before the administrative hearing in this matter*.

The decoy in this matter was able to purchase an alcoholic beverage at only one other premises on the night in question: the 7-Eleven store located at 1749 Pacific Coast Highway in Oceanside. The record in the appeal of that 7-Eleven store, The Southland Corporation and Cunningham, AB-7505,³ of which this Board takes official notice, identifies George Flint as the minor decoy who purchased an alcoholic beverage on January 2, 1999, from that 7-Eleven store. George Flint is the decoy who purchased

³ This case is identified in Department records as File No. 20-335569; Registration No. 99046341.

an alcoholic beverage at the store of the present appellant on January 2, 1999. The record in the 7-Eleven appeal shows that a Special Notice of Defense was filed on May 12, 1999, in which the same law firm which represents appellant in this appeal acknowledged receipt of a copy of the accusation in the 7-Eleven matter. The hearing on 7-Eleven's accusation took place on *July 29, 1999, at 9:30 a.m.* The hearing in the present matter took place on *July 29, 1999, at 1 p.m.* It necessarily follows that at the time of the hearing appellant's counsel were on notice of the very information appellant claims was not provided to it until after this Board's rulings on discovery.

Obviously, appellant's counsel was in possession of all the knowledge appellant purported to lack,⁴ but called no witness nor offered any evidence from that matter during the hearing on appellant's accusation. At the time of the previous hearing, appellant's counsel had the exact information appellant requested, yet did not use it then. Appellant has been accorded the opportunity for conducting a full and fair cross-examination of the decoy, and it is not now entitled to have a second bite of the apple.

There was no basis for any reconsideration of any of the findings and conclusions of the Department, and the Department was entitled to reaffirm its original decision.

⁴The general rule of agency, that notice to or knowledge possessed by an agent is imputable to the principal, applies for certain purposes in the attorney-client relationship. (*Freeman v. Superior Court* (1955) 44 Cal.2d 533 [282 P.2d 857, 860].) As explained in 2 Witkin, Summary of California Law (9th ed. 1987) Agency and Employment §101, pp. 98-99:

“Generally speaking, notice is imputed to the principal of any facts relating to the subject matter of the agency of which the agent acquires knowledge or notice while acting as such within the scope of his authority. It is not enough that the facts concern the business of the principal; they must be so related to the subject of the agency as to bring them within the duties of the agent.”

ORDER

The decision of the Department is affirmed.⁵

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

⁵This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this order as provided by §23090.7 of said code.

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