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

AB-9454
File: 23-486398 Reg: 13079176

MARK ROBIN PURCIEL and SCOTT TAYLOR THOMAS,
dba Oceanside Ale Works
1800 Ord Way, Oceanside, CA 92056-1502,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: February 5, 2015
Los Angeles, CA

ISSUED FEBRUARY 25, 2015

Mark Robin Purciel and Scott Taylor Thomas, doing business as Oceanside Ale Works (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] suspending their license for 15 days because their employee sold an alcoholic beverage to a minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances include appellants Mark Robin Purciel and Scott Taylor Thomas, through Purciel, in propria persona, and the Department of Alcoholic Beverage Control, through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

[1]The decision of the Department, dated June 18, 2014, is set forth in the appendix.

Appellants' small beer manufacturer's license was issued on October 26, 2010. On September 6, 2013, the Department filed an accusation against appellants charging that, on January 12, 2013, Melyssa Anne Tornello, appellants' bartender, sold an alcoholic beverage to 18-year-old Zachary Jafek. Although not noted in the accusation, Jafek was working as a minor decoy in a joint operation between the San Diego County Sheriff's Department and the Department of Alcoholic Beverage Control at the time.

The administrative hearing commenced on December 19, 2013, and appellants appeared through Purciel, in propria persona. Because Jafek (the decoy) was attending school in Utah at the time, the Department had scheduled the hearing to commence at 1:30 p.m. and made arrangements for him to fly in earlier that morning. The decoy's flight from Utah was delayed indefinitely due to a snow storm, however, and he was unable to attend the hearing on December 19. As such, after certain documentary evidence was received, the Department requested a continuance of the hearing on account of the decoy's inability to attend. Despite an objection to the continuance by appellants,[2] the administrative law judge (ALJ) found "good cause" for the continuance and granted the Department a later hearing date of April 2014, at which time the decoy would be on spring break.

The hearing resumed on April 24, 2014, at which time additional documentary

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[2]At oral argument, Purciel indicated that, prior to the hearing on December 19, 2013, an off-the-record conference was held between himself, counsel for the Department, and the ALJ. That conference was when Purciel first learned of the decoy's inability to attend the hearing. According to Purciel, he *did* raise an objection to the Department's failure to present the decoy during the conference. Counsel for the Department did not dispute appellant's representation in this regard, although we observe that the Department was represented by different counsel at the administrative hearing and at oral argument on appeal.

evidence was received and testimony concerning the violation charged was presented by the decoy and Chris Hydar, an officer for the San Diego County Sheriff's Department. Appellants once again appeared at the hearing through Purciel, in propria persona, and presented no witnesses. However, appellants gave an opening statement in which they objected to the Department's failure to produce the decoy at the original hearing, and the ALJ's decision to grant the Department's request for a continuance. Appellants also claimed that the service of the subpoena on the decoy was improper. The ALJ heard appellants' arguments, reiterated that he believed good cause was shown for the continuance, and instructed Purciel to question the decoy, who was present on April 24, 2014, regarding the circumstances surrounding his inability to appear on December 19, 2013.

Testimony established that on the day of the operation, the decoy entered the licensed premises alone, went to the bar area, and waited in line. When it was his turn to be served, the bartender approached the decoy and asked what she could get for him. The decoy ordered the first beer on the menu, a Buccaneer Blonde, as he had been instructed to do. The bartender went to the tap, poured some beer into a plastic cup, and gave the cup to the decoy without asking any age-related questions or requesting proof of majority. The decoy paid for the beer and took the cup of beer to a table where agents were located.

The Department's decision determined that the violation charged was proved and no defense was established. The ALJ recommended, and the Department imposed, a penalty of 15 days' suspension as a result. Also, the Proposed Decision reaffirmed the ALJ's position that the request for a continuance on December 19, 2013

was supported by good cause. (See Proposed Decision at p. 1.)

On appeal, appellants do not challenge that the violation occurred. Rather, appellants contend: (1) the Department's failure to produce the decoy on December 19, 2013 constituted a violation of section 25666 of the Business and Professions Code; and (2) the ALJ violated section 11524 of the Government Code by granting the Department's request for a continuance. Because these issues are interrelated, they will be discussed together.

DISCUSSION

Appellants contend that the Department's failure to produce the decoy on December 19, 2013, the first day of the hearing, constitutes a violation of Business and Professions Code section 25666. Also, appellants contend that the ALJ violated section 11524 of the of the Government Code when he granted the Department's request for a continuance.

