

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

AB-8077

File: 20-218207 Reg: 02053602

7-ELEVEN, INC., BYUNG D. CHUN, and CHUNG HEE CHUN
dba 7-Eleven #2173-18893
1151 Redondo Beach Boulevard, Gardena, CA 90247,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: December 2, 2002
Los Angeles, CA

ISSUED JANUARY 21, 2004

7-Eleven, Inc., Byung D. Chun, and Chung Hee Chun, doing business as 7-Eleven 2173-18893 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for five days, all of which were conditionally stayed for one year, for their clerk having made a sale of an alcoholic beverage without having duly executed a retail application and acknowledgment, a violation of Business and Professions Code section 25658.4, subdivision (a) (section 25658.4(a)).

Appearances on appeal include appellants 7-Eleven, Inc., Byung D. Chun, and Chung Hee Chun, appearing through their counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

¹The decision of the Department, dated December 26, 2002, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 5, 1988.

Thereafter, the Department instituted an accusation against appellants charging the sale of an alcoholic beverage to a minor and the failure of the clerk to execute an application and acknowledgment.

An administrative hearing was held on November 8, 2002, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department adopted the proposed decision of the administrative law judge which dismissed the sale to minor charge (count 1) for non-compliance with Rule 141(b)(2), but sustained the count relating to the clerk's application and acknowledgment (count 2).

Appellants thereafter filed a timely appeal, contending that there is no substantial evidence to support the decision.

DISCUSSION

I

Business and Professions Code section 25658.4(a) requires a retail off-sale clerk to execute, under penalty of perjury, an application and acknowledgment. The statute prescribes that the document is to be in a form understandable to the clerk, and that "the Department shall specify the form of the application and acknowledgment," which is to include a summary of specified provisions of the Alcoholic Beverage Control Act. These include, among others, provisions relating to sales to minors; bona fide evidence of majority; hours of operation; and sales to an intoxicated person. The Department's theory of the case was that the document the clerk executed (Exhibit D) did not include references to on-premises consumption of alcoholic beverages in an off-sale premises and to sales of keg beer for consumption off the licensed premises, so was not in

compliance with the statute. “Exhibit D is close, but it’s not sufficient because it misses those things for that violation.” [RT 88.]

The Department did not place Exhibit D in evidence during its case. Department counsel briefly examined appellant Chun about the document, establishing that it was the only form the clerk signed relating to sales of alcoholic beverages.

The sole finding relating to count 2 of the accusation is Finding V, which states with reference to Exhibit D:

Respondent’s clerk signed an “Employee Awareness Form for Age-Restricted Sales” on December 12, 2001. The form does not contain information pertaining to on-premises consumption of alcoholic beverages in an off-sale premises, or the requirements and prohibitions pertaining to sales of keg beer for consumption off licensed premises. Such information is required to be on the “application and acknowledgment” form signed by clerks who make off-sales of alcoholic beverages. Business and Professions Code Section 25658.4 (a)(1)(E) and (F).

Exhibit D appears to be a form used generally by 7-Eleven, Inc.,² not one designed expressly for California. Although the clerk signed the form, he did not do so under penalty of perjury. (See Exhibit D.)

Appellants suggest that the Department was required to prove “a complete absence” of the information required by the statute. They point out that Exhibit D covers most of the matters required by the statute, but argue that it is not relevant either to prove or disprove compliance with section 25658.4(a). “Rather, this is simply proof that Appellant completed a training form, not that the licensee failed to file a 25658.4(a) affidavit.” (App.Br., page 5.)

The accusation alleges that no application and acknowledgment was executed.

² The form identifies its use as “for states where we sell alcohol,” although it includes reference to other age-restricted products, such as tobacco and lottery.

In the ordinary course, the Department, to prove the negative, would establish, through the licensee or the clerk, that no such form was executed. It appears to have done so in this case during its cross-examination of appellant Chun, when he testified that Exhibit D was the only document the clerk executed relating to sales of alcoholic beverages. (See RT 85.)

ORDER

The decision of the Department is affirmed.³

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
KAREN GETMAN, 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.