

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

AB-9632

File: 20-425323 Reg: 16083908

7-ELEVEN, INC., BALDEEP SINGH BHULLAR,
and BRIDGEMOHAN KAUR BHULLAR,
dba 7-Eleven Store #2133-18822D
331 West Montecito Street, Santa Barbara, CA 93101,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: January 11, 2018
Los Angeles, CA

ISSUED FEBRUARY 8, 2018

Appearances: *Appellants:* Donna J. Hooper, of Solomon Saltsman & Jamieson, as counsel for 7-Eleven, Inc., Baldeep Singh Bhullar, and Bridgemohan Kaur Bhullar.
Respondent: John P. Newton as counsel for the Department of Alcoholic Beverage Control.

OPINION

7-Eleven, Inc., Baldeep Singh Bhullar, and Bridgemohan Kaur Bhullar, doing business as 7-Eleven Store #2133-18822D (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ suspending their license for five days because their clerk sold alcohol to an obviously intoxicated person, a violation of Business and Professions Code section 25602(a).

FACTS AND PROCEDURAL HISTORY

1. The decision of the Department, dated January 11, 2017, is set forth in the appendix.

Appellants' off-sale beer and wine license was issued on June 6, 2005. On March 8, 2016, the Department instituted an accusation against appellants charging that, on October 20, 2015, appellants' clerk sold alcohol to an obviously intoxicated person, a violation of Business and Professions Code section 25602(a).

On March 29, 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 May 11, 2016, appellants purportedly received a response from the Department.² On May 17, 2016, appellants sent a letter to the Department contending that it had "failed to provide the names and addresses" of "[t]wo (2) eighteen year old female decoys who were serving as shoulder tap minor decoys and interacted with the allegedly intoxicated person" and "[t]wo (2) male transients and one (1) female transient." (Exh. A.) It is unclear whether the Department responded to this letter.

On May 26, 2016, appellants filed a Motion to Compel the names and addresses of the two decoys and three transients. Upon receiving appellants' Motion to Compel, Department counsel purportedly "realized that opposing counsel had not received discovery, and rectified the situation by providing the requested names [and] addresses."³ (Dept.Br., at p. 11.) The record contains no order granting or denying the Motion to Compel.

At the commencement of the first portion of the administrative hearing, held on August 16, 2016, the ALJ asked of appellants' counsel, "[I]t's my understanding that the

2. The Department's purported response is not included in the administrative record on appeal.

3. Again, the Department's response is not included in the record.

Department has complied with the Motion to Compel, and there's nothing further that needs to be done, at least as it relates to discovery?" (RT, vol. I, at p. 7.) Counsel for appellants responded that "the addresses for the two 18-year-olds were not supplied as requested." (*Ibid.*) The ALJ then reviewed the Motion to Compel and determined the Department had provided the address of the Santa Barbara Police Department as the contact information for the two decoys. (RT, vol. I, at pp. 7-10.) Counsel for appellants countered that this address was "obviously fake." (RT, vol. I, at p. 10.) The ALJ questioned whether appellants had attempted to contact the decoys through the Santa Barbara Police Department, and upon learning they had not, denied the Motion to Compel "to the extent it hasn't already been addressed," citing Appeals Board rulings on the issue. (RT, vol. I, at p. 12.)

The August 16 administrative hearing then proceeded and was ultimately continued to October 11, 2016. Over the course of the two hearing dates, documentary evidence was received and testimony concerning the violation charged was presented by Supervising Agent Luis Madriz of the Department of Alcoholic Beverage Control; by Officer Mark Corbett of the Santa Barbara Police Department; by co-appellant Baldeep Singh Bhullar; and by appellants' employee, Rodrigo Garcia.

Testimony established that on the date of the violation, Supervising Agent Madriz was working a shoulder-tap operation with two decoys outside the licensed premises. Robert Raseta approached the decoys, spoke to them briefly, then entered the licensed premises. Raseta walked with an unsteady gait, swaying as he did so. He appeared to have trouble with his balance. Agent Madriz formed the opinion that Raseta was intoxicated.

