

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

AB-9644

File: 21-535799 Reg: 16084583

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy #10292
4030 South Western Avenue,
Los Angeles, CA 90062-1634,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: March 1, 2018
Los Angeles, CA

ISSUED MARCH 26, 2018

Appearances: *Appellants:* Donna J. Hooper as counsel for Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as CVS Pharmacy #10292.
Respondent: Jonathan Nguyen as counsel for the Department of Alcoholic Beverage Control.

OPINION

Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as CVS Pharmacy #10292 (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 March 2, 2017, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on January 15, 2014. On August 10, 2016, the Department filed an accusation charging that appellants' clerk, Lucia Salinas (the clerk), sold an alcoholic beverage to 19-year-old Geraldina Marquez on May 27, 2016. Although not noted in the accusation, Marquez was working as a minor decoy for the Los Angeles Police Department Southwest (LAPD SW) Vice Unit at the time.

On August 30, 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 October 7, 2016, the Department responded by providing the address of the LAPD SW Vice Unit in lieu of the decoy's home address.

On October 19, 2016, appellants sent a letter to the LAPD SW Vice Unit noting that they had been provided with the Vice Unit's address and phone number as the contact information for the decoy. (Exh. 1, Motion to Compel Discovery, attach. 3, letter from Saranya Kalai, counsel for appellants, to LAPD SW Vice, Oct. 19, 2016.) The letter claimed that counsel's assistant, Darlene Chacon, had left a "detailed voicemail" on October 18 and 19 asking the decoy to return their call. Appellants informed the LAPD SW Vice Unit that as of October 19—the day after their first call—they had not received a response.

The same day—October 19, 2016—appellants sent a letter to the Department demanding it furnish the decoy's contact information by October 26, 2016. In the letter,

counsel explained appellants' efforts to reach the decoy through the LAPD SW Vice Unit:

[M]y office attempted to reach the decoy at the address and phone number provided and has been unable to do so. In fact, on October 18, 2016 and October 19, 2016 my office called . . . and left a detailed voice message on the Southwest Division Vice's Office voice mail and asked for [the decoy] to return my call. As of this date, we have not received a response to the phone calls. Additionally, my office sent a letter on October 19, 2016 attempting to make contact with the decoy. Again, we have not been able to make contact with the decoy.

(Exh. 1, Motion to Compel, attach. 4, Letter from Saranya Kalai, counsel for appellant, to Ann Bordenkircher, Dept. of Alcoholic Bev. Control, Oct. 19, 2016.) Again, the letter was sent the day after appellants' first call to the LAPD SW Vice Unit. There is no record of any response from the Department.

On October 28, 2016, appellants filed a Motion to Compel Discovery. The Motion alleged the attempted contact described above. (Exh. 1, Motion to Compel, at p. 3.) It also alleged that

On or about October 27, 2016, [counsel's] Assistant, Darlene Chacon received a call from Officer Richardson, from the Los Angeles Police Department. Officer Richardson stated that the decoy . . . is not reachable at the number provided by the Department and that he cannot have [the decoy] return a call to the Respondents.

(*Id.* at pp. 9-10.) Moreover, the Motion to Compel noted that appellants had "sent a letter to the Department . . . in a reasonable and good faith attempt to informally resolve the discovery issue," and that the "letter detailed the Respondents' unsuccessful attempts to reach the decoy" through the LAPD SW Vice Unit. (*Id.* at p. 3, citing Exh. 1, Motion to Compel, attach. 4, *supra.*)

On December 14, 2016, the Department responded and opposed the Motion to Compel, claiming that the Motion was moot. (See generally Exh. 1, Dept. Opp. to

Motion to Compel Discovery.) The Department did not acknowledge appellants' alleged attempts and ultimate inability to contact the decoy through the LAPD SW Vice Unit. (See generally *ibid.*) Instead, the Department alleged that "[i]n a good faith effort to resolve this issue, on December 13, 2016, the Department contacted the minor decoy and asked her if she was willing to speak with respondent's counsel. The minor decoy declined to meet or speak with respondents' counsel before the hearing." (*Id.* at p. 2.) The Department further argued the decoy had an absolute right to refuse an interview. (*Ibid.*)

On December 19, 2016, the Department issued an order denying appellants' Motion to Compel. (Exh. 2, Order Denying Motion to Compel.) The order acknowledged appellants' efforts to reach the decoy:

The Respondents acknowledge in their motion they were provided with contact information for the minor decoy volunteer, that being the Los Angeles Police Department – Southwest Division Vice Office, the law enforcement agency that utilizes the services of the minor decoy volunteer. The Respondents further acknowledge in its [*sic*] motion that one of its assistants called the telephone number provided by the Department and the Respondents sent a letter to the Los Angeles Police Department – Southwest Division Vice Office. Respondents were unable to make contact with the minor decoy volunteer. Respondents' motion states they received a call from an Officer Richardson of the Los Angeles Police Department, claiming the decoy is not reachable at the number provided by the Department and that the officer cannot have the decoy return a call to the Respondents.

