

Underage Drinking Enforcement Training Center

Monthly Resource Alert

May 2008



11720 Beltsville Drive ■ Suite 900 ■ Calverton, MD 20705 ■ Toll Free 877-335-1287

Please visit our enhanced website at www.udetc.org for the latest information on underage drinking.

10th Annual National Leadership Conference Includes a Parallel National Youth Track!

At last year's National Leadership Conference's (NLC) over 270 youth - representing 27 States and over 60 youth agencies and coalitions participated in the youth track. For the Conference's 10th Anniversary, youth 15-18 years old are again invited to share their experiences and resources and learn from each other. The youth track will provide youth an opportunity to learn more about effective strategies, hear motivating speakers, engage in team building activities and develop action plans for their communities for the year ahead. In response to your feedback, expect more interactive activities and networking opportunities! The NLC's Youth track recognizes the current leadership achievements of our Nation's youth and nurtures that leadership potential for the future! For registration information about the youth track and all Conference highlights, go to our website: www.udetc.org.

Newly Published Article Outlines the Dangers of Alcohol Mixed with Energy Drinks

A Wake Forest University School of Medicine article recently published showed that almost one-quarter of college student drinkers reported mixing alcohol with energy drinks. These students are at increased risk for alcohol-related consequences, even after adjusting for the amount of alcohol consumed. The entire article can be found in the research section of our website or simply go to the following link: www.udetc.org/documents/ResourceAlerts/CaffeinatedCocktails.pdf

Success Story: South Carolina's Alcohol Enforcement Team (AET) model show impressive results!

South Carolina's Alcohol Enforcement Team (AET) model has grown from a couple of local successes to statewide coverage! AETs are local multi-jurisdictional partnerships that use best practice enforcement to reduce underage drinking. In 2007, the AET's success resulted in the state allocating \$1.6 million to create an AET in each of the State's 16 judicial circuits, providing more rigorous and consistent enforcement of underage drinking laws. Each circuit developed a plan to use their funding to hire a coordinator, pay officer overtime, seek training from Underage Drinking Enforcement Training Center and local experts, and purchase needed equipment. This month's Success Story shares the effectiveness of collaborative partnerships and comprehensive strategies.

Did you Know...?

That the Law Enforcement Awards submission deadline has been extended to May 15, 2008? Don't delay, click on: <http://www.udetc.org/documents/NLC2008/LEPartnerAward.doc> to nominate an agency or officer for Partner of the Year!

Massachusetts Supreme Court Upholds Action of the State's Alcohol Beverage Commission in an Underage Internet Sting Case

In March of 2008 the Massachusetts Supreme Court rendered their opinion in the civil case of *eVinyard Retail Sales-Massachusetts, Inc. v. Alcoholic Beverage Control Commission*, 450 Mass. 825, 882 N.E.2d 334, 2008. The Superior Court, Suffolk County, allowed seller's motion for judgment on the pleadings. The Commission appealed, and the Supreme Judicial court transferred the appeal on its own motion

The issues on appeal to the Supreme Court included:

- (1) Whether the Commission could suspend seller's license even though license which seller was holding at the time of the violation had expired;
- (2) Whether seller violated statute through the sale and a delivery of alcohol to person under the age of 21; and
- (3) Whether seller was not entrapped into violating the law when it sold and delivered alcoholic beverages to an individual under 21 years of age as part of sting operation.

To learn more about this case and the important issues raised in the licensees appeal please click on the link below: www.udetc.org/documents/ResourceAlerts/May2008case.pdf

May National Electronic Seminar: Rite of What? Alcohol Enforcement Successes of "Busting the Binge" in College Environments

Date: Thursday, May 22, 2008

Time: 3:00-4:15 p.m. EDT

Speakers: Lt. Jimmy Zuehlke, Texas Alcoholic Beverage Commission, Austin, Texas; Officer Andrew Gavrilos, La Crosse Police Department, La Crosse, WI; and Chief Tom King, State College Police Dept., State College, PA

Underage and hazardous drinking on/off college campuses are often viewed as normal "rites of passage," yet present serious public health and safety issues. Learn how local enforcement agencies can partner with campus and community leaders to change community norms, and adapt traditional enforcement strategies to successfully "bust the binge."

Visit www.udetc.org/audioconfregistration.asp to register.

