

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

AB-9585

File: 21-517745 Reg: 16083537

7-ELEVEN, INC. and SUSAN E. WILSON,
dba 7-Eleven Store #2112-34637
150 West Vista Chino, Palm Springs, CA 92262,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: D. Huebel

Appeals Board Hearing: August 3, 2017
Los Angeles, CA

ISSUED AUGUST 17, 2017

Appearances: *Appellants:* Melissa H. Gelbart and Donna J. Hooper, of Solomon Saltsman & Jamieson, as counsel for 7-Eleven, Inc. and Susan E. Wilson.
Respondent: John P. Newton as counsel for the Department of Alcoholic Beverage Control.

OPINION

7-Eleven, Inc. and Susan E. Wilson, doing business as 7-Eleven Store #2112-34637 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ suspending their license for 15 days because their 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 May 20, 2016, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on August 29, 2012. On March 11, 2016, the Department filed an accusation against appellants charging that, on September 15, 2015, appellants' clerk, Maria Estephaina Luis (the clerk), sold an alcoholic beverage to 19-year-old Melquiades Felix Garcia Madera. Although not noted in the accusation, Garcia was working as a minor decoy in a joint operation between the Department of Alcoholic Beverage Control and the Palm Springs Police Department at the time.

On January 26, 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 January 29, 2016, the Department responded by providing the address of the Palm Springs Police Department in lieu of the decoy's home address. On February 3, 2016, appellants sent a letter to the Department demanding it furnish the decoy's contact information by February 12, 2016. On February 9, the Department responded and asserted that the contact information for the Palm Springs Police Department was sufficient.

On February 16, 2016, appellants filed a Motion to Compel Discovery, and on February 22, the Department responded and opposed the motion. On February 25, 2016, Chief ALJ John W. Lewis issued an order denying appellants' Motion to Compel.

The administrative hearing proceeded on March 17, 2016. Documentary evidence was received and testimony concerning the sale was presented by Garcia (the decoy) and by Officer Jose Arellano of the Palm Springs Police Department. Appellants presented no witnesses.

Testimony established that on the date of the operation, Officer Arellano entered the licensed premises, and the decoy entered shortly thereafter. The decoy went to the alcoholic beverage cooler and selected a six-pack of Bud Light beer bottles. Beer is an alcoholic beverage. The decoy took the six-pack of beer to the front sales counter for purchase and stood in line. There was one person in line in front of the decoy. There is no evidence of any other customers standing in line or in the store. There was one other female clerk at the counter who was not attending to any customers.

At the counter, the decoy set the beer down. The clerk scanned the beer and asked the decoy for his identification. The decoy handed his valid California driver's license to the clerk, who looked at it briefly and handed it back to the decoy. The decoy's California driver's license has a vertical orientation, shows his correct date of birth, and includes a red stripe reading "AGE 21 in 2016." The clerk handed the driver's license back to the decoy and told him the cost of the beer. The decoy paid the clerk, who then gave the decoy some change. The clerk did not ask the decoy any age-related questions. The clerk did not swipe the driver's license into the scanning device at the register. There is no evidence the decoy spoke to the clerk. The decoy then exited the store with the bagged six-pack of Bud Light beer.

Officer Arellano was inside the store posing as a customer the entire time and witnessed these events with a clear unobstructed view. Arellano and the decoy did not acknowledge or communicate with each other while in the licensed premises. Arellano exited the store soon after the decoy.

Officer Arellano reentered the licensed premises with the decoy and a Department agent. All three approached the clerk at the counter. Officer Arellano

contacted the clerk, identified himself as an officer, and explained the violation to the clerk. He asked the clerk to walk around the counter to join them on the customer side of the counter, which the clerk did.

Officer Arellano asked the clerk and the decoy to face each other. Arellano asked the clerk if she had sold alcohol to the decoy, pointing at the decoy. The clerk looked at the decoy and looked back at Arellano and acknowledged that she had. Arellano asked the decoy if the clerk was the person who sold alcohol to him. The decoy looked at the clerk, nodded his head yes, and said "yes, it was her." The decoy and the clerk were standing five feet apart, facing and looking at each other, at the time of this identification. A photo of the clerk and the decoy was taken after the face-to-face identification.

