

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

S. J. TOONS, INC.	)	AB-6645
dba Toons)	
52 East Santa Clara Street	)	File: 48-264755
San Jose, CA 95113,	)	Reg: 95033627
Appellant/Licensee,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Jeevan S. Ahuja
DEPARTMENT OF ALCOHOLIC)	
BEVERAGE CONTROL,	)	Date and Place of the
Respondent.	)	Appeals Board Hearing:
	)	September 4, 1996
	)	San Francisco, CA

S. J. Toons, Inc., doing business as Toons (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its on-sale general public premises license for 30 days, with 10 days thereof stayed for a probationary period of two years, for appellant's employees having allowed persons under the age of 21 years to enter and remain in the licensed premises without lawful business, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code § 25665.

¹The decision of the Department dated March 7, 1996, is set forth in the appendix.

Appearances on appeal include appellant S. J. Toons, Inc., represented by its counsel, Edward J. Davila; and the Department of Alcoholic Beverage Control, represented by its counsel, Nicholas R. Loehr.

FACTS AND PROCEDURAL HISTORY

Appellant's license was issued December 5, 1991. Thereafter, the Department instituted an accusation against appellant on August 23, 1995. Appellant requested a hearing.

An administrative hearing was held on February 5, 1996, at which no one representing appellant appeared. The Administrative Law Judge (ALJ) treated a letter faxed to the Department's San Jose office on February 3, 1996, as a Motion to Continue, which he denied. The hearing was held as a default proceeding, and oral and documentary evidence on behalf of the Department was received.

After the hearing, the ALJ issued his Proposed Decision in which it was determined that appellant's employees had allowed two underage persons, one sixteen-year-old and one twenty-year-old, to enter and remain on the licensed premises without lawful business therein, a violation of Business and Professions Code § 25665.

Subsequent to the hearing, the Department issued its decision which suspended appellant's license for 30 days, with 10 days thereof stayed for a two-year probationary period. Appellant filed a timely appeal.

In its appeal, appellant raises the issue that it had been denied its due process rights in that the administrative hearing proceeded improperly as a default and the hearing officer was denied an opportunity to hear exculpatory and mitigating evidence

on behalf of appellant.

DISCUSSION

Appellant contends that the hearing proceeded improperly as a default hearing and appellant was not allowed to present its evidence, thereby being denied due process.

Pursuant to Government Code §11524,² the ALJ may grant or deny a request for a continuance for good cause. Under subdivision (b) of that section, a party is ordinarily required to apply for the continuance within 10 working days after discovering good cause for the continuance. An appellant has no absolute right to a continuance; a continuance is granted or denied at the discretion of the ALJ, and a refusal to grant a continuance will not be disturbed on appeal unless it is shown to be an abuse of discretion. (Givens v. Department of Alcoholic Beverage Control (1959) 176 Cal.App.2d 529 [1 Cal.Rptr. 446].)

Pursuant to Government Code §11520,³ if no appearance is made by an appellant at a properly noticed hearing, the proceeding may continue without appellant, and action may be taken based on any evidence that may be presented, without notice to appellant.

Appellant's hearing was scheduled for Monday, February 5, 1996, at 10 a.m. at the Department's San Jose district office (the district office). Appellant's counsel states that he faxed his request to reschedule the hearing to the district office on

²The text of this statute is set out in the appendix.

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February 3, 1996 (the Saturday before the scheduled hearing of February 5). A hard copy of the letter was delivered to the district office at about 8:55 on Monday morning, February 5. Counsel's request for a continuance was based on his involvement "in a multi-defendant felony jury trial in Santa Clara County Superior Court. . . ." [App. Br. 1-2.] He contends that his secretary, who called the district office on the morning of February 5, was informed that the hearing would be rescheduled and that he reasonably relied upon that information in not appearing. Mr. Davila and his secretary, Ms. Webster, have submitted affidavits to this Board explaining the actions they took in attempting to have the hearing rescheduled and the representations they say were made by a Department employee.

At the time scheduled for the hearing, counsel for the Department presented to the ALJ the letter faxed by appellant's counsel. The ALJ, after reading the letter, stated: "I am going to treat this as a Motion to Continue, and I am going to deny the Motion to Continue because this is an extremely untimely application for a Motion to Continue. ¶ Mr. Davila is in a trial. He had ample opportunity to -- he should have contacted our office prior to this time. His clients are not here; the respondent is not here. There is no reason something could not have been done earlier if, indeed, there was a conflict of some sort" [RT 5].

In this case it is clear that there were problems created by both parties. This Board has been put at a great disadvantage in this matter because neither party has provided us with complete information about the facts and the legal issues involved. Based on the record before us, however, we cannot conclude that the ALJ abused his

discretion in denying this "last minute" request for continuance.

CONCLUSION

The decision of the Department is affirmed.⁴

RAY T. BLAIR, JR., CHAIRMAN
JOHN B. TSU, MEMBER
BEN DAVIDIAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁴This final order is filed as provided by Business and Professions Code §23088, and shall become effective 30 days following the date of this filing of the final order as provided by §23090.7 of said statute for the purposes of any review pursuant to §23090 of said statute.