Raseta entered the licensed premises, and Agent Madriz followed. Raseta was standing by the coolers with an unidentified female. He continued to sway and had trouble keeping his balance. Even though the beers were right in front of him, he asked the woman where the beers were. His words were slurred and he spoke with a pitch which varied from high to low. Raseta's voice was loud; Agent Madriz could clearly hear him from a different aisle approximately ten feet away. Raseta selected a six-pack of Budweiser beer and took it to the counter. He once again walked with an unsteady gait.

Raseta approached the counter and set the beer down. The clerk, Lorenzo Conaway, was directly across the counter from Raseta. Raseta swayed as he stood at the counter and had trouble keeping his balance. He smelled of alcohol and slurred his words as he spoke. Conaway rang up the beer and a couple other items. Raseta paid, after which he exited.

Raseta's gait was unsteady and he swayed as he exited. Agent Madriz approached the counter. Agent Madriz commented that Raseta was really hammered. Conaway said, "Yeah." Agent Madriz then halted the transaction and told Conaway he would be right back.

Agent Madriz exited and noticed Raseta standing in place, looking around. Raseta did not approach the decoys; rather, he walked over to a group of people and sat down with them.

Agent Madriz re-entered the licensed premises, identified himself to Conaway, and explained the violation. Conaway stated that he knew Raseta was drunk, but did not believe that he was so drunk that he should not be allowed to purchase alcohol.

Officer Corbett of the Santa Barbara Police Department contacted Raseta approximately 35 minutes after he exited. Officer Corbett administered a preliminary alcohol screening test to Raseta using a breathalyzer. The test indicated that Raseta had a blood alcohol level of 0.292.

Appellants have a video system which records the interior of the licensed premises. A copy of the video of this incident was played during the hearing. The images on the video were compressed—none of the actions visible were smooth or fluid, but were slightly herky-jerky. Conaway was busy with a line of customers when Raseta first entered. Raseta walked through the line—directly past Conaway—on his way to the coolers. When Conaway finished with the last of the customers in line, he looked around before engaging a second clerk, Rodrigo Garcia, in conversation.

Because only a portion of the coolers are visible in the video due to the angle of the cameras, Raseta was only visible at times as he walked back and forth in front of the coolers. It is unclear if all of the coolers are visible from the front counter. The portion of the coolers that are within the angle of the camera are also visible from the front counter.

Raseta was not visible in the video until he approached the counter. He is joined almost immediately by the unidentified woman, after which Agent Madriz got in line behind them. While at the counter, Raseta appeared to be moving from side to side (consistent with someone who was swaying, rocking back and forth, or shifting his balance from one foot to the other). When Raseta exited, Agent Madriz appeared to speak to Conaway. Agent Madriz looked over at Raseta as he exited; Conaway appeared to look at him as well.

Garcia noticed Raseta while he stood at the counter. Garcia noticed that Raseta was unsteady on his feet, swaying as he tried to stand at the counter. He did not notice any other signs of intoxication. Garcia did not believe that Raseta was intoxicated.

Both Conaway and Garcia completed 7-Eleven's Come of Age training. A portion of this training dealt with the signs of intoxication.

After the hearing, the Department issued a proposed decision determining the violation was proven and no defense was established. The decision imposed a mitigated penalty of five days' suspension in light of appellants' ten years of discipline-free operation.

On November 29, 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, Nov. 29, 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 December 7, 2016, counsel for appellants submitted "Comments to the Director re Proposed Decision," which challenged the legality of the comment procedure itself. Additionally, in an appended letter, appellants "reassert[ed] all arguments raised during the hearing below" and claimed, without specifics, that the ALJ "made unsupported legal conclusions in his Proposed Decision and failed to consider arguments made and evidence presented" by the appellants. (Letter from Saranya Kalai, counsel for appellants, to Dir. Prieto, Dept. of Alcoholic Bev. Control, Dec. 7, 2016.)

Department counsel submitted no comments.

Ultimately, the Department adopted the proposed decision without changes.