To print a hard-copy of this month's Resource Alert visit: www.udetc.org/documents/ResourceAlerts/ResourceAlert0508.pdf

The views expressed in this publication do not necessarily represent the views of the Office of Juvenile Justice for Delinquency Prevention (OJJDP) or the Underage Drinking Enforcement Training Center (UDET) and are solely of the author/source.



Success Stories

Enforcing the Underage Drinking Laws Program

NEWS FROM THE FIELD

www.udetc.org

May 2008

South Carolina's Alcohol Enforcement Team model show impressive results!

South Carolina's Alcohol Enforcement Team (AET) model has grown from a couple of local successes to statewide coverage! AETs now cover all 16 of the State's judicial circuits, providing more intense and consistent enforcement of underage drinking laws.

AETs are local multi-jurisdictional partnerships that use best practice enforcement to reduce underage drinking and to save lives. Just a few years ago, there were two AETs: Florence and Columbia. Each team was making an impressive number of cases and seeing meaningful changes, such as improved merchant compliance rates, and an increased perception of the presence of enforcement by youth.

Beginning in 2006, Enforcing Underage Drinking Laws (EUDL) funds supported the expansion of the AET model to four new counties, mentored by Florence and Columbia: Barnwell, Spartanburg, Clarendon, and York. With this quality mentoring, each site considerably increased enforcement, added new operations, and implemented well-developed public education efforts.

The AET success caught the eye of several legislators, and in 2007, the State allocated \$1.6 million to create an AET in each of the 16 judicial circuits to be coordinated by a lead alcohol and drug abuse agency in the circuit. Each circuit developed a plan to use its funding to hire a coordinator, pay officer overtime, seek training from the Underage Drinking Enforcement Training Center and local experts, and purchase needed equipment.

By October 2007, every team was up and running and implementing operations like compliance checks, controlled party dispersals, public safety checkpoints, and fake ID checks. By the end of February (after just a few months of operations), State totals reached **2,559 compliance checks**, 185 public safety checkpoints, and 11,500-plus tickets issued for various offenses. In addition, **1,245 merchants have been trained** in the Palmetto Retailers Education Program (PREP), a merchant education program delivered by the county alcohol and

drug abuse system. These numbers exceed the totals from all activities in FY 2007 (**1,349 compliance checks and 958 merchants served**).

AET efforts come on the heels of a comprehensive piece of legislation: The Prevention of Underage Drinking and Access to Alcohol Act of 2007. The bill by Sen. Joel Lourie and Rep. Ted Pitts took South Carolina's underage drinking laws from some of the worst to some of the best. In just this one bill, the State instituted keg registration, made youth consumption illegal, "fixed" our State sale statute that was blocking compliance checks in some communities, mandated education/intervention programs upon conviction for youth and merchants, and raised fines and length of driver's license suspensions for multiple offenses. This month's Success Story shares the effectiveness of collaborative partnerships.

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Phone: 877-335-1287. Fax: 301-755-2808

In March of 2008 the Massachusetts Supreme Court rendered their opinion in the civil case of *eVinyard Retail Sales-Massachusetts, Inc. v. Alcoholic Beverage Control Commission*, 450 Mass. 825, 882 N.E.2d 334, 2008.

The Superior Court, Suffolk County, allowed seller's motion for judgment on the pleadings. Commission appealed, and the Supreme Judicial court transferred the appeal on its own motion

Note: In this case the Court referred to Wine.com, Inc. (wine.com), and eVineyard collectively as *eVineyard*

Issues on Appeal

- (1) Whether the Commission could suspend seller's license even though license which seller was holding at the time of the violation had expired;
- (2) Whether seller violated statute through the sale and a delivery of alcohol to person under the age of 21; and
- (3) Whether seller was not entrapped into violating the law when it sold and delivered alcoholic beverages to an individual under 21 years of age as part of sting operation.

Background Information

Wine.com, Inc. is a corporation in the business of selling wine directly to consumers throughout the country.

The plaintiff, eVineyard Retail Sales-Massachusetts, Inc. (eVineyard), is a wholly owned subsidiary of wine.com, through which it sells wine to customers in Massachusetts. eVineyard held a license under G.L. c. 138, § 15, to sell at retail alcoholic beverages that are “not to be drunk on the premises” to citizens and residents of the Commonwealth.

Wine sold in Massachusetts was shipped to customers from the premises of eVineyard Retail Sales-Massachusetts, Inc. (eVineyard), in Avon, Massachusetts.