(*Id.*, at pp. 1-2.) The order describes the Department's purported efforts to remedy the situation in more detail than the Department offered in its Opposition to the Motion to Compel:

The Department attempted to contact the minor decoy volunteer. The Department had trouble getting in touch with the minor decoy volunteer, and was not able to make contact with the minor decoy volunteer until December 13, 2016. On December 13, 2016, the Department informed the minor decoy volunteer of Respondents' counsel's letter, its contents,

and Respondents' counsel's request to speak with the minor decoy volunteer prior to the hearing. The minor decoy volunteer informed the Department that she could be reached at the Los Angeles Police Department, Southwest Division Vice Office. The minor decoy volunteer declined to meet or speak with Respondents' counsel prior to the hearing.

(*Id.* at p. 2.) The order also reasserted the minor decoy's right to refuse an interview.

(*Ibid.*)

The administrative hearing proceeded on December 20, 2016. Documentary evidence was received and testimony concerning the sale was presented by Marquez (the decoy) and by Officers Jared Miller and Lisa Barela of the LAPD SW Vice Unit.

Testimony established that on the date of the operation, Officer Miller entered the licensed premises, and the decoy entered shortly thereafter. The decoy went straight to the alcoholic beverage cooler and selected a three-pack of Bud Light beer cans. The decoy brought the three-pack of beer to the front sales counter and waited in line to purchase the beer. There were three people in front of her, and Officer Miller stood behind her, posing as a customer.

At the counter, the decoy set down the three-pack of Bud Light beer. The clerk asked the decoy how she was and asked for her identification. The decoy handed her valid California driver's license to the clerk, who took possession of it and looked at it for two to three seconds. The decoy's identification has a vertical orientation, shows her correct date of birth, and includes a red stripe reading "Age 21 in 2017." The clerk handed the identification back to the decoy. The clerk scanned the three-pack of Bud Light beer cans and told the decoy the cost of the beer. The decoy paid for the beer. The clerk then gave the decoy some change. The clerk asked the decoy if she wanted the beer bagged. The decoy replied in the affirmative, and the clerk bagged the beer. The decoy then exited the store with the change and the three-pack of Bud Light beer.

Officer Miller was inside the store posing as a customer during this entire time and witnessed these events. Officer Miller exited the licensed premises shortly after the decoy exited.

Officer Barela entered the licensed premises with her partner and Officer Miller. Officer Miller directed Officer Barela to the clerk, who was behind a cash register. Officer Barela made contact with the clerk and identified herself as an LAPD police officer, along with Officer Miller. Officer Barela asked the clerk if there was somewhere away from the registers they could go for privacy. The clerk walked down to the end of the registers in the front, left side of the store by the photo section. The officers followed the clerk and then explained the violation to her.

The decoy reentered the store with an LAPD officer and they met up with the clerk and the other officers, all of whom remained near the photo section. Officer Barela asked the decoy to identify the person who sold her the beer. The decoy pointed at the clerk and said, "She did." The decoy and the clerk were standing three feet apart, facing each other, with the clerk looking at the decoy at the time of this identification. There was no evidence that the clerk did not understand she was being identified as a person who sold alcohol to a minor.

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

On January 9, 2017, 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, Jan. 9, 2017 [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 January 17, 2017, appellants submitted a comment letter "reassert[ing] all arguments raised during the hearing below" and contending the ALJ "failed to consider all material evidence." (Letter from Saranya Kalai, counsel for appellants, to Ramona Prieto, Acting Director, Dept. of Alcoholic Bev. Control, Jan. 17, 2017.) Additionally, 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 Department failed to comply with the discovery provision of the Administrative Procedure Act (APA) when it provided the address of the LAPD SW Vice Unit, rather than the decoy's personal contact information, during pre-hearing discovery, and (2) the Department's comment procedure is 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 LAPD SW Vice Unit, rather than the decoy's address as listed on her California driver's license, during pre-hearing discovery.

