

Underage Drinking Enforcement Training Center

Monthly Resource Alert

December 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.

New Data Shows Underage Youth Purchasing Most of Their Own Alcohol

The report, "Underage Alcohol Use: Where Do Young People Get Alcohol?" found that nearly one-third of underage drinkers paid for the last alcoholic drink they consumed, whereas one in four got alcohol free from a nonrelative of legal drinking age, 14.6 percent got their drink free from another underage person, 5.9 percent got alcohol from a parent or guardian, and 8.5 percent got their drink from another relative aged 21 or older.

Underage male alcohol users were more likely than females to have paid for the last alcohol they consumed, whereas more than three-fourths of female underage drinkers got their last drink free from a nonrelative of legal drinking age. The report was based on data gathered in 2006-2007 from the annual National Survey on Drug Use and Health, sponsored by the Substance Abuse and Mental Health Services Administration. The full survey can be found at <http://oas.samhsa.gov/2k8/underageGetAlc/underageGetAlc.htm>.

Success Stories: Arizona

The City of Tucson and Davis-Monthan Air Force Base Enhance Reporting of Off-base Underage Drinking

Military bases, like other communities across the country, have challenges in the prevention of underage drinking. In the last year, a collaborative effort between Davis-Monthan Air Force Base (DMAFB), the Tucson Police Department, the Arizona Governor's Office of Highway Safety, and the Pima County Task Force to Reduce Underage Drinking has resulted in a new protocol that will make it easier for local Tucson police officers to identify and to make a required report to military police if underage airmen are involved in off-base underage-drinking infractions. Starting in September 2008, using a new electronic ticketing system developed by the Tucson Police Department, civilian police officers and DMAFB security forces will implement a new protocol for reporting off-base alcohol-related incidents, as well as other infractions, among airmen. This new protocol is shared in this month's success story and exemplifies the effectiveness of collaboration in communities through effective policy change.

Quick Fact

More than a quarter of persons aged 12 to 20 (an estimated 10.8 million Americans) used alcohol in the past month, and underage alcohol users drank more on average if they paid for the last alcohol they used (6.0 drinks) than if they did not pay for their last alcoholic drink (3.9 drinks).

December 2008 Resource Alert Legal Case

Case Descriptor

"The New York Supreme Court Reviews the Actions of the New York State Liquor Authority."

In March of 2008, the Supreme Court of the State of New York, New York County, rendered its opinion in *the Matter of the Application of Empire Management and Productions, Inc. d/b/a The Chance Club v. New York State Liquor Authority*, 2008-NY-0422.021.

In this Article 78 proceeding, petitioner Empire Management & Productions, Inc. d/b/a The Chance Club ("Empire") moved for a judgment annulling the determination of respondent New York State Liquor Authority ("Authority") which, after remand, suspended Empire's on-premises liquor license for 15 days and imposed a \$5,000 fine.

To learn more about this case and the important issues raised by the Defendant-Appellant for law enforcement, please click on the link below:

www.udetc.org/documents/ResourceAlerts/December2008Case.pdf

December National Electronic Seminar

Challenges and Successes of Rural Law Enforcement

Date: Thursday, December 21, 2008

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

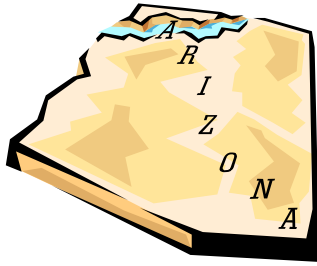
Speakers: Officer Jerry Bristow, Clinton Police Department, Clinton, Illinois; Sgt. Todd Sarazin, Newport Police Department, Newport, Oregon; and Barbara Dougherty, Director Commission on Children and Families, Newport, Oregon

Enforcement of underage drinking laws is a battle fraught with many challenges that may seem overwhelming at times, especially in rural settings where underage drinking may be readily accepted as a harmless "rite of passage," and staff and other resources to address these challenges are limited. Learn how various jurisdictions across the country have innovatively overcome rural enforcement challenges and leveraged local, State, and Federal resources to successfully address adult provider and youth alcohol access and consumption issues, thereby changing community norms and rural enforcement practices.

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/ResourceAlert1208.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 (UDETTC) and are solely of the author/source.



