

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

AB-9606

File: 20-510793 Reg: 16083742

7-ELEVEN, INC. and PAM AND JAS, INC.,
dba 7-Eleven Store #33552B
41260 Murrieta Hot Springs Road, Murrieta, CA 92562,
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

**CORRECTED AUGUST 22, 2017
ISSUED AUGUST 17, 2017**

Appearances: *Appellants:* Melissa H. Gelbart, and Donna J. Hooper, of Solomon Saltsman & Jamieson, as counsel for 7-Eleven, Inc. and Pam and Jas, Inc.
Respondent: Jennifer M. Casey as counsel for the Department of Alcoholic Beverage Control.

OPINION

7-Eleven, Inc./Pam and Jas, Inc., doing business as 7-Eleven Store #33552B (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ suspending their license for 25 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 23, 2016, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on May 4, 2012. On February 9, 2016, the Department filed an accusation against appellants charging that, on December 16, 2015, appellants' clerk, Mahendrabhai Dhurabhai Patel (the clerk), sold an alcoholic beverage to 18-year-old Jessi Caitlin Lovejoy. Although not noted in the accusation, Lovejoy was working as a minor decoy in a joint operation between the Department of Alcoholic Beverage Control and the Murrieta Police Department at the time.

On February 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 March 28, 2016, the Department responded by providing the address of the Murrieta Police Department in lieu of the decoy's home address. On April 7, 2016, appellants sent a letter to the Department demanding it furnish the decoy's contact information by April 12, 2016. On April 14, 2016, the Department responded and asserted that the contact information for the Murrieta Police Department was sufficient.

On April 15, 2016, appellants filed a Motion to Compel Discovery, and on April 20, the Department responded and opposed the motion. On May 4, 2016, ALJ Matthew G. Ainley issued an order denying appellants' motion to compel.

The administrative hearing proceeded on June 21, 2016. Documentary evidence was received and testimony concerning the sale was presented by Lovejoy (the decoy) and by Agent Vincent Rock of the Department of Alcoholic Beverage Control. Appellants presented no witnesses.

Testimony established that on the date of the operation, Agent Rock entered the licensed premises with Detective Chivington of the Murrieta Police Department Special Enforcement Team. The decoy entered shortly thereafter. The decoy went to the alcoholic beverage cooler and selected a 25-ounce can of Bud Light beer. Beer is an alcoholic beverage. The decoy took the can of beer to the front sales counter for purchase and stood in line. There were some customers in front of the decoy. There was a patron standing behind the decoy. Behind that patron stood Agent Rock and Detective Chivington, the latter of whom stood alongside Agent Rock. There were two male clerks working behind the register.

As the decoy faced the counter, she approached the male clerk at the left register. The decoy set the Bud Light beer can down on the counter. The clerk greeted the decoy, saying "Hello, how are you?" The decoy replied, "Good, how are you?" The clerk scanned the beer and asked the decoy for her identification. The decoy handed her valid California driver's license to the clerk, who looked at it for three seconds and handed it back to the decoy. The decoy's California driver's license has a vertical orientation, shows her correct date of birth, and includes a red stripe reading "AGE 21 in 2018" as well as a blue stripe reading "AGE 18 in 2015." The clerk told the decoy the cost of the beer. The decoy paid the clerk, who then gave the decoy some change and bagged the beer. The clerk did not ask the decoy any age-related questions or questions about her identification. The decoy then exited the store with the bagged Bud Light beer can and change.

Agent Rock was inside the licensed premises posing as a customer during this entire time and witnessed these events with a clear, unobstructed view. The decoy did

not communicate with Agent Rock or Detective Chivington while in the licensed premises. Agent Rock exited the store soon after the decoy.

Agent Rock reentered the licensed premises with Agent Mammen, both of whom approached the clerk, who was standing behind the sales counter. Agent Rock made contact with the clerk, identified himself as an officer, and explained the violation to the clerk.

The decoy reentered the store with Detective Pitteti from the Murrieta Police Department Special Enforcement Team. Agent Rock summoned the decoy to join him on the customer side of the counter, which she did. The clerk remained behind the counter and directly across from Agent Rock. The decoy stood adjacent to Agent Rock. Agent Rock asked the decoy who had sold her the beer. The decoy outstretched her right arm, pointed her right index finger at Patel and said, "He sold it to me. I'm 18 years old."

