

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

AB-9618

File: 20-406228 Reg: 16083983

7-ELEVEN, INC., RANJIT KAUR, and BARJINDER SINGH,
dba 7-Eleven #2171-25041C
306 West Baseline Street, San Bernardino, CA 92410,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: D. Huebel

Appeals Board Hearing: October 5, 2017
Los Angeles, CA

ISSUED OCTOBER 19, 2017

Appearances: *Appellants*: Donna J. Hooper, of Solomon Saltsman & Jamieson, as counsel for 7-Eleven, Inc. Ranjit Kaur, and Barjinder Singh.
Respondent: Jonathan Nguyen as counsel for the Department of Alcoholic Beverage Control.

OPINION

7-Eleven, Inc., Ranjit Kaur, and Barjinder Singh, doing business as 7-Eleven #2171-25041C (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 police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

FACTS AND PROCEDURAL HISTORY

1. The decision of the Department, dated October 5, 2016, is set forth in the appendix.

Appellants' off-sale beer and wine license was issued on April 7, 2004. On March 24, 2016 the Department filed an accusation against appellants charging that, on January 21, 2016, appellants' clerk, Rajiv Kumar (the clerk), sold an alcoholic beverage to 18-year-old Alex Gomez Cruz, Jr. Although not noted in the accusation, Cruz was working as a minor decoy for the San Bernardino Police Department at the time.

On April 11, 2016, 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 6, 2016, the Department responded by providing the address of the San Bernardino Police Department in lieu of the decoy's home address. On June 15, 2016, appellants sent a letter to the Department demanding it furnish the decoy's contact information by June 21, 2016. On June 17, 2016, the Department responded and asserted that the contact information for the San Bernardino Police Department was sufficient.

On June 24, 2016, appellants filed a Motion to Compel Discovery, and on June 29, 2016, the Department responded and opposed the motion. On or about July 7, 2016, the Department issued an order denying appellants' motion to compel.

The administrative hearing proceeded on July 28, 2016. Documentary evidence was received and testimony concerning the sale was presented by Cruz (the decoy) and by Officers Shaun Sandoval and Nicole Alvarez of the San Bernardino Police Department. Appellants presented no witnesses.

Testimony established that on the date of the operation, the decoy entered the licensed premises, and Officer Sandoval entered shortly thereafter. The decoy went to the alcoholic beverage cooler and selected two 24-ounce cans of Bud Light beer. The

decoy took the two cans of Bud Light beer to the front sales counter for purchase. There was no one in line.

At the counter, the decoy set down the two 24-ounce cans of Bud Light beer. The clerk scanned the beer and, in English, asked the decoy for his identification. The decoy handed his valid California driver's license to the clerk. The decoy's California driver's license has a vertical orientation, shows his correct date of birth, and includes a red stripe that reads "AGE 21 IN 2018." The clerk looked at the driver's license for two seconds. The decoy saw the clerk then swipe the ID twice along the cash register, and each time the decoy observed a screen, which was viewable from the customer side of the counter, that read "sale of alcohol invalid" or "purchase invalid" or something to that effect. The clerk pushed some buttons on the register screen and proceeded with the sale of alcohol. The decoy paid for the two cans of beer and received change. The clerk bagged the two beer cans, which the decoy took into his possession and with which he exited the store. Officer Sandoval was inside the store during this entire time and witnesses these events. Sandoval and the decoy never communicated with each other while in the store. Sandoval exited the store shortly after the decoy.

The decoy reentered the licensed premises with Officers Alvarez and Sandoval. They all approached the clerk, who stood behind the sales counter. Officer Alvarez identified herself as an officer and explained the violation to the clerk. The two officers and the decoy remained on the customer side of the counter, and the clerk remained on the employee side of the counter.

Officer Alvarez asked the decoy who was the person who sold him the alcohol. The decoy pointed at the clerk and said that he had sold beer to him. The decoy and the

clerk were standing approximately three feet apart, facing and looking at each other at the time of this identification. Alvarez then asked the clerk to move down to the end of the counter. The clerk moved down to the end of the counter, as did Alvarez, Officer Sandoval, and the decoy. A photo of the clerk and the decoy was taken after the face-to-face identification.