Appellants then filed this appeal contending (1) the Department failed to provide the names and addresses of the two minor decoys who interacted with Raseta and therefore could attest to his level of intoxication, and (2) the Department's comment procedure constitutes an underground regulation, violates the Administrative Procedure Act, and encourages illegal ex parte communications.

DISCUSSION

I

Appellants contend failed to comply with the discovery provision of the Administrative Procedure Act by withholding the names and addresses of two minor decoys who participated in the shoulder-tap operation that led to the present disciplinary action, and who had contact with Raseta, the purportedly intoxicated individual, before he entered the licensed premises. (App.Br., at p. 5.)

Appellants object primarily to the Department supplying the address of the Santa Barbara Police Department as the contact information for the two decoys.

They argue this Board's reasoning in *Mauri Restaurant Group* is "fatally flawed." (*Id.* at p. 10.) However, they also reject this Board's later, more detailed rulings, which concluded that minor decoys qualify for the protections afforded peace officers, whose private information is protected under Penal Code section 832.7. (*Id.* at pp. 11-12.)

Appellants argue instead that this case is analogous to *Reid v. Superior Court*, in which the court of appeal held that the contact information of rape victims was subject to disclosure under section 1054.1 of the Penal Code. (*Id.* at pp. 7-9.)

Notably, appellants make a new claim on appeal: that they could not have reached the decoys through the Santa Barbara Police Department because the Department never supplied the decoys' full names. (*Id.* at p. 6.)

Appellants' Motion to Compel demanded a range of information, including the names and addresses not only of the decoys, but of three transients who also interacted with Raseta.

According to Department, upon receiving appellants' Motion to Compel, "the Department attorney read the motion, realized that opposing counsel had not received

discovery, and rectified the situation by providing the requested names [and] addresses." (Dept.Br., at p. 11.)

Appellants describe the exchange differently, claiming only that "the Department did not even bother to file an opposition to the motion to compel," but instead "opposed the motion to compel at the hearing and asserted that by providing the address of the Santa Barbara Police Department they had complied with the discovery statute."

(App.Br., at p. 5.)

At the beginning of the administrative hearing, a long exchange took place on the substance of the Motion to Compel:

THE COURT: [I]t's my understanding that the Department has complied with the Motion to Compel, and there's nothing further that needs to be done, at least as it relates to discovery?

MR. NEWTON [COUNSEL FOR THE DEPARTMENT]: That was my understanding, Your Honor. . . .

THE COURT: Ms. Kalai [counsel for appellants], are there any outstanding discovery matters, or more importantly, is there anything that needs to be done still with respect to the Motion to Compel?

MS. KALAI: I do believe the addresses for the two 18-year-olds were not supplied as requested in the Motion to Compel.

[¶ . . . ¶]

MR. NEWTON: Right. And if I can clarify, Your Honor, we gave the address of the local police department, which is what we normally do, so I don't know if Ms. Kalai is making the—the further argument is she'd like their home addresses. You know, it's a different objection. It's the common one. I believe that just went up on a writ and the appeals court just denied.

THE COURT: Give me a moment and let me take a look at this Motion to Compel more closely.

[¶ . . . ¶]

The Motion to Compel seeks basically two separate things. The first are the addresses of two 18-year-old female decoys. The second are the names and addresses of three transients, two males and one female.

If I understand what you said correctly, Mr. Newton, the Department provided the address of the law enforcement agency for the decoys, but what about the names and addresses of the transients?

MR. NEWTON: We provided the names and addresses that Santa Barbara P.D. had. I think one of them had a P.O. box if I recall correctly, and so we forwarded that along. I don't recall if both of them had addresses or not. But I went to the police department, and they gave me what they had and I forwarded that to them.

THE COURT: Okay. Ms. Kalai, let's deal with the second one first, the transients. Are you satisfied with the Department's response as it relates to the names and addresses of the transients?

MS. KALAI: I believe the request was for two male transients and one female transient. We have received names and alleged addresses for the two male transients. We have not received anything for the female transient who was part of the police report.

And we also, going back to the first issue, we received the [Santa Barbara Police Department] address for the two minor decoys, and it's our position that that's not a valid address, and it is not complying with their discovery obligations.

