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

AB-9518
File: 20-532405 Reg: 14080545

7-ELEVEN, INC. and ALEXANDER EL, INC.,
dba 7-Eleven #24559E
10499 Beach Boulevard, Stanton, CA 90680-1608,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: December 3, 2015
Los Angeles, CA

ISSUED DECEMBER 21, 2015

Appearances: *Appellants:* Ralph Barat Saltsman of Solomon Saltsman & Jamieson as counsel for appellants 7-Eleven, Inc. and Alexander El, Inc., doing business as 7-Eleven Store #24559E.
Respondent: Kerry K. Winters as counsel for the Department of Alcoholic Beverage Control.

OPINION

7-Eleven, Inc. and Alexander El, Inc., doing business as 7-Eleven #24559E (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] suspending their license for 15 days, all conditionally stayed, because their clerk sold an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

FACTS AND PROCEDURAL HISTORY

[1]The decision of the Department, dated April 28, 2015, is set forth in the appendix.

Appellants' off-sale beer and wine license was issued on June 26, 2013. On May 23, 2014, the Department filed an accusation against appellants charging that, on February 7, 2014, appellants' clerk, Long Do (the clerk), sold an alcoholic beverage to 19-year-old Michael Tompkins. Although not noted in the accusation, Tompkins was working as a minor decoy for the Orange County Sheriff's Department at the time.

At the administrative hearing held on October 7, 2014, documentary evidence was received and testimony concerning the sale was presented by Tompkins (the decoy) and by Diamond Tann, a Orange County Sheriff's Deputy. Appellants presented no witnesses.

Testimony established that on the date of the operation, the decoy entered the licensed premises and went to the coolers, where he selected a 25-ounce can of Bud Light beer. He took the beer to the counter. The clerk, Long Do, scanned the beer and asked to see the decoy's identification. The decoy handed his California driver's license to the clerk. The clerk looked at the identification for a few seconds, then handed it back to the decoy. The decoy paid for the beer, and the clerk gave him some change. The decoy picked up the beer and began to exit.

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

Appellants then filed an appeal contending: (1) the record transmitted to the Department Director in his decisionmaking capacity contained an improper ex parte communication; (2) the ALJ's determination that the decoy's conduct within the licensed premises complied with rule 141(b)(2) is not supported by substantial evidence; and (3) the ALJ failed to indicate, with specificity, his reasons for finding the decoy's

testimony credible.

DISCUSSION
I

Appellants contend that the administrative record contained an improper communication — specifically, a "proposed routing slip" containing handwritten notes — which circulated within the Department along with the administrative record and proposed decision. Appellants claim this resulted in two separate ex parte communications: the first to the Department Director in his decisionmaking capacity, and the second to the ALJ. Although appellants concede that the ALJ took appropriate action to remedy the situation by notifying the parties of the communication and offering the opportunity to respond, appellants argue that this does not in fact remedy the "first transmission of the document to the decision-maker" — that is, the alleged ex parte communication to the Department Director — and resolves only the second communication to the ALJ. (App.Br. at p. 6.) Appellants insist the ALJ's "lawful notice of the ex parte communication to the parties does not undo what had been done: [the ALJ] had no ability to affect the legality of the preceding chain of events." (*Ibid.*, emphasis omitted.)

An ex parte communication is broadly defined as "[a] generally prohibited communication between counsel and the court when opposing counsel is not present." (Black's Law Dictionary (7th ed. 1999) at p. 597.) Section 11430.10 of the Government Code provides, in relevant part:

> (a) While the proceeding is pending there shall be no communication, direct or indirect, regarding any issue in the proceeding, to the presiding officer from an employee or representative of an agency that is a party or from an interested person outside the agency, without notice and an

opportunity for all parties to participate in the communication.

(b) Nothing in this section precludes a communication, including a communication from an employee or representative of an agency that is a party, made on the record at the hearing.

Section 11430.70 extends the prohibition on ex parte communications to agency heads:

(a) Subject to subdivision (b) and (c), the provisions of this article governing ex parte communications to the presiding officer also govern ex parte communications in an adjudicative proceeding to the agency head or other person or body to which the power to hear or decide in the proceeding is delegated.

