

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

AB-9589

File: 20-397260; Reg: 15082705

7-ELEVEN, INC. and MANINDER P.S. LOBANA,
dba 7-Eleven Store #2133-16027
1840 Cochran Street, Simi Valley, CA 93065,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley

Appeals Board Hearing: May 4, 2017
Los Angeles, CA

ISSUED MAY 19, 2017

Appearances: *Appellants:* Donna Hooper and Melissa Gelbart, of Solomon, Saltsman & Jamieson, as counsel for 7-Eleven, Inc. and Maninder P.S. Lobana, doing business as 7-Eleven Store #2133-16027,

Respondent: Jonathan V. Nguyen, as counsel for Department of Alcoholic Beverage Control.

OPINION

7-Eleven, Inc. and Maninder P.S. Lobana, doing business as 7-Eleven Store #2133-16027, 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 Department minor decoy, in violation of Business and Professions Code section 25658, subdivision (a).

¹The decision of the Department, dated April 27, 2016, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on February 10, 2013. On June 30, 2015, the Department filed an accusation against appellants charging that, on June 3, 2015, appellants' clerk, Tirath Singh (the clerk), sold an alcoholic beverage to 19-year-old Megan Soller. Although not noted in the accusation, Soller was working as a minor decoy for the Department of Alcoholic Beverage Control at the time.

On July 21, 2015, appellants filed and served a Request for Discovery on the Department pursuant to Government Code section 11507.6 demanding, inter alia, the names and addresses of all witnesses. (Exh. 1.) Appellants received the Department's response on August 21, 2015, providing the address and phone number of the Department's Ventura District Office in lieu of decoy's personal contact information. The Department also provided a copy of the decoy's California driver's license—with the address redacted. (*Ibid.*)

On August 31, 2015, appellants sent a meet and confer letter to the Department. (*Ibid.*) Appellants received the Department's response on September 9, 2015, in which it refused to disclose the decoy's personal contact information. (*Ibid.*)

Appellants filed a Motion to Compel Discovery on September 8, 2015. The Department filed its opposition to the motion on September 14, 2015, and the motion was denied on September 30, 2015. (*Ibid.*)

An administrative hearing was originally scheduled for October 21, 2015, but the Department discovered the decoy was attending school out of state, and would be unavailable to testify on that date. A telephone conference was conducted on September 21, 2015, between the administrative law judge (ALJ), appellants and the Department, to discuss the Department's request for a continuance to permit the decoy

to testify while she was home on break in December. The request for continuance was granted on October 7, 2015. (*Ibid.*) An administrative hearing was held on December 23, 2015. Documentary evidence was received and testimony concerning the sale was presented by Soller (the decoy) and by Department Agent Bryan Parsons.

Testimony established that on the day of the operation, the decoy entered the licensed premises, followed shortly thereafter by Agent Tan. The decoy selected a six-pack of Bud Light beer, took it to the sales counter, and set it down. The clerk asked for identification and the decoy handed the clerk her California driver's license (exh. 4) which had a vertical orientation, contained her correct date of birth—showing her to be 19 years old—and had a red stripe indicating “AGE 21 IN 2017.” The clerk looked briefly at the license, handed it back, then completed the sale without asking any age-related questions. The decoy exited the premises, then re-entered with two Department agents to make a face-to-face identification of the clerk. The clerk was subsequently issued a citation.

The Department's decision determined that the violation charged was proved and no defense was established.

Appellants then filed a timely appeal contending: (1) the ALJ abused his discretion by denying appellants' motion to compel disclosure of the decoy's personal contact information, and (2) the ALJ abused his discretion by omitting facts and conclusions in his proposed decision regarding the granting of a continuance.

DISCUSSION

I

Appellants contend that the ALJ abused his discretion by denying appellants' motion to compel disclosure of the decoy's personal contact information. (App.Br. at

pp. 6-7.) Appellants also contend the Department failed to comply with Government Code section 11507.6 when it provided only the address of the Department's Ventura District Office, when it was in possession of the decoy's home address. (*Id.* at p. 7.)