Officer Alvarez then asked the clerk to show her how the cash register system works when alcohol is scanned into the system. The clerk told Officer Alvarez, in English, that he would like the other male clerk to assist in translating the process. The second male clerk, identified as Singh, was retrieved and the process explained to Officer Alvarez. The can of Bud Light beer the decoy purchased was scanned. A yellow screen appeared instructing the clerk to "SCAN OR SWIPE I.D. OR IF BIRTHDATE IS ON OR BEFORE 1-21-95 PRESS [MANUAL ENTER]." There also appeared a manual override button that read "VISUAL ID OK." Officer Alvarez obtained the decoy's ID and swiped it along the register. A red screen then appeared that read "ITEM DENIED I.D. OR BIRTHDATE INVALID," "CUSTOMER MAY NOT PURCHASE THIS PRODUCT," and "REFUSE THE SALE OF THE AGE RESTRICTED ITEM," with only one button option of "EXIT." Alvarez exited from that screen, rescanned the Bud Light beer, and when the yellow screen appeared again, she pressed the manual override button "VISUAL ID OK" and was permitted to proceed without the red screen popping up.

After the hearing, the ALJ issued a proposed decision, which determined the violation charged was proved and no defense was established.

On August 5, 2016, following submission of the proposed decision, the Department's Administrative Hearing Office sent a letter to appellants and to

Department counsel offering both parties the opportunity to comment on the proposed decision. That letter stated:

Administrative Records Secretary and Concerned Parties:

Enclosed is the Proposed Decision resulting from the hearing before Department of Alcoholic Beverage Control, Administrative Hearing Office in the above entitled matter.

All concerned parties and their attorneys of record are being sent a copy of this Proposed Decision. All concerned parties and attorneys of record are hereby informed that you may submit comments regarding this Proposed Decision to the Director for consideration prior to any action being taken by the Director. Comments to the Director regarding this Proposed Decision shall be mailed to the Administrative Records Secretary. Additional comments submitted for review by the Director, if any, must also be submitted to all parties and their attorneys. For the convenience of all concerned, a list of those parties and their addresses is attached.

Pursuant to General Order 2016-02, the Administrative Records Secretary will hold this Proposed Decision until 14 days after the date of this letter. After that the Administrative Records Secretary will submit this Proposed Decision along with any comments received from concerned parties to the Director for consideration.

(Letter from John W. Lewis, Chief Admin. Law Judge, Dept. of Alcoholic Bev. Control, Aug. 5, 2016 [hereinafter "Comment Letter"].) As suggested in the final paragraph, the Comment Letter reflected a comment procedure adopted by the Department pursuant to its General Order 2016-02. (Dept. of Alcoholic Bev. Control, "GO-Ex Parte and Decision Review," Gen. Order 2016-02, at § 3, ¶¶ 5-6 (eff. Mar. 1, 2016) [hereinafter "General Order"].)

On August 18, 2016, counsel for appellants submitted "Comments to the Director re Proposed Decision," which challenged the legality of the comment procedure itself. The Department submitted no comments.

Ultimately, the Department adopted the proposed decision without changes.

Appellants then filed this appeal contending (1) the Department failed to comply with the discovery provision of the Administrative Procedure Act when it provided the address of the San Bernardino Police Department, rather than the decoy's personal contact information, during pre-hearing discovery, and (2) the Department's comment procedure violates the Administrative Procedure Act (APA) and the Administrative Adjudication Bill of Rights, and constitutes an underground regulation.

DISCUSSION

I

Appellants contend the Department failed to comply with section 11507.6 of the Government Code when it provided the address of the San Bernardino Police Department, rather than the decoy's address as listed on her California driver's license, during pre-hearing discovery. (App.Br., at pp. 4, 7-10.)

