

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

AB-9551

File: 20-360202 Reg: 15082419

7-ELEVEN, INC., HARMINDER SINGH NAGRA, and MANJIT KAUR SUNNER,
dba 7-Eleven Store #2133-25194
620 West Ocean Avenue, Lompoc, CA 93436,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John W. Lewis

Appeals Board Hearing: June 2, 2016
San Diego, CA

ISSUED JUNE 20, 2016

Appearances: *Appellants:* Melissa H. Gelbart, of Solomon Saltsman & Jamieson, as counsel for appellants 7-Eleven, Inc., Harminder Singh Nagra, and Manjit Kaur Sunner.
Respondent: Jacob Rambo and Jonathan Nguyen as counsel for the Department of Alcoholic Beverage Control.

OPINION

7-Eleven, Inc., Harminder Singh Nagra, and Manjit Kaur Sunner, doing business as 7-Eleven Store #2133-25194 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ suspending their license for ten days because their clerk sold an alcoholic beverage to a minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

1. The decision of the Department, dated October 6, 2015, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 5, 2000. On May 11, 2015, the Department filed an accusation against appellants charging that, on April 16, 2015, appellants' clerk, Gaurav Kochar (the clerk), sold an alcoholic beverage to 18-year-old Violet Lopez. Although not noted in the accusation, Lopez was working as a minor decoy for the Department of Alcoholic Beverage Control at the time.

On May 28, 2015, appellants filed and served on the Department a Request for Discovery pursuant to Government Code section 11507.6 demanding the names and addresses of all witnesses. On June 15, 2015, appellants received a response providing the address of the Department's San Luis Obispo District Office in lieu of the decoy's home address. On June 25, appellants sent a letter to the Department demanding that it furnish the decoy's contact information by June 29, 2015. On June 30, 2015, appellants received a response from the Department asserting that the contact information for the District Office was sufficient.

Later on June 30, appellants filed a Motion to Compel Discovery. On July 2, 2015, the Department responded and opposed the motion.

On July 20, 2015, the ALJ denied appellants' motion, arguing that the statute requires only an "address" and not necessarily a home address, and further, that this Board's decision in *Mauri Restaurant Group* (1999) AB-7276 was on point and mandated denial of the motion.

The administrative hearing proceeded on August 25, 2015. Documentary evidence was received and testimony concerning the sale was presented by Lopez (the decoy) and by Agent Robert Root of the Department of Alcoholic Beverage Control. Appellants presented no witnesses.

Testimony established that on the date of the operation, the decoy entered the licensed premises and went to a cooler, where she selected a twelve-pack of Bud Light beer in twelve-ounce cans. The decoy took the beer to the sales counter for purchase.

The decoy placed the beer on the counter. The clerk asked the decoy for identification. The decoy handed the clerk her California driver's license. The clerk took possession of the license, looked at it for five or ten seconds, then handed it back to the decoy and told her the price of the beer. The decoy paid for the beer, received her change, and then exited the store with the beer. The clerk did not ask any age-related questions, nor did he ask any questions regarding the driver's license.

The Department's decision determined that the violation charged was proved and no defense was established.

Appellants then filed an appeal contending (1) the ALJ abused his discretion by denying appellant's motion to compel release of the decoy's contact information, and (2) the Department failed to comply with Government Code section 11507.6 when it provided the address of the Department, rather than the decoy's home address. These issues will be addressed together.

DISCUSSION

Appellants contend that the Department failed to comply with section 11507.6 of the Government Code when it provided the address of the its San Luis Obispo District Office,² rather than the decoy's home address, during pre-hearing discovery. (App.Br. at pp. 6-10.) Appellants favor a plain-language interpretation of this provision that would require the Department to provide the decoy's actual name and contact information. (App.Br. at p. 8.)

Appellants further contend that the ALJ abused his discretion by denying their motion to compel disclosure of the minor decoy's home address. (App.Br. at pp. 5-6.) They accurately observe that this Board has held that the burden of proving an affirmative defense falls on the party raising it, and that "[p]re-hearing discovery is necessary to have a meaningful chance to meet that burden." (App.Br. at p. 6.) Appellants contend the Department's refusal to provide the decoy's address, coupled with the ALJ's denial of their motion to compel, deprived them of the ability to meaningfully defend themselves. (*Ibid.*)

This Board recently addressed a number of cases raising this purely legal issue. In *7-Eleven, Inc./Joe* (2016) AB-9544, we held that the decoy's personal address is

2. Appellants' brief alternatively refers to the San Luis Obispo District Office (see, e.g., App.Br. at pp. 3, 7-8) and the El Segundo District Office (App.Br. at p. 6). The supporting exhibits, however, uniformly refer to the San Luis Obispo District Office. (See Exh. A.)

protected under section 832.7 of the Penal Code. (*Id.* at pp. 6-10.) We follow our *Joe* decision here and refer the parties to that case for a full discussion of the legal issues.

