Attorney: Wilson **Calendar #2**

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

AB-9132
File: 21-447537 Reg: 10072341

7-ELEVEN, INC. and RNJ ENTERPRISES, INC., dba 7-Eleven # 18322
657 Palm Avenue, Imperial Beach, CA 91932,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: September 1, 2011
Los Angeles, CA

7-Eleven, Inc. and RNJ Enterprises, Inc., doing business as 7-Eleven # 18322 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days for their clerk selling an alcoholic beverage to a law enforcement minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc. and RNJ Enterprises, Inc., appearing through their counsel, Ralph B. Saltsman and Autumn Renshaw, and the Department of Alcoholic Beverage Control, appearing through its counsel, Valoree Wortham.

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[1]The decision of the Department, dated September 2, 2010, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on December 15, 2006. On January 6, 2010, the Department filed an accusation against appellants charging that, on October 15, 2009, their clerk sold an alcoholic beverage to an 18-year-old individual who was working as a minor decoy for the Department and the local Sheriff's Department at the time.

A hearing was scheduled in this matter for April 21, 2010. Counsel for appellants arrived at the scheduled hearing location, only to discover that the hearing had been continued. All of the hearing participants had been notified of the continuance except appellants and their attorneys. Appellants, in a letter to the chief administrative law judge (ALJ), requested the appeal be dismissed. The matter was not dismissed and the hearing was rescheduled.

At the administrative hearing held on July 20, 2010, documentary evidence was received and testimony concerning the sale was presented by the decoy. Appellants presented no witnesses, but again asked that the appeal be dismissed because they had not been consulted or notified when the originally scheduled hearing was continued. The motion to dismiss was denied. In its subsequent decision, the Department determined that the violation charged was proved and no defense to the charge was established.

Appellants then filed an appeal contending: (1) The Department violated appellants' due process rights by unilaterally obtaining a continuance of the original hearing date without notification to or consultation with appellants, and (2) the Department violated the provisions of the Administrative Procedure Act (APA) by communicating ex parte with the Department's Administrative Hearing Office (AHO).

DISCUSSION

I

Appellants contend that the Department violated their right to procedural fairness because the Department sought, and was granted, a continuance without notifying or consulting with appellants.

Appellants do not appear to be objecting to the continuance as such, but to the Department's failure to provide notice that it was requesting a continuance and, most particularly, that the hearing was continued. Because appellants and their counsel did not receive notice that the hearing had been continued, one of their attorneys made a fruitless trip from Los Angeles to San Diego and back, in the rain, on the date originally scheduled for the hearing.

The grant or denial of a continuance is at the discretion of the ALJ, and that decision "will be upheld unless a clear abuse is shown, amounting to a miscarriage of justice." (*Mahoney v. Southland Mental Health Associates Medical Group* (1990) 223 Cal.App.3d 167, 170 [272 Cal.Rptr. 602].) It is not clear from the record whether this continuance came about as a result of an ALJ's review or simply by the action of the clerical or administrative staff of the AHO. However, both Chief ALJ John Lewis and ALJ Rudy Echeverria, who conducted the hearing, heard appellants' argument urging dismissal of the accusation because of the Department's failure to provide notice, and both rejected the argument.

The basis for the Department's continuance request was the decoy's inability to testify on the originally scheduled hearing date because he had joined the military and was attending boot camp. The hearing was rescheduled for a time when the decoy was home on leave before deployment to Kuwait. This Board is aware that similar situations

have arisen before, and it appears that a continuance is almost routinely granted under these circumstances, even if the licensee objects.

The usual procedure followed by the Department appears to be that the licensee's counsel is contacted before a continuance is requested so that mutually acceptable dates for rescheduling and other details may be worked out ahead of time. However, we find nothing that prohibits either party from unilaterally requesting a continuance. In such a case, however, the other party *should* be notified of the request, even if there is no absolute rule that it *must* be notified. Certainly, the other party must be notified if a continuance is granted.[2]

The Department clearly did not abide by its usual procedure and it was wrong not to notify the licensee that the hearing was continued. However, that does not automatically mean that the decision should be reversed.

