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

AB-9490
File: 20-516397 Reg: 14080760

CIRCLE K STORES, INC.,
dba Circle K #9489
68990 Ramon Road, Cathedral City, CA 92234-3339,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John W. Lewis/Matthew G. Ainley

Appeals Board Hearing: November 3, 2015
San Diego, CA

ISSUED DECEMBER 7, 2015
AMENDED DECEMBER 10, 2015

Appearances: *Appellant*: Jennifer L. Oden, of Solomon Saltsman & Jamieson, as counsel for Circle K Stores, Inc., doing business as Circle K #9489.
Respondent: Kerry K. Winters, as counsel for the Department of Alcoholic Beverage Control.

OPINION

This appeal is from a decision of the Department of Alcoholic Beverage Control[1] suspending appellant's license for 15 days because its clerk sold an alcoholic beverage to a minor decoy in violation of Business and Professions Code section 25658, subdivision (a).

[1]The decision of the Department, dated January 21, 2015, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on December 23, 2011. On July 2, 2014, the Department filed an accusation charging that appellant's clerk, Araceli Reyes (the clerk), sold an alcoholic beverage to 19-year-old Mariah Daily on May 20, 2014. Although not noted in the accusation, Daily was working as a minor decoy for the Department at the time.

The administrative hearing was originally calendared for September 18, 2014 before Administrative Law Judge (ALJ) John Lewis. (RT, Vol. I, at p. 5.) However, although Daily (the decoy) was notified of the hearing and apparently subpoenaed, she failed for some unknown reason to appear on September 18. (*Ibid*.) Consequently, the Department requested a continuance, which appellant opposed on grounds that the decoy's failure to appear violated Business and Professions Code section 25666. (RT, Vol. I, at pp. 5-6.) ALJ Lewis granted the Department's request over appellant's objection. (RT, Vol. I, at p. 7.)

The continued administrative hearing occurred on November 19, 2014 before ALJ Matthew G. Ainley. On that date, documentary evidence was received, and testimony concerning the sale was presented by the decoy, and by Mike Piltz, an agent for the Department. Appellant presented no witnesses.

Testimony established that on the date of the operation, Agent Piltz entered the licensed premises, followed a few moments later by the decoy. The decoy went to the alcoholic beverage coolers and selected a 25-ounce can of Bud Light beer. She took the beer to the register and set it down on the counter.

The clerk scanned the beer and asked to see the decoy's identification. The decoy handed the clerk her California driver's license, and the clerk looked at the ID for

a second before handing it back to the decoy. The clerk told the decoy the price of the beer, and the decoy paid for the beer. The clerk gave the decoy some change and bagged the beer, and the decoy exited the licensed premises, followed by Piltz.

The Department issued a decision determining that the violation charged was proved and no defense was established. The Department's decision imposed a penalty of 15 days' suspension.

Appellant filed an appeal contending that the Department did not proceed in the manner required by law when the ALJ continued the administrative hearing — over appellant's objection — after the minor decoy failed to appear at the originally calendared administrative hearing.

DISCUSSION

I

Appellant claims it was error for the ALJ to have granted the Department's request for a continuance in this case. In support of its contention, appellant exclusively relies on a very recent opinion of this Board, *Purciel/Thomas* (2015) AB-9454, which addressed this same issue, and held the Department violated Business and Professions Code section 25666 by not producing a minor decoy on the day the administrative hearing was originally calendared and instead granting a continuance of the administrative hearing pursuant to Government Code section 11524. (See *id*. at p. 11.) The Department urges this Board to reconsider its decision in *Purciel*, *supra*, and claims that the continuance in this case was properly granted under section 11524, irrespective of section 25666. (See Dept.Br. at p. 13.) The Department further claims that, even if it was error for the ALJ to have granted the continuance in this case, the error was nevertheless harmless because appellant has not alleged that it was in any

way prejudiced by the continuance. (*Id*. at pp. 13-14.)

This case once again calls upon the Board to interpret and, if possible, reconcile section 25666 of the Business and Professions Code (hereinafter, section 25666) with section 11524 of the Government Code (hereinafter, section 11524).

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

On the other hand, section 11524 provides that an ALJ may grant a continuance of an administrative hearing for good cause.