Appellants argue the reasoning employed by this Board in *Mauri Restaurant Group* is "fatally flawed." (*Id.* at p. 9.) However, they also reject this Board's later, more detailed rulings, which concluded that minor decoys qualify as "peace officers" whose private information is protected under Penal Code section 832.7. (*Id.* at p. 11; see also *7-Eleven, Inc./Joe* (2016) AB-9544 [holding that the minor decoy qualifies for peace officer protections by operation of Penal Code § 830.6(c)].)

Appellants argue instead that this case is analogous to *Reid v. Superior Court*, in which the court of appeal held the contact information of rape victims was subject to disclosure under section 1054.1 of the Penal Code. (App.Br., at pp. 5-7, citing *Reid v. Superior Ct.* (1997) 55 Cal.App.4th 1326 [64 Cal.Rptr.2d 714].)

This Board has recently addressed a number of cases raising this purely legal issue. In *7-Eleven, Inc./Joe*, we held that the decoy's personal address is protected under section 832.7 of the Penal Code. (*7-Eleven, Inc./Joe, supra*, at pp. 6-10.) Appellants counter the reasoning of that case by arguing that "minor decoys are never identified as peace officers in the statutory scheme that identifies the class of persons whose personnel records are made confidential." (App.Br., at p. 10.) Moreover, appellants contend Penal Code section 830.6(c) does not protect the decoy's home address because that section "does not deem a person a 'peace officer,' but instead only temporarily grants that person limited powers of a peace officer." (*Id.* at p. 11.) Appellants argue that *only* individuals who are "actually deemed peace officers . . . may enjoy the protection of their contact information from discovery pursuant to" section 832.7 of the Penal Code. (*Ibid.*)

Appellants overlook case law extending, by operation of Penal Code section 830.6(c), various peace officer protections to individuals or organizations summoned to the aid of law enforcement. In *7-Eleven, Inc./Joe*, we cited as persuasive authority the Ninth Circuit's decision in *Forro Precision, Inc.*, which held the provision "must be understood as according a citizen immunity that derives from the officer's own immunity." (*Forro Precision v. Intl. Business Machines Corp.* (9th Cir. 1982) 673 F.2d 1045, 1054 [interpreting Pen. Code, § 830.6(b), later renumbered as subdivision (c)].) *Forro Precision* relies on two California cases, both of which grant similar civil immunity to parties assisting law enforcement. (See *Forro Precision, supra*, at p. 1054, citing *Peterson v. Robison* (1954) 43 Cal.2d 690, 697 [277 P.2d 19] [private citizen not subject to action for false arrest when arrest made at peace officer's request] and *Sokol v.*

Public Utilities Com. (1966) 65 Cal.2d 247 [53 Cal.Rptr. 673] [public utility not civilly liable for disconnecting plaintiff's phone upon notice that it was used for illegal purposes].)

Regrettably, there is no case law discussing whether the protections afforded a peace officer's *contact information* are extended to individuals summoned to the peace officer's assistance. However, immunity from civil suit is a significant protection—it effectively eliminates a civil recovery for an injured plaintiff. If the courts have seen fit to extend peace officers' civil immunity to individuals summoned under section 830.6, we believe they would also extend the lesser protections of section 832.7 to those individuals as well—particularly where, as here, those protections help facilitate decoy sting operations by ensuring decoy volunteers are not subjected to unwarranted disclosure of personal information.

Appellants "respectfully disagree" with this Board's extension of section 832.7 to minor decoys aiding law enforcement, and instead argue in favor of analogous application of the court of appeal's holding in *Reid v. Superior Court*. (App.Br., at pp. 5-7, 11.) In *Reid*, the prosecution withheld the names and addresses of rape victims in a high-profile prosecution at the victims' request. (*Reid, supra*, at pp. 1330-1331) The trial court ordered conditional disclosure of the victims' information: the names and addresses would be supplied to the defense, but "the court also ordered that neither defense counsel 'nor anyone acting in [his] direction or employ contact these victims for purposes of obtaining any further statements from them or investigation by virtue of contact with them.'" (*Id.* at p. 1331.) The defense was "free to correspond" with the

victims," provided it did so only in writing and through the court or district attorney, which would "forward any correspondence to these victims." (*Ibid.*)

