

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

AB-9563

File: 21-477934 Reg: 15082716

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy 6976
4414 East York Boulevard, Los Angeles, CA,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley

Appeals Board Hearing: August 4, 2016
Los Angeles, CA

ISSUED AUGUST 24, 2016

Appearances: *Appellants:* Melissa H. Gelbart, of Solomon Saltsman & Jamieson, as counsel for appellants 7-Eleven, Inc. and DTLA Services, Inc., doing business as CVS Pharmacy 6976.
Respondent: Jennifer Casey and Jonathan Nguyen as counsel for the Department of Alcoholic Beverage Control.

OPINION

Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as CVS Pharmacy 6976 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ suspending their license for 10 days because their clerk sold an alcoholic beverage to a Department minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on June 22, 2009. On July 2, 2015, the Department filed an accusation against appellants charging that, on March 12, 2015,

1. The decision of the Department, dated December 14, 2015, is set forth in the appendix.

appellants' clerk, Roberto Cardenas (the clerk), sold an alcoholic beverage to 19-year-old Julio Moreno. Although not noted in the accusation, Moreno was working as a minor decoy for the Department of Alcoholic Beverage Control at the time.

On July 21, 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 August 21, 2015, the Department responded by providing the address of its Los Angeles/Metro District Office in lieu of the decoy's home address. On August 28, appellants sent a letter to the Department demanding it furnish the decoy's contact information by September 4, 2015. On August 31, 2015, the Department responded and asserted that the contact information for the District Office was sufficient.

On September 8, 2015, appellants filed a Motion to Compel Discovery. On September 15, 2015, the Department responded and opposed the motion.

On September 30, 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 October 14, 2015. Documentary evidence was received and testimony concerning the sale was presented by Moreno (the decoy), by Agent Patrick Bullock of the Department of Alcoholic Beverage Control, and by Roberto Cardenas, the selling clerk.

Testimony established that on the date of the operation, Agent Bullock entered the licensed premises. The decoy entered a few moments later. The decoy walked to the beer cooler and selected a 25-ounce can of Bud Light beer. He took the beer to the front counter and set it down. The clerk asked to see the decoy's identification. The decoy removed his

California driver's license from his pocket and handed it to the clerk. The clerk looked at the identification, then entered something into the register. The decoy paid for the beer, and the clerk gave him some change. The decoy then exited the premises.

The Department's decision determined that the violation charged was proved and no defense was established, and imposed a penalty of ten days' suspension.

Appellants then filed this appeal contending (1) the ALJ abused his discretion by denying appellants' 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 its Los Angeles/Metro District Office, rather than the decoy's home address. These issues will be addressed together.

DISCUSSION

Appellants contend the Department failed to comply with section 11507.6 of the Government Code when it provided the address of its Los Angeles/Metro District Office, rather than the decoy's home address, during pre-hearing discovery. (App.Br. at pp. 7-10.)

Appellants further contend the ALJ abused his discretion by denying their motion to compel disclosure of the minor decoy's home address. (App.Br. at pp. 5-7.) 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 insist that 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. (App.Br. at pp. 6-7.)

This Board has 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 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.

In *7-Eleven, Inc./Nagra* (2016) AB-9551, we emphasized that the decoy must *actually be reachable* at the address provided. (*Id.* at p. 5, citing *7-Eleven, Inc./Joe, supra*, at p. 11.) We noted that “the Department is accountable for the validity of the addresses it provides.” (*Id.* at p. 7.) “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.” (*Id.* at p. 6.) This Board will offer relief in the form of reversal if “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.” (*Id.* at p. 8.)

In this case, there is nothing to suggest that appellants attempted to contact the decoy through the Los Angeles/Metro District Office. They make no such allegation in their brief, and the record includes no such correspondence. Appellants merely assert “it is unreasonable and even impractical, if not impossible, to contact [the decoy] at the address and/or phone number for the Los Angeles/Metro ABC District Office.” (App.Br. at p. 8.) If pre-hearing contact with the decoy was as essential to appellants’ defense as they claim, then we are at a loss to explain their failure to even *attempt* contact with the decoy through the District Office address. We see no grounds for relief.

ORDER

The decision of the Department is affirmed.²

2. 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.

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

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.