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

AB-9556
File: 20-428020 Reg: 15082457

7-ELEVEN, INC., MUNINDERJIT SINGH DHILLON, and SHALINDER DHILLON,
dba 7-Eleven Store #2175-13832E
512 South Chapel Avenue, Alhambra, CA 91801,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: September 1, 2016
Los Angeles, CA

ISSUED SEPTEMBER 28, 2016

Appearances: *Appellants:* Stephen W. Solomon, Melissa H. Gelbart, and Michelangelo Tatone of Solomon Saltsman & Jamieson as counsel for appellants 7-Eleven, Inc., Muninderjit Singh Dhillon, and Shalinder Dhillon.
Respondent: Jacob L. Rambo, Jennifer M. Casey, and Jonathan Nguyen as counsel for the Department of Alcoholic Beverage Control.

OPINION

7-Eleven, Inc., Muninderjit Singh Dhillon, and Shalinder Dhillon, doing business as 7-Eleven Store #2175-13832E (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] suspending their license for twenty-five days because their clerk sold an alcoholic beverage to a Department minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on August 8, 2005. On May 18, 2015, the Department filed an accusation against appellants charging that, on February 19,

1. The decision of the Department, dated November 18, 2015, is set forth in the appendix.

2015, appellants' clerk, Bhupinder Jit Singh (the clerk), sold an alcoholic beverage to 19-year-old Hung Su. Although not noted in the accusation, Su was working as a minor decoy for the Department of Alcoholic Beverage Control at the time.

On June 5, 2015, appellants filed and served on the Department a Request for Discovery pursuant to Government Code section 11507.6 demanding, inter alia, the names and addresses of all witnesses. On June 15, 2015, appellants received a response providing the address of the Department's Monrovia District Office in lieu of the decoy's home address. On June 25, 2015, appellants sent a letter to the Department demanding that it furnish the decoy's contact information by June 29, 2015. On June 30, 2015, appellants received a response from the Department asserting that the contact information for the District Office was sufficient.

Later on June 30, appellants filed a Motion to Compel Discovery. On July 3, 2015, the Department responded and opposed the motion.

On July 15, 2015, the ALJ denied appellants' motion, arguing that the statute requires only an "address" and not necessarily a home address, and further, that this Board's decision in *Mauri Restaurant Group* (1999) AB-7276 was on point and mandated denial of the motion.

The bifurcated administrative hearing proceeded on August 18 and September 16, 2015. At the start of the August 18 hearing date, counsel for appellants requested that the hearing be videotaped. (RT, vol. I, at pp. 9-11.) The videographer had accompanied appellants' counsel to the hearing. (RT, vol. I, at p. 9.) Appellants argued that "[a] videographer can catch crucial elements of testimony that cannot be captured by the court reporter," including a witness' appearance, demeanor, mannerisms," or description of events. (RT, vol. I,

at pp. 9-10.) They paraphrased this Board's previous commentary on the issue: "[T]he Appeal's [*sic*] Board has noted in a footnote . . . that video recordings could be helpful in these types of cases for the Appeal's [*sic*] Board to accurately and fully review the record." (RT, vol. I, at p. 10, citing *Garfield Beach CVS, LLC/Longs Drug Stores Cal., LLC* (2014) AB-9178a, at p. 7, fn. 2.)

The Department responded both verbally and in a Memorandum of Points and Authorities.[2] It argued that section 11512(d) requires a stenographic reporter, and only allows for videorecording with the Department's consent. (RT, vol. I, at pp. 11-12.) Additionally, it argued that the videographer was not subject to the same training and certification as a stenographic reporter; that the Appeals Board could not exercise independent factfinding judgment based on a videotape; that the videotape could not properly be included in the official record; and that videotaping would be disruptive and might intimidate the decoy. (RT, vol. I, at pp. 12-13.)

Appellants countered that section 11512(d) does not apply to videotape. (RT, vol. I, at pp. 13-14.) They argued that, despite use of the broad term "electronically," the legislature intended the statute to apply only to audiorecordings. (RT, vol. I, at p. 14.) Additionally, appellants argued that the Appeals Board would not make independent determinations based on the videotape, but would simply "review the record on appeal." (RT, vol. I, at p. 14.) Finally, appellants argued that the recording would not be intrusive, and that the decoy, who was over 18, was participating in a public hearing. (RT, vol. I, at pp. 14-15.)

