

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

AB-9630

File: 47-541355 Reg: 16084335

NAPLES RESTAURANT GROUP, LLC,
dba The Boat House on the Bay
190 North Marina Drive,
Long Beach, CA 90803,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: March 1, 2018
Los Angeles, CA

ISSUED MARCH 26, 2018

Appearances: *Appellant*: Donna J. Hooper as counsel for Naples Restaurant Group, LLC, doing business as The Boat House on the Bay.
Respondent: Kerry K. Winters as counsel for the Department of Alcoholic Beverage Control.

OPINION

Naples Restaurant Group, LLC, doing business as The Boat House on the Bay (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ suspending its license for 15 days because its clerk sold an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

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

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general eating place license was issued on April 15, 2014. On June 15, 2016, the Department filed an accusation charging that appellant's bartender, Kurtis Eifert (the bartender), sold an alcoholic beverage to 19-year-old Janae Bukowski on November 12, 2015. Although not noted in the accusation, Bukowski was working as a minor decoy in a joint operation between the Department of Alcoholic Beverage Control and the Long Beach Police Department at the time.

On June 23, 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 August 10, 2016, the Department responded by providing the address of the Long Beach Police Department in lieu of the decoy's home address. On August 17, 2016, appellant sent a letter to the Department demanding it furnish the decoy's contact information by August 22, 2016. The Department did not respond.

On August 26, 2016, appellant filed a Motion to Compel Discovery, and on August 31, 2016, the Department responded and opposed the motion. On September 6, 2016, the Department issued an order denying appellant's Motion to Compel.

The administrative hearing proceeded on September 27, 2016. Documentary evidence was received and testimony concerning the sale was presented by Bukowski (the decoy), by Detective Juan Gomez of the Long Beach Police Department, and by Agent Vic Duong of the Department of Alcoholic Beverage Control.

Testimony established that on the date of the operation, Detective Gomez and his partner entered the licensed premises and sat at the bar counter. The decoy entered

a few minutes later and went to a section of the bar counter approximately ten feet away from the detectives. The bartender approached the decoy and asked her what she wanted to drink. The decoy ordered a Bud Light. The bartender turned around, grabbed a bottle of Bud Light beer, opened it, and set it down on the counter. The bartender told the decoy to wait and asked to see her identification. The decoy handed him her California driver's license. The bartender took the license, looked at it, turned around and looked at it again under a lamp, then returned it to the decoy.

Detective Gomez signaled the backup officers, who entered and approached the decoy. The decoy told the officers that the bartender was the person who had served her. The officers asked the bartender to come out from behind the counter, which he did. Agent Duong asked the decoy to identify the person who served her the alcohol. At a distance of approximately three feet, the decoy pointed to the bartender and said that he had. They were facing each other at the time. A photo of the two of them was taken, after which the bartender was cited. During the face-to-face identification, the bartender stated that he had checked the decoy's ID.

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

On November 8, 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.

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. 8, 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 November 16, 2016, appellant submitted a comment letter reiterating several of its closing arguments and asserting that "the ALJ made unsupported legal conclusions" in the proposed decision. (Letter from Saranya Kalai, counsel for appellant, to Ramona Prieto, Acting Director, Dept. of Alcoholic Bev. Control, Nov. 16, 2016.) Additionally, appellant appended "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.

Appellant then filed this appeal contending (1) the Department failed to comply with the discovery provision of the Administrative Procedure Act (APA) when it provided the address of the Long Beach Police Department, rather than the decoy's personal contact information, during pre-hearing discovery, and (2) the Department's comment procedure is an underground regulation, violates the APA, and encourages illegal ex parte communications.

DISCUSSION

I

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

Appellant argues the reasoning employed by this Board in *Mauri Restaurant Group* is "fatally flawed." (*Id.* at p. 10, citing *Mauri Restaurant Group* (1999) AB-7276.) Moreover, appellant entirely ignores this Board recent, more detailed rulings, which concluded minor decoys qualify as "peace officers" whose private information is protected under Penal Code section 832.7.² (See *id.* at pp. 4-12; see also *7-Eleven, Inc./Joe* (2016) AB-9544 [first of many cases holding that the minor decoy qualifies for peace officer protections by operation of Penal Code § 830.6(c)].)

2. Appellant's failure to acknowledge the Board's more recent rulings is particularly mystifying, since each of those cases—at this point, numbering in the dozens—was argued by the same law firm representing the appellant in the present case. We can only assume that counsel for appellant is aware of the Board's rulings, has read them, and has simply chosen to ignore them entirely.

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. 6-8, citing *Reid v. Superior Ct.* (1997) 55 Cal.App.4th 1326 [64 Cal.Rptr.2d 714].) Appellant does not address recent Board rulings rejecting application of *Reid*. (See, e.g., *7-Eleven, Inc./Pam & Jas, Inc.* (2017) AB-9603 [rejecting analogous application of *Reid*], citing *Cimarusti v. Superior Ct.* (2000) 79 Cal.App.4th 799, 808 [94 Cal.Rptr.2d 336] [finding *Reid* analogy "inapt" and holding there is generally "no due process right to prehearing discovery in administrative hearing cases."].)

There is no evidence appellant made any attempt to contact the decoy through the Long Beach Police Department.

This Board has recently faced a flood 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, and in *7-Eleven, Inc./Pam & Jas, Inc.*, we rejected analogous application of *Reid*. (*7-Eleven, Inc./Joe, supra*, at pp. 6-10; *7-Eleven, Inc./Pam & Jas, Inc.* (2017) AB-9603, at pp. 8-12.) Appellant—or rather, appellant's counsel—simply reasserts legal theories this Board has already found meritless. We therefore refer appellant to the Board decisions cited above for our full 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 APA, constitutes an underground regulation prohibited by the APA, and encourages illegal ex parte communications.

This Board 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.)

However, we also find that the sole comment, submitted by appellants, had no effect on the outcome of the case, and that the comment procedure did not materially affect appellants' due process rights. (See *id.* at pp. 26-29.) Appellant suffered no prejudice; we therefore offer no relief.

ORDER

The decision of the Department is affirmed.³

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

3. 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.