The Department first responds to appellants' arguments by claiming these issues were waived because appellants failed to raise them on the first day of the administrative hearing, before the matter was continued. The Department correctly observes, as this Board has stated in the past, that "[i]t is settled law that the failure to raise an issue or assert a defense at the administrative hearing bars its consideration when raised or asserted for the first time on appeal." (*7-Eleven, Inc./Cavazos* (2013) AB-9324 at p. 3, citing *Hooks v. Cal. Personnel Bd.* (1980) 111 Cal.App.3d 572, 577 [168 Cal.Rptr. 822]; *Shea v. Bd. of Med. Examiners* (1978) 81 Cal.App.3d 564, 576 [146 Cal.Rptr 653]; *Reimel v. House* (1968) 259 Cal.App.2d 511, 515 [66 Cal.Rptr. 434]; *Wilke & Holzheiser, Inc. v. Dept. of Alcoholic Bev. Control* (1966) 65 Cal.2d 349,

377 [55 Cal.Rtpr. 23]; *Harris v. Alcoholic Bev. Control Appeals Bd.* (1961) 197 Cal.App.2d 182, 187 [17 Cal.Rptr. 167].) Notwithstanding this premise, we are not convinced that it applies here.

Most importantly, appellants *did* raise these arguments at the administrative hearing during their opening argument, albeit on the second day of the hearing.[3] The ALJ entertained appellants' arguments and expressly rejected them. (See Proposed Decision at p.1; RT, Vol. II at pp. 14-19; 64-66.) Thus, by default, it appears that this ruling is subject to review on appeal. Additionally, any attempts to "enlarge the scope of administrative powers are void," and "courts are obligated to strike them down." (*AFL-CIO v. Unemployment Ins. Appeals Bd.* (1996) 13 Cal.4th 1017, 1035-1036 [56

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[3]Assuming Purciel's assertion during oral argument that he raised an objection to the continuance off the record on December 19, 2013 to be true (see fn. 2 *ante*), we are troubled by the fact that the objection did not make it onto the record for that day of the hearing, particularly because appellants appeared in propria persona. While pro per litigants are not entitled to any special treatment, this principle does not prevent judges from providing assistance to self-represented litigants to enable them to comply with rules of procedure — such as preserving a *known* objection for appeal — and ensuring the case is decided on its merits. (See, e.g, *Monastero v. Los Angeles Transit Co.* (1955) 131 Cal.App.2d 156 [280 P.3d 187] [court of appeal found no fault with the trial judge's extensive assistance to the self-represented plaintiff, including ordering the defendant to provide the plaintiff with typical jury instructions for similar cases, and referred to the judge's efforts with approval]; see also *Gamet v. Blanchard* (2001) 91 Cal.App.4th 1276, 1284 [111 Cal.Rptr.2d 439] ["Judges should recognize that an in propria persona litigant may be prone to misunderstanding court requirements or orders — that happens enough with lawyers — and take at least some care to assure their orders are plain and understandable."].)

Because the pertinent events occurred off the record, we cannot presume to know what transpired. That aside, we hope that in the interest of justice, both the Department and its ALJs are conscious of the plight of pro per litigants, and would assist them in ensuring that any objections raised by said litigants off the record are properly preserved for appeal, whether or not the Department or its ALJs believe them to be meritorious. Regardless, because we find the issues here were properly preserved for appeal, we need not address this matter further.

Cal.Rptr.2d 109]; see also *Morris v. Williams* (1967) 67 Cal.2d 733, 748 [63 Cal.Rptr. 689]; *Dyna-Med, Inc. v. Fair Employment and Housing Comm.* (1987) 43 Cal.3d 1379, 1389 [241 Cal.Rptr. 67]; *Dept. of Alcoholic Bev. Control v. Miller Brewing Co.* (2008) 104 Cal.App.4th 1189, 1198-1199 [128 Cal.Rptr.2d 861].) An enlargement of administrative power is unenforceable as a matter of law, and a void judgment is subject to collateral attack at any time. (See, e.g., *Talley v. Valuation Counselors Group, Inc.* (2010) 191 Cal.App.4th 132, 149 [119 Cal.Rptr.3d 300].) As such, we will consider appellants' arguments here.

