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

AB-9654
File: 20-214483; Reg: 16084902

7-ELEVEN, INC., CAROL CRIBBS, and CHARLES CRIBBS,
dba 7-Eleven Store #2237-22014
518 South Lovers Lane, Visalia, CA 93292,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Albert Roldan

Appeals Board Hearing: May 3, 2018
Los Angeles, CA

ISSUED MAY 30, 2018

Appearances: *Appellants:* Ralph Barat Saltsman and Donna J. Hooper, of Solomon, Saltsman & Jamieson, as counsel for 7-Eleven, Inc., Carol Cribbs, and Charles Cribbs,

Respondent: Kerry K. Winters, as counsel for Department of Alcoholic Beverage Control.

OPINION

7-Eleven, Inc., Carol Cribbs, and Charles Cribbs, doing business as 7-Eleven Store #2237-22014, appeal from a decision of the Department of Alcoholic Beverage Control[1] suspending their license for 15 days (with 5 days stayed for a period of one year, provided no cause for discipline arises during that time) because their clerk sold an alcoholic beverage to a police minor decoy, in violation of Business and Professions

[1]The decision of the Department, dated May 22, 2017, is set forth in the appendix.

Code section 25658, subdivision (a).

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 1, 1988. There is no record of prior discipline being sustained on the license.

On November 7, 2016, the Department filed an accusation against appellants charging that, on September 9, 2016, appellants' clerk sold an alcoholic beverage to 19-year-old Jose Chavez. Although not noted in the accusation, Chavez was working as a minor decoy for the Visalia Police Department (VPD) at the time.

Appellants filed and served on the Department a Special Notice of Defense pursuant to Government Code section 11506, as well as a Request for Discovery pursuant to Government Code section 11507.6, demanding, inter alia, the names and addresses of all witnesses. The Department responded by providing the address and phone number of the VPD, in lieu of the decoy's personal contact information. Thereafter, appellants filed a Motion to Compel Discovery. The motion was opposed by the Department, and it was denied by the administrative law judge (ALJ). In his decision, the ALJ found "that the Department had complied with its discovery obligation by providing contact information for the law enforcement agency that had used the decoy." (Findings of Fact, ¶ 1.)

At the administrative hearing held on March 14, 2017, documentary evidence was received and testimony concerning the sale was presented by Chavez (the decoy). Appellants presented no witnesses.

Testimony established that on the day of the operation, the decoy entered the licensed premises and went to the cooler where he selected a single can of Budweiser beer which he took to the counter. The decoy set the beer down and the clerk asked

for his identification. The decoy handed the clerk his California driver's license, which had a portrait orientation and contained a red stripe indicating: "AGE 21 IN 2018." (Exh. D-7.) The clerk took the license and looked at it, then appeared to scan the ID and enter something into the register. The clerk then completed the sale without asking any age-related questions. The decoy exited the premises, then subsequently re-entered with law enforcement officers to conduct a face-to-face identification of the clerk who sold him the beer. A photo of the decoy and clerk was later taken. (Exh. D-8.) These facts are not in dispute in this appeal.

On March 22, 2017, the ALJ submitted a proposed decision, sustaining the accusation and suspending the license for a period of 15 days—with 5 days stayed for one year, provided no further cause for discipline arises during that time. Thereafter, on March 30, 2017, the Department's Administrative Hearing Office sent a letter from its Chief ALJ to both appellants and Department counsel, inviting the submission of comments on the proposed decision and stating that the proposed decision and any comments submitted would be submitted to the Director of ABC in 14 days.

Appellants submitted comments to the Director, arguing that neither the Administrative Procedure Act (APA) nor the ABC Act authorize the Department to permit the parties in a disciplinary procedure to comment on a proposed decision, and that by requesting submission of these comments, the Department exceeded the authority granted to it by the APA. The Department did not submit comments.

On May 3, 2017, the Department adopted the proposed decision in its entirety, and on May 22, 2017, the Department issued its Certificate of Decision.

Appellants then filed a timely appeal contending the ALJ erred in denying

appellants' motion to compel disclosure of the decoy's address.

DISCUSSION

Appellants contend that the ALJ abused his discretion by denying appellants' motion to compel disclosure of the decoy's personal contact information. They maintain the Department failed to comply with Government Code section 11507.6 when it provided only the address of the VPD (when it was in possession of the decoy's "actual" address) and that this constitutes a violation of their due process rights, thereby resulting in prejudice.

This issue has been raised and argued in innumerable cases before this Board, and the Board has consistently found that appellants are not entitled to the decoy's personal contact information. As the Board held in 1999:

> Government Code §11507.6 entitles a party to an address for a witness. The statute does not say it must be a residential address. . . . We think any requirement that a decoy's home address be disclosed must be conditioned upon a showing that the address itself has a material connection to the issues, and not simply as a means of contacting the decoy.

