

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

AB-8196

File: 21-217303 Reg: 03054623

7-ELEVEN, INC., GURBAX R. MARWAH, and RAJNI MARWAH,
dba 7-Eleven # 2174-16931
10011 Mills Road, Whittier, CA 90604,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: August 5, 2004
Los Angeles, CA

ISSUED SEPTEMBER 17, 2004

7-Eleven, Inc., Gurbax¹ R. Marwah, and Rajni Marwah, doing business as 7-Eleven # 2174-16931 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control² which suspended their license for 15 days, 5 days of which were stayed for a 1-year probationary period, for their clerk selling an alcoholic beverage to a person under the age of 21, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., Gurbax R. Marwah, and Rajni Marwah, appearing through their counsel, Ralph B. Saltsman, Stephen W.

¹We use this spelling instead of "Gurbak," which is used in most of the documents in the record, because "Gurbax" was the spelling given by this co-licensee when called as a witness.

²The decision of the Department, dated September 18, 2003, is set forth in the appendix.

Solomon, and R. Bruce Evans, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on July 5, 1988. Thereafter, the Department instituted an accusation against appellants charging that, on December 27, 2002, appellants' clerk, Parminder Singh (the clerk), sold an alcoholic beverage to 19-year-old Christopher Imsen.

At the administrative hearing held on July 18, 2003, documentary evidence was received, and testimony concerning the sale was presented by Imsen (the minor) and by Department investigators Joseph Perez, Jr., and William Armantrout.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged had been proven, and no defense had been established.

Appellants filed an appeal contending that the Department failed to introduce sufficient evidence that the product sold by appellants' clerk was an alcoholic beverage.

DISCUSSION

At the hearing, the testimony established that the minor purchased from appellants' clerk a can labeled "Fosters Lager." The can was entered into evidence as exhibit 5. Nowhere on the can or its label did it say "beer" or "alcoholic beverage" or show the alcoholic content. Appellants contend that the designation of "lager" on the can does not prove that it is beer under the definition of that term in Business and Professions Code section 23006.

Section 23006 states that "'Beer' means any alcoholic beverage obtained by the fermentation of any infusion or decoction of barley, malt, hops, or any other similar product, or any combination thereof in water, and includes ale, porter, brown, stout, lager beer, small beer, and strong beer" Appellants argue that the term "lager," standing

alone, is not included in this definition nor is it defined elsewhere in the Business and Professions Code. They conclude that the Department thus failed to meet its burden to establish that the product sold is beer or any kind of alcoholic beverage.

Appellants raised this issue at the administrative hearing, and the administrative law judge (ALJ) addressed their contention in Determination of Issues I:

Noting that the product which Imsen purchased "simply stated that (it) was Fosters Lager", Respondents argued that under "Business and Professions Code Section 23006 beer is defined as an alcoholic beverage, per se, however Lager in and of itself and as an isolated term is not included in this definition." Respondents' argument does not help Respondents' case.

Business and Professions Code Section 23004 defines "alcoholic beverage" to include beer. Business and Professions Code Section 23006 defines "beer" to include "lager beer". Since lager, by dictionary definition, is a type of beer, the word "beer" in the phrase "lager beer" is redundant. (This type of redundancy is not uncommon. For example, the word "whiskey" often follows the word "bourbon" and "scotch", even though bourbon and scotch by definition are types of whiskey.)

Since the product which Singh sold to Imsen was a lager, and since lager is a type of beer, which is a type of alcoholic beverage, the product was an alcoholic beverage.

This analysis reasonably and adequately supports the conclusion that beer was sold. In addition, "lager" is simply another name for "lager beer":

lager *n.*: A type of beer of German origin that contains a relatively small amount of hops and is aged from six weeks to six months to allow sedimentation. **Also called lager beer.** [Emphasis added.]

(American Heritage Dict. (4th ed. 2000).)

The definition of "lager" in Webster's Revised Unabridged Dictionary (1998) is more concise: "n. Lager beer."

Since "lager" is "lager beer" and "lager beer" is "beer," the Department did not fail to carry its burden of showing that the product purchased was an alcoholic beverage.

The case of *Godoy* (1999) AB-6992, cited by appellants, is distinguishable. In *Godoy*, a police minor decoy purchased a bottle of "Olde English 800." There was no direct testimony that Olde English 800 was an alcoholic beverage, no testimony that the label stated anything regarding alcoholic content, and the bottle and the label were not introduced into evidence. The Board concluded that the Department had not carried its burden because there was no evidence that the label showed it was an alcoholic beverage, and the Department could not rely on Olde English 800 being "universally known" as an alcoholic beverage, since Olde English 800 "does not enjoy that degree of notoriety" enjoyed by such well known brands as Budweiser or Miller Lite.

In *Godoy*, the Department attempted to rely entirely on the brand name of the product to establish that it was an alcoholic beverage. Here, the word "lager" in the brand name "Fosters Lager" provides sufficient evidence that the product is an alcoholic beverage. This is certainly enough to meet the Department's burden of going forward with the evidence. It was then appellants' burden to show that the product was not an alcoholic beverage, and they did not do so.

ORDER

The decision of the Department is affirmed.³

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

³This 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.