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

AB-9623
File: 21-434142 Reg: 16083996

RBI FOOD MART & DELI INC.,
dba RBI Food Mart & Deli
22520 Sidding Road, Bakersfield, CA 93314,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: November 2, 2017
Los Angeles, CA

ISSUED NOVEMBER 28, 2017

Appearances: *Appellant*: Donna J. Hooper, of Solomon Saltsman & Jamieson, as counsel for 7-Eleven, Inc. and RBI Food Mart & Deli, Inc.
Respondent: Kerry K. Winters as counsel for the Department of Alcoholic Beverage Control.

OPINION

RBI Food Mart & Deli Inc., doing business as RBI Food Mart & Deli (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] imposing a penalty of revocation, stayed to allow license transfer,[2] because its clerk sold an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

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1. The decision of the Department, dated November 21, 2016, is set forth in the appendix.

2. Appellants do not object to the penalty imposed.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on March 22, 2006. On March 25, 2016, the Department filed an accusation charging that appellant's clerk, Navtej Singh (the clerk), sold an alcoholic beverage to 18-year-old James Murphy on December 29, 2015. Although not noted in the accusation, Murphy was working as a minor decoy for the Kern County Sheriff's Department at the time.

On April 8, 2016, appellant 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 May 9, 2016, the Department responded by providing the address of the Kern County Sheriff's Department in lieu of the decoy's home address. On May 17, 2017, appellant sent a letter to the Department demanding it furnish the decoy's contact information by May 19, 2016. The Department did not respond.

On May 23, 2016, appellant filed a Motion to Compel Discovery,[3] and on June 14, 2016, the Department responded and opposed the motion. On June 20, 2016, the Department issued an order denying appellant's motion to compel production of the decoy's home address.[4]

The administrative hearing proceeded on July 14, 2016. Documentary evidence was received, and testimony concerning the sale was presented by Murphy (the decoy); by Deputy Brent Allan Burton and Detective David Weigand of the Kern County Sheriff's

3. The Motion to Compel also demanded a copy of the citation issued to the clerk.

4. The order granted the motion to compel production of the citation issued to the selling clerk. The production of the citation is not at issue in this case.

Department; by Agent Paul Lopez of the Department of Alcoholic Beverage Control; and by Harinder Sira, appellant's primary shareholder.

Testimony established that on the date of the operation, the decoy entered the licensed premises, and Deputy Burton entered a few seconds later. The deocy walked to the cooler, selected a 24-ounce can of Coors Light beer, and took it to the register. The clerk, Navtej Singh, asked to see the decoy's ID. The decoy handed his California driver's license to the clerk. The clerk swiped the ID through a card reader, then looked at it. The clerk asked the decoy how old he was, and the decoy replied that he was 18 years old. The clerk finished ringing up the sale and the decoy paid. The clerk gave the decoy some change, after which the decoy exited with the beer. Deputy Burton exited as well.

The decoy reentered the licensed premises with Deputy Burton and Detective Weigand. Weigand asked the decoy to identify the person who sold him the beer. The decoy pointed to the clerk and said that he had. The decoy and the clerk were approximately four feet apart at the time. The officers then identified themselves to the clerk and explained the violation to him. A photo of the decoy and the clerk was taken, after which the clerk was cited.

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

On August 17, 2016, following submission of the proposed decision, the Department's Administrative Hearing Office sent a letter to appellant 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.
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> 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. 17, 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 29, 2016, counsel for the Department submitted comments to the Department Director arguing that there is no legal authority to support the ALJ's conclusion that two separate violations pled in a single accusation count as a single "strike" for purposes of penalty determination. Counsel for the Department argued that, in light of appellant's recent prior violations, a more severe penalty of outright revocation

was justified, and therefore requested the Director reject the proposed decision and decide the matter on the record.

Appellant submitted no comments.

Ultimately, the Department adopted the decision, including the penalty imposed, without changes.

Appellant 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 Kern County Sheriff's 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

Appellant contends the Department failed to comply with section 11507.6 of the Government Code when it provided the address of the Kern County Sheriff's Department, rather than the decoy's address as listed on her California driver's license, during pre-hearing discovery. (App.Br., at pp. 4-12.)

Appellant argues the reasoning employed by this Board in *Mauri Restaurant Group* is "fatally flawed." (*Id.* at p. 10.) However, it also rejects 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. 12; 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)].)

Appellant argues 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. 6-7, 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.) Appellant counters 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, appellant contends 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. 12.) Appellant argues 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*.)

Appellant ignores 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.

Appellant "respectfully disagrees" 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. 6-7, 12.) 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.)

Appellant overlooks 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 appeal 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 appellant's 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."[5] (*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

5. 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.

administrative discovery].) Contrary to appellant's insistence, the disclosure of a victim's contact information is in no way analogous to disclosure of a peace officer's contact information.

