

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

AB-9685

File: 21-479395 Reg: 17085767

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy #6705
316 South Pacific Coast Highway,
Redondo Beach, CA 90277-3729,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: November 1, 2018
Ontario, CA

ISSUED NOVEMBER 29, 2018

Appearances: *Appellants:* Alexa L. Halloran, of Solomon Saltsman & Jamieson, as counsel for Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as CVS Pharmacy #6705.
Respondent: Kerry K. Winters and Colleen R. Villarreal 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 #6705 (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 January 19, 2018, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on September 9, 2009. On July 24, 2017, the Department filed an accusation charging that appellants' clerk, Ali Zabir Mirza (the clerk), sold an alcoholic beverage to 19-year-old Gonzalo Humberto Lopez Valencia on February 23, 2017. Although not noted in the accusation, Lopez was working as a minor decoy in a joint operation between the Redondo Beach Police Department and the Department of Alcoholic Beverage Control at the time.

On October 3, 2017, appellants submitted a Motion to Compel Discovery.

At the administrative hearing held on November 7, 2017, documentary evidence was received and testimony concerning the sale was presented by Lopez (the decoy); by Detective Blake Nimmons of the Redondo Beach Police Department; and by Agent Danny Vergara of the Department of Alcoholic Beverage Control. Appellants presented no witnesses.

Appellants do not dispute the fact of the violation. Testimony established that on the date of the operation, the decoy approached the clerk with a three-pack of 25-ounce cans of Bud Light beer. The clerk asked for, and was provided, the decoy's California driver's license, which had a vertical orientation, showed his correct date of birth, and included a red stripe which read "AGE 21 in 2018." The clerk entered his own date of birth into the register and completed the sale.

At the commencement of the administrative hearing, the Department claimed it had not received appellants' Motion to Compel Discovery and therefore did not submit a written opposition. The ALJ found the Department provided no reasonable explanation as to why the Department would not have received the Motion to Compel despite

appellants' proof of service and argument that it was properly addressed and mailed to the Department's current mailing address. The ALJ noted that a letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail. The ALJ held that the Department had failed to rebut the presumption that it received the Motion to Compel Discovery, and allowed both parties to argue the Motion on the record.

In their Motion, appellants acknowledged they were provided with contact information for the minor decoy volunteer, to wit, the contact information for the Redondo Beach Police Department, the law enforcement agency that utilizes the services of the minor decoy volunteer and at which the minor decoy is employed as a police cadet. The decoy works part-time at the Redondo Beach Police Department, where he has an inbox and receives mail and telephone messages. The address and telephone number provided by the Department was the decoy's work address and work telephone number at the Redondo Beach Police Department, where he can be reached. Appellants were unable to make contact with the minor decoy despite mailing a letter to the decoy at the address provided and leaving a voice message for the decoy at the telephone number provided by the Department.

Testimony elicited from the decoy revealed that the decoy received, in his inbox at the Redondo Beach police Department, the telephone message left for him by appellants' counsel. The decoy spoke with Sergeant Snakenborg at the Redondo Beach Police Department about the message. Sergeant Snakenborg told the decoy he did not have to talk to appellants' counsel, but if he wanted to speak with them he could. Sergeant Snakenborg told the decoy that if he did talk to appellants' counsel, he would

advise the decoy to have the district attorney present. The decoy testified that he did not want to talk to appellants' counsel.

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

Regarding the Motion to Compel, the ALJ noted that appellants sought to compel the disclosure of some other address or contact information for the minor decoy beyond the contact information for the Redondo Beach Police Department. The ALJ found the Department was under no obligation to provide the minor decoy's home address or personal contact information. The ALJ held the Department had fulfilled its obligation and complied with Government Code section 11507.6 by providing the contact information for the minor decoy, which is the decoy's employment address at which it was proven he could be reached.

The ALJ held that the minor decoy was under no legal obligation to meet or speak with appellants' counsel prior to the hearing, and has a legal right to refuse to do so. Moreover, the ALJ found the minor decoy was under no legal obligation to contact appellants' counsel. The Motion to Compel was therefore denied.

Appellants then filed this appeal contending (1) the Department, through the actions of the Redondo Beach Police Department, interfered with appellants' attempts to interview the minor decoy by requesting an attorney be present; and (2) the provision of the Redondo Police Department's contact information, rather than the decoy's home address, was improper and effectively allowed the Department to interfere.

