

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

AB-8601

File: 20-284067 Reg: 05060988

7-ELEVEN, INC., MANIGEH G. BAYATI, and MOSTAFA BAYATI
dba 7-Eleven #2172-22873
14975 Brookhurst, Westminster, CA 92683,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: May 3, 2006
Los Angeles, CA

ISSUED JULY 12, 2007

7-Eleven, Inc., Manigeh G. Bayati, and Mostafa Bayati, doing business as 7-Eleven #2172-22873 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 days for their clerk, Son Tony Le, having sold a 24-ounce can of Bud Light beer before 6:00 a.m., a violation of Business and Professions Code section 25631, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., Manigeh G. Bayati, and Mostafa Bayati, appearing through their counsel, Bryan A. Bayati, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry Winters.

¹The decision of the Department, dated August 3, 2006, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on June 10, 1993.

Thereafter, the Department instituted an accusation against appellants charging the sale of an alcoholic beverage between the hours of 2:00 a.m. and 6:00 a.m.

An administrative hearing was held on May 17, 2006, at which time oral and documentary evidence was received. At that hearing, Benjamin Delarosa, a Department investigator, testified that he removed a can of Bud Light beer from the cooler in appellants' store and took it to the counter. He was told by the clerk that although he could not sell the beer to him before 6:00 a.m., he would do so anyway. Co-licensee Mostafa Bayati testified that he believed the clerk made the sale because he had been bullied by the investigator to make the sale. Le, the clerk, did not testify.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established, and determined that Bayati's hearsay testimony that the clerk was intimidated into making the sale was unsupported by any direct evidence.

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) the licensee was not represented by counsel; (2) the exclusion from evidence of the Le declaration was error; (3) appellants were unable to cross-examine the Department investigator; and (4) the clerk did not intend to make a sale. Issues 1 and 3 are related and will be treated as a single issue. Similarly, issues 2 and 4 present related issues, and will be treated accordingly.

DISCUSSION

I

Appellant/co-licensee Mostafa Bayati represented appellants at the administrative hearing. Appellants now contend on appeal that they were prejudiced by this self-representation because Bayati was unfamiliar with legal and administrative procedure. As a consequence, they assert, he did not know to comply with Government Code section 11514, which explains the procedure to be followed for the use of declarations, and, as a result, the critical evidence consisting of the clerk's testimony was excluded. In addition, appellant/co-licensee Bayati complains that he was unable to cross-examine the Department witness because of his lack of training.

It should be noted at the outset that the notice of appeal and the appeal brief on appellants behalf was prepared and filed by Bryan Bayati, appellant/co-licensee Mostafa Bayati's son. There is also a letter from Bryan Bayati in the file dated March 11, 2006, approximately two months prior to the administrative hearing, informing the Department he had been retained to represent appellants, and requesting discovery. Appellant co-licensee Bayati did not object to going forward with the hearing even though his son was not present, and offered no explanation for his absence.

Whether or not appellant/co-licensee was incompetent to represent appellants at the hearing is not properly an issue. The right to effective assistance of counsel is a criminal law concept not applicable to administrative license disciplinary actions.

"A proceeding before an administrative agency to determine whether a license should be revoked is not a criminal or quasi-criminal prosecution." (*Skipitar v. Munro*

(1959) 175 Cal.App.2d 1, 6 [345 P.2d 508]; *Molina v. Munro* (1956) 145 Cal.App.2d 601, 606 [302 P.2d 818].) The court in *Kim v. Orellana* (1983) 145 Cal.App.3d 1024, 1027 [193 Cal.Rptr. 827], explained:

Due process does not include the further requirement that competent representation be furnished by counsel in a civil action. The only conduct proscribed by the due process clause of the United States Constitution is conduct that may be fairly attributed to the state; the same is true with respect to the corresponding procedural due process provision of the California Constitution. (*Martin v. Heady* (1980) 103 Cal.App.3d 580, 586 [163 Cal.Rptr. 117].) Any lack of adequate representation on the part of appellant's retained counsel cannot be attributed to the state.

This is particularly true in this case where appellants were represented by counsel who, for personal reasons, known to appellants, was unable to attend the hearing.

Nor do we find any merit in appellants' claim they should have been granted a continuance of the hearing because of their attorney's inability to be present. His prospective absence was known by appellants well in advance of the hearing date, but no request for a continuance was made until the day of the hearing itself. Government Code section 11524 authorizes an ALJ to 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 the good cause for the continuance, unless that party did not cause and sought to prevent the condition or event establishing the good cause. An appellant has no absolute right to a continuance; they are 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].) Given the circumstances of this case, we are

satisfied there was no abuse of discretion.

Any prejudice appellants may have experienced was self-inflicted.

II

Appellants complain they were prejudiced by the exclusion from evidence of the declaration of the clerk, Sun T. Le, in which he asserts that he made the sale because he was intimidated by the investigator's insistence that he sell him the beer.

Government Code section 11514 requires, at least 10 days prior to the hearing, a copy of any affidavit a party proposes to introduce in evidence, accompanied by a written notice to the opposing party, stating that the affiant will not be called to testify orally, and the opposing party will not be entitled to question him unless he notifies his opponent within seven days of his desire to do so. In the absence of such notice, the affidavit is treated as hearsay evidence.

No notice of the intent to offer Le's testimony by way of affidavit or declaration was provided to the Department. Since Le was not present at the hearing, the Department was unable to cross-examine him on the content of his declaration. Under such circumstances, the declaration could only be treated as hearsay, by itself insufficient to support a finding.

The only evidence that the clerk did not intend to make the sale is the hearsay assertion in his declaration. The testimony of the Department investigator establishes the contrary. Hence, its exclusion was non-prejudicial.

Much of the argument presented on appellant's behalf, although unquestionably sincere, was simply lacking in legal support, and insufficient to warrant the relief sought.

ORDER

The decision of the Department is affirmed.²

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

² This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate district court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.