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.[6] 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

Appellant contends the Department's comment procedure, implemented pursuant to its General Order 2016-02, violates the hearing and review procedures set forth in the

6. Appellant notes that the Second Appellate District has taken a writ in the case of *7-Eleven, Inc./Holmes* (2016) AB-9554. (App.Br., at p. 12, fn. 3.) The mere acceptance of a writ is not synonymous with a completed review, and gives us no cause to reconsider our analysis. In any event, the Second Appellate District, in an unpublished ruling, affirmed the Board on the basis that the appellant had failed to show prejudice. (*7-Eleven, Inc. v. Alcoholic Bev. Control Appeals Bd.* (Nov. 22, 2017, B277805) [nonpub. opn.].)

APA, constitutes an underground regulation prohibited by the APA, and encourages illegal ex parte communications. (App.Br., at pp. 13-22.)

Appellant further contends that "no actual prejudice need be shown" in order to merit reversal. (App.Br., at p. 21.) Appellant relies on *Quintanar*, in which the court of appeal reversed based on secret Department ex parte hearing reports. (*Ibid*., citing *Dept. of Alcoholic Bev. Control. v. Alcoholic Bev. Control Appeals Bd.* (*Quintanar*) 40 Cal.4th 1 [50 Cal.Rptr. 585].) Appellant insists the comment submitted by Department counsel was an illegal ex parte communication, in the vein of the secret *Quintanar* hearing reports. (App.Br., at p. 22.) It claims there is no way of knowing whether the Department's comment affected the Director's decision to adopt the proposed decision. (*Ibid.*) Finally, appellant argues that the mere implementation of the comment procedure in this case is a violation of the law, and that the Board therefore has no alternative but to reverse the Department decision, regardless of prejudice. (App.Cl.Br., at pp. 13-14, citing Cal. Const., art. XX, § 22.)

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

cases, reversal is inappropriate where the appellant has shown no prejudice or material effect on due process. (See, e.g., *ibid*.)

First, there is nothing in the constitution that mandates reversal where the Board finds the Department failed to proceed in the manner required by law. The constitution outlines remedies as follows:

> In appeals where the board finds that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before the department it may enter an order remanding the matter to the department for reconsideration in light of such evidence. *In all other appeals the board shall enter an order either affirming or reversing the decision of the department.*

(Cal. Const., art. XX, § 22, emphasis added; see also Bus. & Prof. Code § 23085 [duplicating constitutional language].) Nothing in this language *requires* reversal where the Board finds a violation of law, and no such mandate can reasonably be inferred from it, either.[7]

Second, reversal in the absence of prejudice upends the hierarchy of laws, and itself invites a miscarriage of justice. In *Tidewater*, the court emphasized the absurdity of reversing an otherwise legally proper decision because of the existence of an underground regulation:

> If, when we agreed with an agency's application of a controlling law, we nevertheless rejected that application simply because the agency failed to comply with the APA [rulemaking procedures], then we would undermine the legal force of the controlling law. Under such a rule, an agency could effectively repeal a controlling law simply by reiterating all its substantive provisions in improperly adopted regulations.

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7. In ordinary civil practice, prejudice is a constitutionally required showing: "No judgment shall be set aside . . . unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const., art. 6, § 13.) On a practical level, reversal without a showing of prejudice is itself a miscarriage of justice.

(*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577 [59 Cal.Rtpr.2d 186].) To put it another way, requiring the appellant to show actual prejudice ensures that constitutional and statutory provisions—both legally superior to *any* regulations, whether duly adopted or underground—are properly enforced, and are not undermined by an agency's failure to submit to the rulemaking process. That is precisely what appellant seeks in this case: it asks this Board to erase its violation of a statute prohibiting sales of alcohol to minors—one aimed at protecting the health and safety of the state's citizens—simply because the Department failed to properly implement an unrelated regulation.

Finally, appellants contend the Director might have imposed a lesser penalty were it not for the Department's comment. This is mere speculation, not a showing of prejudice. Moreover, as speculation goes, it is absurd: the proposed decision imposed the very penalty *appellant itself* requested at the administrative hearing. (See RT at p. 83.) The Director adopted the proposed decision—including appellant's requested penalty—without changes. We can imagine no prejudice in appellant getting precisely what it asked for.

As we have noted elsewhere, the Department's comment procedure does create a minefield of *potential* due process issues; there may be circumstances in which an appellant can indeed show it was prejudiced by the Department's comment procedure. (See *7-Eleven, Inc./Gupta*, *supra*, 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."].)

This, however, is not such a case.

In the meanwhile, 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.[8]

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

8. 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.