The clerk was issued a citation after the face-to-face identification. The clerk did not appear and did not testify at the hearing. There is no evidence the clerk was distracted or that anyone interfered during the sales transaction or the face-to-face identification.

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

On April 14, 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, Apr. 14, 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 April 29, 2016²—fifteen days after the date of the Comment Letter—counsel for appellants submitted "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.

Appellants then filed this appeal contending (1) the ALJ abused her discretion by denying appellants' motion to compel the decoy's home address, and (2) the

2. Appellants' comments were received by the Department the following Monday, May 3, 2016.

Department's comment procedure constitutes an underground regulation, violates the APA, and invites illegal ex parte communications.

DISCUSSION

I

Appellants contend the Department failed to comply with section 11507.6 of the Government Code when it provided the address of the Palm Springs Police Department, rather than the decoy's address as listed on his California driver's license, during pre-hearing discovery. (App.Br., at pp. 6-7.)

Appellants further contend the ALJ abused her discretion by denying appellants' motion to compel the decoy's address. (*Id.* at p. 6.)

Appellants argue the reasoning employed by this Board in *Mauri Restaurant Group* is "fatally flawed." (*Id.* at p. 7.) However, they also reject this Board's later, more detailed rulings, which concluded that minor decoys qualify as "peace officers" whose private information is protected under Penal Code section 832.7. (*Id.* at pp. 8-9; see also *7-Eleven, Inc./Joe* (2016) AB-9544 [holding that the minor decoy qualifies for peace officer protections by operation of Penal Code § 830.6(c)].)

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

Appellants counter the reasoning of that case by arguing that "minor decoys are never identified as peace officers in the statutory scheme that identifies the class of persons whose personnel records are made confidential." (App.Br., at p. 8.) Moreover, appellants contend that Penal Code section 830.6(c) does not protect the decoy's home

address because that section "does not deem a person a 'peace officer,' but instead only temporarily grants that person limited powers of a peace officer." (*Ibid.*) Appellants argue that *only* individuals who are "actually deemed peace officers . . . may enjoy the protection of their contact information from discovery pursuant to" section 832.7 of the Penal Code. (*Ibid.*)

Appellants overlook case law extending, by operation of Penal Code section 830.6(c), various peace officer protections to individuals or organizations summoned to the aid of law enforcement. In *7-Eleven, Inc./Joe*, we cited as persuasive authority the Ninth Circuit's decision in *Forro Precision, Inc.*, which held that the provision "must be understood as according a citizen immunity that derives from the officer's own immunity." (*Forro Precision v. Intl. Business Machines Corp.* (9th Cir. 1982) 673 F.2d 1045, 1054 [interpreting Pen. Code, § 830.6(b), later renumbered as subdivision (c)].) *Forro Precision* relies on two California cases, both of which grant similar civil immunity to parties assisting law enforcement. (See *Forro Precision, supra*, at p. 1054, citing *Peterson v. Robison* (1954) 43 Cal.2d 690, 697 [277 P.2d 19] [private citizen not subject to action for false arrest when arrest made at peace officer's request] and *Sokol v. Public Utilities Com.* (1966) 65 Cal.2d 247 [53 Cal.Rptr. 673] [public utility not civilly liable for disconnecting plaintiff's phone upon notice that it was used for illegal purposes].)

Regrettably, there is no case law discussing whether the protections afforded a peace officer's *contact information* are extended to individuals summoned to the peace officer's assistance. However, immunity from civil suit is a significant protection—it effectively eliminates a civil recovery for an injured plaintiff. If the courts have seen fit to

extend peace officers' civil immunity to individuals summoned under section 830.6, we believe they would also extend the lesser protections of section 832.7 to those individuals as well—particularly where, as here, those protections help facilitate decoy sting operations by ensuring decoy volunteers are not subjected to unwarranted disclosure of personal information.

Finally, appellants neither establish nor allege that they attempted to contact the decoy through the Palm Springs Police Department. Appellants have shown no cause to believe the decoy was unreachable at that address. Provision of the Palm Springs Police Department address was therefore proper.

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. (App.Br., at pp. 9-21.)

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. 11-24.)

Furthermore, we find that the sole comment, submitted by appellant, had no effect on the outcome of the case, and therefore, that the comment procedure did not materially affect appellant's 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." (*Gupta, supra*, at p. 29.)

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.