

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

AB-9654

File: 20-214483; Reg: 16084902

7-ELEVEN, INC., CAROL CRIBBS, and CHARLES CRIBBS,
dba 7-Eleven Store #2237-22014
518 South Lovers Lane, Visalia, CA 93292,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Albert Roldan

Appeals Board Hearing: May 3, 2018
Los Angeles, CA

ISSUED MAY 30, 2018

Appearances: *Appellants:* Ralph Barat Saltsman and Donna J. Hooper, of Solomon, Saltsman & Jamieson, as counsel for 7-Eleven, Inc., Carol Cribbs, and Charles Cribbs,

Respondent: Kerry K. Winters, as counsel for Department of Alcoholic Beverage Control.

OPINION

7-Eleven, Inc., Carol Cribbs, and Charles Cribbs, doing business as 7-Eleven Store #2237-22014, appeal from a decision of the Department of Alcoholic Beverage Control¹ suspending their license for 15 days (with 5 days stayed for a period of one year, provided no cause for discipline arises during that time) because their clerk sold an alcoholic beverage to a police minor decoy, in violation of Business and Professions Code section 25658, subdivision (a).

¹The decision of the Department, dated May 22, 2017, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 1, 1988. There is no record of prior discipline being sustained on the license.

On November 7, 2016, the Department filed an accusation against appellants charging that, on September 9, 2016, appellants' clerk sold an alcoholic beverage to 19-year-old Jose Chavez. Although not noted in the accusation, Chavez was working as a minor decoy for the Visalia Police Department (VPD) at the time.

Appellants filed and served on the Department a Special Notice of Defense pursuant to Government Code section 11506, as well as a Request for Discovery pursuant to Government Code section 11507.6, demanding, inter alia, the names and addresses of all witnesses. The Department responded by providing the address and phone number of the VPD, in lieu of the decoy's personal contact information. Thereafter, appellants filed a Motion to Compel Discovery. The motion was opposed by the Department, and it was denied by the administrative law judge (ALJ). In his decision, the ALJ found "that the Department had complied with its discovery obligation by providing contact information for the law enforcement agency that had used the decoy." (Findings of Fact, ¶ 1.)

At the administrative hearing held on March 14, 2017, documentary evidence was received and testimony concerning the sale was presented by Chavez (the decoy). Appellants presented no witnesses.

Testimony established that on the day of the operation, the decoy entered the licensed premises and went to the cooler where he selected a single can of Budweiser beer which he took to the counter. The decoy set the beer down and the clerk asked for his identification. The decoy handed the clerk his California driver's license, which

had a portrait orientation and contained a red stripe indicating: "AGE 21 IN 2018." (Exh. D-7.) The clerk took the license and looked at it, then appeared to scan the ID and enter something into the register. The clerk then completed the sale without asking any age-related questions. The decoy exited the premises, then subsequently re-entered with law enforcement officers to conduct a face-to-face identification of the clerk who sold him the beer. A photo of the decoy and clerk was later taken. (Exh. D-8.) These facts are not in dispute in this appeal.

On March 22, 2017, the ALJ submitted a proposed decision, sustaining the accusation and suspending the license for a period of 15 days—with 5 days stayed for one year, provided no further cause for discipline arises during that time. Thereafter, on March 30, 2017, the Department's Administrative Hearing Office sent a letter from its Chief ALJ to both appellants and Department counsel, inviting the submission of comments on the proposed decision and stating that the proposed decision and any comments submitted would be submitted to the Director of ABC in 14 days.

Appellants submitted comments to the Director, arguing that neither the Administrative Procedure Act (APA) nor the ABC Act authorize the Department to permit the parties in a disciplinary procedure to comment on a proposed decision, and that by requesting submission of these comments, the Department exceeded the authority granted to it by the APA. The Department did not submit comments.

On May 3, 2017, the Department adopted the proposed decision in its entirety, and on May 22, 2017, the Department issued its Certificate of Decision.

Appellants then filed a timely appeal contending the ALJ erred in denying appellants' motion to compel disclosure of the decoy's address.

DISCUSSION

Appellants contend that the ALJ abused his discretion by denying appellants' motion to compel disclosure of the decoy's personal contact information. They maintain the Department failed to comply with Government Code section 11507.6 when it provided only the address of the VPD (when it was in possession of the decoy's "actual" address) and that this constitutes a violation of their due process rights, thereby resulting in prejudice.