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2. The Department's Memorandum of Points and Authorities was marked as Exhibit 6, but was not entered into evidence.

The ALJ asked appellants for “binding precedent, statutory, a rule, case law, anything” that might authorize the videorecording despite the Department’s refusal to consent. (RT, vol. I, at p. 17.) Appellants were unable to provide any such authority. (RT, vol. I, at pp. 17-18.) Accordingly, the ALJ refused the request, and the administrative hearing proceeded with only a stenographic reporter. (RT, vol. I, at p. 19.)

Documentary evidence was received and testimony concerning the sale was presented by Su (the decoy), by Agent Danny Vergara of the Department of Alcoholic Beverage Control, and by co-appellant Muninderjit S. Dhillon.

The Department's decision determined that the violation charged was proved and no defense was established. The decision imposed a penalty of twenty-five days’ suspension, as this was appellants’ second sale-to-minor violation in sixteen months.

Appellants then filed this appeal contending (1) the ALJ abused his discretion by denying appellants’ motion to compel release of the decoy’s contact information; (2) the Department failed to comply with Government Code section 11507.6 when it provided the address of its Monrovia District Office, rather than the decoy’s home address, in response to appellants’ discovery request; (3) the ALJ erred in denying appellants’ request to videotape the administrative hearing; (4) the ALJ failed to explain the basis for denying appellants’ request to videotape the administrative hearing in the decision below; and (5) the ALJ abused his discretion by incorrectly stating that appellants did not request a mitigated penalty, and, as a result, by declining mitigation. The first and second issues will be addressed together, as will the third and fourth issues.

DISCUSSION

I

Appellants contend the Department failed to comply with section 11507.6 of the Government Code when it provided the address of its Monrovia District Office, rather than the decoy's home address, during pre-hearing discovery. (App.Br. at pp. 11-14.)

Appellants further contend the ALJ abused his discretion by denying their motion to compel disclosure of the minor decoy's home address. (App.Br. at pp. 10-11.) They accurately observe that this Board has held that the burden of proving an affirmative defense falls on the party raising it, and that "[p]re-hearing discovery is necessary to have a meaningful chance to meet that burden." (App.Br. at p. 11.) Appellants insist the Department's refusal to provide the decoy's address, coupled with the ALJ's denial of their motion to compel, prejudiced them and deprived them of the ability to meaningfully defend themselves. (App.Br. at pp. 11, 13.)

This Board has recently addressed a number of cases raising this purely legal issue. In *7-Eleven, Inc./Joe* (2016) AB-9544, we held that the decoy's personal address is protected under section 832.7 of the Penal Code. (*Id.* at pp. 6-10.)

At oral argument, however, appellants strenuously objected to the *Joe* decision and to our application of Penal Code section 830.6(c) to minor decoys. According to appellants, section 830 of the Penal Code defines a "peace officer" and limits application of subsequent provisions, including section 830.6(c), to individuals who meet "all standards imposed by law on a peace officer"—including, for example, background checks and firearms training. Appellants argue it is absurd extend the definition to minor decoys, who undergo virtually none of the training or certification required of true peace officers. To underscore the alleged

absurdity, appellants insist that the Board's reading of section 830 would allow minor decoys to carry firearms or respond to emergency calls.

Appellants misread both this Board's *Joe* decision and the statutes in question. First, the language of section 830 in no way precludes the application of section 830.6(c) to minor decoys assisting in alcoholic beverage operations. The first clause of section 830 uses inclusive language: "*Any* person who comes within the provisions of this chapter and who otherwise meets all standards imposed by law on a peace officer is a peace officer . . . ." (Pen. Code, § 830, emphasis added.) Thus, anyone who falls under a provision of the chapter *and* has undergone the training and certification cited by appellants is necessarily included in the definition of "peace officer" by operation of this clause—but nothing in the clause *excludes* others.

It is only in the second clause that we encounter exclusive language: ". . . and notwithstanding any other provision of law, *no person other than those designated in this chapter* is a peace officer." (Pen. Code, § 830, emphasis added.) This second restrictive clause makes no reference to training, certification, or other "standards imposed by law on a peace officer"; it refers only to the statutes in that chapter of the Penal Code. If an individual falls under one of these provisions, she is a "peace officer" for purposes of the applicable statute, regardless of training or certification; anyone else is necessarily excluded.