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 15, 2016²—sixteen 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 minor decoy's home address, and (2) the Department's comment procedure constitutes an underground regulation, violates the APA, and encourages illegal ex parte communications.

2. Appellants' comments were received by the Department the following Monday, June 18, 2016.

DISCUSSION

I

Appellants contend the Department failed to comply with section 11507.6 of the Government Code when it provided the address of the Murrieta Police Department, rather than the decoy's address as listed on her 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 home address. (*Id.* at pp. 9-10.)

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 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.

In this case, appellants contend they did attempt to reach the minor decoy through the Murrieta Police Department, but were unable to make contact. (App.Br., at p. 9.) At the administrative hearing, appellants moved to admit a declaration signed by Darlene Chocan, purportedly an employee at the office of appellants' counsel. (RT at p. 7.) Appellants argued the declaration supported the facts alleged in their motion to compel the decoy's address. (RT at pp. 7-8.)

The Department objected to admission of Chocan's declaration. First, it pointed out that the declaration was only provided the day before hearing. (RT at p. 8.) It argued the declaration could have and should have been produced earlier. Moreover, the Department argued it had a right to cross-examine Chocan, or, alternatively, to receive 14 days' notice prior to an affidavit being admitted in lieu of testimony. (*Ibid.*)

Appellants responded by downplaying the significance of Chocan's declaration. Counsel for appellants argued the motion to compel the decoy's address was already denied and the issue was therefore moot, and that appellants were "just trying to build the record to show . . . what steps were taken." (RT at p. 8.)

The Department responded by reemphasizing its right to cross-examine Chocan, noting that witnesses need to testify under penalty of perjury. (RT at p. 9.)

The ALJ refused to admit the declaration.

Appellants contend only in passing that exclusion of the declaration was improper; they provide only a broad legal argument that "[a] party is entitled to have

received in evidence and considered by the court . . . all competent, material, and relevant evidence which tends to prove or disprove any material issue." (App.Br., at p. 9, citing *Bole v. Bole* (1946) 76 Cal.App.2d 344, 346 [172 P.2d 936] [trial court judge erroneously excluded live witness testimony in divorce case].)

The Administrative Procedure Act provides for admission of an affidavit in lieu of testimony, with conditions:

At any time 10 or more days prior to a hearing or a continued hearing, any party may mail or deliver to the opposing party a copy of any affidavit which he proposes to introduce into evidence, together with a notice as provided in subdivision (b). Unless the opposing party, within seven days after such mailing or delivery, mails or delivers to the proponent a request to cross-examine an affiant, his right to cross-examine such affiant is waived and the affidavit, if introduced in evidence, shall be given the same effect as if the affiant had testified orally. If an opportunity to cross-examine an affiant is not afforded after request therefor is made as herein provided, the affidavit may be introduced in evidence, but shall be given only the same effect as other hearsay evidence.

(Gov. Code, § 11514(a).) It is undisputed that appellants did not give the Department 10 days' notice of their intent to introduce Chocan's declaration. Their failure to do so deprived the Department of the opportunity to request cross-examination. The statute does provide that an affidavit may nevertheless be introduced, even if the opposing party is not ultimately afforded the opportunity to cross-examine the affiant. (*Ibid.*) This language, however, is permissive: "the affidavit *may* be introduced in evidence." (*Ibid.*) Under these terms, the ALJ's refusal to admit an improperly noticed affidavit as evidence in lieu of testimony cannot be construed as an abuse of discretion.

Moreover, the production of the Chocan's declaration so long after appellants' motion to compel was filed and denied suggests appellants were not seeking disclosure of the decoy's address in good faith, but were simply manufacturing a procedural defense they hoped would lead to outright reversal on appeal before this Board. When

we suggested in *Joe* that licensees preserve evidence of their attempts to reach the decoy at the address provided, we assumed—perhaps incorrectly—that they would produce that evidence in good faith, through the proper legal channels. (See *7-Eleven, Inc./Joe, supra*, at p. 11.) We will not reward the casual manipulation of evidentiary procedures. The ALJ's refusal to admit the Chocan declaration was 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. 10-22.)

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.)

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.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.