

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

**AB-9127**

File: 48-419346 Reg: 10072862

ALJOY INCORPORATED, dba SOM  
2925 16th Street, San Francisco, CA 94103  
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,  
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: April 7, 2011  
San Francisco, CA

**ISSUED APRIL 28, 2011**

Aljoy Incorporated, doing business as SOM (appellant), appeals from a decision of the Department of Alcoholic Beverage Control<sup>1</sup> which suspended its license for 15 days for permitting the consumption of an alcoholic beverage on the licensed premises after 2:00 a.m., a violation of Business and Professions Code<sup>2</sup> section 25632.

Appearances on appeal include appellant Aljoy Incorporated, appearing through its owner, Peter Glikshtern, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kelly Vent.

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<sup>1</sup>The decision of the Department, dated August 11, 2010, is set forth in the appendix.

<sup>2</sup>Unless otherwise indicated, statutory references in this opinion are to the Business and Professions Code.

## FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on January 9, 2006. On April 19, 2010, the Department instituted an accusation charging that, on January 9, 2010, appellant had permitted the consumption of an alcoholic beverage on the licensed premises during a time that it was unlawful to do so.

At the administrative hearing held on July 15, 2010, documentary evidence was received and the parties stipulated that a patron had consumed an alcoholic beverage after 2:00 a.m. on January 9, 2010. Testimony was presented by Peter Glikshtern, who is the owner and president of the corporate licensee, and by Department investigator Daniel Sumida.

The investigator testified that, while he and his partner were outside the premises at about 2:25 p.m., he observed a patron on the patio of the premises take a drink from what appeared to be a bottle of beer. After entering the premises, he saw the patron again drink from the bottle. He confirmed that the patron had been drinking Corona beer and that he had purchased the beer before 2:00 a.m.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged was proved. Appellant filed a timely appeal contending that it did not permit the violation.

## DISCUSSION

Section 25632 provides:

Any retail licensee, or agent or employee of such licensee, who permits any alcoholic beverage to be consumed by any person on the licensee's licensed premises during any hours in which it is unlawful to sell, give, or deliver any alcoholic beverage for consumption on the premises is guilty of a misdemeanor.

The "hours in which it is unlawful to sell, give, or deliver any alcoholic beverage for consumption" are defined in section 25631 as "between the hours of 2 o'clock a.m. and 6 o'clock a.m. of the same day."

Appellant contends it did not violate section 25632 because it did not *permit* the illegal consumption of alcoholic beverages. It asserts that it cannot be considered to have permitted the violation because the Department found that appellant "has a policy of stopping the sale of alcoholic beverages at 1:30 a.m., and having its security staff ask customers 'to finish their drinks and hand over the bottles and glasses' at 1:45 a.m." (Decision at p. 2 [FF IV]) and because it was diligent in executing that policy on the night in question. Appellant urges that its diligence in the execution of the policy on January 9, 2010, "clearly establishes an affirmative defense of not permitting said unlawful activity."

The problem with appellant's argument is that there is not admissible evidence to prove the facts on which it relies. The administrative law judge (ALJ) found that appellant has a policy as stated in Glikshtern's uncontested testimony. However, Glikshtern could not testify to the execution of that policy on January 9, 2010, since he was not present at that time. [RT 10.] Having a policy does not establish appellant's defense.

The Board does not need to reach the more difficult legal question of whether "diligent execution" of that policy would be enough to establish that appellant did not permit the violation. The only evidence appellant presented to support its assertion is a letter from Bruce Aguirre (Ex. A), who was the manager of the bar at the time of the violation and was present that night. The letter was admitted as administrative hearsay,

which "may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions."<sup>3</sup> (Gov. Code, § 11513, subd. (d).)

The Department made a timely objection to admission of the letter into evidence. There is no direct evidence in the record of how the premises' policy was implemented that night, so there is no evidence that the letter can supplement or explain. The statements in the letter cannot, by themselves, support a finding about how appellant's employees implemented the policy that night, so there simply is no competent evidence that the policy was diligently executed. Without evidence of what was done to prevent the violation that night, appellant cannot establish that it did not permit the violation.

#### ORDER

The decision of the Department is affirmed.<sup>4</sup>

FRED ARMENDARIZ, CHAIRMAN  
TINA FRANK, MEMBER  
MICHAEL A. PROSIO, MEMBER  
ALCOHOLIC BEVERAGE CONTROL  
APPEALS BOARD

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<sup>3</sup>The Department attorney did not object to the letter being used to supplement Glikshtern's testimony about the "normal practice" at the premises, but he did make a timely objection to statements in the letter pertaining to the specific events of that night. The statements were not made under penalty of perjury, the letter was not provided to the Department before the hearing, and there was no opportunity for the Department to cross-examine Aguirre; this Board does not believe (and appellant does not argue) that this document would be "admissible over objection in civil actions."

<sup>4</sup>This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code section 23090 et seq.