THE COURT: All right. Do you even have an address for the female transient?

MR. NEWTON: I gave them everything that the police department had. I seem to recall one of them not having—at least one of them not having an address.

THE COURT: But you don't have—you don't have anything more than what you gave them is what you're telling me?

MR. NEWTON: That's correct, Your Honor, and neither does the Santa Barbara Police Department.

(RT, vol. I, at pp. 7-9.) This exchange supports the Department's account of the events—that is, that it received appellants' Motion to Compel, realized that appellants had not received discovery, and remedied the problem by providing the information available to them. In the time since filing their Motion to Compel, appellants had clearly received at least part of the information they originally demanded; it is therefore misleading to claim, as appellants do in their brief, that "the Department did not even

bother to file an opposition to the motion to compel." (App.Br., at p. 5.) They did not file an opposition because they instead supplied the information appellants sought.

Moreover, appellants' contention at the hearing substantively differed from their Motion to Compel. In the Motion to Compel, appellants demanded:

(1) The names and addresses of all witnesses to the extent known to the Department. Specifically, the Department failed to provide the names and addresses of the following witnesses:

- a. Two (2) eighteen year old female decoys who were serving as shoulder tap minor decoys and interacted with the allegedly obviously intoxicated person, Robert Dean Raseta, and
- b. Two (2) male transients and one (1) female transient.

(Exh. A, Motion to Compel, at p. 2.) Thus, in their Motion to Compel, appellants complained about the *lack* of an address for the minor decoys. At the hearing, however, appellants abandoned that argument and instead took issue with the *specific address* provided for the decoys, contending that the Santa Barbara Police Department address was "obviously fake." This is a fundamentally different issue than the one raised in their Motion to Compel, and again, supports the Department's claim that they proffered the discovery requested in the Motion to Compel.

Most significantly, at no point during this exchange did appellants' counsel contend they had not received the decoys' *names*. In fact, the ALJ questioned counsel at length as to whether appellants had attempted to contact the decoys through the Santa Barbara Police Department, and counsel responded that they had not:

THE COURT: Did you try [to reach them]?

MS. KALAI: I do not know at this time because we didn't get the address where they'll be reachable at.

THE COURT: You got an address, which I suspect is going to be an address where they work as volunteers. Is it your contention that a work

address, volunteer or paid, is a bad address that you could not reach someone at work?

MS. KALAI: But this is based on the assumption that they are indeed working as volunteers at [the Santa Barbara Police Department]. There is no proof that these people will be reachable there.

THE COURT: But you did not try. You don't know that. Did you call them up and say, I'd like to speak to Person A and Person B?

MS. KALAI: Why would I—we believe that requiring that extra step is placing the burden on us and not on the other side, whose duty and obligation it is to fulfill their discovery obligations.

(RT, vol. I, at p. 11.) At no point whatsoever did counsel for appellants contend that it couldn't reach the decoys *because the Department didn't supply their names*. Instead, at the hearing, appellants relied on circular logic—they did not attempt to reach the decoys because the decoys were unreachable—along with the unsupported charge that the Department attempted to defraud them with an "obviously fake" address. (RT, vol. I, at pp. 10-12.)

At oral argument, appellants insisted they were never given the decoy's names. The Department countered that it supplied all the information it had on the decoys. Neither party seemed particularly certain of what information on the decoys had been exchanged—except, of course, that the Santa Barbara Police Department address was provided for both.

While the record itself does not disclose the decoys' names, it also does not disclose the names of the two male transients—information which appellants conceded was indeed supplied by the Department. (See RT, vol. 1, at p. 9.) The absence of the decoys' names from the record therefore tells us nothing about whether the Department provided the names as requested.

Given appellants' failure to raise this issue at the administrative hearing, we are inclined to find it waived. (See, e.g., *Hooks v. Cal. Personnel Bd.* (1980) 111 Cal.App.3d 572, 577 [168 Cal.Rptr. 822] [due process argument raised for the first time on appeal is waived].)

We wish to emphasize, however, the extent of the discovery provision at issue.

