

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

AB-9605

File: 20-484814 Reg: 16083894

7-ELEVEN, INC., JASVINDER KAUR VIRK, and MUNINDER SINGH VIRK,
dba 7-Eleven Store #2133-18828
1017 North Broadway, Santa Maria, CA 93454-3133,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: September 7, 2017
San Diego, CA

ISSUED SEPTEMBER 29, 2017

Appearances: *Appellants:* Donna J. Hooper, of Solomon Saltsman & Jamieson, as counsel for 7-Eleven, Inc., Jasvinder Kaur Virk, and Muninder Singh Virk.
Respondent: Jonathan Nguyen as counsel for the Department of Alcoholic Beverage Control.

OPINION

7-Eleven, Inc., Jasvinder Kaur Virk, and Muninder Singh Virk, doing business as 7-Eleven Store #2133-18828 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ suspending their license for 25 days² 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 August 4, 2016, is set forth in the appendix.

2. The penalty in this case takes into account the fact that this is appellants' second sale-to-minor violation within two years. (Decision, Penalty.)

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on January 26, 2010. On March 4, 2016, the Department filed an accusation against appellants charging that, on September 4, 2015, appellants' clerk, Sabrina Hernandez (the clerk), sold an alcoholic beverage to 18-year-old Ruth Lopez. Although not noted in the accusation, Lopez and a second decoy, Dulce G.,³ were working as minor decoys for the Santa Maria Police Department at the time.⁴

On March 21, 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 April 18, 2016, the Department responded by providing the address of the Santa Maria Police Department in lieu of the decoy's home address. On April 29, 2016, appellants sent a letter to the Department demanding it furnish the decoy's contact information by May 2, 2016.

On May 3, 2016, appellants filed a Motion to Compel Discovery, and on May 11, 2016, the Department responded and opposed the motion. On May 17, 2016, ALJ Matthew G. Ainley issued an order denying appellants' motion to compel.

The administrative hearing proceeded on May 24, 2016. Documentary evidence was received and testimony concerning the sale was presented by Lopez and Dulce G. (the decoys); by Santa Maria Police Officers William Jackson and Salvador Guerra, Jr.; and by appellant Muninder Virk.

3. Dulce G. was 16 years old on the date of the decoy operation. Her surname is therefore withheld.

4. Appellants do not raise the presence of Dulce G., the second decoy, as support for any defense to the Department decision. (See generally App.Br.)

Testimony established that on the date of the operation, the decoys entered the licensed premises. Officer Guerra entered shortly behind them. The decoys went to the coolers, where decoy Lopez selected a six-pack of Bud Light beer. Lopez carried the beer to the front counter and set it down.

The clerk asked decoy Lopez for her identification. Lopez handed her California driver's license to the clerk, who looked at it for a moment. The clerk handed the identification back to Lopez without asking any questions. Lopez paid and the clerk gave her some change. Lopez picked up the beer and exited with decoy Dulce G.

Decoy Dulce G. stood next to decoy Lopez, but slightly father back from the counter, for the duration of the transaction. Dulce did not purchase anything and did not interact with the clerk in any way. The clerk did not ask Dulce for her identification.

Officer Guerra reentered the licensed premises with other officers. He contacted the clerk and explained the violation. Decoy Lopez was brought back into the licensed premises, while decoy Dulce G. remained outside. On the customer side of the counter, one of the officers asked Lopez if clerk Hernandez was the one who sold her the beer. Lopez said that she was and pointed to the clerk. Lopez and the clerk were between three and seven feet apart at the time, facing each other. The clerk was not otherwise engaged at the time of the identification. A photo of the two of them was taken, after which Lopez exited. The clerk was then cited.

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

On June 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, Jun. 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 July 7, 2016, 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 his discretion by denying appellants' motion to compel the decoy's home address, and (2) the Department's comment procedure constitutes an underground regulation, violates the APA, and encourages 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 Santa Maria Police Department, rather than the decoy's home address as listed on her California driver's license, during pre-hearing discovery. (App.Br., at pp. 4-5.)

Appellants argue the reasoning employed by this Board in *Mauri Restaurant Group* is "fatally flawed." (*Id.* at p. 5.) 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. 6-7; 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. 9.) 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 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.⁵

Finally, appellants neither establish nor allege that they attempted to contact the decoy through the Santa Maria Police Department. Appellants have shown no cause to believe the decoy was unreachable at that address. Provision of the Santa Maria 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. 7-30.)

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.)

5. In their closing brief, appellants argue the court of appeal's holding in *Reid v. Superior Court* should apply by analogy. (App.Cl.Br., at pp. 3-5, citing *Reid v. Superior Ct.* (1997) 55 Cal.App.4th 1326 [64 Cal.Rptr.2d 714].) This argument was omitted from appellants' opening brief, thus depriving the Department of the opportunity to respond to it in writing. (See generally App.Br.) We therefore disregard appellant's *Reid* argument in this decision.

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." (*Ibid.*)

ORDER

The decision of the Department is affirmed.⁶

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

6. 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.