This issue has been raised and argued in innumerable cases before this Board, and the Board has consistently found that appellants are not entitled to the decoy's personal contact information. As the Board held in 1999:

Government Code §11507.6 entitles a party to an address for a witness. The statute does not say it must be a residential address. . . . We think any requirement that a decoy's home address be disclosed must be conditioned upon a showing that the address itself has a material connection to the issues, and not simply as a means of contacting the decoy.

(*In re Mauri* (1999) AB-7276, at p. 8.) We continue to affirm our holding in *Mauri*, and disagree with appellants' assertion that the case is "fatally flawed." (App.Op.Br. at p. 9.)

In *7-Eleven, Inc./Joe* (2016) AB-9544² the Board further 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, once again, and refer the parties to that case for an in-depth discussion of the Board's reasoning. Furthermore, we completely disagree with appellants' assertion at oral argument that we have changed our position since that decision. In that case we said:

In order to comply with the statute, the Department must supply

²Cert. den., *7-Eleven, Inc. et al v. ABC Appeals Bd.* (July 6, 2016) 2nd App. Dist. B275900.

"the names and addresses of witnesses." While the Penal Code protects the personal contact information of certain peace officers, it does not permit the Department to supply a sham address; the decoy must *actually be reachable* at the address provided. If a licensee establishes that it attempted to reach a decoy at the address provided by the Department,^(fn.) and the law enforcement agency at that address indicated it could not or would not forward the licensee's communications to the decoy, then the Department is in violation of the statute until it supplies a valid address, and the licensee may seek recourse through a motion to compel.

(*Id.* at pp. 11-12.) Here, there is no evidence that the VPD refused to forward any communications to the decoy. Rather, the record shows that appellants called the VPD records department and asked for the decoy, but were told the records department people did not know who that was. As counsel for the Department pointed out, had appellants asked to speak to the officers named in the police report—the only individuals at the VPD who had actual contact with the decoy—appellants would have been able to deliver their request to deliver a message to the decoy.

Appellants' argument that the discovery statutes in administrative proceedings are the same or equivalent to criminal discovery statutes—thereby mandating the discovery appellants seek—has been rejected previously by the court of appeals:

Petitioners' analogy to criminal cases is inapt. Generally, there is no due process right to prehearing discovery in administrative hearing cases, and particularly no constitutional right to take depositions. The scope of discovery in administrative hearings is governed by statute and the agency's discretion.

(*Cimarusti v. Superior Court* (2000) 79 Cal.App.4th 799, 808-809 [94 Cal.Rptr.2d 336].)

The Board must similarly reject this argument.

A due process argument, similar to that of appellants, was also rejected in

Cimarusti:

Petitioners' contention that they were denied due process is unpersuasive. . . . At the hearing, which will be conducted in accordance with the Administrative Procedure Act [citation], petitioners can call and examine

witnesses, introduce exhibits, cross-examine opposing witnesses on any relevant matter even if not covered on direct examination, impeach witnesses, and rebut evidence. [Citation.] The statutory prehearing discovery and hearing procedures are sufficient to satisfy petitioners' due process rights.

(*Id.* at p. 809.) Here, as in *Cimarusti*, appellants had the ability to call and examine witnesses, introduce exhibits, cross-examine opposing witnesses, impeach witnesses, and rebut evidence. This satisfies the due process requirements of the APA. (*Ibid.*)

Appellants allege the failure to provide the decoy's "actual" address meant they "were prejudiced by being unable to diligently investigate and prepare to test the Department's evidence and defend themselves at the hearing." (App.Op.Br. at p. 11.)

This contention is unsupported and speculative. The standard is as follows:

[T]he decisions of the Department should not be defeated by reason of "any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the [reviewing body] shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13.)

(*Reimel v. House* (1969) 268 Cal.App.2d 780, 787 [74 Cal.Rptr. 345].) "Under the standard established by Cal.Const., art. VI, § 13, an appellant bears the burden to show it is reasonably probable he or she would have received a more favorable result at trial had the error not occurred." (*Citizens for Open Government v. City of Lodi* (2012) 205 Cal.App.4th 296, 297 [140 Cal.Rptr.3d 459].) Appellants have not met their burden of establishing prejudice—*i.e.*, that possession of the decoy's home address would have resulted in a different, more favorable result at the administrative hearing. Furthermore, appellants have not demonstrated a compelling need for the decoy's personal contact information, nor demonstrated how the denial of their motion to compel constitutes an abuse of discretion.

