ISSUED AUGUST 22, 2000

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

BABUBAHAI K. PATEL dba Inland Dairy 2055 White Avenue La Verne, CA 91750, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)))))))))))	AB-7449 File: 20-12494 Reg: 97040683 Administrative Law Judge at the Dept. Hearing: Sonny Lo Date and Place of the Appeals Board Hearing: July 6, 2000 Los Angeles, CA

Babubahai K. Patel, doing business as Inland Dairy (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended his off-sale beer and wine license for 15 days for his clerk, Russell S. Elmore, having sold a six-pack of Bud Lite beer to Jessica Rose Muell,[2] a 19-year-old minor acting as a decoy for the La Verne Police Department, being contrary to the universal and

[1]The decision of the Department, dated July 14, 1999, made pursuant to Government Code §11517, subdivision (c), together with the proposed decision of the Administrative Law Judge (ALJ), is set forth in the appendix.

[2] Throughout the transcript the decoy's name is spelled "Mell." Her name is spelled "Muell" in the accusation and the proposed decision, as well as on a photograph introduced as Exhibit 3.

generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from violations of Business and Professions Code §25658, subdivision (a), and §23804.

Appearances on appeal include appellant Babubahai K. Patel, appearing through his counsel, Michael B. Levin, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on August 10, 1976. Thereafter, the Department instituted an accusation against appellant charging an unlawful sale to a minor, and violation of a condition on his license prohibiting the sale of an alcoholic beverage to a person while that person remains seated in his or her automobile.

An administrative hearing was held on February 16, 1999, at which time oral and documentary evidence was received. At that hearing, testimony was presented by William Witzka, Jr., the La Verne police officer accompanying the decoy (in a separate automobile), and Jessica Muell, the minor decoy, concerning her purchase of a six-pack of Bud Lite while seated in her car in a drive-through lane of the premises. Appellant presented no witnesses.

The proposed decision of the Administrative Law Judge (ALJ) dismissed the accusation, concluding that the Department had failed to establish that Bud Lite was an alcoholic beverage. Chiding the Department by listing a number of ways

by which the Department could have proved the items purchased were beer but did not, the ALJ also declined to take judicial notice that Bud Lite was beer.

The Department then issued its own decision under Government Code §11517, subdivision (c). It determined that Bud Lite was an alcoholic beverage on the basis of the officer's testimony that the six-pack he saw was beer; on the taking of official notice under Government Code §11515;[3] the Department's technical expertise in its field; and on the notoriety of Bud Lite as an alcoholic beverage.

Appellant has filed a timely notice of appeal. In his appeal, appellant raises the following issue: the decision is not supported by the findings and the findings are not supported by substantial evidence in light of the whole record.

DISCUSSION

Although appellant has cast his appeal as an attack on the sufficiency of the

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[3] Government Code §11515 provides:

"In reaching a decision official notice may be taken, either before or after the submission of the case for decision, of any generally accepted technical or scientific matter within the agency's special field, and of any fact which may be judicially noticed by the courts of this State. Parties present at the hearing shall be informed of the matters to be noticed, and those matters shall be noted in the record, referred to therein, or appended thereto. Any such party shall be given a reasonable opportunity on request to refute the officially noticed matters by evidence or by written or oral presentation of authority, the manner of such refutation to be determined by the agency."

findings to support the decision, and a contention that there was not substantial evidence to support the findings, the basic issue can be stated more simply - was there a valid basis in the record for the Department's determination that the content of the product sold to the minor decoy - a six-pack of 12-ounce metal containers labeled "Bud Lite" - was an alcoholic beverage, namely, beer?

The Department declined to adopt the ALJ's findings which had led him to find that the Department had failed to prove its case. Instead, it adopted three findings of fact of its own as the basis for its determination that the six-pack which was sold was an alcoholic beverage. Each of these newly-adopted findings is vigorously challenged by appellant.

The Department found as follows:

> "Finding of Fact V - That the six-pack sold to the minor was an alcoholic beverage as established by Officer Witzka's testimony that the six-pack purchased by the decoy was 'beer.' The fact that Officer Witzka did not recall reading the word 'beer' on the label of the product did not refute the officer's testimony as to the identity of the product as 'beer,' as the officer may have been familiar with such a notorious product by the overall appearance of the label.
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> "Finding of Fact VI - That the attorney for the Department did in fact request that official notice be taken under Government Code §11515, when she argued that 'Bud Lite' was so well known that it was common knowledge that it was an alcoholic beverage. In addition, the attorney for the respondent was aware that the attorney for the Department was requesting notice be taken that 'Bud Lite' was an alcoholic beverage, and he had an opportunity to refuted [sic] that request at the hearing, as required by Government Code Section 11515.
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> "Finding of Fact VII - That official notice is taken under Government Code Section 11515 that 'Bud Lite' is an alcoholic beverage. This finding under Government Code Section 11515 is based not only on the technical

> expertise within the agency's special field, but also on the notoriety of 'Bud Lite' in general."

Appellant stresses the fact that the police officer testified he did not recall seeing the word "beer" on the cans, and argues that it is speculative that the officer may have been familiar with such a notorious product by the overall appearance of its label. Thus, appellant contends, the officer's testimony is fatally flawed, since it lacks any affirmative causal link identifying Bud Lite as beer or as an alcoholic beverage.

Appellant also points to the absence of any formal request that judicial notice be taken during the Department's case or the Respondent's case. Appellant concedes that Department counsel attempted to argue that it was common knowledge that Bud Lite was an alcoholic beverage, but contends, without citation of authority, that matters cannot be judicially noticed in closing argument.

Finally, appellant challenges the taking of judicial notice by the Department itself, contending the record lacks evidence of the notoriety cited by the Department. Appellant also contends that §11515's requirement of notice to the opposing party and an opportunity to respond was not met.

Had the six-pack of Bud Lite not been destroyed, this case would not be here. Faulty police work (in failing to preserve physical evidence) and a less than adept presentation of the Department's case has brought to the Board an appeal based upon a most technical ground - that a product commonly known to be beer was not proved to be beer.

Appellant is technically correct when he argues that there was no affirmative evidence that the police officer knew Bud Lite was an alcoholic beverage. But that is not to say that the police officer's belief that what he saw was beer can be totally disregarded, when the product is so well-known and heavily advertised as a beer as is Bud Lite.

Appellant is less than correct with respect to his argument that judicial notice may not be taken after the evidence has closed at the administrative hearing level. Section 11515 specifically provides that, in reaching a decision, "official notice may be taken either before or after submission of the case for decision."

Although the request by Department counsel might have been better articulated than it was -

> "MS. NGUYEN: Bud Lite – you know that when you order Bud Lite that it's beer, that you're asking for beer. You don't have to say 'I'd like the Bud Lite beer. I want a Bud Lite.' When people come to a bar and asked for Bud Lite, they are normally served Bud Lite beer.
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> THE COURT: Are you testifying now?
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> MS. NGUYEN: No, Your Honor, but it's presumptive. "

- we agree with the Department that it should have been considered a request that judicial notice be taken that Bud Lite is beer, and an alcoholic beverage.

Consequently, we see no error in the Department's reliance upon its technical expertise in its field - that of regulating the sale of all alcoholic beverages - to support its determination that the product sold to the minor, in violation of both a statute and a license condition, was an alcoholic beverage.

ORDER

The decision of the Department is affirmed.[4]

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

Board Member Ray T. Blair, Jr., did not participate in the deliberation of this appeal.

[4] 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.