

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

AB-7677a

File: 20-295718 Reg: 00048291

CIRCLE K STORES, INC. dba Circle K Store #5213
1061 West El Norte Parkway, Escondido, CA 92026,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: April 3, 2003
Los Angeles, CA

ISSUED JUNE 9, 2003

Circle K Stores, Inc., doing business as Circle K Store #5213 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 25 days for its clerk having sold an alcoholic beverage to a minor, 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 Circle K Stores, Inc., appearing through its counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

This is the second appeal in this matter, arising from the sale of an alcoholic beverage to a minor acting as a police decoy. In the original appeal, the Board rejected

¹The decision of the Department, dated May 23, 2002, is set forth in the appendix.

appellant's contention that the decoy's appearance violated Department Rule 141(b)(2), but held that appellant's discovery request for police reports in the Department's possession relating to prior violations committed by appellant should have been granted, stating, in part:

We believe appellant was entitled to the requested police reports pertaining to the prior disciplinary actions because the Department alleged the existence of the prior discipline in the accusation for purposes of penalty enhancement. In this situation, the police reports are discoverable under both subdivisions (e) and (f) of Government Code §11507.6. Without the police reports, appellant may not have access to facts surrounding the prior violations. This could well hamper appellant in arguing what weight should be given the prior discipline. We fail to see how the Department can argue that this information is not relevant, when the Department itself has, on more than one occasion, brought up the facts and circumstances of prior violations when justifying a penalty recommendation both to ALJ's and to this Board.

...

This decision is intended to do no more than provide the licensee with the same information that the Department had, so that the parties have equal opportunities to argue the effect the prior violations should have on the present penalty to be imposed. By this decision, we make no assertion that an ALJ or the Department will, or should, find the circumstances of prior violations to be appropriate or significant considerations in fixing a penalty.

Upon remand, the Department entered the following order:

In accordance with the Order of the Board, following compliance by the Department with the licensee's discovery request, as limited by the Board in its decision, the matter is remanded to Administrative Law Judge Rodolfo Echeverria to initially take further argument on the issue of an appropriate penalty by way of affidavit and briefing only, as it pertains to the police reports concerning the prior violations. Following submission of any such further argument, and any response from the Department, the Administrative Law Judge shall thereafter hold any proceedings as he determines are necessary and appropriate, in his exclusive discretion.

Thereafter, ALJ Echeverria issued a proposed decision which reaffirmed his original penalty order and set forth his reasons for doing so:

Although the Respondent was provided with the prior police reports as required by the Appeals Board, the Respondent's Offer of Proof fails to address the issue of whether the prior violations should have an effect on the penalty to be

imposed in the instant matter and it fails to address the issue of whether the circumstances of the prior violations should be appropriate or significant considerations in fixing a penalty. Instead of addressing the above-stated issues that were clearly identified by the Appeals Board, the Respondent only provided unrelated arguments pertaining to a totally different issue¹ which are not applicable to the instant case.

...
Since the Respondent's Offer of Proof fails to address the penalty issues identified by the Appeals Board, there is no new evidence and there is no new argument to consider in determining the appropriate penalty in this case.

¹ The arguments set forth in Respondent's Offer of Proof pertain to the unrelated issue of "other licensees who sold to the same decoy during the same work shift."

Appellant now contends that the Department erred in its failure to conduct a further hearing after the police reports were given them.

DISCUSSION

The offer of proof which appellant filed was not made part of the record, either as a pleading or as an exhibit. However, it would appear from the ALJ's brief description of it to be the same boilerplate offer of proof seen in the many appeals which the Board has previously heard involving sales to other decoys.

The whole purpose of the Board's reversal in the original appeal was to give the appellant an opportunity to address the question of the appropriateness of the penalty in light of what the police reports showed with respect to the violations which were the subject of the prior disciplinary penalties.

We do not think the ALJ abused his discretion in requiring an offer of proof. Had appellant addressed the issue that it said it was going to address, a hearing may not even have been necessary. Conceivably, appellant could have made a case for a more lenient penalty by way of an effective offer of proof; at the very least, had it addressed the issue, it might have persuaded the ALJ to consider a lesser penalty.

It is clear from the Appeals Board's ruling that it expected appellant to challenge the weight to be accorded the prior disciplines. Instead, appellant appears to have addressed an issue that was not raised in the first appeal, that involving other sales to the decoy.²

Since appellant had its chance to challenge the penalty and did not, there is no reason to question the Department's order.

ORDER

The decision of the Department is affirmed.³

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

² Appellant has not disputed the ALJ's description of the offer of proof it filed.

³ 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.