The court of appeal ultimately overturned the trial court, holding that "the victims' expressed wish to protect their right to privacy cannot provide the basis for a superior court order to interfere with the defendant's normally unrestricted right to contact prosecution witnesses." (*Id.* at pp. 1338-1339.) Moreover, it found no evidence of "harassment, threats, or danger to the safety of the victims" or other good cause to withhold the victims' information under the statutory exceptions outlined in section 1054 of the Penal Code. (*Id.* at p. 1339.)

Appellants overlook significant differences between *Reid* and administrative disciplinary actions. These differences establish that *Reid* is, at best, irrelevant.

First and most obviously, *Reid* was a criminal prosecution, not an administrative disciplinary proceeding. It is true that the California Supreme Court has found that "[a] disciplinary proceeding has a punitive character, for the agency can prohibit an accused from practicing his profession," and therefore, that petitioners who face the loss of their livelihood due to alleged criminal acts "should have the same opportunity as in criminal prosecutions to prepare their defense." (*Shively v. Stewart* (1966) 65 Cal.2d 475, 480 [421 P.2d 65] [addressing subpoena of documents in medical license revocation].) The two are not consistently analogous, however; they are governed by fundamentally different statutory schemes. (Compare Pen. Code, § 1054.7 [governing discovery in criminal prosecutions] with Gov. Code, § 11507.6 [governing discovery in administrative proceedings]; see also Gov. Code, § 11507.5 [section 11507.6 "provide[s] the exclusive right to and method of discovery" in any administrative proceeding].)

In *Cimarusti*, the court of appeals underscored these differences when it rejected analogous application of *Reid*: "Petitioners' analogy to criminal cases is inapt. Generally, there is no due process right to prehearing discovery in administrative hearing cases The scope of discovery in administrative hearings is governed by statute and the agency's discretion." (*Cimarusti v. Superior Ct.* (2000) 79 Cal.App.4th 799, 808 [94 Cal.Rptr.2d 336].)

One difference of relevance to appellants' case is the treatment of *Pitchess* discovery motions. In a criminal prosecution, a *Pitchess* motion allows the defendant to access, under specific limited circumstances, a peace officer's confidential personnel information despite the protections afforded by Penal Code section 832.7(a). (See Evid. Code, §§ 1043, 1045 [codifying the California Supreme Court's ruling in *Pitchess v. Superior Ct.* (1974) 11 Cal.3d 531 [113 Cal.Rptr. 897].] In order to prevail on a *Pitchess* motion, the defendant must show that the peace officer's conduct is material to the proceedings. (See Evid. Code, § 1043.) If the defendant's showing is sufficient, the peace officer's personnel information—including home address—may be disclosed to the defendant.

In administrative proceedings, however, *Pitchess* motions are not permitted. (*Brown v. Valverde* (2010) 183 Cal.App.4th 1531, 1549 [108 Cal.Rptr.3d 429] [finding no provision for *Pitchess* motions in Gov. Code, § 11507.6 , which provides the exclusive rights of discovery in administrative proceedings pursuant to § 11507.5].) There is presently no statutorily authorized means by which a licensee in a disciplinary proceeding can force disclosure of a peace officer's home address. (See *ibid.*) Section 832.7 of the Penal Code is effectively *more* protective in administrative proceedings—

where it cannot be overcome, even if the peace officer's personnel information is material to the disciplinary action—than in criminal prosecutions. The reflexive analogous application of criminal case law to an administrative proceeding is therefore inappropriate—especially where it implicates disclosure of peace officer information.