Success Stories

Enforcing the Underage Drinking Laws Program

NEWS FROM THE FIELD

www.udetc.org

December 2008

The City of Tucson and Davis-Monthan Air Force Base Enhance Reporting of Off-base Underage Drinking

As with other military bases, underage drinking presents an ongoing challenge to Davis-Monthan Air Force Base (DMAFB). Its population is about 7,000, and an adjacent community— Tucson, Arizona, and its suburbs—has nearly 1,000,000 residents. However, off-base underage drinking infractions involving active duty DMAFB airmen have historically been underreported, partially because airmen have not been required to identify themselves as military personnel to civilian police who, in turn, have had no requirement to identify individuals involved in underage drinking infractions as military.

In the last year, the DMAFB, the Tucson Police Department, the Arizona Governor's Office of Highway Safety, and the Pima County Task Force to Reduce Underage Drinking have collaborated to solve this problem. Their efforts have resulted in a new protocol that will make it easier—and required—for local Tucson police officers to identify and report to military police if underage airmen are involved in off-base underage drinking infractions.

Starting in September 2008, using a new electronic ticketing system developed by the Tucson Police Department, civilian police officers and DMAFB security forces will implement a new protocol for reporting off-base alcohol-related incidents, as well as other infractions, among airmen. The new protocol includes the following changes:

1. usage of a new e-ticket that has a check box for "active duty military";
2. when this box is checked, the data will be collected electronically;
3. a report will be generated by the Tucson Police Department that includes the name, date, time, and the charge on the ticket, and will be sent electronically to DMAFB Security Forces daily;
4. any airmen identified in the report will be referred for screening and assessment through the ADAPT program on base within 7 duty days.

This new effort between DMAFB and the Tucson Police Department is intended to increase the safety and well-being of active duty personnel and the civilian population of Tucson and its surrounding communities in the following ways:

- The increased enforcement of off-base infractions will likely result in an increased perception by active-duty underage airmen of the consequences associated with drinking off-base, which may prevent or reduce off-base drinking incidents, such as minor in possession or DUIs.
- The increase in data collected regarding all off-base active-duty military infractions in the City of Tucson will enhance the ability of the community and DMAFB to develop approaches to improve the safety and well-being of its citizens.
- Because of the change in protocol within the Tucson Police Department, this reporting enhancement will be sustainable long after individuals responsible for the change have left their current positions. This will help to ensure a safer community into the future.

This success story exemplifies the effectiveness of collaboration in communities resulting in effective policy change. This collaborative effort will continue and enhance the positive relationship that has existed for decades between DMAFB and the surrounding communities. For any additional information contact:

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11720 Beltsville Drive, Suite 900, Calverton, MD 20705.
Phone: 877-335-1287. Fax: 301-755-2808

December 2008 Resource Alert Legal Case

“The New York Supreme Court Reviews the Actions of the New York State Liquor Authority.”

In March of 2008 the Supreme Court of the State of New York, New York County rendered their opinion *in the Matter of the Application of Empire Management and Productions, Inc. d/b/a The Chance Club v New York State Liquor Authority*, 2008-NY-0422.021.

In this Article 78 proceeding, petitioner Empire Management & Productions, Inc. d/b/a The Chance Club ("Empire") moved for a judgment annulling the determination of respondent New York State Liquor Authority's ("Authority") which, after remand, suspended Empire's on-premises liquor licensee for fifteen days and imposed a \$5,000 fine.

The Facts of the Case

Empire owned and operated an establishment that sells alcoholic beverages pursuant to an on-premises liquor license issued by the Authority. The Authority possesses the power to, issue, revoke and suspend licenses or permits to sell alcoholic beverages subject to certain rules and procedures. By Notice of Pleading dated March 1, 2006, the Authority commenced revocation proceedings against Empire based on the following offenses:

- (1) Selling an unlimited amount of drinks during a set time for a fixed price prior to January 31, 2006, in violation of § 117-a(1)(a) of the ABC Law,
- (2) failure to exercise adequate supervision over the premises on February 1, 2006 in violation of Rule 54.2 and Rule 36.1(f) of the Rules of the Authority [9 NYCRR 48.2 and 53.1(f)],
- (3) Selling alcoholic beverage(s) to visibly intoxicated person in violation of § 65(2) of the ABC Law,
- (4) Using unauthorized trade names on February 1, 2006 in violation of Rule 36.1(p) [9 NYCRR 53.1(p)].