In *Purciel*, *supra*, this Board interpreted section 25666 thus:

> 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 [licensee] has not waived its right.

(*Id.* at pp. 7-8, emphasis in original.)

The Department takes issue with this interpretation, and the entire *Purciel* opinion for that matter. The Department argues

> The plain language of the [*sic*] section 25666 provides the Department *shall* produce the minor *unless* the minor is unavailable. Second, if the minor's unavailability is due to physical or mental illness, and the ALJ finds that it is reasonably likely the minor can be produced in a reasonable time period, the ALJ *shall* grant a reasonable continuance. Read together, the provisions of Business and Professions code section 25666 require the Department to produce the minor, but excuses the requirement if the minor is unavailable; however, if the unavailability is due to some "then-existing" infirmity which the ALJ deems reasonably likely to go away such that the minor can be produced in a reasonable time, the ALJ is *required* to grant a continuance (i.e., has no discretion to deny) to allow production of the minor.

(Dept.Br. at p. 10, emphasis in original.) The Department goes on to contend that the crux of section 25666 is actually the second sentence of the statute, wherein, the Department argues, the Legislature created an "exception to the exception" that the ALJ *may* grant a continuance for good cause under section 11524, by establishing a *requirement* that a continuance be granted where the ALJ finds that it is reasonably likely that the then-ill or infirm minor can be produced within a reasonable amount of time. (See *id*. at pp. 10-12.)

The flaw in the Department's piecemeal interpretation of section 25666 is facially apparent — it omits consideration of the language specifying permissible reasons for the minor's absence from the first sentence of the statute to reach its misplaced conclusion about the statute's purpose. The statute's charge is clear and unambiguous in minor decoy cases such as this — "the [D]epartment *shall*[2] produce" the minor decoy at "*any*[3] hearing on an accusation charging a licensee with a violation of" section 25658, "unless he or she is unavailable as a witness *because* he or she is dead or unable to

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[2]As cited by the Department, Business and Professions Code section 19 provides "'Shall' is mandatory and 'may' is permissive."

[3]"The word 'any' [as used in a statute] has been held to mean 'all' and 'every.'" (*People v. Vaughn* (1961) 196 Cal.App.2d 622, 629 [16 Cal.Rptr. 711], citations omitted.)

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." (Bus. & Prof. Code § 25666, emphasis added.) The Department's interpretation ignores the fact that the Legislature chose to carefully define the circumstances under which the Department is excused from producing the minor at any administrative hearing involving section 25658. Such an interpretation would render the entire latter portion of the first sentence of section 25666 superfluous, and, as we have said before, "[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].)

Also, as we indicated in *Purciel*, *supra*,

> [U]nder 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.)

(*Id*. at pp. 8-9, emphasis in original.)

Moreover, as stated above, the Department's assertion that the second sentence of section 25666 merely establishes an exception to the exception which removes the ALJ's discretion to grant a continuance fails because it ignores the existence of the first sentence compelling the minor's attendance absent one of the enumerated extenuating

circumstances. As the Board has said before, the task in interpreting 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.) Indeed, in interpreting a statute, the Board "should give significance to every word, phrase, and sentence of an act, and that any construction rendering certain words surplusage should be avoided." (*Walker v. Super. Ct.* (1988) 47 Cal.3d 112, 122 [253 Cal.Rptr. 1], citations omitted.)

The clear wording of the first two sentences of section 25666 establishes that the more reasonable interpretation is that the second sentence merely creates an exception to the first, and provides that a reasonable continuance is only appropriate — and, indeed, mandatory — where the "minor is absent because of a then-existing physical or mental illness or infirmity," and the ALJ "finds that it is reasonably likely that the minor can be produced within a reasonable amount of time." If the circumstances warranting the exception in the second sentence of section 25666 are absent, the mandate of the first sentence controls, and the alleged minor must appear at any hearing unless he or she is dead or mentally or physically ill or infirm.

