

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

AB-8886

File: 21-452078 Reg: 07066689

FREEDOM MARKETS, INC., dba Freedom Market
635 El Cajon Boulevard, El Cajon, CA 92020,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: June 4, 2009
Los Angeles, CA

ISSUED AUGUST 19, 2009

Freedom Markets, Inc., doing business as Freedom Market (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its off-sale general license for 15 days, seven of which were conditionally stayed for one year, for its owner, Salem Somo, having sold a glass of Bud Light beer, an alcoholic beverage, to Christine Johnson, an 18-year-old police decoy, in violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Freedom Markets, Inc., acting through its owner, Salem Somo appearing in propria persona, and the Department of Alcoholic Beverage Control, appearing through its counsel, Valoree Wortham.

¹The decision of the Department, dated April 24, 2008, is set forth in the appendix.

PROCEDURAL HISTORY

Appellant's off-sale general license was issued on March 27, 2007. Thereafter, on or about August 20, 2007, the Department instituted an accusation against appellant charging the sale of an alcoholic beverage to a minor. Although not stated in the accusation, the minor was acting as a decoy for the El Cajon Police Department.

Documentary evidence was received and testimony concerning the violation charged was presented at an administrative hearing held on March 13, 2008.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been proved.

Appellant, acting through its owner, Salem Somo, filed a timely notice of appeal. In a letter brief, Somo concedes that he sold an alcoholic beverage to the decoy, but contends that he thought he was selling an energy drink, explaining that the cans of beer resembled cans of an energy drink which he also sold in his store. He knew the decoy was not 21 because he and a clerk had refused to sell her beer on two previous occasions.

DISCUSSION

The administrative law judge (ALJ) took into account appellant's claim of confusion and the unfairness of multiple visits by a decoy, but correctly ruled that neither was a valid defense. He wrote, in Conclusions of Law, paragraph 4:

The decoy was under the age of 20 years and displayed the appearance that generally could be expected of a person less than 21 years of age. In fact, Salem Somo testified he knew the decoy and would not have sold to her had he known he was selling beer. Somo argued that the decoy operation was unfair by using the same decoy for the third time and because she did not bring an obvious can of beer to the sales counter. These defenses are rejected. Absent more, it is not a violation for the same decoy to attempt more than once to buy alcoholic beverages at the same location so long as it is not done repeatedly over a very short period of time. Two prior visits, one 4-5 weeks earlier and one

about 6 months earlier (Findings of Fact, ¶ 10) does not appear to be too frequent. Nor is the decoy, who is by definition young and inexperienced in matters of alcoholic beverages, required to select an alcoholic beverage that the counter person will surely recognize. Decoy Johnson did select cans of Bud Light beer, a generally well-known brand. A clerk in a Department-licensed business has a responsibility to know which of his products are age-sensitive and which are not. If the item is one with which he is not familiar, he has but to look closely at it. While the confusion over the cans may amount to an extenuating circumstance, it does not void the violation.

Appellant's arguments to this Board mirror the arguments he made at the administrative hearing. They are no more persuasive here than they were to Judge McCarthy.

ORDER

The decision of the Department is affirmed.²

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

² 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.