The Notice of Pleading indicated the hearing would occur on March 24, 2006 at 11:00 am, and notified the licensee that **". . . YOUR FAILURE TO PLEAD WILL BE DEEMED A `NO CONTEST' PLEA AND NO FURTHER HEARING WILL BE HELD."** (*Emphasis added*)

Empire did not respond to the Notice of Pleading or appear and enter a plea on the March 24th hearing date set forth in the Notice of Pleading. Pursuant to the Rules of the Authority (9 NYCRR 54.2(a)(b)),(fn1) the default was treated as a plea of no contest. A report dated September 13, 2006 was then prepared by the Authority's Office of Counsel,

which described facts that provided a basis for the charges, specifically, an advertisement received by the Authority for an event on January 31, 2006, at which free beer would be served, and a February 1, 2006 on-site investigation of the premises by the Authority where the investigator observed a visibly intoxicated person being served alcohol and patrons under the age of 21 drinking alcoholic beverages.

The report also indicated that Empire's adverse history consisted of a "disorderly premises" violation resulting in the imposition of a \$1,000 fine, which was paid. The report then indicated that the maximum penalty for the charges was "[r]evocation plus bond claim."

Before a meeting of the Authority's Board scheduled for September 20, 2006, counsel for Empire sought to vacate Empire's default. At the meeting, the Authority members denied Empire's request to set aside the default and ordered Empire's license suspended for seven days, and imposed a civil penalty of \$3,000.

Empire then commenced an Article 78 proceeding before the Supreme Court seeking to vacate its default and to annul the Authority's determination. The Authority submitted a verified answer opposing the relief sought by Empire. Following oral argument and with the permission of the court, **Empire submitted supplemental papers, in which Empire argued that the Authority violated its own rules** since the Authority's determination was based on a summary prepared by the Authority's Office of Counsel rather than by a Hearing Officer as required by the Rules of the Authority (9 NYCRR § 54.4(h)(fn2))

Empire further argued that it was harmed as the result of the Authority's failure to follow the rule since the Office of Counsel which prosecuted the case also summarized the facts and recommended the penalty to be imposed.

Although given an opportunity to submit supplemental papers regarding the issue of whether the failure of the Hearing Officer to prepare a summary violated the Authority's rules, the Authority did not do so.

By decision, order and judgment dated May 16, 2007, the Supreme Court found that the Authority did not act irrationally when it declined to vacate Empire's default, noting that the Authority submitted uncontroverted evidence that Empire was served with the Notice of Pleading in accordance with the Rules of the Authority, and that Empire submitted no evidence that it had a meritorious defense to the charges sustained against it, or that it is entitled to equitable relief

However, the court also found that Empire was correct that the Authority had failed to follow its own rule (9 NYCRR § 54.4 [h]) which required that the Hearing Officer summarize the facts of the case and recommend the penalty, rather than the Authority's Office of Counsel which prosecuted the case, and that this failure provided grounds for annulling the Authority's determination. *See e.g. Squeeze Inn, Inc. v New York State Liquor Authority*, 176 A.D.2d 645 (1st Dept 1991)(trial court properly annulled determination of the Authority based on its failure to set forth maximum penalty that

might be assessed in its Notice of Pleading); *Oinny Rest. v State Liquor Authority of State of N.Y.*, 203 AD2d at 973 (same).

Accordingly, by decision, order and judgment dated May 16, 2007, the Supreme Court granted the petition to the extent of annulling the Authority's determination and vacating any penalty provided therein, and remanding the matter to the Authority for a new determination based on the summary of facts and recommended penalty of a Hearing Office in accordance with 9 NYCRR § 54.4 (h).

On June 13, 2007, the Board Members of the Authority held a regular meeting and directed the Authority's Hearing Bureau to "summarize the facts and recommend penalty then resubmit to the members of the Authority." In accordance with this direction Stephen D. Karlinsky, the Chief Administrative Law Judge (hereinafter "the Hearing Officer"), wrote a Memorandum dated September 20, 2007 to the Members of the Authority regarding the charges against Empire. The Memorandum listed the four charges against Empire as provided in the March 1, 2006 Notice of Pleading and noted that as Empire did not respond to the duly served Notice of Pleading, Empire was deemed to have pleaded "Not Contest" to the charges.

The Memorandum described the following three complaints contained regarding the premises in the Authority's file:

(1) A November 1, 2005 on-line complaint received by the Authority regarding unfair business competition in allowing first three kegs of beer free to college students and other illegal promotions, and over intoxication leading to fights and dangerous crowd motivators;

(2) A January 24, 2006 on-line complaint received by the Authority regarding advertising that first three kegs of beer were going to be free, and

(3) A January 25, 2006 complaint by telephone to the Authority regarding service of alcohol to underage customers.