Having had the Board's opinion on this issue affirmed by the Court of Appeals,³ albeit by way of an unpublished decision, we consider this issue moot until and unless we are instructed otherwise by a higher court.

ORDER

The decision of the Department is affirmed.⁴

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

³On November 22, 2017, the Second District Court of Appeals filed an unpublished decision affirming the Board's decision in *7-Eleven/Holmes* (2016) AB-9554 on this issue. Since unpublished decisions cannot be cited we are not permitted to quote the decision here, nor cite it as authority.

⁴This 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.

APPENDIX

**BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA**

**IN THE MATTER OF THE ACCUSATION
AGAINST:**

7-ELEVEN, INC, CAROL AND CHARLES CRIBBS
7-ELEVEN 2237 22014
518 S LOVERS LANE
VISALIA, CA 93292

OFF-SALE BEER AND WINE - LICENSE

Respondent(s)/Licensee(s)
Under the Alcoholic Beverage Control Act

FRESNO DISTRICT OFFICE

File: 20-214483

Reg: 16084902

CERTIFICATE OF DECISION

It is hereby certified that, having reviewed the findings of fact, determination of issues, and recommendation in the attached proposed decision, the Department of Alcoholic Beverage Control adopted said proposed decision as its decision in the case on May 3, 2017. Pursuant to Government Code section 11519, this decision shall become effective 30 days after it is delivered or mailed.

Any party may petition for reconsideration of this decision. Pursuant to Government Code section 11521(a), the Department's power to order reconsideration expires 30 days after the delivery or mailing of this decision, or if an earlier effective date is stated above, upon such earlier effective date of the decision.

Any appeal of this decision must be made in accordance with Business and Professions Code sections 23080-23089. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005, or mail your written appeal to the Alcoholic Beverage Control Appeals Board, 300 Capitol Mall, Suite 1245, Sacramento, CA 95814.

On or after July 3, 2017, a representative of the Department will contact you to arrange to pick-up the license certificate.

Sacramento, California

Dated: May 22, 2017.

RECEIVED

MAY 23 2017

Alcoholic Beverage Control
Office of Legal Services



Matthew D. Botting
General Counsel

**BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA**

IN THE MATTER OF THE ACCUSATION AGAINST:

7-Eleven, Inc., Carol and Charles Cribbs	}	File: 20-214483
dba 7-Eleven 2237 22014	}	
518 S. Lovers Lane	}	Reg.: 16084902
Visalia, California 93292	}	
	}	License Type: 20
Respondent	}	
	}	Page Count: 55
	}	
	}	Reporter:
	}	Monica January CSR # 13647
	}	Wood-Randall Reporting
	}	
<u>Off-Sale Beer and Wine License</u>	}	<u>PROPOSED DECISION</u>

Administrative Law Judge Alberto Roldan, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Visalia, California, on March 14, 2017.

Sean Klein, Attorney, represented the Department of Alcoholic Beverage Control (Department).

Melissa Gelbart, Attorney, represented Respondent 7-Eleven, Inc., and Carol and Charles Cribbs.

The Department seeks to discipline the Respondent's license on the grounds that, on or about September 9, 2016 the Respondent, through their agent or employee, Shannon Flaniken, sold, furnished, or gave alcoholic beverages to Jose Chavez, an individual under the age of 21 in violation of Business and Professions Code section 25658(a).¹ (Exhibit D-1.)

Oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the hearing. The matter was argued and submitted for decision on March 14, 2017.

¹ All statutory references are to the Business and Professions Code unless otherwise noted.

