

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

AB-7266a

File: 47-267148 Reg: 98042733

ACAPULCO RESTAURANTS, INC. dba Acapulco Restaurant
2022 First Street, Simi Valley, CA 93065,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

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

ISSUED JUNE 9, 2003

Acapulco Restaurants, Inc., doing business as Acapulco Restaurant (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 15 days for a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Acapulco Restaurants, Inc., appearing through its counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

FACTS AND PROCEDURAL HISTORY

This is the second appeal in this matter. In the original appeal, the Board affirmed the decision of the Department on all issues except that regarding discovery.

¹The decision of the Department, dated October 11, 2001, is set forth in the appendix.

The Board concluded that appellant was entitled to discovery of the identities of any other licensees who themselves or through their employees had on the same night made sales of alcoholic beverages to the decoy who made the purchase in this case, and ordered the case remanded to the Department for further proceedings consistent with its order.

The Department, accordingly, remanded the matter to the Administrative Law Judge (ALJ) for the taking, by way of affidavit and argument only, such new evidence the licensee intended to offer at any further hearing. Quite obviously, such new evidence would be that derived from the discovery information regarding other sellers.

The decision of the Department recites that the Department submitted a declaration indicating that no discoverable information existed which had not already been produced. The ALJ concluded:

In light of the fact that no discoverable information exists which has not already been produced, there is no additional evidence for the Administrative Law Judge to consider. Further proceedings in this case are not appropriate and are not necessary.

On that basis, he found that no reason had been shown for modifying the original findings of fact, determination of issues, or order, and reaffirmed the 15-day suspension.

Appellant has filed a timely appeal, and now contends that the Department's failure to provide it with the identities of other licensees resulted in the denial to it of an opportunity to conduct a full cross-examination of the decoy and the police officer who testified.

DISCUSSION

Appellant tells us its initial cross-examination was “truncated” because appellant did not have the benefit of the discovery regarding sales by other licensees.

(App.Br., page 6.) It then tells us that “although the Department did not ask questions concerning the other locations where the decoy purchased an alcoholic beverage, cross-examination could (and should) delve deeply into the area so as to test the veracity and reliability of the decoy’s testimony overall.”

In fact, appellant’s counsel did explore on cross-examination the area of sale by other licensees, referring to a report purporting to show 12 purchases at 68 locations [RT 38]. The report was not placed in evidence,² and the decoy testified that, on the only occasion that he was a decoy, he visited only 10 to 15 locations. He was asked [RT 38]:

Q. Did you make purchases of 12 locations?

A. No, sir.

Q. How many locations did you make purchases in?

A. I don’t recall, sir.

Q. More than one?

At this point, a colloquy took place regarding whether the report covered only a single night. When it was established that the decoy in question had visited only 10 to 15 premises, the cross-examination shifted to other areas and never returned.

The police officer who accompanied the decoy was also asked about the possibility of other sales. He recalled specifically that the decoy had been refused at the two on-sale locations he visited, but could not recall any other locations [RT 63-69].

² The report, according to appellant’s brief, was an ABC Form 309, provided by the Department during discovery.

In addition, a second decoy who had accompanied the decoy in question into the restaurant was called by appellant's counsel, but was not asked if any other premises had sold to him.

Appellant suggests that there were other sales to this decoy, but there is nothing in the record to indicate that there was. The decision cites the Department's declaration that no other discoverable information exists, and concludes that, since there is no additional evidence for the ALJ to consider, any further proceedings are neither appropriate nor necessary. We have found no reason to think otherwise.

ORDER

The decision of the Department is affirmed.³

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

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.