The Board does not accept the Department's position that "Business and Professions Code section 25666 . . . does not state any intent to exclusively list or cover

all situations relating to minor unavailability or to preempt in any fashion the administrative law judge's ordinary discretion." (Dept.Br. at p. 12.) The Department has cited no authority to support this contention. Moreover, the Board specifically addressed this argument in *Purciel*, *supra*, and found the opposite to be true:

> 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 [*sic*], 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.
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> (Stats. 1963, ch. 1562, § 1, pp. 3144-3145.)
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> 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.

(*Purciel*, *supra*, at pp. 9-10.) Thus, contrary to the Department's contention, the Legislative history of the statute evinces that its precise, narrow wording was

intentional.[4]

Next, the Department cites decisions of this Board previous to *Purciel* in support of its argument. Each of these decisions addressed the same question of law, but contrary to *Purciel* held that an ALJ's discretion to grant a good cause continuance pursuant to section 11524 trumped the more specific language of section 25666. In *Waters/White* (2000) AB-7233, for instance, the decoy did not appear at the administrative hearing, and the ALJ granted the Department's request for a continuance over the licensee's objection. (*Id*. at p. 3.) On appeal, the Board observed:

> 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.)
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> 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 Counsel, § 9.)
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> "[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],

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[4]This is not to mention the fact that section 25666 expressly excludes Government Code section 11511 from its otherwise sweeping mandate. Section 11511 appears in the same title, division, part, and chapter of the Government Code as section 11524. Clearly then, the Legislature was conscious of the formal hearing requirements of the Administrative Procedure Act when it drafted section 25666, and also knew how to exempt specific sections from that statute from section 25666. We can therefore only assume that the Legislature's decision *not* to expressly exempt section 11524 from the language of section 25666 was deliberate.

> 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.)

(*Id*. at p. 4.)

In *Equilon Enterprises, LLC* (2001) AB-7622, despite having been subpoenaed, the minor decoy failed to appear at the administrative hearing. (*Id*. at p. 3.) The appellant claimed that section 25666 mandated a reversal, and the Board disagreed, finding:

> It is well settled that the granting or denial of a motion for a continuance is a matter of discretion. Where, as here, the request is timely — when the non-appearance of an essential witness who has been subpoenaed is first known — that a continuance would be granted is a foregone conclusion.
>
> We find nothing in § 25666 that deprives a hearing officer of the discretion he or she possesses with respect to whether a continuance may or should be granted. The purpose of that section is to ensure the presence of a minor at a hearing in which the alleged violation relates in some direct way to the conduct of the minor. We do not see it as intended to preclude the Department from continuing to pursue a violation simply because its witness failed to respond to a subpoena.
>
> This is not to say that, upon a showing that the Department had not subpoenaed the minor to appear at the hearing, a continuance would have been proper.[fn.] But, given appellant's concession that the minor had been subpoenaed, we cannot say the ALJ abused his discretion by granting the continuance.

(*Id*. at pp. 4-5.)

Next, in *7-Eleven, Inc./Gill* (2003) AB-8042, while both the police officer and the minor decoy were subpoenaed to the administrative hearing, neither was served and both failed to appear on the date the hearing was originally set to be heard. (*Id*. at p. 4.) The ALJ granted the Department's request for a continuance over the appellant's objection. (*Id*. at pp. 4-5.) In rejecting the appellant's section 25666 argument, the Board reasoned:

> 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.Rtpr. 446].) By the same token, an order granting a continuance should not be disturbed in the absence of an abuse of discretion.
>
> [¶ . . . ¶]
>
> We find nothing in section 25666 that deprives a hearing officer of the discretion he or she possesses with respect to whether a continuance may or should be granted. The purpose of that section is to ensure the presence of a minor at a hearing in which the alleged violation relates in some direct way to the conduct of the minor. We do not see it as intended to preclude the Department from continuing to pursue a violation where the Department followed the normal procedure for placing a subpoena with a police officer and a decoy.

(*Id*. at pp. 5-6.)

Lastly, in 7-*Eleven, Inc./Nat Stores Corp.* (2009) AB-8776, the final decision cited by the Department, the minor decoy did not appear on the originally scheduled date for the administrative hearing. (*Id.* at p. 2, fn. 2.) The Department moved for a continuance, and the appellants moved to dismiss the accusation because the decoy did not appear. (*Ibid*.) While the appellants did not cite section 25666 specifically, they argued that because of alleged defects in the service of the subpoena on the decoy, her absence did not constitute good cause for a continuance. (*Ibid*.)