Appellants argue this case is analogous to *Reid v. Superior Court*, in which the court of appeal held the contact information of rape victims was subject to disclosure under section 1054.1 of the Penal Code. (App.Br., at pp. 9-10, citing *Reid v. Superior Ct.* (1997) 55 Cal.App.4th 1326 [64 Cal.Rptr.2d 714].) Appellants do not address recent Board rulings rejecting application of *Reid*. (See, e.g., *7-Eleven, Inc./Pam & Jas, Inc.* (2017) AB-9603 [rejecting analogous application of *Reid*], citing *Cimarusti v. Superior Ct.* (2000) 79 Cal.App.4th 799, 808 [94 Cal.Rptr.2d 336] [finding *Reid* analogy "inapt" and holding there is generally "no due process right to prehearing discovery in administrative hearing cases."].) Appellants do argue that *Cimarusti*, a court of appeal

case rejecting application of the *Reid* holding in an administrative case, is inapplicable because it did not involve section 11507.6, but rather interpreted a different discovery statute within the Government Code. (App.Br., at pp. 6-7, citing *Cimarusti, supra*, at pp. 808-809.) Appellants insist that *Cimarusti's* ultimate holding—that there is no right to interview witnesses in administrative proceedings—does not apply to cases implicating section 11507.6 of the Government Code. (App.Br., at p. 7.)

Finally, appellants "respectfully disagree" with this Board's rulings in similar cases, which concluded minor decoys assisting law enforcement in decoy operations qualify as "peace officers" whose private information is protected under Penal Code section 832.7. (App.Br., at pp. 11-12; see also *7-Eleven, Inc./Joe* (2016) AB-9544 [first of many cases holding that the minor decoy qualifies for peace officer protections by operation of Penal Code § 830.6(c)].) Appellants argue, without reference to authority, that "[n]othing in [Penal Code section 830.6(c)] implies that 'summoning' a minor decoy to assist a peace officer would make the decoy's contact information confidential unless such a summons required the summoning agency to establish . . . a record for the purpose of investigating complaints against the decoy." (App.Br., at p. 11.)

Appellants further contend they attempted to reach the decoy through the LAPD SW Vice Unit by letter and by telephone, and received a follow-up call from an officer who affirmatively declared that the decoy "could not be reached at the office by any means." (App.Br., at p. 6.) According to appellants, this caused them "to incur substantial prejudice due to their inability to independently request to speak with the minor decoy in question." (App.Br., at p. 5.)

Section 11507.6 of the Government Code provides, in relevant part:

After initiation of a proceeding in which a respondent or other party is entitled to a hearing on the merits, a party, upon written request made to another party . . . is entitled to (1) obtain the names and addresses of witnesses to the extent known to the other party, including, but not limited to, those intended to be called to testify at the hearing.

(Gov. Code, § 11507.6.)

In *7-Eleven, Inc./Joe*, this Board held that "in order to comply with section 11507.6, the Department must supply an address *at which the decoy may actually be reached.*" (*7-Eleven, Inc./Joe, supra*, at p. 11, emphasis in original.) We added,

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 [noting that the burden falls on the licensee to prove the decoy was unreachable].)

The Department counters that appellants did not show the decoy could not be reached through the LAPD SW Vice Unit address. It claims,

[T]he Department . . . indicated the decoy could be reached at LAPD's Southwest Division Vice Office since this was the law enforcement agency that conducted the decoy operation. Thereafter, counsel for appellants sent a letter indicating the address provided was not responsive to its request. Counsel did not indicate she attempted to reach the decoy at the address provided and was unable to. Nor did counsel request that the Department arrange a meeting with the decoy to allow counsel to interview her. Instead, counsel stated that if the Department did not provide the "actual" address for the decoy, a Motion to Compel would be filed.

(Dept.Br., at p. 4.) It later contends that "[a]ppellants were provided with the contact information for the decoy but elected not to use it," that "[a]ppellant's counsel never attempted to reach the decoy at the address provided," and that "[t]his claim fails because of counsel's own inability to pick up a phone and make a call to LAPD's

Southwest Division Vice Office to determine if the decoy could be reached at the number and address provided." (Dept.Br., at pp. 8-9.)

The Department's allegations on this point are perplexing, as the Department itself claimed it reached out to the decoy "in a good faith effort to resolve" appellants' purported difficulty reaching the decoy through the LAPD SW Vice Unit. (Exh. 1, Dept. Opposition to Motion to Compel, at p. 1.) The Department's position on appeal—that appellants' counsel couldn't be bothered to "pick up a phone and make a call"—is belied by content of the Order Denying the Motion to Compel, and undermines the Department's purported "good faith."

In this case—and despite allegations to the contrary in the Department's brief—it appears appellants *did* attempt to contact the decoy through the LAPD SW Vice Office, and in fact informed the Department that they could not reach the decoy *before* filing their Motion to Compel. In the October 19 letter to the Department, counsel for appellants directly stated "my office attempted to reach the decoy at the address and phone number provided and has been unable to do so." (Exh. 1, attach. 4, Letter from Saranya Kalai, counsel for appellants, to Ann Bordenkircher, at pp. 1-2.)