Section 11507.6 provides, in relevant part:

After initiation of a proceeding in which a respondent or other party is entitled to a hearing on the merits, a party, upon written request made to another party . . . is entitled to . . . obtain the names and addresses of witnesses *to the extent known to the other party.*

(Gov. Code, § 11507.6, emphasis added.) The Department contends it supplied all the information it had on the decoys, and beyond claiming they were entitled to each decoy's personal contact information—a claim this Board has repeatedly rejected—appellant offers no support for its claim that the Department improperly withheld information.

Nor was the Department required to locate the decoys in this case. In minor decoy sting operations resulting in a violation of sections 25658, 25663, or 25665, the decoy is a mandatory witness: "the department *shall* produce the alleged minor for examination at the hearing." (Bus. & Prof. Code, § 25666, emphasis added.) This case, however, involves a violation of 25602(a), which prohibits the sale of alcoholic beverages to an obviously intoxicated person. While the illegal sale at issue came to light in the course of a shoulder-tap operation involving two minor decoys, the minor decoys' conduct did not play a role in the violation. The decoys are therefore not required witnesses.

Appellants counter that the decoys were percipient witnesses who interacted with Raseta and may have offered testimony regarding his level of intoxication. In fact, the decoys did not witness the actual transaction; their impressions of Raseta's conduct would therefore offer little probative value. Agent Madriz witnessed the transaction and testified regarding Raseta's conduct and apparent level of intoxication. If the selling clerk's impression differed significantly, it was incumbent upon appellants to produce the clerk. In any event, the Department has no duty to investigate and identify bystanders simply because their testimony *might* support appellants' case. Assuming the Department disclosed what information it had on the two decoys—and appellants have not shown otherwise—then it has fulfilled its discovery obligations.

In their closing brief, appellants take a different tack entirely and insist the Department cannot argue that the Santa Barbara Police Department address was sufficient because "[t]he only argument made by the Department during the hearing was that they had turned over the addresses for the decoy, not that the address was protected." (App.Cl.Br., at p. 5.) They claim that "[t]he Department did not raise any arguments other than compliance." (*Ibid.*)

Appellant misunderstands its burden of proof. The Department provided the address of the Santa Barbara Police Department for the decoys, in keeping with its own practice and the previous holdings of this Board. This is, as this Board has repeatedly held, sufficient to satisfy the requirements of Government Code section 11507.6. (See, e.g., *7-Eleven, Inc./Joe* (2016) AB-9544.) Beyond that, the burden fell on appellants to present either a valid legal argument as to why that address was insufficient, or, alternatively, produce factual evidence showing that the decoys were unreachable at

the address provided. The argument appellants presented, as the ALJ noted, has already been rejected repeatedly before this Board. (RT, vol. I, at p. 11-12.) Rather than presenting factual evidence that the decoys were unreachable, appellants instead rejected their burden of proof and offered nothing. (See RT, vol. I, at p. 11 ["[W]e believe that requiring that extra step [of attempting to contact the decoys] is placing the burden on us and not on the other side].) Appellants thus failed to provide either evidence or a valid legal argument, and chose to rely instead on nothing more than the unsupported claim that the Santa Barbara Police Department address was "obviously fake." (RT, vol. I, at pp. 7-12.) The ALJ therefore properly denied the Motion to Compel "to the extent it hasn't already been addressed." (See RT, vol. I, at p. 12.)

With regard to appellants' claim that the Santa Barbara Police Department address does not satisfy the discovery provision of the Administrative Procedure Act, we see no difference between this and the many prior cases raising this legal issue. (See Gov. Code, § 11507.6 [providing for discovery in administrative proceedings].) As is typically the case, appellants made no attempt to contact the decoys at the address provided. We refer appellants to our analysis in *7-Eleven, Inc./Joe* (2016) AB-9544 and *7-Eleven, Inc./Pam and Jas, Inc.* (2017) AB-9603.

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.

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 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, we find that the sole comment, submitted by appellants, had no effect on the outcome of the case, and therefore, that the comment procedure did not materially affect appellants' 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.¹

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

1. 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.