The California Supreme Court, in *Quintanar*, reinforced the language of section 11430.70 and further held that ex parte communications are forbidden not only during the trial stage, but at any point in the course of adjudication, including the decisionmaking phase. (*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (*Quintanar*) (2006) 40 Cal.4th 1, 11-14 [50 Cal.Rptr.3d 585].)

Section 11430.50 provides guidance where a presiding officer (or agency head, pursuant to section 11430.10(a)) receives an improper written communication:

(a) If a presiding officer receives a communication in violation of this article, the presiding officer shall make all of the following a part of the record in the proceeding:

(1) If the communication is written, the writing and any written response of the presiding officer to the communication.

[¶ . . . ¶]

(b) The presiding officer shall notify all parties that a communication described in this section has been made a part of the record.

(c) If a party requests an opportunity to address the communication within 10 days after receipt of notice of the communication:

(1) The party shall be allowed to comment on the communication.

> (2) The presiding officer has discretion to allow the party to present evidence concerning the subject of the communication, including discretion to reopen a hearing that has been concluded.

Thus, as we have noted in our recent ex parte communication decisions, "the proper remedy when a decision maker receives an unsolicited ex parte communication is to immediately lift the veil of secrecy and give the opposing party an opportunity to respond." (*7-Eleven, Inc./Sirisut Corp.* (2014) AB-9398, at p. 10.)

The record in this case shows exemplary compliance with the remedial procedures outlined in section 11430.50. When the ALJ discovered the alleged ex parte communication, he had already submitted his proposed decision. He nevertheless reopened the record and, drawing specific guidance from the provisions of the Government Code cited above, acted to neutralize any potential prejudice. Exhibit 6 contains a two-page "Notice of Ex Parte Communication" signed by ALJ Ainley, which notes the existence of the proposed routing slip and offers the following statement of the parties' rights:

> Pursuant to the Administrative Procedure Act, a copy of the route slip is being provided to both parties via this notice. The parties have 10 days from the receipt of this notice to request an opportunity to address this communication. The record is hereby reopened for the sole and limited purpose of receiving such requests. All requests are to be submitted in writing and served on all other parties; e-mails will not be accepted.

(Notice of Ex Parte Communication, Exhibit 6, at p. 2.) Exhibit 6 also includes a photocopy of the "Proposed Decision Route Slip" with handwritten notes recommending clarification of the conditions of the stayed suspension.

Following the ALJ's disclosure, appellants submitted a single-sentence "Request to Address Communication Pursuant to 'Notice of Ex Parte Communication'" dated

January 28, 2015. (Exhibit A.)

The ALJ responded with an "Order," dated February 17, 2015, acknowledging appellants' request:

> Following the Notice of Ex Parte Communication dated January 20, 2015, the Respondents requested an opportunity to address the ex parte communication described therein. This request has been marked as exhibit A. The Department did not file such a request.
>
> Government Code section 11430.50(c) provides that any party who requests the opportunity to respond "*shall* be allowed to comment on the communication" (emphasis added). The Respondent is, accordingly, entitled to submit such a response and may do so no later than March 2, 2015.
>
> Section 11430.50(c) further provides that a party who files such a request may, in the administrative law judge's discretion, "present evidence concerning the subject of the communication." Since the communication at issue only dealt with the terms of the proposed stay, no further evidence is necessary.

Appellants, however, never followed through with a response. At oral argument, counsel for appellants indicated that they did not feel a response was necessary, since the ALJ, in attempting to remedy the communication, was following the law. Before this Board appellants bifurcate the alleged ex parte communication, claiming a first improper communication to the Department Director and a second to the ALJ. At the administrative hearing level, however — despite receiving notice of the routing slip and the opportunity to be heard regarding any potential prejudicial effect — appellants stated no objection to the circulation of the routing slip to *either* the Director or the ALJ, nor did they object to its contents.

The Revised Proposed Decision, dated April 28, 2015, describes the entire chain of events:

> Oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the hearing. The matter was argued and submitted for decision on October 7, 2014. A proposed decision was prepared and submitted to the Director of the Department. The matter was subsequently remanded to the undersigned by the Department for clarification of the terms of the penalty. A handwritten routing slip was included with the order of remand. Since it did not appear that the routing slip had been provided to the attorneys for either party, the undersigned prepared and sent out a Notice of Ex Parte Communication. (Exhibit 6.) The Respondents' attorney subsequently filed a Request to Address Communication. (Exhibit A.) By order dated February 17, 2015, the Respondents were given until March 2, 2015, to file their response. (Exhibit 7.) As of the date of this revised proposed decision, no such response has been received.