Appellants have, in effect, put the cart before the horse. It is the subsequent provisions that supply the manifold definitions of "peace officer"; it is not, as appellants argue, an implicit definition of "peace officer" that limits application of the subsequent provisions.

Included in those provisions is section 830.6(c), which formed the basis of our decision in *Joe*. The statute provides, “[w]henever any person is summoned to the aid of any uniformed peace officer, the summoned person is vested with the powers of a peace officer that are expressly delegated to him or her by the summoning officer or that are otherwise reasonably necessary to properly assist the officer." (Pen. Code, § 830.6(c).) The language expressly restricts the “powers of peace officer” to those “expressly delegated . . . by the summoning officer.” The grant of authority is quite limited and entrusted to the judgment of the summoning officer. Contrary to appellants’ claim, it does not permit an untrained minor decoy to wield a loaded sidearm or careen an ambulance willy-nilly through the city streets.

In *Joe*, we cited in a parenthetical to *Forro Precision*, a well-reasoned Ninth Circuit case applying California law to an analogous set of facts. (*7-Eleven, Inc./Joe*, *supra*, at p. 10, citing *Forro Precision, Inc. v. IBM* (9th Cir. 1982) 673 F.2d 1045, 1054 [1982 U.S. App. LEXIS 20438].) In that case, police obtained a valid search warrant for Forro Precision’s business premises. (*Forro Precision*, *supra*, at p. 1054.) The warrant specified technical documents. (*Ibid*.) However, the technical documents, which related to computer systems, were beyond the understanding of a layperson—including police officers. (*Ibid.*) The police therefore enlisted the assistance of IBM employees in executing the search warrant. (*Ibid.*) Police maintained supervision over the assisting IBM employees at all times. (*Ibid.*)

The court concluded “IBM’s actions in assisting the police in making the search were privileged and could not serve as a basis for civil liability.” (*Id.* at p. 1053.) In interpreting Penal Code 830.6(b)—redesignated as the current subdivision (c) pursuant to a 1996 amendment—the court found,

> California allows police officers to request the aid of citizens in executing search warrants. People v. Turner, 249 Cal.App.2d 909, 927, 57 Cal.Rptr. 854, 865, cert denied, 389 U.S. 963, 88 S. Ct. 348, 19 L. Ed. 2d 375 (1967); Cal. Penal Code § 1530 (West 1970). The California legislature has provided that a citizen aiding an officer has such powers as the supervising officer may delegate. Cal. Penal Code § 830.6(b). (West Supp. 1980). The officer himself is immune from suit arising out of the execution of a valid warrant. Vallindras v. Massachusetts Bonding & Ins. Co., 42 Cal.2d 149, 265 P.2d 907, 910-11 (1954); Cal.Civ.Proc. Code § 262.1 (West 1954). The California legislature has not, however, expressly provided for such immunity for the citizen assisting a search.
>
> We think that California Penal Code section 830.6(b) must be understood as according a citizen immunity that derives from the officer's own immunity.

(*Id.* at p. 1054.) The court noted the importance of encouraging citizens to aid police: "A citizen should not have to assess his potential civil liability when presented with a reasonable police request for assistance. Otherwise, citizen cooperation might be deterred." (*Ibid.*)

No court has interpreted section 830.6(c) with reference to minor decoys, or with regard to a summoned person's address or other personal information. We find the Ninth Circuit's reasoning persuasive, however. A minor should not have to face disclosure of her home address to the target of a decoy buy operation. To hold otherwise might discourage minor participation in decoy operations.

We therefore reiterate our holding in *Joe*. (See *7-Eleven, Inc./Joe*, *supra*, at p. 10.) The minor qualifies as a peace officer, by delegation of limited powers, under section 830.6(c). She is protected from disclosure of her personal information, including home address, by section 832.7 of the Penal Code. This protection derives from the protections afforded the delegating officer—that is, where the officer delegates power, he also delegates relevant legal protections.

This holding merely protects the decoy's personal information, however. It does not excuse the Department from providing a valid address. In *7-Eleven, Inc./Nagra* (2016) AB-9551, we emphasized that the decoy must *actually be reachable* at the address provided. (*Id.* at p. 5, citing *7-Eleven, Inc./Joe*, *supra*, at p. 11.) We noted that "the Department is accountable for the validity of the addresses it provides." (*Id.* at p. 7.) "It is not enough to provide a Department District Office address if the District Office is unable or unwilling to forward communications to the decoy." (*Id.* at p. 6.) This Board will offer relief in the form of reversal if "we are presented with a well-established record showing that a decoy was legitimately unreachable at the address the Department provided during discovery, and the Department took no steps to provide an address at which the decoy could actually be reached." (*Id.* at p. 8.)