As in *Joe*, however, we emphasize that “in order to comply with section 11507.6, the Department must supply an address *at which the decoy may actually be reached.*”

(*Id.* at p. 10.) We wrote:

While the Penal Code protects the personal contact information of certain peace officers, it does not permit the Department to supply a sham address; the decoy must *actually be reachable* at the address provided. If a licensee establishes that it attempted to reach a decoy at the address provided by the Department,^[fn.] and the law enforcement agency at that address indicated it could not or would not forward the licensee’s communications to the decoy, then the Department is in violation of the statute until it supplies a valid address, and the licensee may seek recourse through a motion to compel.

(*Id.* at p. 11.) While section 832.7 of the Penal Code prevents release of the decoy’s personal information, including her home address, it does not eliminate the licensee’s discovery rights under section 11507.6 of the Government Code.

We revisit the matter here because, at oral argument, counsel for appellants complained that they contacted the Department District Office — the address provided for the decoy — via telephone, but the District Office failed to put them in contact with the decoy. Counsel for the Department responded that it was unaware of any such contact from appellants’ counsel, and therefore asserted the call was never made.

This Board may consider only the record before it. (See Bus. & Prof. Code, § 23090.1.) There is nothing in this record showing appellants did in fact contact the San Luis Obispo District Office in an attempt to reach the decoy. Assuming they did,

there is nothing in the record to show whether the District Office forwarded that contact to the decoy, or what response, if any, the decoy may have made.

The after-the-fact allegations and inferences of counsel are insufficient to support reversal. Nevertheless, this Board is concerned by the Department's apparent failure to verify that decoys can actually be reached at the addresses it provides during discovery.

We therefore emphasize — again — that the Department must provide an address at which the decoy may *actually* be reached. It is not enough to provide a Department District Office address if the District Office is unable or unwilling to forward communications to the decoy.³ Moreover, the District Office must relay to the licensee any response it receives from the decoy — even if the only response is a blanket refusal to speak with the licensee. This applies equally to law enforcement agencies; if the Department cannot verify that the decoy can be reached through the law enforcement agency's address, then that address does not satisfy section 11507.6 of the

3. As appellants point out, the Department's provision of a District Office address in lieu of the decoy's home address apparently violates its own internal policy, which states, "[P]olice cadets, explorers, and other youthful volunteers that assist in minor decoy investigations are not considered employees for the purpose of third-party service." (App.Br. at p. 9, citing Dept. of Alcoholic Bev. Control P-Manual, at p. 112.5.) The protective provisions of the Penal Code supersede the Department's internal policies, so the Department's decision to provide a District Office address does not itself constitute a violation of law. (See Pen. Code, § 832.7; see also *Joe, supra*, at pp. 4-11.) However, if a District Office is unaware that Department legal counsel has substituted its address for the decoy's during section 11507.6 discovery, then the District Office may very well refuse contact in order to comply with the Department's internal policies. It is therefore incumbent upon Department counsel to verify that the District Office is actually prepared to forward a licensee's communications to the decoy — despite contrary internal policies.

Government Code. In short, the Department is accountable for the validity of the addresses it provides.

For the licensee's part, all attempts at communication with a decoy through a District Office or law enforcement agency should be made in writing.⁴ If the District Office or law enforcement agency is unable or unwilling to forward correspondence to the decoy, then the licensee should contact Department counsel — again, in writing — and inform them that the decoy cannot be reached at the address provided.

The Department, for its part, should respond to the licensee in writing. This applies to both its District Offices when communicating any response from the decoy and to its legal counsel in attempting to resolve any gaps in communication.

To be clear, it is the licensee's burden to establish a violation of section 11507.6. (See Gov. Code, § 11507.7; see also *Joe, supra*, at p. 11). However, if a licensee presents written evidence of attempted communication with the decoy through a District Office or law enforcement agency, along with evidence that the District Office or law enforcement agency was unwilling or unable to forward the licensee's communications to the decoy, then the licensee has shown that the address provided does not comply with section 11507.6. The Department must either supply an alternative address for the decoy or contact the District Office or law enforcement agency in order to ensure the

4. A mere demand for the decoy's home address is not an attempted communication with the decoy.

decoy is indeed reachable at the address it provided and, if necessary, resolve any barriers to communication.

If, in the future, we are presented with a well-established record showing that a decoy was legitimately unreachable at the address the Department provided during discovery, and the Department took no steps to provide an address at which the decoy could actually be reached, then we will not hesitate to reverse.

ORDER

The decision of the Department is affirmed.⁵

FRED HIESTAND, ACTING CHAIRMAN
PETER J. RODDY, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

5. This 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.