

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

AB-8965

File: 20-243727 Reg: 08068523

7-ELEVEN, INC., and SALEM ENTERPRISES, INC.,
dba 7-Eleven Store No. 2111-15591
3407 College Boulevard, Oceanside, CA 92056,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: August 5, 2010
Los Angeles, CA

ISSUED SEPTEMBER 21, 2010

7-Eleven, Inc., and Salem Enterprises, Inc., doing business as 7-Eleven Store No. 2111-15591 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for ten days for their clerk, James Jefferson, having sold a six-pack of Bud Light beer, an alcoholic beverage, to Emily Ricci, an 18-year-old police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., and Salem Enterprises, Inc., appearing through their counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Valoree Wortham.

¹The decision of the Department, dated October 22, 2008, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on May 29, 1990. On April 8, 2008, the Department instituted an accusation against appellants charging the sale of an alcoholic beverage on December 21, 2007, to Emily Ricci, a person under 21 years of age. Although not stated in the accusation, Ricci was acting as a decoy for the Oceanside Police Department.

An administrative hearing was held on August 29, 2008, at which time documentary evidence was received and testimony concerning the violation charged was presented by Brent Keys, an Oceanside police officer, and Emily Ricci (the decoy). Barbara Salem, president of Salem Enterprises, Inc., testified about employee training and store policies with respect to the sale of tobacco and alcohol products.

The evidence at the hearing established that the sale was made to the decoy after the clerk had requested and examined the decoy's California driver's license. The license stated the decoy's correct date of birth, and contained a red stripe with the words "AGE 21 in 2010" in white letters. The decoy was not asked any age-related questions.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established, and no affirmative defense had been proved.

Appellants filed a timely notice of appeal in which they claim the administrative law judge improperly quashed a subpoena, thereby precluding appellants from obtaining evidence that the Department utilized an underground regulation.

DISCUSSION

Appellants contend that the quashing of a subpoena directed to Department

Administrator Robin Van Dyke precluded them from obtaining evidence that would prove that the Department utilized an underground regulation in formulating its penalty recommendation. This argument flies directly in the face of the claim made at the administrative hearing as to what appellants proposed to prove. Indeed, appellants' counsel complained that the Department did not intend to "utilize, enforce or attempt to enforce any guideline, criteria bulletin, manual, instruction, order, standard of general application, or other rule," as proscribed by Government Code section 11340.5, subdivision (a).

The colloquy relating to the Department's motion to quash the subpoena [RT 10-12] is most illuminating:

Ms. Sullivan: Well, Your Honor, if I may be heard for just a moment?

Judge Echeverria: Yes.

Ms. Sullivan: Ms. Wortham [Department Counsel] assumes the reason I would be having her testify here today would be –

Judge Echeverria: May I see your subpoena, please.

Ms. Sullivan: -- the same as for prior occasions. Of course. But, in fact, it's Respondent's position that the recommended penalty that the Department will offer in this matter today deviates from its pattern and practice with respect to the length of discipline-free license history, and may in fact be trying to aggravate a penalty based on prior Accusations against this license that were either dismissed by the Department's own decision-making process or because they were adjudicated to violate Rule 141(b) --

The Department argues in its brief that Ms. Sullivan not only failed to allege that there was an underground regulation, "but seemed to be undermining that possibility" by showing that District Administrator Van Dyke was *not* following a "pattern or practice." (Dept. Br., p.5.) We agree. It is as if appellants are arguing "it is unfair for you to have an underground regulation but not to utilize it in this case."

Appellants' counsel have repeatedly raised on appeal on behalf of other clients the contention that the Department's penalty determinations are the product of an underground regulation. The Board has uniformly rejected those contentions. (See, e.g., *Randhawa* (2010) AB- 8973; *Yummy Foods, Inc.* (2010) AB-8950.) Appellants' brief in this case is virtually identical to the briefs filed in those cases. It ignores what took place at the administrative hearing, and unfairly criticizes the administrative law judge (ALJ) by asserting that his decision "was based on no recognizable lawful process" (App. Br., p.2), and that he "misunderstood counsel's explanation of the potential relevance of the testimony of the District Administrator." (*Ibid.*) If there was any misunderstanding, it was the fault of appellants' counsel.

We agree with the Department that appellants failed to raise the issue of an underground regulation. Further, the contention that the Department was attempting to aggravate the penalty proved to be unfounded; the Department imposed a suspension more lenient than its standard 15-day suspension for a sale-to-minor violation of Business and Professions Code section 25658, subdivision (a).

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.