Secondly, the information withheld in *Reid* belonged to victims, not peace officers or individuals summoned to their aid. As *Reid* noted, the victims' contact information could only be withheld for good cause, which in the criminal context is limited by statute to "threats or possible danger to the safety of a victim or witness, possible loss or destruction of evidence, or possible compromise of other investigations by law enforcement."² (*Reid, supra*, at p. 1334, quoting Pen. Code, § 1054.7.) With regard to peace officers, however, the presumption shifts. The prosecution, by law, withholds a peace officer's contact information, and the burden falls on the criminal defendant to establish the materiality of that information through a *Pitchess* motion. (See Evid. Code, §§ 1043, 1045; see also *Brown, supra*, at p. 1549 [*Pitchess* motions not permitted in administrative discovery].) Contrary to appellants' insistence, the disclosure of a victim's contact information is in no way analogous to disclosure of a peace officer's contact information.

2. While Penal Code section 1054 is not relevant to the facts of this case, that statute would provide even stronger grounds for withholding minor decoys' home address, since routinely disclosing that information would impair the ability of law enforcement agencies to recruit minor decoys willing to participate in enforcement operations. The legislature has indicated its support for minor decoy enforcement operations, and the legality of these operations has been affirmed by the courts. (Bus. & Prof. Code, § 25658(f) [granting immunity to minors who purchase alcohol if they are "used by peace officers . . . to apprehend licensees"]; *Provigo Corp. v. Alcoholic Bev. Control Appeals Bd.* (1994) 28 Cal.Rptr.2d 638 [7 Cal.4th 561].) Disclosing decoys' home addresses would compromise not only individual investigations, but an entire investigatory scheme.

Finally, the victims' contact information was withheld in *Reid* at the victims' request, for fear of potential harassment and to avoid the embarrassment of being publicly associated with a high-profile rape case. (*Reid, supra*, at pp. 1338-1339.) Peace officer information, on the other hand, is withheld by statutory requirement. (Pen. Code, § 832.7(a).) Again, application of *Reid*, even by analogy, is inappropriate.

This Board's holding in *Joe* rests on extending the protections afforded peace officers under section 832.7(a) to minor decoys, by operation of Penal Code section 830.6(c). (See *Joe, supra*, at pp. 9-10.) To date, that holding has not been reviewed or overturned by a higher court.³ The Department hearing was an administrative proceeding, and peace officer information—including, by extension, the minor decoy's home address—was properly withheld. *Reid* is not analogous, and in no way undermines our holding in *Joe*. Unless a higher court holds otherwise, we will continue to apply the *Joe* analysis.

II

Appellants contend the Department's comment procedure, implemented pursuant to its General Order 2016-02, violates the hearing and review procedures set forth in the APA, constitutes an underground regulation prohibited by the APA, and encourages illegal ex parte communications. (App.Br., at pp. 11-20.)

We recently addressed an identical argument in *7-Eleven, Inc./Gupta* (2017) AB-9583. In that case, we concluded the Department's comment procedure, as outlined in

3. Appellants note that the Second Appellate District has taken a writ in the case of *7-Eleven, Inc./Holmes* (2016) AB-9554. (App.Br., at p. 11, fn. 3.) The acceptance of a writ is not synonymous with a completed review, and gives us no present cause to reconsider our analysis.

the General Order, constitutes an unenforceable underground regulation. The comment procedure was identical in this case. We therefore reach the same legal conclusion here, and refer the parties to *Gupta* for our complete reasoning. (*Id.* at pp. 12-25.)

Furthermore, the sole comment, submitted by appellant, had no effect on the outcome of the case, and therefore, the comment procedure did not materially affect appellant's due process rights. (See *id.* at pp. 26-29.)

As we have noted elsewhere, however, the Department's comment procedure creates a minefield of potential due process issues. (See *id.* at p. 29 ["The Department's decision to bypass the rulemaking process deprived it of the opportunity to review public comments that might have alerted it to potential pitfalls in the comment procedure."].) We remind the parties that "we shall remain particularly vigilant in future cases, and will not hesitate to reverse where the Department's improperly adopted comment procedure materially infringes on an appellant's due process rights." (*Ibid.*)

ORDER

The decision of the Department is affirmed.⁴

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

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.