Government Code section 11507.6 provides in pertinent part:

After initiation of a proceeding in which a respondent or other party is entitled to a hearing on the merits, a party, upon written request made to another party, prior to the hearing and within 30 days after service by the agency of the initial pleading or within 15 days after the service of an additional pleading, is entitled to (1) obtain the names and addresses of witnesses to the extent known to the other party . . .

(Gov. Code, § 11507.6.) Appellants favor a plain-language interpretation of this provision that would require the Department to provide the decoy's home address "to the extent known" by the Department (App.Br. at p. 7), while the Department maintains it is only required to furnish *an* address—not a residential address. (Dept.Br. at p. 4.)

This Board has addressed a number of cases raising this identical issue. In *7-Eleven, Inc./Joe* (2016) AB-9544² we held that the decoy's personal address is protected under section 832.7 of the Penal Code. (*Id.* at pp. 6-10.) We follow our *Joe* decision here, and refer the parties to that case for an in-depth discussion.

The Department also maintains, and we agree, that disclosing the decoy's home address would violate his right to privacy. "Individuals have a legally protected privacy interest in their home addresses." (Dept.Br. at p. 6, citing *County of Los Angeles v. Los Angeles County Employee Relations Com.* (2013) 56 Cal.4th 905, 927 [157 Cal.Rptr.3d 481].) As the Department points out, appellants "have consistently failed to show any reason why they need the decoy's home address." (*Id.* at p. 7.) When a person's

²Cert. den., *7-Eleven, Inc. et al v. ABC Appeals Bd.* (July 6, 2016) 2nd App. Dist. B275900.

privacy rights are implicated, the party seeking discovery must show that there is a “compelling need” for this information, and demonstrate that the information is both “directly relevant” and “essential to the fair resolution” of the matter. (*Id.* at p. 6, citing *Alch v. Superior Court* (2008) 165 Cal.App.4th 1412, 1423-1425 [82 Cal.Rptr.3rd 470].) Appellants have not established any compelling need for the information, nor have they demonstrated that the decoy’s private information is both directly relevant and essential to the fair resolution of the matter.

In the instant case, the record contains no evidence showing that an attempt was made to reach the decoy at the Department’s Ventura District Office. Indeed, counsel for appellants stated during oral argument that while they do attempt to reach the decoy when provided with the address of a police department, they make no attempt when the address provided to them is “that of our opponent.” Since we are satisfied that the Department is making every effort to cooperate, by instructing their district offices to pass along the message to decoys when appellants attempt to reach them at a district office address, we can find no fault here. Furthermore, appellants have not demonstrated a compelling need for the decoy’s personal contact information. It is appellants’ burden to establish a violation of section 11507.6. (See Gov. Code, § 11507.7; see also *Joe, supra*, at p. 11). Appellants have not met this burden, nor have they demonstrated how the denial of their motion constitutes an abuse of discretion.

II

Appellants contend that the ALJ abused his discretion by omitting facts and conclusions in his proposed decision regarding the granting of a continuance over the objections of appellants. (App.Br. at p. 9.) Appellants contend that the ALJ’s failure to

discuss this issue in his proposed decision deprived the Director of ABC, as well as appellants, of a meaningful review of the decision. (*Id.* at pp. 11-12.)

Government Code section 11524, subdivision (a), vests an administrative law judge with authority to grant a continuance upon a showing of “good cause.”

