

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

AB-9641

File: 21-558268 Reg: 16084644

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy #7136
3710 Franklin Boulevard,
Sacramento, CA 95820-1128,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Alberto Roldan

Appeals Board Hearing: April 6, 2018
Sacramento, CA

ISSUED APRIL 18, 2018

Appearances: *Appellants:* Donna J. Hooper, of Solomon Saltsman & Jamieson, as counsel for Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as CVS Pharmacy #7136.
Respondent: Kerry K. Winters and Sean Klein 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 #7136 (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 10, 2017, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on February 22, 2016. On August 26, 2016, the Department filed an accusation charging that appellants' clerk, Gregory Bevens (the clerk), sold an alcoholic beverage to 19-year-old Michael Reese on April 28, 2016. Although not noted in the accusation, Reese was working as a minor decoy in a joint operation between the Department of Alcoholic Beverage Control and the Sacramento Police Department at the time.

On September 8, 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 17, 2016, the Department responded by providing the address of the Sacramento Police Department in lieu of the decoy's home address.

On or about October 24, 2016, an employee of appellants' counsel, Darlene Chacon, attempted to contact the minor decoy at the Sacramento Police Department phone number provided by the Department. (Exh. L-1, Motion to Compel Discovery, attach. 2, Declaration of Darlene Chacon, Nov. 4, 2016, at p. 1 [hereinafter "Chacon Declaration"].) Chacon left a voice message for the decoy. (*Ibid.*) The same day, Chacon received a call back from Sergeant Bill Wann of the Sacramento Police Department. (*Ibid.*) Sergeant Wann told Chacon that the decoy "didn't work in the office full time" but that he could take a message for the decoy.² (*Ibid.*) On or about October 26, Chacon left another voice message for the decoy. (*Ibid.*) The following day, October

2. In her declaration, Chacon does not state whether she left a message for the decoy with Sergeant Wann.

27, 2016, Chacon mailed a letter to the decoy at the Sacramento Police Department address provided by the Department. (*Id.* at p. 2; see also Exh. L-1, Motion to Compel Discovery, attach. 3, Letter from Saranya Kalai to Sacramento Police Dept., Oct. 27, 2016.)

Also on October 27, 2016, appellants sent a letter to the Department claiming they were unable to reach the decoy at the Sacramento Police Department, and demanding the Department furnish the decoy's "actual contact information" as well as "a copy of his un-redacted California Driver's License" by October 31, 2016.³ (Exh. 1, Motion to Compel Discovery, attach. 3, Letter from Saranya Kalai to Ann Bordenkircher, Oct. 27, 2016, at p. 2.) The Department did not respond.

On or about November 3, 2016, Sergeant Wann left a message with Chacon's office stating that he had forwarded Chacon's message to the decoy. (Chacon Declaration, at p. 2.)

On November 4, 2016, appellants filed a Motion to Compel Discovery claiming they were unable to reach the decoy through the Sacramento Police Department contact information provided by the Department. Appellants again sought the "actual contact information" included on the decoy's unredacted driver's license. (Exh. 1, Motion to Compel, at pp. 11, 18.) On December 2, 2016, the Department responded and opposed the Motion to Compel. The Department argued that based on Chacon's exchanges with Sergeant Wann, it was obvious "that the Department *did* give an address that could be used for contacting the decoy," and that "[t]he fact that the decoy

3. Appellants were careful not to directly request the decoy's home address or personal contact information in this letter. The decoy's unredacted driver's license, however, would necessarily disclose his home address.

did not contact Ms. Chacon does not mean the address given was not appropriate."

(Exh. 1, Dept. Opp. to Motion to Compel Discovery, at p. 2, emphasis in original.)

On December 13, 2016, ALJ John W. Lewis issued an Order denying appellants' Motion to Compel. He wrote:

A clerk for Respondents' counsel contacted the Sacramento Police Department, the law enforcement agency that used the services of the minor decoy volunteer. The clerk spoke to Sgt. Bill Wann who took a message for Michael Reese, the minor decoy volunteer. On November 3, 2016, Sgt. Wann contacted Respondents' counsel's clerk and left her a voice message stating that he did give the message to minor decoy volunteer Michael Reese.

Apparently Respondents' counsel now seeks to have the Department provide them with the home address of the minor decoy volunteer, although Respondent seems to avoid using the term "home address".

The Department is under no such obligation. As Respondents' counsel notes, they were provided with the contact information for the minor decoy volunteer. The message left for the minor decoy volunteer was delivered to him by Sgt. Wann. The Department has fulfilled its obligation and provided the contact information for the minor decoy volunteer. The minor decoy volunteer is under no obligation to contact Respondents' counsel.

(Exh. L-1, Order Denying Motion to Compel, at pp. 1-2.)

The administrative hearing proceeded on January 5, 2017. Documentary evidence was received, and testimony concerning the sale was presented by Reese (the decoy) and by Officer Yul Alameda of the Sacramento Police Department. Appellants presented no witnesses.

Testimony established that on the date of the operation, the decoy entered the licensed premises, went to the cooler area, and selected a six-pack of Coors Light beer, which he then took to the checkout counter area. The decoy placed the beer on the counter next to the register and waited to be checked out. The beer was the only item the decoy presented for purchase.

The clerk asked to see the decoy's identification as he began the transaction for the Coors Light. The decoy handed his California Driver's License to the clerk. The decoy's license was the portrait type, with a red bar under the date of birth that specifically said he would not be 21 until 2018 and a blue bar that said he turned 18 in 2015. The decoy took possession of and looked at the license for a few seconds after the decoy handed it to him.

Despite the information on the face of the license, the clerk made no comments regarding the decoy's age or appearance before he handed the identification back to the decoy. The clerk rang up the cost of the beer after looking at the license. He completed the sale after the decoy gave him cash to pay for the six-pack. The decoy received change from the clerk. The decoy then exited the licensed premises with the six-pack. At no point during the transaction did the clerk ask about or make any comments regarding the decoy's age or appearance.

The decoy spoke with Officer Alameda, a second Sacramento Police Department Officer, and Department Agent Bickel about what occurred. The decoy described the clerk as a male wearing a gold chain around his neck. The decoy then re-entered the premises with the Sacramento Police Department officers and Agent Bickel. He continued to hold the six-pack. From inside the entrance area, the decoy pointed out, from approximately 20 feet away, the clerk who had sold the alcohol to him. The clerk was busy with customers at this time. Officer Alameda approached the clerk's register and informed him and a manager that they needed to speak with the clerk regarding the investigation. The clerk was told he was being investigated for selling alcohol to a minor.

The manager took over the clerk's register and the officers were given access to the employee break room in order to speak with the clerk.

The decoy and the officers joined the clerk in the break room. During the investigation and while the clerk was present, Agent Bickel asked the decoy to identify the person who sold him the beer. The decoy pointed at the clerk and said that the clerk had sold him the beer. The clerk was facing the decoy and looking at him and the officer next to him when this occurred. The distance between the decoy and the clerk during the identification was approximately two to three feet. This identification occurred in the break room soon after they entered it.

After the identification, the decoy posed for a picture standing directly next to the clerk while holding his license and the six-pack he had purchased from the clerk. After the photograph, the clerk was cited for selling alcohol to the decoy.

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

Appellants then filed this appeal contending the Department failed to comply with the discovery provision of the Administrative Procedure Act when it provided the address of the Sacramento Police Department, rather than the decoy's personal contact information, during pre-hearing discovery.

DISCUSSION

Appellants contend the Department failed to comply with section 11507.6 of the Government Code when it provided the address of the Sacramento Police Department, rather than the decoy's "actual work address," during pre-hearing discovery. (App.Br., at pp. 6-16.)

Appellants argue the reasoning employed by this Board in *Mauri Restaurant Group* is "fatally flawed." (*Id.* at p. 13, citing *Mauri Restaurant Group* (1999) AB-7276 [rejecting argument that appellants were entitled to decoy's home address].) Moreover, appellants entirely ignore this Board's recent, more detailed rulings, which concluded minor decoys qualify as "peace officers" whose private information is protected under Penal Code section 832.7.⁴ (See *id.* at pp. 4-12; 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 instead that 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. 6-8, 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."].)