In this case, there is nothing to suggest that appellants attempted to contact the decoy through the Monrovia District Office. They make no such allegation in their brief, and the record includes no such correspondence. If pre-hearing contact with the decoy was as essential to appellants' defense as they claim, then we cannot comprehend their failure to even *attempt* contact with the decoy through the District Office. We see no cause to offer relief.

II

Appellants contend that the ALJ erred in denying their request to videotape the administrative hearing. They apply, by analogy, the law and policy surrounding videotaped depositions, and cite the California Supreme Court's decision in *Emerson Electronics* as support for their assertion that videotape is "as reliable as, or even more advantageous than, traditional means of recording" since, among other things, it captures gestures, demeanor, and

nonverbal responses, and allows a witness to act out events. (App.Br. at p. 16, citing *Emerson Electronics Co. v. Superior Ct.* (1997) 16 Cal.4th 1101, 1110, fn. 3 [68 Cal.Rptr.2d 883].)

Appellants also direct this Board to uncited legislative history, which, they contend, shows that "the word 'electronically' refers to audio recordings and not video recordings, and therefore" permits videorecording without consent of the opposing party. (App.Br. at p. 17.)

Moreover, appellants insist they provided good cause to videotape the hearing, but the ALJ nevertheless denied the request without explaining his reasons for doing so. (App.Br. at p. 19.)

Section 11512(d) of the Government Code dictates reporting procedures for administrative hearings: "The proceedings at the hearing shall be reported by a stenographic reporter. However, upon the consent of all the parties, the proceedings may be reported electronically."

This Board has recently received a slew of briefs premised on the same interpretation of section 11512(d)—specifically, that the word "electronically" was intended by the legislature to encompass only audiorecordings, and that a videorecorded transcript may be allowed, even absent the opposing party's consent, provided it does not *replace* the stenographic transcript.

In the earliest of these appeals, this Board articulated its support for the notion of videorecorded transcripts generally, but nevertheless rejected appellants' strained interpretation of the statute:

> According to the plain language of the statute, the consent of both parties is required before an administrative hearing may be reported by videorecording. Videorecording—along with audiorecording and all other recording methods that invariably depend on electricity—fall under the broad term "electronically." Because consent could not be obtained, denial of appellants' request was proper as a matter of law.

(*7-Eleven, Inc./Arman Corp.* (2016) AB-9535, at p. 8.) The law has not changed, and the facts of this case are, for purposes of this issue, indistinguishable. We therefore repeat our conclusion that "we cannot find error in the ALJ's refusal to allow the production of a video transcript, particularly where the videographer is paid by one party, and the other party has unequivocally exercised its statutory right to decline." (*Id.* at p. 21.)

Unless the legislature modifies section 11512(d) or a higher court shines a brighter light on its meaning, we consider this legal issue duly resolved.

III

Appellants contend that the ALJ abused his discretion by incorrectly stating they did not recommend a mitigated penalty, when in fact they recommended a penalty of less than twenty-five days' suspension. According to appellants, this error "caused" the ALJ to not mitigate the penalty despite preventative measures enacted after the violation. (App.Br. at pp. 20-22.)

The Appeals Board may examine the issue of an excessive penalty if it is raised by an appellant. (*Joseph's of Cal. v. Alcoholic Bev. Control Appeals Bd.* (1971) 19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183].) However, it will not disturb the penalty order absent an abuse of discretion. (*Martin v. Alcoholic Bev. Control Appeals Bd.* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) If the penalty imposed is reasonable, the Board must uphold it, even if another penalty would be equally, or even more, reasonable. "If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within the area of its discretion." (*Harris v. Alcoholic Bev. Control Appeals Bd.* (1965) 62 Cal.2d 589, 594 [43 Cal.Rptr. 633].)

Department rule 144, which sets forth the Department's penalty guidelines, provides that "higher or lower penalties . . . *may* be recommended based on the facts of individual cases where generally supported by aggravating or mitigating circumstances." (Cal. Code Regs., tit. 4, § 144, emphasis added.) For a second sale-to-minor violation within thirty-six months, rule 144 recommends a penalty of twenty-five days' suspension. (Penalty Guidelines, Cal. Code Regs., tit. 4, § 144.)