In exercising the power to grant continuances in an administrative proceeding, an administrative law judge must be guided by the same principles applicable to continuances generally in adjudicative settings: continuances should be granted sparingly, nay grudgingly, and then only on a proper and adequate showing of good cause. In general, a continuance for a short and certain time is less objectionable than a continuance for a long and uncertain time, and there must be a substantial showing of necessity to support a continuance into the indefinite future. But the factors that influence the granting or denying of a continuance in any particular case are so varied that the judge must necessarily exercise a broad discretion. Since it is impossible to foresee or predict all of the vicissitudes that may occur in the course of a contested proceeding, 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* (1996) 49 Cal.App4th 332, 56 Cal.Rptr.2d 774)

Witkin, the leading text writer on California law, has succinctly assessed as follows: "The 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. On an appeal from the judgment . . . it is practically impossible to show reversible error in the granting of a continuance." (4 Witkin, Cal. Procedure (2d ed. 1971) Trial, § 7, p. 2865.

(*Taylor v. Bell* (1971) 21 Cal.App.3d 1002, 1007 [98 Cal.Rptr. 855].)

In addition to the “good cause” determination of Government Code section 11524(a), minor decoy hearings are governed by Business and Professions Code section 25666 which provides:

(a) 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 licensee has waived, in writing, the appearance of

the minor. When a minor is absent because of a then-existing physical or 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.

(b) (1) Nothing in this section shall prevent the department from taking testimony of the minor as provided in Section 11511 of the Government Code.

(2) This section is not intended to preclude the continuance of a hearing because of the unavailability of a minor for any other reason pursuant to Section 11524 of the Government Code.

(Cal. Bus. & Prof. Code, §25666.)

As explained in an unpublished decision,³ subdivision (b)(2) was added to section 25666—effective January 1, 2016—to clarify that sections 25666 and 11524 are not mutually exclusive, but are to be read as working in harmony. The case went on to explain that the amendment to section 25666 did not change the law, but merely clarified what had been the law all along—namely, that the specific reasons for a continuance enumerated in section 25666 did not foreclose other reasons for continuance granted under the penumbra of “good cause” in section 11524. Although we cannot cite an unpublished opinion, nor rely upon it as precedent, such a case can be used to explain the current state of the law, which is that Government Code section 11524 provides that a continuance may be granted at the decision maker’s discretion, upon a showing of good cause, *in addition to* Business and Professions Code section 25666 requiring that a continuance be granted in specified circumstances.

The Department maintains the ALJ was not required to state his reasons for

³*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. & Circle K Stores, Inc.*, 2016 Cal. App. Unpub. LEXIS 5866, (Cal.App.4th Dist., Aug. 8, 2016), which annulled the Board’s decision in *Circle K* (2015) AB-9490 and reinstated the Department’s decision.

denying appellants' motion for reconsideration—which asked the ALJ to reverse his decision on the continuance, and to dismiss the matter—because it was a pre-hearing motion and had nothing to do with the accusation against appellants. (Dept.Br. at p. 9.) As the Department points out, the discussion about the granting of the continuance was made on the record (see RT at pp. 14-18), and therefore—as a pre-hearing matter—was not required to be a part of the ALJ's proposed decision. (*Ibid.*)

Finally, the Department contends that appellants are attempting to characterize their own arguments made in opposition to the continuance as evidence, when, in fact, since appellants' counsel was not under oath at the time the arguments were made, these are *not* facts to be considered as evidence. (*Id.* at pp. 11-12.) We agree.

We believe the continuance was properly granted, and that it was not an abuse of discretion to omit a discussion of this continuance from the proposed decision. The ALJ has broad discretion to grant a continuance when, as here, the decoy is out of state at the time of the original hearing, and a brief continuance of three months makes it possible for the decoy to appear and testify—as she is required to do by section 25666. This appears to be the quintessential definition of the “good cause” required by section 11524. Appellants have not shown how they were prejudiced by this delay, nor have they demonstrated how the ALJ's omission from his proposed decision of a discussion of facts not in evidence constitutes an abuse of discretion.

ORDER

The decision of the Department is affirmed.⁴

BAXTER RICE, CHAIRMAN
JUAN PEDRO GAFFNEY RIVERA, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁴This 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.