FINDINGS OF FACT

1. The Department filed the accusation on November 7, 2016. Subsequent to the filing of the accusation, Respondent sought additional discovery from the Department. Specifically, the Respondent sought the home address of the minor Decoy used in this case by the Department. The Department communicated that it was in compliance with discovery by having provided the law enforcement contact information of the agency that utilized the Decoy. The Respondent subsequently brought a motion to compel this discovery. After considering the Respondent's motion and the Department's opposition to the motion, an order denying the motion to compel discovery was issued on March 10, 2017 based on the finding that the Department had complied with its discovery obligation by providing contact information for the law enforcement agency that had used the decoy. (Exhibits D-3, D-4 and D-5)
2. On July 1, 1988 the Department issued a type 20, off-sale beer and wine license to the Respondent for the above-described location (the Licensed Premises).
3. There is no record of a *sustained* prior Departmental discipline against the Respondent's license. The Department presented evidence that an accusation was filed against the Respondent on April 15, 2005. The Department discipline that was imposed in that matter led to an appeal to the Alcoholic Beverage Appeals Board (Board). The Board remanded the matter to the Department for further proceedings to determine whether allegations of *ex parte* communications had impacted the fairness of the previous proceedings in light of the recent California Supreme Court decision in *Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Appeals Board* (2006) 40 Cal.4th 1 (*Quintanar*). Based on the lack of subsequent records in the matter and representations by the Department's counsel in this matter, it appears the Department elected not to pursue the case after the remand.
4. Jose Chavez (Chavez) was born on August 29, 1997 and was 19 years old at the time of the investigation on September 9, 2016. On that date, Chavez served as a minor decoy in an operation conducted by the Visalia Police Department (VPD) in conjunction with the Department at a series of locations.
5. Chavez appeared and testified at the hearing. On September 9, 2016 his appearance was as depicted in a photograph of him that was taken during the operation (Exhibit D-8) where he was wearing a black t-shirt with a Ventura Blvd. street sign image, blue jeans and black Nike sneakers. He had short, black hair combed to one side. He was clean shaven and had no visible tattoos or jewelry. Chavez was 5'7" and approximately 160 pounds at the time of the operation. His appearance at the hearing was essentially the same as his appearance on the date of the decoy operation.

6. On September 9, 2016 at about 10 p.m. Chavez entered the Licensed Premises in furtherance of the operation. He found the refrigerators with the beer selections and picked a single can of Budweiser beer, which he then took to the cashier. Chavez placed the beer on the counter next to the register and waited to be checked out. The beer was the only item Chavez presented for purchase.

7. A female clerk was working at that register. This clerk was the same person in the photo that was later taken of Chavez standing next to the clerk that served him. (Exhibit D-8) The clerk asked Chavez for identification as she began the transaction for the Budweiser beer. Chavez gave his California Driver's License (Exhibit D-7) to the clerk right after she asked for it. Chavez's license was the portrait type that had the red bar under the date of birth that specifically said he would not be 21 until 2018. The clerk took possession of and looked at the license after it was handed to her by Chavez.

8. She appeared to then scan the identification and punch digits on her register while holding the identification. Despite the information on the license, the clerk rang up the cost of the beer and returned the license. She completed the sale after Chavez gave her cash to pay for the can of Budweiser beer. Chavez was given change by the clerk along with the beer purchase after it was placed in a paper bag. He then exited the Licensed Premises with the can of Budweiser beer.

9. Chavez immediately went to the vehicle where the law enforcement officers were waiting and confirmed what had just occurred. Chavez then re-entered with the law enforcement officers. He continued to hold the Budweiser can. Once inside the Licensed Premises, Chavez stood with the officers next to him while the clerk was contacted. The officers were in tactical clothing but had their badges displayed. Chavez was asked by one of the officers about who sold him the beer. Reese pointed from approximately 4-6 feet away at the clerk who had sold the alcohol to him. Chavez simultaneously said out loud "she sold me the beer". She appeared to be aware of the identification because Chavez and the clerk's eyes met when he pointed to and identified her.

10. After the identification, Chavez posed for a picture standing directly next to the clerk while holding the can of Budweiser he had purchased from her. (Exhibit D-8)

11. Chavez became involved with the decoy program through the Visalia Police Department explorer program. At the time of this operation Chavez did not have any rank in the program. His training involved being told to truthfully answer age related questions and to provide his identification if asked for it. This sale occurred on the second date that Chavez had volunteered for the decoy program.

12. Chavez appeared his chronological age at the time of the decoy operation. Based on his overall appearance, i.e., his physical appearance, clothing, poise, demeanor, maturity, and mannerisms shown at the hearing, and his appearance and conduct in front of the clerk at the Licensed Premises on September 9, 2016, Chavez displayed the appearance which could generally be expected of a person less than 21 years of age during the interactions with the clerk. The clerk did not testify in this matter to explain her age related impressions of Chavez or why she sold Chavez alcohol after being given a driver's license that showed him to be 19 years of age.

13. Except as set forth in this decision, all other allegations in the accusation and all other contentions of the parties lack merit.

CONCLUSIONS OF LAW

1. Article XX, section 22 of the California Constitution and section 24200(a) provide that a license to sell alcoholic beverages may be suspended or revoked if continuation of the license would be contrary to public welfare or morals.

2. Section 24200(b) provides that a licensee's violation, or causing or permitting of a violation, of any penal provision of California law prohibiting or regulating the sale of alcoholic beverages is also a basis for the suspension or revocation of the license.

3. Section 25658(a) provides that every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any person under the age of 21 years is guilty of a misdemeanor.

4. Cause for suspension or revocation of the Respondent's license exists under Article XX, section 22 of the California State Constitution and sections 24200(a) and (b) on the basis that on September 9, 2016 the Respondent's clerk, inside the Licensed Premises, sold an alcoholic beverage to Jose Chavez, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 4-12.)

5. The Respondent argued that there was a failure of proof because the Department did not establish the name of the clerk in its evidence. In addition, the Respondent argued that the decoy operation at the Licensed Premises failed to comply with rule 141² and, therefore, the accusation should be dismissed pursuant to rule 141(c). Specifically, the Respondent argued that the appearance of Chavez failed to comply with rule 141(b)(2) because his short haircut made him appear that he was in the military or a law enforcement officer and his demeanor appeared older because of his explorer training.

² All rules referred to herein are contained in title 4 of the California Code of Regulations unless otherwise noted.

6. There is no credible evidence supporting the assertion by the Respondent that there was a failure to comply with the requirements of rule 141(b)(2). Neither the clerk nor any other witnesses for the Respondent testified regarding the impact of Chavez's demeanor on his appearance. It is also noted that persons as young as 17 years of age can enlist in the military so a "military" appearance alone cannot be relied upon to establish that a person is older than 21 years of age. Given the totality of the evidence presented by the Department credibly establishing compliance with rule 141(b)(2), the Respondent's unsupported assertions that compliance did not occur is found not credible.

7. Chavez testified in this matter and his appearance matched the appearance he presented to the clerk on the date of the operation. His appearance was consistent with a person under the age of 21. He presented identification to the clerk that clearly showed he was 19 years old. As previously noted, the clerk did not testify to establish whether there was anything in Chavez's manner or appearance that led her to reasonably conclude that he was over 21.

8. The remaining argument of the Respondent that there was a failure of proof by the Department because it did not establish the name of the clerk is also rejected. Section 25658(a) requires the Department to establish the following to support an accusation:

"Except as otherwise provided in subdivision (c), every person who sells, furnishes, gives, or causes to be sold, furnished, or given away any alcoholic beverage to any person under 21 years of age is guilty of a misdemeanor."

9. The evidence established that the individual who made the sale was a female store clerk of the Licensed Premises. Chavez also identified a photograph of the clerk in which she is clearly wearing a uniform. Her actions during the sale were clearly shown to be done in furtherance of the business of the Licensed Premises. Given this, the failure of the Department to establish the clerk's proper name was of no import once she was shown to be a "person" acting on behalf of the Respondent's business who had sold alcohol to Chavez despite the fact that he was only 19 years old.

PENALTY

The Department recommended that the Respondent's license be suspended for a period of 15 days which is the standard penalty for a violation without mitigation. The Respondent presented Exhibit D-2 to rebut an expected argument for mitigation by the Respondent. Given that the document cannot be weighed in aggravation or mitigation because it is not a record of sustained discipline, this finder of fact declines to give the document weight in its consideration.

The Respondent sought significant mitigation since the Licensed Premises had been in operation since 1988 without prior discipline. No evidence of established and enforced policies to prevent sales of alcoholic beverages to underage individuals was presented by the Respondent. While the long period of discipline free operation is an appropriate factor in mitigation, clear liability was established in this case and no other mitigating factors were presented. The Respondent has established no nexus between the long period of discipline free operation and sound practices to prevent such occurrences.

There appear to be no factors in aggravation applicable to this violation. The penalty recommended herein complies with rule 144.

ORDER

The Respondents' off-sale general license is hereby suspended for a period of 15 days, with execution of 5 days of the suspension stayed upon the condition that no subsequent final determination be made, after hearing or upon stipulation and waiver, that cause for disciplinary action occurred within one year from the effective date of this decision; that should such determination be made, the Director of the Department of Alcoholic Beverage Control may, in the Director's discretion and without further hearing, vacate this stay order and reimpose the stayed penalty; and that should no such determination be made, the stay shall become permanent.

Dated: March 22, 2017


Alberto Roldan
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By: 
Date: 5 / 3 / 17