Notably, it appears that no investigation was made regarding these complaints and that no charges were filed as a result of these complaints.

The Memorandum described an on-site inspection of the premises by an investigator from the Authority during the early morning hours of February 1, 2006. The investigator reported that he observed

(i) Advertisements for an event on January 31, 2006, involving the sale of free beer,

(ii) Patrons under 21 years of age consuming alcohol, and

(iii) A sale of alcohol to a visibly intoxicated patron.

The Memorandum concluded that "[b]ased on the information contain in the Authority's file which was uncontested by the licensee, charges 1, 2, 3 and 4 are sustained," and **recommended a penalty of a 30-day license suspension and a \$5,000.00 fine.**

Empire, by its counsel, submitted written opposition, asserting that the facts recited in the Memorandum were insufficient to make out a prima facie case, and that the recommended penalty was shocking and far in excess of the previous penalty of a seven day suspension, and a civil penalty of \$3,000.

At their regular meeting on October 31, 2007 of the Authority's Board, Chairman Boyle and Commissioner Healy voted to sustain the charges against Empire and imposed a penalty of a fifteen day license suspension and a \$5,000 fine and ordered that the suspension be carried out between November 29th and December 14, 2007.

On or about November 27, 2007, Empire commenced an Article 78 proceeding challenging the Authority's October 31, 2007 determination by order to show cause, and this court issued temporary restraining order enjoining interference with Empire's purchase and on-premises sale of alcoholic beverages.

Empire argued that the imposition of a greater penalty after this matter was remanded for a new determination based on the summary of facts and recommended penalty of the Hearing Officer, was retaliatory, shocking to one's sense of fairness, and disproportionate given the circumstances of the case.

Empire also argued that the Authority's failure to promulgate rules and regulations necessary to implement section 117-a(1)(a), regarding the sale of free alcoholic beverages, deprives licensees, like Empire, of notice regarding the proscribed conduct and precludes the establishment of a prima facie case.

In opposition, the Authority argued that section 117-a(1)(a) of the ABC Law, which provides that a licensee shall not "offer, sell, serve, or deliver to any person or persons an unlimited number of drinks during any set period of time for a fixed price," is sufficiently clear and specific without the promulgation of implementing rules and regulations. The Authority also argued that given the charges sustained against Empire, the penalty was not irrational or an abuse of discretion and was not retaliatory.

Analysis of the Court

“As a preliminary matter, contrary to Empire's position, it was not necessary for the Authority to promulgate rules or regulations in order to enforce section 117-a(1)(a), since the purpose of the statute is specific and its enforcement here is consistent with that purpose.” See *Ellis Center for Long Term Care v. De Buono*, 261 A.D.2d 791, 795 (3d Dept), appeal dismissed, 93 N.Y.2d 1037 (1999)([w]hen the purpose of the statute is specific, it is unnecessary for an agency to promulgate formal rules or regulations as long as the intent of the statute is effectuated”).

The Court next addressed the issue of the charges sustained against Empire. "...[I]t cannot be said that the \$5,000 fine and the fifteen-day suspension imposed as a penalty in this case was irrational, disproportionate to the offense or shocking to the sense of fairness." *Papadakis v. Brezenoff*, 103 A.D.2d 704, 705 (1st Dept 1984), *aff'd*, 64 N.Y.2d 878 (1985), *citing*, *Matter of Pell v. Board of Education*, 34 N.Y.2d 222 (1974). In this regard, the court noted that the charges sustained against Empire, particularly the advertising of free alcoholic beverages, were serious and disturbing.

"However, the substantial increase in the penalty imposed after remand to the two of the three same members of the Authority's Board based on the same charges sustained prior to Empire's application for Article 78 relief raises an issue as to whether the penalty was vindictive or retaliatory." *See Anonymous v. Commissioner of Health*, 21 AD3d 841, 844 (1st Dept 2005) (record raised a triable issue of fact as to whether agency refused to executed consent agreement in retaliation for petitioner *filing* an Article 78 proceeding with respect to matters not covered by agreement); *People v. Hilliard*, ___ AD3d ___, 2008 WL 596166, * 3 (3d Dept 2008)(holding that sentence imposed after retrial by same judge is presumed to be vindictive in the absence of "new facts or *events* . . . articulate to justify the increased sentence"); *compare Bezar v. De Buono*, 240 A.D.2d 978 (3d Dept 1997)(element of vindictiveness was not present since administrative review board which increased penalty upon appeal was composed of different individuals than the hearing committee which imposed the initial penalty).