(*In re Mauri* (1999) AB-7276, at p. 8.) We continue to affirm our holding in *Mauri*, and disagree with appellants' assertion that the case is "fatally flawed." (App.Op.Br. at p. 9.)

In *7-Eleven, Inc./Joe* (2016) AB-9544[2] the Board further held that the decoy's personal address is protected under section 832.7 of the Penal Code. (*Id.* at pp. 6-10.)

[2]Cert. den., *7-Eleven, Inc. et al v. ABC Appeals Bd.* (July 6, 2016) 2nd App. Dist. B275900.

We follow our *Joe* decision here, once again, and refer the parties to that case for an in-depth discussion of the Board's reasoning. Furthermore, we completely disagree with appellants' assertion at oral argument that we have changed our position since that decision. In that case we said:

> In order to comply with the statute, the Department must supply "the names and addresses of witnesses." 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 pp. 11-12.) Here, there is no evidence that the VPD refused to forward any communications to the decoy. Rather, the record shows that appellants called the VPD records department and asked for the decoy, but were told the records department people did not know who that was. As counsel for the Department pointed out, had appellants asked to speak to the officers named in the police report—the only individuals at the VPD who had actual contact with the decoy—appellants would have been able to deliver their request to deliver a message to the decoy.

Appellants' argument that the discovery statutes in administrative proceedings are the same or equivalent to criminal discovery statutes—thereby mandating the discovery appellants seek—has been rejected previously by the court of appeals:

> Petitioners' analogy to criminal cases is inapt. Generally, there is no due process right to prehearing discovery in administrative hearing cases, and particularly no constitutional right to take depositions. The scope of discovery in administrative hearings is governed by statute and the agency's discretion.

(*Cimarusti v. Superior Court* (2000) 79 Cal.App.4th 799, 808-809 [94 Cal.Rptr.2d 336].) The Board must similarly reject this argument.

A due process argument, similar to that of appellants, was also rejected in *Cimarusti*:

> Petitioners' contention that they were denied due process is unpersuasive. . . . At the hearing, which will be conducted in accordance with the Administrative Procedure Act [citation], petitioners can call and examine witnesses, introduce exhibits, cross-examine opposing witnesses on any relevant matter even if not covered on direct examination, impeach witnesses, and rebut evidence. [Citation.] The statutory prehearing discovery and hearing procedures are sufficient to satisfy petitioners' due process rights.

(*Id.* at p. 809.) Here, as in *Cimarusti*, appellants had the ability to call and examine witnesses, introduce exhibits, cross-examine opposing witnesses, impeach witnesses, and rebut evidence. This satisfies the due process requirements of the APA. (*Ibid*.)

Appellants allege the failure to provide the decoy's "actual" address meant they "were prejudiced by being unable to diligently investigate and prepare to test the Department's evidence and defend themselves at the hearing." (App.Op.Br. at. p. 11.) This contention is unsupported and speculative. The standard is as follows:

> [T]he decisions of the Department should not be defeated by reason of "any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the [reviewing body] shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13.)

(*Reimel v. House* (1969) 268 Cal.App.2d 780, 787 [74 Cal.Rptr. 345].) "Under the standard established by Cal.Const., art. VI, § 13, an appellant bears the burden to show it is reasonably probable he or she would have received a more favorable result at trial had the error not occurred." (*Citizens for Open Government v. City of Lodi* (2012) 205

Cal.App.4th 296, 297 [140 Cal.Rptr.3d 459].) Appellants have not met their burden of establishing prejudice—*i.e.*, that possession of the decoy's home address would have resulted in a different, more favorable result at the administrative hearing. Furthermore, appellants have not demonstrated a compelling need for the decoy's personal contact information, nor demonstrated how the denial of their motion to compel constitutes an abuse of discretion.

Having had the Board's opinion on this issue affirmed by the Court of Appeals,[3] albeit by way of an unpublished decision, we consider this issue moot until and unless we are instructed otherwise by a higher court.

ORDER

The decision of the Department is affirmed.[4]

BAXTER RICE, CHAIRMAN
PETER J. RODDY, MEMBER
JUAN PEDRO GAFFNEY RIVERA, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[3]On November 22, 2017, the Second District Court of Appeals filed an unpublished decision affirming the Board's decision in 7-Eleven/Holmes (2016) AB-9554 on this issue. Since unpublished decisions cannot be cited we are not permitted to quote the decision here, nor cite it as authority.

[4]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.