As mentioned above, appellants maintain that the Department violated section 25666 of the Business and Professions Code (hereinafter, section 25666) when it failed to produce the decoy on December 19, 2013. Section 25666 reads as follows:

> In any hearing on an accusation charging a licensee with a violation of Sections 25658, 25663, and 25665, the department shall produce the alleged minor for examination at the hearing unless he or she is unavailable as a witness because he or she is dead or unable to attend the hearing because of a then-existing physical or mental illness or infirmity, or unless the license has waived, in writing, the appearance of the minor. When the minor is absent because of a then-existing physical mental illness or infirmity, a reasonable continuance shall be granted to allow for the appearance of the minor if the administrative law judge finds that it is reasonably likely that the minor can be produced within a reasonable amount of time. Nothing in this section shall prevent the department from taking testimony of the minor as provided in Section 11511 of the Government Code.

Appellants contend that section 25666 must be read in conjunction with section 11524 of the Government Code (section 11524) which provides that an ALJ may grant continuances for "good cause." The Department counters by arguing that the two statutes must be read separately and without reference to each other, that section 25666 does not apply to continuances, and that the ALJ acted within his discretion

under section 11524 when he granted the continuance requested on December 19, 2013.

This case presents an issue of statutory interpretation, specifically whether the categorical concept of "good cause" found in section 11524 is a free standing one to be determined solely on the facts presented according to the sound discretion of the ALJ, or is it, when the presence of the alleged minor witness is at issue, to be given meaning by reference to section 25666? The Board's task in interpreting these pertinent statutes is to ascertain the intent of the Legislature so as to effectuate the purpose of the law. (*Los Angeles Unified School Dist. v. Garcia* (2013) 58 Cal.4th 175, 186 [165 Cal.Rptr.3d 460]; *Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (*Masani*) (2004) 118 Cal.App.4th 1429, 1438 [13 Cal.Rptr.3d 826].) "To determine the intent of legislation, we first consult the words themselves giving them their usual and ordinary meaning. Where the statutory wording is clear a court should not add or alter it to accomplish a purpose that does not appear on the face of the statute or from its legislative history." (*Masani*, s*upra*, at p. 1438, citations omitted.) This is simply because "the language is generally the most reliable indicator of legislative intent." (*Garcia*, *supra*, at p. 186, quoting *City of Alhambra v. County of Los Angeles* (2012) 55 Cal.4th 707, 718-719 [149 Cal.Rptr.3d 247].)

The nature, purpose, and mandate of section 25666 are obvious from its face: absent a written waiver, a licensee facing discipline for any of the listed offenses — all of which involve minors — has the right to have the alleged minor present at the disciplinary hearing, and the Department is obligated to produce the minor unless certain extenuating circumstances exist. Those specific extenuating circumstances are

that the minor must either be *dead* or otherwise unable to attend due to a *physical or mental illness or infirmity*. If none of the extenuating circumstances are present, section 25666 is violated if the Department fails to produce the minor at any such disciplinary hearing wherein the appellant has not waived its right.

We do not accept the Department's contention that section 25666 does not apply to continuances. (See Dept.Br. at pp. 7-8.) First, the statute expressly allows for a continuance, but only under the very limited circumstance when the minor is absent *because of* a then-existing physical or mental illness or infirmity, and the ALJ believes that it is reasonably likely that the minor can be produced within a reasonable amount of time. (See Bus. & Prof. Code § 25666.) The Department's interpretation would render the entire second sentence of section 25666 dealing with continuances superfluous, and "[t]he rules of statutory construction direct us to avoid, if possible, interpretations that render a part of a statute surplusage." (*People v. Cole* (2006) 38 Cal.4th 964, 980-981 [7 Cal.Rptr.3d 333], citing *Fontana Unified School Dist. v. Burman* (1988) 45 Cal.3d 208, 221 [246 Cal.Rptr. 733]; *Stafford v. Realty Bond Service Corp.* (1952) 39 Cal.2d 797, 805 [249 P.2d 241].)

Moreover, under the maxim of statutory construction, *expressio unius est exclusio alterius*, "if exemptions are specified in a statute, [the Board] may not imply additional exemptions unless there is a clear legislative intent to the contrary." (*Simmons v. Ghaderi* (2008) 44 Cal.4th 570, 583 [80 Cal.Rptr.3d 83], citations omitted.) Here, written waiver, death, or then-existing illness or infirmity are the only situations exempting the Department from its obligation to produce the minor, and the then-existing illness or infirmity which the ALJ finds to be resolvable is the only exemption

allowing for a continuance listed in section 25666. Nothing from the language of the statute suggests that the Legislature intended any additional exemptions to apply in cases such as this, and we are therefore precluded from implying them here. (*Ghaderi*, *supra*, at p. 583.)