DISCUSSION

I

Appellants argue the Department improperly interfered with their attempts to interview the minor decoy before the administrative hearing. (App.Br., at pp. 4-5.) They direct this Board to the decoy's testimony, in which the decoy described a conversation with Sergeant Snakenborg of the Redondo Beach Police Department. (*Id.*, at p. 6.) Appellants describe this conversation as "improper and inappropriate," and claim it "violated the Appellant's [*sic*] equal access to interview potential witnesses." (*Ibid.*) According to appellants, "Direct statements made to a potential witness by an authority figure and the witnesses' superior officer unequivocally influence the witness to be uncooperative in communicating to defense counsel." (*Ibid.*)

Appellants rely on two criminal cases for support. The first, *Gregory v. United States*, issued by the D.C. Circuit, dealt with a capital-murder trial in which the prosecutor instructed witnesses not to speak to anyone—including defense counsel—unless he was present. (*Gregory v. U.S.* (1966) 369 F.2d 185, 188.) In light of this and numerous other errors, the court overturned the defendant's conviction. (*Id.* at p. 192.)

Gregory, however, interpreted a federal criminal-law discovery statute, and not a provision of California's Administrative Procedure Act. (See *Gregory, supra*, at p. 187.) Apart from the fact that *Gregory* involved capital murder and, therefore, much higher stakes, the federal law cited in *Gregory* has no application to the present case. Moreover, *Gregory* involved contact between the prosecutor and the witness, not a third party.

The second case, *United States v. Ebrahimi*, while not a capital murder case, is factually similar to *Gregory*. (See generally *U.S. v. Ebrahimi* (2015) 137 F.Supp.3d 886.) While interviewing witnesses, the criminal prosecutor "made several 'requests' of the witnesses." (*Id.*, at p. 887, quotation marks in original.) These "requests" included "ask[ing] the witnesses to notify the Government if they were contacted by another party and asked to make a statement about the case," and "that if such a notification took place, the Government would request an agent to be present during the interview to memorialize any statement the witness provided."² (*Ibid.*) The prosecution argued these were merely "requests" and not directives. (*Id.*, at p. 889.) Citing *Gregory*, the court found that "the Government's communications with potential witnesses, taken in context, could reasonably have been interpreted by the witnesses as an instruction or could have otherwise impermissibly influenced the witnesses." (*Ibid.*)

As in *Gregory*, *Ebrahimi* took place in the federal criminal context and did not interpret any provision of California's Administrative Procedure Act. (Compare *Ebrahimi, supra*, with *Gregory, supra*.) Moreover, as in *Gregory*, *Ebrahimi* involved contact between the prosecutor and a witness, and not a third party.

Notably, appellant's opening brief lacks any reference to *Cimarusti*, a California case interpreting the extent to which parties to administrative actions are guaranteed access to witnesses, and whether a parties' due process rights are violated when there is alleged witness interference. (See generally *Cimarusti* (2000) 79 Cal.App.4th 799 [94 Cal.Rptr.2d 336].) In that case, several youth correctional guards appealed disciplinary actions taken against them by the California Youth Authority. (*Id.* at pp. 801-802.)

2. In the criminal context "the Government" refers to the prosecution.

Counsel for the guards sought to interview several witnesses, all wards of the Youth Authority. (*Id.*, at p. 807.) All but one of the wards "signed written forms stating that they [did] *not* desire to talk to petitioners' counsel." (*Id.* at pp. 807-808, emphasis in original.)

While the guards "impliedly concede[d]" that the wards were not required to speak with the guards' counsel, the guards nevertheless contended that they "ha[d] the right to speak with the wards *in person* and have the wards tell them, or their counsel, that they do not wish to speak with them about this matter." (*Id.*, at p. 808, emphasis in original.) The guards further alleged that "the Youth Authority had given suggestive information to the wards predisposing them to refuse to talk to petitioners' counsel," and that "the Youth Authority's prior suggestiveness and refusal of face-to-face access 'interfered' with the asserted 'right' to ask the wards in person for an interview." (*Ibid.*, quotation marks in original.)