"Moreover, an examination of the record provides no rational basis for the increased penalty which more than doubled the period of suspension and substantially increased the line. Notably, the Board's October 31, 2007 determination provides no explanation for the increased penalty for the same sustained charges. Furthermore, the factual summary of the violations observed by the investigator which provide that basis for the charges and penalty are substantially the same in the Hearing Officer's Memorandum written after remand and in the earlier report prepared by the Authority's Office of Counsel. Moreover, while the Hearing Officer's Memorandum contains an additional summary of facts as to complaints regarding the premises that preceded the February 1, 2006 inspection of the premises, such complaints, which were apparently not investigated and are not the basis for the relevant charges, cannot justify the substantial increase in the penalty imposed after remand.."

"Accordingly, as the record does not support an increase in penalty imposed after remand, the petition is granted to the extent of annulling the Authority's October 31, 2007 determination, vacating the penalty and remanding this matter to the Authority for further determination consistent with this decision, order and judgment.

In view of the above, it is ordered and adjudged that the petition is granted to the extent of annulling the determination of October 31, 2007 and vacating any penalty provided therein, and remanding the matter to the Authority for a new determination consistent with this decision order and judgment. "

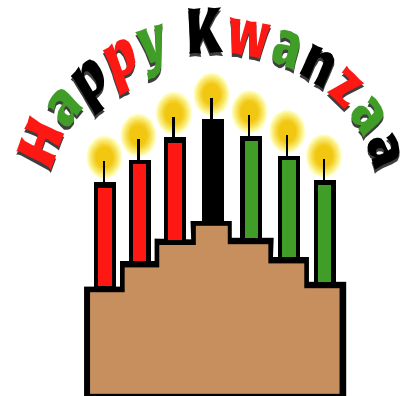


National Electronic Seminars Enforcing Underage Drinking Laws Program

The OJJDP Audio-TELECONFERENCE Series

December 18, 2008 3:00 – 4:15 p.m. Eastern Time
Challenges and Successes of Rural Law Enforcement

Enforcement of underage drinking laws is a battle fraught with many challenges that may seem overwhelming at times, especially in rural settings where underage drinking may be readily accepted as a harmless “rite of passage,” and staff and other resources to address these challenges are limited. Learn how various jurisdictions across the country have innovatively overcome rural enforcement challenges and leveraged local, State, and Federal resources to successfully address adult provider and youth alcohol access and consumption issues, thereby changing community norms and rural enforcement practices.



February 19, 2009 3:00 – 4:15 p.m. Eastern Time
School Substance Abuse Policy

Underage drinking by high school and university students continues to be a significant problem. Preventing the use of alcohol on campuses is an important goal of administrators because of the many negative consequences resulting from alcohol use/abuse. When schools establish alcohol policies that clearly state expectations and penalties regarding alcohol use by students, they help reinforce the fact that underage drinking is not acceptable. This audio call will address the following questions:

*Why is a substance-abuse policy important?
What should a comprehensive substance-abuse policy include?
How should a policy be communicated?*

This audio call will help participants realize the importance of developing a strong policy and assist participants in reviewing, communicating and enforcing a comprehensive policy.

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

Enforcing Underage Drinking Laws Program

AUDIO CONFERENCE

TOPIC

Challenges and Successes of Rural Law Enforcement

Enforcement of underage drinking is a battle fraught with many challenges that may seem overwhelming at times, especially in rural settings where underage drinking may be readily accepted as a harmless "rite of passage", and staff and other resources to address these challenges are limited. Learn how various jurisdictions across the country have innovatively overcome rural enforcement challenges and leveraged local, State and Federal resources to successfully address adult provider and youth alcohol access and consumption issues, thereby changing community norms and rural enforcement practices.



DATE

December 18, 2008

TIME

3:00-4:15 p.m. EST



PRESENTERS

Presenter 1:

Officer Jerry Bristow, Clinton Police Department, Clinton, IL
jbristow@clintonillinois.com

Presenter 2:

Sgt. Todd Sarazin, Newport Police Department, Newport, OR
T.Sarazin@newportpolice.net

Presenter 3:

Barbara Dougherty, Director Commission on Children and Families
 Newport, OR 97365
bdougherty@co.lincoln.or.us

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.