The Board once again rejected the appellants' arguments, finding,

> A continuance is granted or denied at the discretion of the ALJ, and the ALJ's determination of whether good cause existed for a continuance will not be disturbed on appeal unless shown to be an abuse of discretion. (*Cooper v. Board of Medical Examiners* (1975) 49 Cal.App.3d 931, 944 [123 Cal.Rptr. 563]; *Savoy Club v. Board of Supervisors* (1970) 12 Cal.App.3d 1034, 1038 [91 Cal.Rptr. 198]; *Givens v. Department of Alcoholic Beverage Control* (1959) 176 Cal.App.2d 529, 532 [1 Cal.Rptr. 446].)
>
> We cannot say that the ALJ abused his discretion in this case.

> Regardless of whether the subpoena was served correctly or not, the minor would not have been able to appear at the administrative hearing because of the conflicting subpoena for the criminal case.

(*Id*. at p. 8.)

But none of the aforementioned decisions except *Purciel* provide any analysis concerning the language of section 25666; its mandate that the Department produce the minor at *any* administrative hearing concerning the violations listed *unless* the minor is dead, ill, or infirm; or its demand that an ALJ grant a continuance when one of the listed extenuating circumstances is present. Rather, these pre-*Purciel* decisions rely on a rudimentary statement — notably proffered without citation to any legal authority or legislative history of the statute — of section 25666's purpose that is dismissive of the express and specific language used throughout its provisions. This disregard of the actual language of section 25666 renders the decisions unhelpful in reconciling section 25666 with section cannot be heeded, especially where "the language [used] 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].)

Moreover, the consensus, which seems to be shared by each of the cited decisions, that nothing in section 25666 deprives an ALJ of his or her discretion whether or not to grant a continuance[5] is puzzling. The second sentence of section 25666 — relating to continuances — is written in compulsory terms, and even the Department in this case admits this sentence plainly removes an ALJ's discretion *not* to

[5]See, e.g., *7-Eleven, Inc./Gill*, *supra*, at p. 5 ["We find nothing in section 25666 that deprives a hearing officer of the discretion he or she possesses with respect to whether a continuance may or should be granted."].

grant a continuance under the specific circumstances described therein. (See Dept.Br. at p. 10.) Thus, this apparent consensus among the cited decisions, too, is fundamentally flawed.

Additionally, not one of the cited decisions attempts to reconcile section 25666 with section 11524. As we stated in *Purciel*, *supra*,

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.)

(*Id*. at pp. 10-11.) We see no reason for the Board to reconsider *Purciel* and its harmonization of the two statutes.

Indeed, the failure of the pre-*Purciel* cited decisions to reconcile the language of section 25666 with section 11524 is significant. While the Department argues that the doctrine of stare decisis is generally not applicable to administrative decisions (see *Motor Transit Co. v. Railroad Com. of Cal.* (1922) 189 Cal. 573, 586 [209 P. 586] [orders of the Railroad Commission, "not attaining the status of *res ajudicata*, obviously, cannot be held to rise to the dignity of *stare decisis*"]), agency adjudications and appellate decisions therefrom produce administrative norms. Like judicial interpretations of statutes and regulations, these norms operate as rules of general application and have value as guidelines comparable to stare decisis. (See *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade* (1973) 412 U.S. 800, 807-808 [93 S.Ct. 2367] [stating agency adjudicatory decisions "may serve as precedents," that there is "a presumption that those policies [announced in adjudications] will be carried out best if the settled rule is adhered to," and that the agency's "duty to explain its departure from prior norms" flows from that presumption]; *Kelly ex rel. Mich. Dept. of Natural Res. v. FERC* (D.C. Cir. 1996) 96 F.3d 1482, 1489 [321 U.S.App.D.C. 34] ["It is, of course, axiomatic that an agency adjudication must either be consistent with prior adjudications or offer a reasoned basis for its departure from precedent."]; *M.M. & P. Maritime Advancement, Training, Educ. & Safety Program v. Dept. of Commerce* (2nd Cir.1984) 729 F.2d 748,

755: [“An agency is obligated to follow precedent, and if it chooses to change, it must explain why.”]; William N. Eskridge, Jr., Overriding Supreme Court Statutory Interpretation Decisions (1991) 101 Yale L.J. 331, 397 [discussing the stare decisis effect of statutory interpretation precedents]; E. H. Schopler, Annotation Comment Note: Applicability of Stare Decisis Doctrine to Decisions of Administrative Agencies (1961) 79 A.L.R.2d 1126, 1132 [“[A]dministrative agencies . . . act very much like courts, as regards precedents.”].)