This Board need not even reach the question of whether the proposed routing slip was in fact an improper ex parte communication; if it was, the ALJ's response complied with the Government Code and offered appellants both notice and an opportunity to respond. This is sufficient to remedy any impropriety and preclude any prejudice — including any improper communication to the Department Director. If appellants felt the Director's receipt of the document constituted a separate ex parte communication, it was incumbent upon them to bring this objection to the ALJ's attention by filing an response. The ALJ, after all, is the finder of fact, and is therefore equipped to resolve purely factual issues such as where the routing slip originated, what members of Department counsel contributed commentary, and whether that commentary was offered solely in an advisory capacity and properly screened from the Department's prosecutorial functions. Indeed, an ALJ has the power to dismiss the case entirely if an ex parte communication proves sufficiently prejudicial.

Appellants, however, offered no such response. On appeal, they imply that *no* remedy was possible — that is, once an ex parte communication has crossed the

Department Director's desk, the damage is irreparable:

> The Department has intentionally blurred the distinction between the two levels of ex parte communications in this case. One level of ex parte communications was remedied by ALJ Ainley through his compliance with the procedures proscribed [*sic*] by the APA and his disclosure of the communication, a Proposed Routing Slip, to the parties. ALJ Ainley cured the violation that occurred when he received the Proposed Routing Slip. The Department erroneously contends that ALJ Ainley's disclosure diminished *any* violation stemming from the Proposed Routing Slip. However, the Department is unable to escape the fact that an illegal ex parte communication had already occurred. The Proposed Routing Slip had already been transmitted to the Department's decision-maker, and therefore it was an incurable ex parte communication in its own right. ALJ Ainley had no ability to affect the legality of the preceding chain of events. Thus, the simple fact that Appellants were made aware of the Proposed Routing Slip through ALJ Ainley's disclosure does not absolve the Department from improperly and impermissibly transmitting such ex parte documents to the Director.

(App.Cl.Br. at p. 2.) Notably, appellants cite no law to support such a toothless characterization of the ALJ's capacity to remedy improper ex parte communications. Indeed, appellants attempt to build their case on *Quintanar* — drawing a parallel between the hearing reports addressed in that case and the proposed routing slip in this one — but overlook the following passage:

> We note . . . that the further remedy ordered by the Court of Appeal — mandatory screening procedures barring prosecutor-decision maker contacts and precluding use of reports of hearing in future cases — is overbroad. The APA bars only advocate-decision maker ex parte contacts, not all contacts. Thus, for example, nothing in the APA precludes the ultimate decision maker from considering posthearing briefs submitted by, and served on, each side. *The Department if it so chooses may continue to use the report of hearing procedure, so long as it provides licensees a copy of the report and the opportunity to respond.* (Cf. § 11430.50 [contacts with presiding officer or decision maker must be public, and all parties must be afforded opportunity to respond].)

(*Quintanar*, *supra*, at p. 17, emphasis added.)

It is undisputed that appellants were provided notice of the routing slip and an

opportunity to be heard regarding its contents, precisely as required by Government Code section 11430.50. Appellants chose not to file a response. If there was in fact an improper ex parte communication made to the Department Director in his decisionmaking capacity — and we need not resolve that question here — the ALJ's actions were sufficient to remedy it and prevent any prejudice.

II

Appellants contend that the ALJ's finding that the decoy appeared his age under the actual circumstances presented to the clerk is not supported by substantial evidence. Appellants argue that the record is "devoid of sufficient reasonable and credible evidence of solid value regarding the decoy's conduct or of his demeanor, mannerisms or poise on the specified date to support the Department's finding." (App.Br. at pp. 7-8.)

Rule 141(b)(2) provides: "The decoy shall display the appearance which could generally be expected of a person under 21 years of age, under the actual circumstances presented to the seller of alcoholic beverages at the time of the alleged offense." The rule provides an affirmative defense, and the burden of proof lies with appellants. (*Chevron Stations, Inc.* (2015) AB-9445; *7-Eleven, Inc./Lo* (2006) AB-8384.)