A cursory review of the legislative history of section 25666 suggests that it was intended to provide an exhaustive list of circumstances under which the Department is excused from producing the minor at a disciplinary hearing. Specifically, section 25666 was enacted in 1963, and former section 25666 read as follows:

> In any hearing on an accusation charging a licensee with a violation of Sections 26658, 25663, and 25665, the department shall produce the alleged minor for examination at the hearing unless the licensee has waived, in writing, the appearance of the minor. Nothing in this section shall prevent the department from taking testimony of such minor as provided in Section 11511 of the Government Code.

(Stats. 1963, ch. 1562, § 1, pp. 3144-3145.)

The year 1987 marks the only time section 25666 was amended since its enactment. In that amendment, the words "he or she is unavailable as a witness because he or she is dead or unable to attend the hearing because of a then-existing physical or mental illness or infirmity, or unless" were added to the first sentence, and the entire second sentence relating to continuances was added, resulting in the current version of the statute. (Stats. 1987, ch. 81, § 1, p. 8890.) The Digest for the 1987 amendment states that the language was added to section 25666 "to provide that the department is not required to produce the minor if the minor is unavailable as a witness, *as specified*." (Legis. Counsel's Dig., Assem. Bill No. 340 (1987 Reg. Sess.), Summary Dig., p. 26, emphasis added.) The deliberate inclusion of the words "as

specified" evince that the Legislature intended the *specific* circumstances added to section 25666 to be the exclusive means through which the Department would be excused from producing the alleged minor at a disciplinary hearing. Because the same amendment added the second sentence to section 25666 describing the very limited circumstances under which a continuance may be granted, it is reasonable to infer that provision too was intended to be exclusive.

Finally, we must reconcile section 25666 with section 11524. As one court has observed:

> If two seemingly inconsistent statutes conflict, the court's role is to harmonize the law. [Citations]. We presume that the Legislature, when enacting a statute, was aware of existing related laws and intended to maintain a consistent body of rules. (*People v. Vessell* (1995) 36 Cal.App.4th 285, 289 [42 Cal.Rptr.2d 241].)
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> If inconsistent statutes cannot otherwise be reconciled, "a particular or specific provision will take precedence over a conflicting general provision." [Citations.] The Supreme Court has confirmed, "' where the general statute standing alone would include the same matter as the special act, and thus conflict with it, the special act will be considered as an exception to the general statute whether it was passed before or after such general enactment. [Citations].'" (*People v. Gilbert* (1969) 1 Cal.3d 475, 479 [82 Cal.Rptr. 724].)

(*Stone Street Capital, LLC v. Cal. State Lottery Com*. (2008) 165 Cal.App.4th 109, 118-119 [80 Cal.Rptr.3d 326].)

We find that the principles of statutory interpretation explained in *Stone Street Capital* apply to this case. While section 11524 generally allows an ALJ to grant a continuance for "good cause," section 25666 specifically addresses the acceptable grounds for continuance in cases such as this. The specific provisions of section 25666 define, as a matter of law, what constitutes "good cause" under section 11524 when it

comes to the grant of a continuance based on the absence or unavailability of a minor decoy in a Department-set disciplinary hearing. (See *Stone Street Capital*, *supra*, at pp. 118-119.) Put slightly differently, but to the same legal effect, while section 11524 allows for a continuance to be granted upon a showing of "good cause," section 25666 delineates the exclusive grounds for good cause continuances in disciplinary hearings where, as here, the violation charged falls under sections 25658, 25663, and or 25665 of the Business and Professions Code, and the request for a continuance is based on the failure of the alleged minor to appear at the scheduled hearing. "Action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an 'abuse of discretion.' " (*Horsford v. Bd. of Trustees of Cal. State Univ.* (2005) 132 Cal.App.4th 359, 393 [83 Cal.Rptr. 644], citations omitted.)

Because appellants did not waive their right to have the decoy present on December 19, 2013, and because the specific extenuating circumstances justifying a continuance in cases such as this were absent here, the Department was obligated under section 25666 to produce the decoy at appellants' disciplinary hearing on that date. Having failed to do so, the Department violated section 25666.

ORDER

The decision of the Department is reversed.[4]

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[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.

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
PETER J. RODDY, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD