

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

AB-8786

File: 20-315461 Reg: 07065804

7-ELEVEN, INC., CARLOS DEL ROSARIO and LOLITA DEL ROSARIO,
dba 7-Eleven 2136 17476
5570 Cahuenga Boulevard, North Hollywood, CA 91601,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen

Appeals Board Hearing: May 6, 2010
Los Angeles, CA

ISSUED AUGUST 4, 2010

7-Eleven, Inc., Carlos Del Rosario and Lolita Del Rosario, doing business as 7-Eleven 2136 17476 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 10 days for their clerk, Taslima Mahtab, having sold a can of Bud Light beer to Courtney Van Heyningen, 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., Carlos Del Rosario and Lolita Del Rosario, appearing through their counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry K. Winters.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on January 30, 1996. The

¹The decision of the Department, dated November 29, 2007, is set forth in the appendix.

Department instituted an accusation against appellants in 2007, charging the sale of an alcoholic beverage to a person under the age of 21 on March 16, 2007.

An administrative hearing was held on September 11, 2007, at which time documentary evidence was received and testimony concerning the violation charged was presented. Los Angeles police officer Jason Acevedo testified that he observed the transaction while standing behind the minor decoy. He testified that the clerk did not ask the decoy her age or for identification before making the sale of a 24-ounce can of Bud Light beer. Courtney Van Heyningen, the decoy, testified that the clerk sold her the beer without asking her age or for identification. She also testified that, after leaving the store with her purchase, she returned to the store with other officers and identified the clerk as the person who sold to her.

Judy Matty, a Department District Administrator, was called as a witness by appellants, and was questioned concerning appellants' claim that the penalty was determined by an unlawful underground regulation.

Subsequent to the hearing, the Department issued its decision which determined that the violation had been proved, and that appellants had not established any affirmative defenses under Rule 141 (4 Cal. Code Regs., §141.)

Appellants filed a timely notice of appeal in which they contend that the Department utilized an underground regulation in setting the penalty.

DISCUSSION

Appellants rely on the testimony of District Administrator Judy Matty for their contention that the Department utilized a series of guidelines, not public and not pursuant to its rule-making authority, but "nevertheless sacrosanct" in assignment of penalties. They quote a portion of her testimony [RT 77-78], which they cryptically describe as a "subdivision assignment of penalty for a first strike minor case," in the

Statement of Facts in their brief:

A. My notations on my copy of the Rule 144 says "minor degrees dash licensee without history - - excuse me. Without disciplinary history for 5 to 7 years, 10 days. Without disciplinary history for 8 plus years, 10 days all stayed. That was my summation of what I believed was consistent with what other districts were recommending.

Q. I'm sorry. You said, 5 to 7 and then 7 to - -

A. And then 8 plus - -

Q. Oh, I'm sorry.

A. - - Without disciplinary history, 10 days all stayed. And again this is kind of a collection of what - -

Q. Okay.

A. - - I surmised from other district administrators in other districts.

Government Code section 11340.5 provides, in pertinent part:

No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation

Section 11342.600 defines "regulation" as "every rule, regulation, order, or standard of general application . . . adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure." The "two principal identifying characteristics" of a regulation are that the rule "appl[ies] generally, rather than in a specific case," and it "must 'implement, interpret, or make specific the law enforced or administered by [the agency], or . . . govern [the agency's] procedure.'" (*California Advocates for Nursing Home Reform v. Bonta* (2003) 106 Cal.App.4th 498, 507 [130 Cal.Rptr.2d 823].)

District Administrator Matty's testimony, read as a whole, refutes the notion that she was making her penalty recommendation - at the same time a pre-hearing

settlement offer - pursuant to some hard and fast Departmental policy. She testified that her recommendation was the consensus she derived from contacts with several other District Administrators: "This is what I thought was reasonable when I talked to other D.A.'s in other situations." [RT 81.]

It is important to keep in perspective the fact that a District Administrator's recommendation has limited force. If rejected by a licensee, it has no force other than that it may serve as the basis for a penalty recommendation made by the Department attorney at the close of the administrative hearing, a recommendation that is not binding on the administrative law judge, and from which there are often departures.

An underground regulation is determined by an agency-wide practice set by agency-wide policymakers. (Gov. Code, § 11342.600 [a rule must be "adopted by [a] state agency" to be a regulation].) District Administrator Matty's testimony falls far short of demonstrating the existence of a Departmental underground regulation.

ORDER

The decision of the Department is affirmed.²

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

²This 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.