The one case appellants cite to support their argument is *Mathew Zaheri Corp. v. New Motor Vehicle Bd*. (1997) 55 Cal.App.4th 1305 [64 Cal.Rptr.2d 705] (*Zaheri*). Appellants cite the case for the following language: "Misconduct of court or counsel is a potential ground of reversal in a civil action, and can be a ground for overturning an administrative adjudication for denial of a fair hearing." (*Id*. at p. 1314.)

While appellant relied on a general principle stated in the opinion, *Zaheri* really supports the Department's position. In *Zaheri*, a car dealer in a dispute with a franchisor sought to overturn the New Motor Vehicle Board's decision in favor of the franchisor, on the ground that ex parte communications between the administrative law

[2]It is not clear whether it is the Department's attorney or the AHO staff who is responsible for notifying the licensee of a continuance. Best practice would probably be for both to do so. In this case neither did.

judges and the franchisor's counsel deprived the dealer of a fair hearing. (*Zaheri*, *supra*, at pp. 1318-1320.) The court found that the ex parte communication violated the law of legal ethics.[3] It then went on to say:

> However, to warrant reversal such misconduct must be shown to be prejudicial as a miscarriage of justice or as intentional and sufficiently heinous to warrant reversal as a punishment or because it shows bias on the part of the tribunal.

(*Id*. at p. 1315.)

The court concluded that the misconduct of the attorneys and the ALJ did not compel reversal. Reversal would only have been warranted if the misconduct were "shown to be prejudicial or intentional and heinous" (p. 1318), which, the court said, was not shown on the record it had before it.

Similarly, the misconduct here does not warrant reversal. The lack of notice to appellants was the result of oversight; it was not intentional and certainly not heinous. While appellants and their counsel did incur expense and inconvenience, they were not legally prejudiced. The court in *Zaheri* (at p. 1318) said " 'Prejudice' connotes that the Board's decision stemmed, at least in part, from the asserted misconduct." Appellants still had the opportunity to present their case[4] and they received a fair hearing. They have not alleged that the decision of the Department in any way resulted from the failure to notice the continuance, so we cannot say that the misconduct warranted reversal.

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[3]*Zaheri* was decided just before the major revision of the APA that included the current prohibitions against ex parte communications. The court found that the then-existing provisions against ex parte communications did not apply to the situation before it, but also looked for violations of legal or judicial ethics and due process.

[4]We note that they did not take advantage of this opportunity, presenting no testimony and only two items of documentary evidence, both of which had to do with the continuance.

II

Appellants contend that the Department violated the provisions of the APA by communicating ex parte with the Department's Administrative Hearing Office.

Although Government Code section 11430.10 prohibits both direct and indirect communication with the presiding officer (in this case, the ALJ), section 11430.20, subdivision (b), provides that "a communication otherwise prohibited by Section 11430.10 is permissible" if "[t]he communication concerns a matter of procedure or practice, including a request for a continuance, that is not in controversy."

The Law Revision Commission Comments for section 11430.20 state, in part:

> This article is not intended to preclude communications made to a presiding officer or staff assistant regarding noncontroversial matters of procedure and practice, such as the format of pleadings, number of copies required, manner of service, and calendaring and status discussions. Subdivision (b). Such topics are not part of the merits of the matter, provided they appear to be noncontroversial in context of the specific case.

Although this request for continuance became a matter of controversy later, at the time the communication occurred, it was simply a routine request, of a type that has routinely been granted. In any case, the controversy that arose from the continuance request had nothing to do with the merits of the case.

The communication here, while ex parte, was not a prohibited one, and appellants have not shown that they are entitled to any remedy.

ORDER

The decision of the Department is affirmed.[5]

FRED ARMENDARIZ, CHAIRMAN
TINA FRANK, 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.