This Board is bound by the factual findings in the Department's decision so long as those findings are supported by substantial evidence. The standard of review is as follows:

> We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. [Citations.] We must indulge in all legitimate inferences in support of the Department's

> determination. Neither the Board nor [an appellate] court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. [Citation.] The function of an appellate Board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

Appellants present a rule 141(b)(2) affirmative defense, then ignore their burden of proof. The Department is *not* required to establish the decoy's appearance as displayed to the clerk as part of its prima facie case. As we wrote in *Chevron Stations, Inc.*, *supra*, "Rule 141 creates a constitutionally permitted affirmative defense, and due process does not require the Department to disprove the existence of that defense." (*Id.* at p. 13.) The Department only bore the burden of presenting a prima facie case indicating a sale to a minor in violation of section 25658(a). It clearly did so; uncontroverted testimony established that appellants' clerk sold an alcoholic beverage to the decoy. (See RT at pp. 12-15, 34-37.) Rather than attempt to disprove the fact of the violation, however, appellants relied solely on an affirmative defense under rule 141(b)(2). (RT at pp. 56-57.) Having raised that affirmative defense, appellants bore the burden of proving that the decoy's appearance, as presented to the clerk, did *not* comply with the rule.

Appellants did not produce the clerk as a witness at the administrative hearing, nor did they produce any other direct evidence of the decoy's actual appearance on the date of the operation. Instead, appellants attempted to carry their burden of proof at

the administrative hearing by arguing three pieces of evidence that they insisted must lead to the inference that the decoy appeared over 21: the decoy's build, his success rate on the date of the operation, and his experience as an Explorer. The ALJ took note of the appellants' evidence (see Findings of Fact ¶ 8), then rejected their arguments:

> 5. The Respondent [*sic*] argued that the decoy operation at the Licensed Premises failed to comply with rule 141(b)(2)[fn.] and, therefore, the accusation should be dismissed pursuant to rule 141(c). Specifically, the Respondent argued that [the decoy's] height, weight, and build, coupled with his extensive experience as an Explorer, made him appear to be unusually mature. In support of this argument, the Respondent noted that [the decoy] was able to purchase alcohol at half of the locations he visited on February 7, 2014.
>
> This argument is rejected. Although [the decoy] had more experience as an Explorer than most, there was nothing about this experience which made him appear to be older. Indeed, his appearance at the hearing, including his demeanor on the stand, was consistent with his actual age.

(Conclusions of Law ¶ 5.) With regard to the decoy's Explorer experience and so-called "success rate," appellants failed to connect these pieces of evidence with the decoy's actual appearance on the date of the hearing, as required in previous cases before this Board. (See, e.g., *7-Eleven, Inc./Azzam* (2001) AB-7631, at p. 5 ["A decoy's experience is not, by itself, relevant to a determination of the decoy's apparent age; it is only the *observable effect* of that experience that can be considered by the trier of fact."]; *7-Eleven, Inc./Jain* (2004) AB-8082, at p. 3 [per se rule based on a decoy's success rate "would be inappropriate, since the sales could be attributable to a number of reasons other than a belief that the decoy appeared to be over the age of 21"].) With regard to the decoy's build, the determination of whether it changed the decoy's age is left to the ALJ's reasonable determination. (See *O'Brien* (2001) AB-

7751, at p. 6 ["To a large extent, application of such standards as [rule 141(b)(2)] provides is, of necessity, subjective; all that can be required is reasonableness in the application."].) Regardless, these arguments are not at issue here; appellants have abandoned them entirely on appeal and focus instead on shifting the burden of proof. The decision to reject their rule 141(b)(2) defense must therefore be affirmed.

III

Appellants contend that the ALJ failed to explain his reasons for finding the decoy's testimony credible. Appellants argue that the decoy failed to recall certain facts about the operation and that his testimony contradicted Deputy Tann's. Appellants insist that the "evidentiary record is rife with conflict and inconsistency," (App.Br. at p. 10), and the ALJ was therefore required to "make a credibility determination supported by specific evidence of the observed demeanor, manner, or attitude of the witness." (*Id.* at pp. 9-10.)