The ALJ made the following factual findings regarding the preventative measures appellants implemented following the present violation:

> After learning of the sale, [co-licensee Muninderjit Dhillon] eliminated the visual ID button from the register. He met with all of his employees and emphasized the need to make sure that all purchasers of alcoholic beverages were old enough to do so. He also had all employees undergo retraining using the Come of Age computer module. He and his wife, meanwhile, attended the Department's LEAD training. He substantially increased the number of visits by mystery shoppers. Finally, he added new signs throughout the Licensed Premises warning that ID will be checked in connection with each sale of alcohol. (Exhibit A).

(Findings of Fact, ¶ 8.) Appellants do not challenge these findings. We therefore conclude these findings reflect, completely and accurately, the measures appellants have taken to prevent additional violations. Moreover, their inclusion in the findings of fact indicates that the ALJ acknowledged and considered these measures.

During closing argument, counsel for appellants described these measures and argued in favor of mitigation:

> [I]f you Honor is to sustain the Accusation, Respondents do contend that there is [*sic*] mitigating factors to be considered. We heard from one of the co-licensees, Mr. Dhillon, today, and he testified to approximately six things that have been done since this sale happened in February of 2015 to make sure that this does not happen again and that he as a co-licensee does, in fact, take the sale of alcohol seriously.

> [¶ . . . ¶]
>
> So for those reasons, Respondents would contend that there is [*sic*] mitigating factors to look at and a mitigated penalty of less than the 25-day suspension is warranted.

(RT, vol. II, at pp. 21-22.) Notably, appellants did not recommend any specific alternate penalty; they only recommended something *less* than the twenty-five days recommended by the penalty guidelines for a second sale-to-minor violation.

After concluding that cause for discipline was established, the ALJ assigned a penalty of twenty-five days' suspension:

> The Department requested that the Respondents' license be suspended for a period of 25 days on the basis that the violation at issue here is their second sale of alcohol to a minor violation in 16 months. The Respondents did not recommend a penalty in the event that the accusation were sustained, although they noted that the Respondents had made a number of changes in response to this violation. The penalty recommended herein complies with rule 144.

The ALJ's penalty assignment reinforces the conclusion that he acknowledged and considered the preventative measures described by appellants. Moreover, there is no question that a twenty-five day suspension is well within the ALJ's discretion; it is, in fact, the recommended penalty for a second sale-to-minor violation within thirty-six months, and appellants' two sale-to-minor violations took place only sixteen months apart. (See Penalty Guidelines, Cal. Code Regs., tit. 4, § 144.) There is no abuse of discretion in the penalty itself.

Appellants, however, argue that they did in fact recommend a mitigated penalty, and that the ALJ's failure to acknowledge that recommended penalty "caused" him to refuse mitigation, and thus amounted to an abuse of discretion. (App.Br. at p. 20.) They write:

> The ALJ's decision to suspend the license without mitigation on the mistaken belief that Appellants did not recommend a mitigation penalty was an abuse of discretion. Appellants presented uncontroverted evidence of the

> mitigating factors that were undertaken. In addition, Appellants recommended that if the accusation were sustained, that the penalty be mitigated to a period less than the 25 day suspension sought by the Department. Appellants thus properly established and recommended mitigation of the penalty.

(App.Br. at p. 22.)

Appellants' argument is unpersuasive for two reasons. First, the ALJ's statement was objectively correct. Appellants did not recommend a penalty; they only recommended that the penalty be "less than the 25 day suspension"—that is, that the penalty be mitigated to some undefined extent. "Less than" could mean anything from a few seconds less to no penalty at all. The ALJ's statement is therefore accurate; appellants did not in fact recommend a penalty, but instead only recommended mitigation generally.

Second, even if appellants had made a specific penalty recommendation, the ALJ was not required to accept it. Mitigation is not a matter of proof. It is a matter of Department discretion, and can be granted or refused regardless of whether an appellant raises the issue or advocates a specific penalty. Here, the penalty was well within both the guidelines and the ALJ's discretion.

We wish to highlight a point that seems lost on appellants. It was not their failure to recommend a specific penalty that led the ALJ to impose a twenty-five day suspension; it was the undisputed fact that they sold alcohol to minors twice within sixteen months. Under such circumstances, there was no abuse of discretion in refusing mitigation.

ORDER

The decision of the Department is affirmed.[3]

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
PETER J. RODDY, 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.