The Facts of the Case

As part of an Attorney General “sting” operation, an underage decoy—a nineteen year old cooperating individual (CI)—ordered wine from wine.com over the Internet. To place her order, the CI opened an account with eVineyard, submitting her name, address, and a fictitious date of birth, which indicated that she was twenty-two years of age. She agreed to the Web site's terms of service, which state that wine will not be sold or delivered to persons under the age of twenty-one years.

At five locations the Web site informed and warned viewers that the purchaser and recipient of wine must be at least twenty-one years of age. According to eVineyard, by using the Web site, and agreeing to its “terms of service,” the purchaser acknowledged that she was twenty-one years of age or older and contracts with it not to use the Web site unless she is at least twenty-one years of age.

The CI's wine order was processed by eVineyard, and delivered to her by Federal Express, with whom eVineyard contracted for the delivery of all of its orders. In the contract, Federal Express agreed to deliver wine orders to customers in compliance with certain age verification requirements. eVineyard paid Federal Express an extra two dollars per delivery for its carriers to check identification and verify that each recipient is twenty-one years of age or older. (*Emphasis added*)

eVineyard placed labels on its packages informing the carrier that the packages contain alcohol and that a driver should not deliver the package to anyone under twenty-one years of age or visibly intoxicated, and that, if reasonable doubt about age exists, the driver should verify age and record the recipient's driver's license number or other identification. Federal Express also required that certain labels be used on packages containing alcohol. Federal Express delivered the wine, in this case, to the underage CI without asking for identification or proof of age.

The agreement between Federal Express and eVineyard, laid out the conditions for shipping with Federal Express Ground, and provided that the customer (eVineyard) may not ship alcohol to anyone under the age of twenty-one years, and that the customer agrees to “indemnify, defend and hold harmless” Federal Express for “any and all claims, losses, damages, fine, costs, expenses and judgments ... arising out of or related to Customer's non-compliance with the above.” The agreement also provided that Federal Express was not eVineyard's agent.

As a result of this and a second sting operation, eVineyard was administratively charged with two counts of violating G.L. c. 138, § 34, which prohibits the sale or delivery of alcohol to minors.

The Alcoholic Beverages Control Commission (commission) held a hearing to assess whether eVineyard violated G.L. c. 138, § 34. The commission found that it had, and ordered a ten-day suspension of its license, five days for each violation. **Note: Only the first violation was appealed in this case.**

Federal Express, which is separately licensed by the commission to “transport and deliver ... alcoholic beverages” in the Commonwealth pursuant to G.L. c. 138, § 22, admitted responsibility for delivering to a minor, in connection with this same sale. Accordingly, Federal Express was found to have violated G.L. c. 138, § 34, and the commission ordered a three-day suspension of its license to deliver alcohol.

The Attorney General's second sting operation appeared to yield results similar to the first. eVineyard was charged with both violations, while Federal Express was only charged with the first. eVineyard filed a motion to dismiss the second violation, arguing that because Federal Express had not been charged, it could not defend itself, as it had no knowledge of the conditions of delivery. The Alcoholic Beverages Control Commission (commission) took the motion under advisement, and heard evidence only as to the first violation. However, in its decision, it found both violations, and ordered a five-day

suspension for each. In light of the inadequate record, the Superior Court judge vacated the violation order concerning the second violation, and the commission did not appeal.

Analysis of the Court

I. Scope of Review

The Court noted that their scope of review of the commission's decision, was defined by statute and G.L. c. 30A, § 14 and that the agency decision may be set aside if “the substantial rights of any party may have been prejudiced” because it is based on an error of law or on an unlawful procedure, is arbitrary or capricious, is unwarranted by the facts found by the agency, is unconstitutional, is in excess of statutory authority or jurisdiction, or is not supported by substantial evidence. G.L. c. 30A, § 14(7). Substantial evidence is “such evidence as a reasonable mind might accept as adequate **338 to support a conclusion.” G.L. c. 30A, § 1(6).