Notably, appellants' complaint before this Board fundamentally differs from their Motion to Compel. (Compare App.Br. with Exh. 1, Motion to Compel Discovery.) They

4. Appellants' failure to acknowledge the Board's more recent rulings is particularly mystifying, since each of those cases—at this point, numbering in the dozens—was argued by the same law firm representing appellants in the present case. We are left to assume that counsel for appellants is aware of the Board's rulings, has read them, and has simply chosen to ignore them entirely.

no longer seek the decoy's unredacted driver's license, but instead contend they were entitled to the decoy's "actual work address." (App.Br., at p. 6.)

This Board has recently faced a flood of cases raising this 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, and in *7-Eleven, Inc./Pam & Jas, Inc.*, we rejected analogous application of *Reid*. (*7-Eleven, Inc./Joe, supra*, at pp. 6-10; *7-Eleven, Inc./Pam & Jas, Inc.* (2017) AB-9603, at pp. 8-12.) Appellants—or rather, appellants' counsel—simply reassert legal theories this Board has already found meritless. We therefore refer appellants to the Board decisions cited above for our full legal analysis.

The facts in this case are unusual for two reasons. First, appellants have dropped their demand for the decoy's unredacted driver's license (see Exh. 1, Motion to Compel, at p. 18), and instead argue they were entitled to a work address the decoy recited on the stand during the administrative hearing. (App.Br., at p. 4; see also RT at p. 21.) Appellants argue the Department "refused to disclose" this alternative work address. (App.Br., at p. 6.)

It is true that section 11507.6 grants appellants the right to "obtain the names and addresses of witnesses to the extent known to the other party." (Gov. Code, § 11507.6.) Appellants present no evidence, however, that the Department knew of the decoy's alternative work address. The Department cannot be compelled to supply what it does not have.

Second, appellants repeatedly claim they were unable to reach the decoy through the Sacramento Police Department contact information provided by the Department. This is patently untrue: Darlene Chacon, an employee of appellants'

counsel, signed a sworn declaration stating that on October 24, 2016—the same day she left a voice mail for the decoy at the Sacramento Police Department—Sergeant Wann returned her call and told her the decoy "didn't work in the office full time" and that "he would take a message for [the decoy]." (Chacon Declaration, at p. 1.) Additionally, according to Chacon, on November 3, 2016, Sergeant Wann left a message with Chacon's office stating he gave Chacon's message to the decoy. (Chacon Declaration, at p. 2.) Finally, the decoy's own testimony indicates that he was notified of appellants' counsel's attempt to reach him, and simply did not want to speak with them:

Q [BY MS. WINTERS]. [W]ere you informed at some point that an attorney for Garfield Beach wanted to talk to you?

A. Yes.

Q. How did you find out that information?

A. I believe it was through an e-mail from the ABC unit.

Q. And did you contact the law firm?

A. No.

Q. Why didn't you contact them?

A. Because I didn't feel—one, I didn't feel obligated; and, two, I didn't want to be asked questions without someone here to defend me.

(RT at pp. 41-42.) The record is clear; appellants' counsel was able to reach the decoy through the address and phone number provided. While it is true that the contact was indirect—Chacon had to leave a message and speak with Sergeant Wann rather than the decoy himself—there is nothing in the section 11507.6 that guarantees appellants the right to speak directly with the witness.

In this case, the decoy simply did not wish to speak with appellants or their counsel. (RT at p. 42.) As the court of appeal observed in *Cimarusti*, the witness has "an absolute right to decline an interview." (*Cimarusti v. Superior Ct.* (2000) 79 Cal.App.4th 799, 809 [9 Cal.Rptr.2d 336].) Appellants were not entitled to speak directly with the decoy, and have therefore shown no grounds for relief.

ORDER

The decision of the Department is affirmed.⁵

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

5. 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.