

ISSUED MAY 8, 2000

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

DARNELL WATERS, EARLEAN	)	AB-7233
WATERS, and GAYLE WHITE)	
dba Fruitvale Liquors	)	File: 21-161444
2678 Fruitvale Avenue	)	Reg: 98042432
Oakland, CA 94601,)	
Appellant s/Licensees,	)	Administrative Law Judge
	)	at the Dept. Hearing:
v.	)	Jeevan S. Ahuja
)	
	)	Date and Place of the
DEPARTMENT OF ALCOHOLIC	)	Appeals Board Hearing:
BEVERAGE CONTROL,	)	March 16, 2000
Respondent.	)	San Francisco, CA

Darnell Waters, Earlean Waters, and Gayle White, doing business as Fruitvale Liquors (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 25 days for appellant Darnell Waters selling an alcoholic beverage to a person under the age of 21, 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 §25658, subdivision (a).

¹The decision of the Department, dated September 24, 1998, is set forth in the appendix.

Appearances on appeal include appellants Darnell Waters, Earlean Waters, and Gayle White, appearing through their counsel, Denise Davis Moorehead, and the Department of Alcoholic Beverage Control, appearing through its counsel, Thomas Allen.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on September 27, 1984. Thereafter, the Department instituted an accusation against appellants charging the above-noted sale of a wine cooler on November 25, 1997 to Che Phillips, who was then 18 years old.

An administrative hearing was held on April 13, 1998; May 19, 1998;² and July 16, 1998, at which times oral and documentary evidence was received. At the July 16, 1998, hearing, testimony was presented by Che Phillips, who purchased the wine cooler while acting as a police decoy, and by Mike Gessini, an Oakland police officer.

Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred as charged. Appellants filed a Petition for Reconsideration with the Department on October 21, 1998, and the Department issued an order denying the Petition on October 27, 1998.

Appellants thereafter filed a timely notice of appeal. In their appeal,

²The matter was heard by ALJ Arnold Greenberg on April 13, 1998. The matter was continued due to the sudden and unforeseen inability of counsel for appellants to attend the hearing. The matter was heard by ALJ S. Judson on May 19, 1998, and the Department was represented on that date by Thomas Allen. The matter was continued due to the failure of the minor decoy to appear.

appellants raise the following issue: The ALJ erroneously granted the Department's motion to continue the hearing on May 19, 1998.

DISCUSSION

At the May 19, 1998, hearing, the Department moved to continue the matter because the minor decoy did not appear at the hearing. A subpoena naming two police officers and Che Phillips, the minor decoy and a police cadet, was served on the person acting as Court Liaison for the Oakland Police Department. The Court Liaison notified the officers and they attempted to contact the decoy, but were unable to do so. The officers appeared at the time and place for the hearing, but the decoy did not.

Counsel for appellants objected to granting the continuance, since the decoy had been served and was in contempt for not appearing.

Business and Professions Code §25666 specifies that in a sale-to-minor case, the minor decoy must attend the hearing, except in certain circumstances not relevant here. If the minor does not appear, the Department cannot proceed against the licensee.

The ALJ decided not to dismiss the accusation, but to grant a 30-day continuance, specifying that if the decoy did not appear at that time, she would be held in contempt and a further continuance would not be granted. [RT 10-13 (4/19/98).] The minor did appear and testify at the hearing set on July 16, 1998.

A party is ordinarily required to apply for the continuance within 10 working days after discovering the good cause for the continuance, unless that party did not cause and sought to prevent the condition or event establishing the good cause.

(Gov. Code §11524, subd. (b).) Continuances are granted or denied in the discretion of the ALJ for good cause shown. (Gov. Code §11524; Givens v. Department of Alcoholic Beverage Control (1959) 176 Cal.App.2d 529 [1 Cal.Rptr. 446]; Dresser v. Board of Medical Quality Assurance (1982) 130 Cal.App. 3d 506, 518 [181 Cal.Rptr. 797].) “[T]he factors which influence the granting or denying of a continuance in any particular case are so varied that the trial judge must necessarily exercise a broad discretion.” (Arnett v. Office of Admin. Hearings (1996) 49 Cal.App. 4th 332, 343 [56 Cal.Rptr.2d 774], quoting 7 Witkin, Cal. Procedure (3d ed. 1985) Trial, §9, p. 26.)

The continuance was requested by the Department on May 19, 1998, because the minor decoy involved did not appear. Department counsel stated that the decoy had been subpoenaed through the Court Liaison of the Oakland Police department, but the officers charged with contacting the decoy had been unable to do so. The bona fide and unforeseen unavailability of a witness is good cause for the granting of a continuance. (See, e.g., Standards of Judicial Administration Recommended by the Judicial Council, §9.)

“[S]ince it is impossible to foresee or predict all of the vicissitudes that may occur in the course of a contested proceeding [citation omitted], the determination of a request for a continuance must be based upon the facts and circumstances of the case as they exist at the time of the determination.” (Arnett v. Office of Admin. Hearings, supra.)

Appellants have not filed a brief in this matter and their notice of appeal alleges only that “the decision and penalty are the direct products of the improper

granting of the motion for continuance, making such decision and penalty legally unsustainable.” While it may be true that the Department would have been unable to proceed with their case if the continuance had not been granted, that does not make the granting of the continuance an abuse of the ALJ’s discretion. The decision and penalty were the direct products of Darnell Waters’s sale of an alcoholic beverage to a minor. Appellants have not shown that the ALJ abused his discretion in granting the continuance.

ORDER

The decision of the Department is affirmed.³

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

³This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this order as provided by §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 §23090 et seq.