As our state supreme court has explained:

> "The doctrine of stare decisis expresses a fundamental policy . . . that a rule once declared in an appellate decision constitutes a precedent which should normally be followed . . . . It is based on the assumption that certainty, predictability and stability in the law are the major objectives of the legal system . . . ." [Citations]. But, as Justice Frankfurter wrote, it equally is true that " ' "[*s*]*tare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." [Citations.]'" (*Cianci v. Superior Court* (1985) 40 Cal. 3d 903, 923-924 [221 Cal. Rptr. 575, 710 P.2d 375], quoting *Boys Markets v. Clerks Union* (1970) 398 U.S. 235, 240-241 [26 L. Ed. 2d 199, 204-205, 90 S. Ct. 1583].) As this court has stated: "Although the doctrine [of stare decisis] does indeed serve important values, it nevertheless should not shield court-created error from correction." (*Cianci v. Superior Court*, *supra*, 40 Cal. 3d at p. 924; *County of Los Angeles v. Faus* (1957) 48 Cal. 2d 672, 679 [312 P.2d 680] ["Previous decisions should not be followed to the extent that error may be perpetuated and that wrong may result."]. See also the concurring opinion of Justice Mosk in *Smith v. Anderson* (1967) 67 Cal. 2d 635, 646 [63 Cal. Rptr. 391, 433 P.2d 183], quoting *Wolf v. Colorado* (1949) 338 U.S. 25, 47 [93 L. Ed. 1782, 1795, 69 S. Ct. 1359] ["'Wisdom too often never comes, and so one ought not to reject it merely because it comes late.'"].)

(*Peterson v. Super. Ct.* (1995) 10 Cal.4th 1185, 1195-1196 [43 Cal.Rptr.2d 836].)

For the reasons stated above, to the extent that *Waters/White*, *Equilon Enterprises, LLC*, and *7-Eleven, Inc./Gill*, *supra*, held that — absent a written waiver by the licensee or one of the narrowly defined exceptions in the second sentence of section

25666 — an ALJ had the discretion to grant a continuance under section 11524 based on the failure of the decoy to appear at a previously set administrative hearing on an accusation charging a violation of section 25658, we find those decisions to have been wrong when made under the current language of section 25666.[6] This error, if left unchecked, would be perpetuated and result in further wrong to licensees. Therefore, to the extent the cited decisions purported to interpret and or reconcile section 25666 and section 11524, those decisions are overruled.

We turn now to the question of prejudice.[7] The Department contends, "[e]ven if it was error to grant the good cause continuance, appellant has not alleged nor shown that it was prejudiced by the continuance. For example, appellant has not claimed that a necessary witness became unavailable due to the continuance. Appellant failed to set forth any facts to establish how it was prejudiced, therefore, appellant's contention should be dismissed." (Dept.Br. at p. 14.) Notably, the Department is correct that appellant did not address prejudice in either its opening or its closing brief.

In *Nat Stores Corp.*, *supra*, as cited by the Department, the Board addressed the question of prejudice as follows:

> Even if we had concluded that it was error for the ALJ to grant the continuance, appellants would still not be entitled to reversal of the Department's decision. Error alone does not warrant reversal. "The burden is on the appellant, not alone to show error, but to show injury from the error." (9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 325, p. 335,

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[6]This holding also applies to *Nat Stores Corp.*, *supra*, to the extent that it can be deemed a decision pertaining to section 25666.

[7]The Board did not address the question of prejudice in *Purciel*, *supra*, nor did it have to. Prejudice to the appellants was easily established in that case because, at oral argument, appellant Mark Robin Purciel, appearing in propria persona, informed the Board that a key witness to the appellants' case — who was present on the date the hearing was originally calendared — was indefinitely unavailable on the date the continued hearing was set because of an overseas military deployment.

italics omitted.)