As here, the guards relied on criminal cases as support. The court wrote, "Petitioners' analogy to criminal cases is inapt. Generally, there is no due process right to prehearing discovery in administrative hearing cases." (*Ibid.*, rejecting application of *Reid v. Superior Ct.* (1997) 55 Cal.App.4th 1326 [64 Cal.Rptr.2d 714] [criminal rape case in which court ordered release of witness' personal contact information to defendant's counsel].) The court also rejected the guards' contention that their due process rights had been violated:

Petitioners have been provided with the wards' prior statements. At the hearing, which will be conducted in accordance with the Administrative Procedure Act (Gov. Code, § 19578, adopting the procedure in Gov. Code, § 11513), petitioners can call and examine witnesses, introduce exhibits, cross-examine opposing witnesses on any relevant matter even if not covered on direct examination, impeach witnesses, and rebut evidence. (Gov. Code, § 11513, subd. (b).) The statutory prehearing

discovery and hearing procedures are sufficient to satisfy petitioners' due process rights.

(*Cimarusti, supra*, at p. 809.)

Finally—and most significantly for purposes of the case at hand—the court found that the alleged witness interference by the Youth Authority was irrelevant where the wards had refused an interview: "Whether or not the wards were influenced by the Youth Authority, they have the absolute right to decline an interview." (*Ibid.*)

Here, appellants allege that a conversation with a third party—Sergeant Snakenborg of the Redondo Beach Police Department—"unequivocally influence[d] the witness to be uncooperative."³ (App.Br., at p. 6.) The decoy described the conversation twice in response to cross-examination by appellants' counsel. The two descriptions differed slightly:

[BY MS. HOOPER:] So when you talked to your sergeant about this note that you got to call Darlene [Chacon], what exactly did he say?

[THE DECOY:] He told me that I didn't have to give them a call back. And if I did, I would have to have our DA present, District Attorney.

(RT at p. 73.)

[BY MS. HOOPER:] So Sergeant Snakenborg told you that if you wanted to talk to us, you should have a District Attorney with you?

[THE DECOY:] He said that I could have called you guys, but he recommended to have, like, a District Attorney next to me.

(*Ibid.*)

3. At times, appellants conflate the Department of Alcoholic Beverage Control, the prosecuting agency, with the Redondo Police Department. (See, e.g., App.Br., at p. 5 ["The Department's statements to the minor witness requesting that an attorney be present . . . directly violated the defendant's due process right to equal access."].) To be clear, Sergeant Snakenborg is neither an employee nor an agent of the Department of Alcoholic Beverage Control.

Notably, the District Attorney is not the prosecutor in this case. Appellants faced disciplinary action before the Department of Alcoholic Beverage Control, not criminal charges. What appellants allege to be "interference" is little more than the decoy's supervisor recommending that he have an attorney present if he chose to engage with appellants' counsel.

Ultimately, however, that fact is irrelevant, as the decoy unequivocally stated that it was his decision to not speak with appellants' counsel:

[BY MS. HOOPER:] And is that why you decided you didn't want to talk to us?

[THE DECOY:] I just didn't want to talk to no one.

(RT at pp. 73-74.) Under *Cimarusti*, the decoy had "the absolute right to decline an interview" regardless of whether he was influenced by his conversation with Sergeant Snakenborg. (*Cimarusti, supra*, at p. 809.) No due process violation occurred where, as here, the decoy simply chose not to return appellants' calls.

II

Appellants object to provision of the Redondo Beach Police Department address and phone number as the decoy's contact information. Appellants acknowledge that "the Board has previously ruled that only providing the address of [the] police station is not a violation of Government Code section 11507.6," but nevertheless insist the practice is "a purposeful attempt to make it difficult to contact minor decoy witnesses." (App.Br., at p. 8.)

In *7-Eleven, Inc./Joe*, this Board held that minor decoys assisting law enforcement in decoy operations qualify as "peace officers" whose private information is protected under Penal Code section 832.7. (*7-Eleven, Inc./Joe* (2016) AB-9544, at

pp. 4-15.) Appellants give this Board no cause to reconsider that holding—particularly where, as here, the decoy is in fact a police cadet employed by the Redondo Beach Police Department. (See RT at p. 31.) Provision of the Redondo Beach Police Department address was therefore proper.

ORDER

The decision of the Department is affirmed.⁴

BAXTER RICE, CHAIRMAN
PETER J. RODDY, MEMBER
MEGAN MCGUINNESS, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

4. 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.