Moreover, the Department's Order Denying the Motion to Compel acknowledged appellants' fruitless attempts to reach the decoy through the LAPD SW Vice Unit. (See generally Exh. 2, Order Denying Motion to Compel.) More importantly, the Order noted that *the Department itself* "had trouble getting in touch with the minor decoy volunteer, and was not able to make contact . . . until December 13, 2016." (*Id.* at p. 2.) While it is not clear from the record *where* the Department managed to finally reach the decoy, the decoy "informed the Department that she could be reached at the [LAPD SW] Vice

Office," despite apparently being unreachable by either party before December 13.

(*Ibid.*, emphasis added.)

If the Department itself was unable to make contact with the decoy—a necessary witness—until December 13, then it suggests the Department may have acted in bad faith when it ignored appellants' October 19 letter claiming an inability to reach the decoy through the LAPD SW Vice Unit contact information. In essence, the appellants informed the Department the decoy was unreachable at that address *and* the Department knew, firsthand, from its own difficulty contacting the decoy, that the decoy was apparently unreachable there.

Nevertheless, the record shows no action to remedy or even acknowledge the situation until December 13—a week before the hearing—when, according to the Department, it reached out to the decoy in a "good faith effort to resolve" the issue. (Exh. 1, Department's Opposition to Motion to Compel, at p. 2.) According to the Order Denying the Motion, however, December 13 was simply the date *the Department itself* finally managed to make contact with the decoy.

The question, then, is whether the Department violated the law by denying appellants' Motion to Compel, or at a minimum, by failing to provide an alternate address. We find that it did not: although this particular decoy proved difficult to contact, she ultimately confirmed she was reachable at the address and phone number provided to appellants, and did so before the Department ruled on the Motion to Compel.

According to the Order Denying the Motion to Compel, the Department finally managed to reach the decoy on December 13. Despite appellants' difficulties, the decoy confirmed that she *could* be reached at the LAPD SW Vice Office. (Exh. 1, Order

Denying Motion to Compel, at p. 2.) This effectively resolved the issue: *per the witness herself*, she could be reached through the LAPD SW Vice Unit. The contact information provided was therefore sufficient to satisfy section 11507.6.

Appellants will no doubt object that their experience indicates otherwise—that is, that they attempted to reach the decoy through the LAPD SW Vice Unit and were unable to do so. As discussed above, however, appellants were not alone in having difficulties reaching this particular decoy. While there is a partial affidavit of Darlene Chacon, an assistant to appellants' counsel, attached to appellants' Motion to Compel alleging that she "received a call from Officer Richardson and he stated the decoy is not reachable at this number and he cannot have her return a call," it is not clear who Officer Richardson is; no first name is given, and no Officer Richardson appears to be connected with this decoy operation.² (Exh. 1, Motion to Compel, attach. 2; see generally RT.) In any event, Officer Richardson was contradicted by the decoy herself. The decoy's assurance that she *could* be reached through the LAPD SW Vice Unit, although provided late in the game, is sufficient.

Moreover, under no circumstances would appellants be entitled to the decoy's personal contact information, even if the LAPD SW Vice Unit contact information proved entirely illegitimate. As this Board has repeatedly held, the decoy's personal contact information is protected. (See *7-Eleven, Inc./Joe, supra.*)

Perhaps most significant, however, is the fact that the decoy, through the Department, expressly declined to meet or speak with appellants' counsel. Upon

2. Moreover, the Chacon affidavit is incomplete: only paragraphs 7 and 8 are included in the attachment. The portion that *is* included is nearly illegible. (See Exh. 1, Motion to Compel, attach. 2.)

reaching the decoy on December 13, "the Department informed the minor decoy volunteer of Respondents' counsel's letter [and] its contents," and "[t]he minor decoy volunteer declined to meet or speak with Respondents' counsel prior to the hearing." (Exh. 2, Order Denying Motion to Compel, at p. 2.)

As the court observed in *Cimarusti*, "[g]enerally, there is no due process right to prehearing discovery in administrative hearing cases." (*Cimarusti, supra*, at p. 808.) "The scope of discovery in administrative hearings is governed by statute and the agency's discretion." (*Id.* at pp. 808-809.) In this case, section 11507.6 guarantees appellants receive the decoy's name and address to the extent known, but it does *not* guarantee appellants will have the opportunity to interview the decoy. (See Gov. Code, § 11507.6.) In fact, the statute does not require the decoy to acknowledge or otherwise respond to calls or correspondence, or even to communicate directly with appellants or their counsel regarding her decision to decline an interview. (See *ibid.*) As the *Cimarusti* court noted, witnesses in administrative proceedings "have the absolute right to decline an interview." (*Cimarusti, supra*, at p. 809.)

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.

This Board 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.)

However, we also find that the sole comment, submitted by appellants, had no effect on the outcome of the case, and that the comment procedure did not materially affect appellants' due process rights. (See *id.* at pp. 26-29.) Appellants suffered no prejudice; we therefore offer no relief.

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.