The Court further noted that “... [t]he reviewing court may not substitute its judgment on questions of fact for that of the agency. *Olde Towne Liquor Store, Inc. v. Alcoholic Beverages Control Comm'n*, 372 Mass. 152, 154, 360 N.E.2d 1057 (1977). When questions of law are at issue, we exercise de novo review, giving “substantial deference to a reasonable interpretation of a statute by the administrative agency charged with its administration [and] enforcement.” *Commerce Ins. Co. v. Commissioner of Ins.*, 447 Mass. 478, 481, 852 N.E.2d 1061 (2006)

A. Mootness

eVineyard first argued that the suspension imposed on it is unenforceable because the license it was holding at the time of the violation, March of 2004, expired, and it subsequently obtained a new license.

eVineyard claimed that in November, 2006, it inadvertently failed to apply for a 2007 license. Under G.L. c. 138, § 16A, if a licensee fails to apply for renewal in accordance with the terms of the statute, another application “shall be treated as an application for a new license. eVineyard subsequently applied for and obtained a new license for 2007 and consequently argued the commission's decision to issue a license suspension should be moot.

The Court disagreed with that premise noting that eVineyard's position would allow a licensee facing suspension to evade the sanction by allowing its former license to expire and then obtaining a new one. This is plainly not what the Legislature intended with regard to G.L. c. 138, § 64. Cf. *Perry v. Medical Practice Bd.*, 169 Vt. 399, 404, 737 A.2d 900 (1999), and cases cited (“It is well settled that a licensee may not evade disciplinary action merely by resigning or allowing a license to expire.... Otherwise, the licensee could apply for admission in another jurisdiction, or subsequently reapply in the same jurisdiction, and maintain that he or she has never been disciplined for professional

misconduct.” The commission may proceed to suspend a licensee's current license based on an offense committed by it under its prior license.

B. G.L. c. 138, § 34

The Court restated that General Law c. 138, § 34, makes it unlawful for anyone to make “a sale or delivery of any alcoholic beverage or alcohol to any person under 21 years of age” The statute provides “...[w]hoever makes a sale or delivery of any alcoholic beverage or alcohol to any person under 21 years of age, either for his own use or for the use of his parent or any other person ... shall be punished by a fine of not more than \$2,000 or by imprisonment for not more than one year or both.”

The Court established the facts of this case did not require them to decide whether the “sale” took place at the time the order was accepted by eVineyard or only on the delivery of wine by Federal Express. “There is no question in this case that both a sale and a delivery of alcohol was made to a person under the age of twenty-one years in violation of G.L. c. 138, § 34. Nor is there any question that eVineyard was responsible for both: the order was taken by eVineyard, payment was received and accepted by eVineyard, and delivery was effectuated by eVineyard through its delivery contract with Federal Express. eVineyard cannot evade responsibility for making sales to minors, which it has an affirmative duty not to do, by delegating the task of delivery to a third party. Cf. *Miller Brewing Co. v. Alcoholic Beverages Control Comm'n*, 56 Mass.App.Ct. 801, 809-810, 780 N.E.2d 80 (2002).

The Court noted that G.L. c. 138, § 34B, provides a “safe harbor” for licensees who unknowingly sell or deliver alcohol to minors but only if they have “reasonably relie[d] on ... a liquor purchase identification card or motor vehicle license ... or on a valid passport ... for proof of a person's identity and age.” The Court said the transaction in this case did not fall within the safe harbor provision because none of the acceptable forms of identification were sought either at the time of the acceptance of the order or at the time the alcohol was delivered to the CI. “If Federal Express had reasonably relied on the forms of identification set forth in the statute at the time it delivered the wine, we would be presented with a very different situation. To the extent that the safe harbor provisions would have protected Federal Express from liability under G.L. c. 138, § 34B, we see no reason why that protection would not ordinarily extend to the Internet seller (here, eVineyard), at least in the circumstances of this case.”

C. Entrapment

To raise an entrapment defense properly, the Court observed that eVineyard needed to produce evidence of government inducement. Solicitation by a government agent alone was insufficient to show inducement. *Commonwealth v. Shuman*, supra. eVineyard has shown nothing more than solicitation. *Arthurs v. Board of Registration in Med.*, 383 Mass. 299, 317-318, 418 N.E.2d 1236 (1981) (no entrapment where undercover State police detective went to doctor nine times falsely asserting that he could not sleep, and doctor prescribed, in all but one visit, controlled substances that were prohibited other

than for legitimate medical purposes). “Moreover, even if we were to reach the issue of predisposition we agree with the commission that in the absence of a scienter requirement in the statutes, the “question is not whether eVineyard was predisposed to sell alcohol to persons whom it knew to be underage, but whether eVineyard’s [Internet] practices evidenced a willingness to sell alcohol in a manner that could allow minors to make purchases by the simple expedience of misrepresenting their age.”