> Appellants have not alleged, much less shown, how they were prejudiced by the granting of the continuance. It is not enough for appellants to say "The rules are the rules." (App. Br. at 17.)
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> As the court pointed out in *Reimel v. House* (1969) 268 Cal.App.2d 780, 787 [74 Cal.Rptr. 345],
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> > since the appeals board exercises a "strictly 'limited'" power of review over the Department's "'exclusive power' to issue, deny, suspend or revoke licenses" (*Martin v. Alcoholic Beverage etc. Appeals Board*, *supra*, 52 Cal.2d 238, 246), the decisions of the Department should not be defeated by reason of "any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the [reviewing body] shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13.)
>
> Even if it had been error to grant the continuance, the constitutional provision noted above would dictate that the Department's decision should not be reversed.

(*Id*. at pp. 8-9.)

We do not accept this argument. "Prejudice" is defined as "[d]amage or detriment to one's legal rights or claims." (Black's Law Dict. (10th ed. 2014) p. 1370, col. 2.) With that definition in mind, the *Nat Stores Corp.* decision's dismissal of the failure of the alleged minor to appear at the hearing as a mere "matter of procedure" is improper. (*Nat Stores Corp*., *supra*, at p. 9, citations omitted.) Absent one of the narrow exceptions listed in section 25666, the alleged minor's attendance at any — i.e., every and all (see footnote 3, *ante*) — hearing(s) on an accusation charging a violation of section 25658 is statutorily compelled. This statutory compulsion is unsurprising, especially in decoy cases such as this, because the minor is singlehandedly the most important witness — for both licensees and the Department — to the events resulting in

the accusation, and is the only presumably unbiased witness who can testify to matters vital to the very limited defenses against such an accusation available to licensees.[8] To that end, licensees have a statutorily protected right to rely on the alleged minor's presence at *any* hearing on an accusation charging a violation of one of the enumerated sections[9] in preparing their defenses thereto, and if the Department fails to fulfill its obligation to produce the alleged minor, even temporarily, it has violated that legal right to the detriment of the licensees.

II

On a final note, although the Department neglected to address this specific argument in its response brief, during oral argument on November 3, 2015, counsel for the Department called the Board's attention to legislation that was signed into law by the Governor on October 6, 2015. Specifically, the Legislative Counsel Digest for Assembly Bill 776 provides "[t]his bill would state that the . . . provisions [of section 25666] are not intended to preclude the continuance of a hearing because of the unavailability of a minor for any other reason pursuant to a specified provision." (2015 Cal. ALS 519; 2015 Cal. AB 776; 2015 Cal. Stats. ch. 519.) To that end, the bill amends section 25666 to read:

> (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

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[8]See Cal. Code Regs., tit. 4, § 141. This is not to mention the fact that, as we have learned from myriad appeals filed with this Board, an ALJ's assessment of the minor decoy's in-person physical appearance, non-physical appearance, mannerisms, and demeanor is essential for cases where, as here, a licensee argues a violation of rule 141(b)(2).

[9]Notwithstanding, of course, one of the extenuating circumstances enumerated in section 25666.

> 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 the testimony of the minor as provided in Section 11511 of the Government Code.
>
> (b)(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.

(*Ibid.*)

We have two observations about AB 776 as it relates to this appeal. First, as the Department admitted during oral argument, the bill was passed as non-urgency legislation, and therefore does not become effective until January 1, 2016. As such, it has no bearing on this proceeding. Second, we find the Legislature's inclusion of subdivision (b)(2) evinces that the current language of section 25666 is unclear and therefore open to interpretation as to whether it is intended to preclude the continuance of a hearing for reasons other than those specifically enumerated within the statute. For the reasons discussed above, as well as those delineated in *Purciel*, *supra*, we find that the most reasonable reading of section 25666, as it currently stands, precludes a continuance of an administrative hearing for reasons other than those specifically described in its provisions. We reserve the right to revisit this issue if and when it comes before the Board *after* January 1, 2016.

ORDER

The decision of the Department is reversed.[10]

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

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[10]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.