

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND	)	
PROFESSIONAL REGULATION,	)	
DIVISION OF ALCOHOLIC	)	
BEVERAGES AND TOBACCO,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 99-2237
	)	
SHEAURAY, INC.,	)	
	)	
Respondent.	)	
_____	)	

RECOMMENDED ORDER

Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing in Sarasota, Florida, on August 17, 1999.

APPEARANCES

For Petitioner: Ruth Nicole Selfridge  
Assistant General Counsel  
Department of Business and  
Professional Regulation  
1940 North Monroe Street  
Tallahassee, Florida 32399-1007

For Respondent: Mei-Rong Manley  
President  
Sheauray, Inc.  
1201 14th Street, West  
Bradenton, Florida 34205

STATEMENT OF THE ISSUE

The issue is whether Respondent sold an alcoholic beverage to a person under 21 years of age, in violation of Section 562.11(1)(a), Florida Statutes.

### PRELIMINARY STATEMENT

By Administrative Action dated March 24, 1999, Petitioner alleged that Respondent sold one 12-pack of Budweiser alcoholic beer to a person under 21 years of age.

By request for hearing, Respondent stated that the purchaser appeared to be over 25 years old.

At the hearing, Petitioner called three witnesses and offered into evidence three exhibits. Respondent called one witness and offered into evidence no exhibits. All exhibits were admitted.

The court reporter filed the Transcript on August 27, 1999.

### FINDINGS OF FACT

1. Petitioner has granted Respondent license number 51-02167, 1APS, for the sale of alcoholic beverages. Respondent received its first temporary license for the sale of alcoholic beverages on November 24, 1997. The license authorizes Respondent to resell package sales of only beer, as well as other alcoholic beverages under six percent alcohol by volume.

2. Respondent's sole officer and shareholder is Mei-Rong Manley. Respondent operates a gas station at 1201 4th Street West in Bradenton. On the day in question, Ms. Manley was the sole employee present.

3. K. W. was born on February 23, 1983. In March 1999, he was six feet, two inches tall and weighed 160 pounds.

4. Petitioner randomly selected Respondent's store for an undercover purchase. Petitioner had not previously received a complaint that Respondent was selling alcoholic beverages to underage persons. The record does not reveal a prior instance of an underaged sale of alcoholic beverages by Respondent.

5. On March 19, 1999, K. W. entered Respondent's store, walked directly to the beer cooler, and picked up a 12-pack of Budweiser alcoholic beer. He then carried the 12-pack of beer to the checkout counter.

6. Shortly after K. W. entered the store, one of Petitioner's plainclothes agents entered the store, posing as a customer, but secretly observing the situation. There were no other persons in the store besides Ms. Manley, K. W., and the agent.

7. When K. W. reached the checkout counter, he laid down the 12-pack of beer. Ms. Manley stated the purchase price of the beer as \$8.55. K. W. gave her a larger sum in currency, and Ms. Manley returned to him the proper change. K. W. then left the store with the beer. He had been in the store 3-4 minutes.

8. At no time did Ms. Manley ask K. W. how old he was. At no time did Ms. Manley ask K. W. to produce identification.

9. Ms. Manley also claims that she was distracted when making the sale to K. W. She alternatively claims that she was concerned that the plainclothes agent was preparing to steal something and that she was engrossed in doing bookkeeping when

K. W. approached the counter. The evidence does not support these alternative claims, which are somewhat conflicting.

10. Ms. Manley claims to have believed that K. W. was well past 21 years of age. A native of Taiwan, Ms. Manley has resided in the United States for the past 15 years. Her belief was unreasonable.

11. While making the purchase, K. W. wore a dark Calvin Klein t-shirt and shorts. He is a tall person, but not of considerable weight. Moreover, his youthful face and manner of presenting himself do not suggest that he is over 21 years of age. A diligent merchant of alcoholic beverages could not have mistakenly assumed that K. W. was over five years older than the 16 years that he was at the time of the purchase.

#### CONCLUSIONS OF LAW

12. The Division of Administrative Hearings has jurisdiction over the subject matter. Section 120.57(1), Florida Statutes. (All references to Sections are to Florida Statutes. All references to Rules are to the Florida Administrative Code.)

13. Section 561.29(1)(a) provides that Petitioner may revoke or suspend a license for the violation of any law. Section 562.111(1) prohibits the possession of alcoholic beverages by anyone under 21 years of age.

14. Petitioner must prove the material allegations by clear and convincing evidence. Pic N' Save Central Florida, Inc., v. Department of Business and Professional Regulation, 601 So. 2d

245 (Fla. 1st DCA 1992). The court in this case held that the licensee is held to a "reasonable standard of diligence" and required "culpable" responsibility so that the violation is due to the licensee's "own negligence, intentional wrongdoing, or lack of diligence."

15. Petitioner has proved by clear and convincing evidence that Respondent, through its sole officer and shareholder, failed to exercise due diligence in selling a 12-pack of alcohol beer to a 16-year old boy, who, except for his height, did not look significantly older than 16 years of age. In any event, he did not look 21 years of age.

16. Rule 61A-2.022(11) provides that the penalty for a first violation of Section 562.11 is \$1000 and a seven-day license suspension. Rule 61A-2.022(7) provides that "[a]ll civil penalties may be substituted with license or permit suspensions using the ratio of 1 day for each \$50."

#### RECOMMENDATION

It is

RECOMMENDED that the Division of Alcoholic Beverages and Tobacco enter a final order finding Respondent guilty of violating Section 562.11(1)(a) and imposing an administrative fine of \$1000 and a license suspension of seven days; provided, however, that Respondent may elect to reduce the fine and add to the suspension at the ratio of \$50 of fine for one day of suspension, so that, for example, she may eliminate the fine

altogether by accepting a suspension of 27 days (7 days provided by rule plus the 20 additional days to reduce the fine to 0).

DONE AND ENTERED this 8th day of September, 1999, in Tallahassee, Leon County, Florida.

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ROBERT E. MEALE  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 8th day of September, 1999.

COPIES FURNISHED:

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1201 14th Street, West  
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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this recommended order. Any exceptions to this recommended order must be filed with the agency that will issue the final order in this case.