The Court observed that the operation was conducted by the Attorney General’s office in compliance with its own guidelines for sting operations concerning Internet alcohol sales to minors. “These guidelines allow decoys to misrepresent their age when ordering alcohol via the Internet, but prevent them from transmitting by facsimile or otherwise providing false identification documents to an Internet retailer. The commission’s on-premises guidelines are inapplicable to remote, Internet-based, sting operations, particularly when conducted by the Attorney General’s office. Cf. *BAA Mass., Inc. v. Alcoholic Beverages Control Comm’n*, 49 Mass.App.Ct. 839, 846, 733 N.E.2d 564 (2000) (telephone orders).

The Attorney General’s protocol instructed the decoys to respond to any question received via the Internet about their date of birth with a birth date that corresponds to the age of twenty-two years. Because the sting operation was conducted in accordance with applicable guidelines and free of entrapment, the commission properly relied on the evidence obtained from it in suspending eVineyard’s license. *Fran’s Lunch, Inc. v. Alcoholic Beverages Control Comm’n*, supra at 665, 700 N.E.2d 843.

The judgment entered in the Superior Court is reversed in part, and the decision of the commission suspending eVineyard’s license for five days was affirmed.



Enforcing Underage Drinking Laws Program

AUDIO CONFERENCE

TOPIC

“Rite” of What? Alcohol Enforcement Successes of “Busting the Binge” in College Environments

Underage and hazardous drinking on/off college campuses are often viewed as normal “rites of passage,” yet present serious public health and safety issues. Learn how local enforcement agencies can partner with campus and community leaders to change community norms, and adapt traditional enforcement strategies to successfully “bust the binge.”



DATE

May 22, 2008

TIME

3:00–4:15 p.m. EDT

PRESENTERS

Presenter 1:

Tom King, Chief of Police, State College Police Dept., State College, PA
tking@statecollegepa.us

Presenter Group 2:

Jimmy Zuehlke, Lieutenant, Texas Alcoholic Beverage Commission, Austin, Texas
jimmy.zuehlke@tabc.state.tx.us

Presenter Group 3:

Andrew Gavrilos, Officer, Community Services Bureau, La Crosse Police Department, La Crosse, WI
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WEB ENHANCED

Internet users will be able to log on to our conference web page to view presentation slides and interact with other participants.

REGISTER

Please register by using one of our automated options:

- **To register on our website**, please visit www.udetc.org and complete the online registration form, or
- **To register by phone**, please call our toll-free number, 1-877-335-1287, extension 230, and follow the prompts.

Telephone dial-in instructions and accompanying materials for the audio conference will be mailed one (1) week before the call.



National Electronic Seminars Enforcing Underage Drinking Laws Program

The OJJDP Audio-TELECONFERENCE Series

May 22, 2008 3:00 – 4:15 p.m. Eastern Time

“Rite” of What? Alcohol Enforcement Successes of “Busting the Binge” in College Environments

Underage and hazardous drinking on/off college campuses are often viewed as normal “rites of passage,” yet present serious public health and safety issues. Learn how local enforcement agencies can partner with campus and community leaders to change community norms, and adapt traditional enforcement strategies to successfully “bust the binge.”



June 19, 2008 3:00 – 4:15 p.m. Eastern Time

On-Premise Enforcement and Retailer Training Opportunities

When people think of underage alcohol problems they often think about the role of the licensed retailer and most frequently the convenience store or liquor store. The on-premise retail licensees make up nearly half of all the licensed businesses throughout the country. Depending on the laws of each jurisdiction people under the age of 21 may be lawfully allowed inside these businesses to socialize, but not consume alcohol. Retailer promotions and popular music make the on premise licensee a popular destination for those under the age of 21.

How does law enforcement police the on-premise licensee? What role does the licensee assume in responsibility for underage alcohol problems in a community? What initiatives are available to the on-premise retailer to assist them in responsible sales, service, and safety to their customers and the community? Our panel will discuss the role of the retailer in this process, what tools are being used by law enforcement to improve safety and what makes up a retailer training program that can demonstrate measurable success. Listeners will gain information on innovative law enforcement strategies in the community and hear how one community created a very successful training program for retailers.

For audio-conference registration information, please visit www.udetc.org

All programs provide opportunities for presentation, discussion, and sharing information. Telephone dial-in instructions and accompanying materials will be mailed to registrants two weeks before the audio conference.

To register for any of these free electronic seminars by phone, call toll-free 1-877-335-1287 extension 230