It is the province of the ALJ, as the trier of fact, to make determinations as to witness credibility. (*Lorimore v. State Personnel Bd.* (1965) 232 Cal.App.2d 183, 189 [42 Cal.Rptr. 640]; *Brice v. Dept. of Alcoholic Bev. Control* (1957) 153 Cal.App.2d 315, 323 [314 P.2d 807].) The Appeals Board will not interfere with those determinations in the absence of a clear showing of abuse of discretion.

Appellants rely primarily on section 11425.50(b) of the Government Code, which states, in relevant part:

> If the factual basis for the decision includes a determination based substantially on the credibility of a witness, the statement shall identify any specific evidence of the observed demeanor, manner, or attitude of the witness that supports the determination, and on judicial review the court shall give great weight to the determination to the extent the determination

> identifies the observed demeanor, manner, or attitude of the witness that supports it.

According to appellants, the decoy's inconsistencies and failed recollections triggered this provision, and because the ALJ failed to make specific credibility findings, the decision must be reversed. (App.Br. at pp. 9-10, 13.)

In *7-Eleven Inc./Singh* (2002) AB-7792, the appellants, as here, argued that the decoy's testimony suffered from credibility defects and that the ALJ was therefore required to explain why the decoy's testimony was sufficient to support the Department's accusation. The Board rejected this argument, stating:

> Section 11425.50 is silent as to the consequences which flow from an ALJ's failure to articulate the factors mentioned. However, we do not think that any failure to comply with the statute means the decision must be reversed. It is more reasonable to construe this provision as saying simply that a reviewing court may give greater weight to a credibility determination in which the ALJ discussed the evidence upon which he or she based the determination. We do not think it means the determination is entitled to no weight at all.

(*Id.* at pp. 3-4.) Thus, even if the ALJ committed error by failing to articulate detailed credibility findings, this Board need not reverse the decision below.

Moreover, we are not convinced any such error occurred. Appellants describe the inconsistencies between the decoy's testimony and Deputy Tann's as follows:

> The Department called Deputy Tann as its first witness. Deputy Tann testified that the decoy went inside the premises first. (RT 11:4-5.) Decoy Tompkins, the second witness, testified that investigators went into the licensed premises before him. (RT 33:17-18.) Deputy Tann testified that [the decoy] handed money to the clerk before he produced his identification. (RT 13:13.) [The decoy] testified that he gave the clerk money after he had given the clerk his driver's license and placed it back in his pocket. (RT 36:23-25.) Deputy Tann testified that after the sale, [the decoy] never exited the store. (RT 15:21-22.) [The decoy] testified that after the sale, he took the beer off the counter and exited the store. (RT 37:3-3.) Deputy Tann testified that after he had identified himself to

> the clerk . . . Tann requested that [the clerk] come to the front of the counter, and [the clerk] did. (RT 15:12-18.) [The decoy] testified that when he came back inside the store, [the clerk] was standing behind the counter, and remained behind the counter during the identification. (RT 38:22-25; 39:9-10.) Deputy Tann testified that [the decoy] was standing four feet from [the clerk] when he asked the decoy to identify who sold him the beer. (RT 16:11-18.) [The decoy] testified that he was ten feet from [the clerk] when he identified him as the person who sold him the beer. (RT 38:14.)

(App.Br. at p. 11.)

These supposedly grave inconsistencies raise several questions, which can be summarized thus:

· Who entered the licensed premises first: the decoy or the officers?

· What did the decoy hand to the clerk first: the money or his driver's license?

· Where was the decoy in the moments between the sale and the face-to-face identification: inside the premises or out?

· Where was the clerk during the face-to-face identification: behind the counter or in front of it?

· How far from the clerk was the decoy standing when the face-to-face identification took place: four feet or ten feet?

Notably, *regardless of how these questions are resolved*, the inevitable conclusion is that the clerk proceeded with the sale of alcoholic beverages to a minor, even after viewing the minor's valid identification. The last three questions are irrelevant; appellants did not raise a rule 141(b)(5) defense, and a valid face-to-face identification is not an element of a section 25658(a) violation. (See *Chevron Stations, Inc.*, *supra*, at p. 13.) The first two questions address factual details so tangential that they lead to the exact same legal conclusion — that appellants' clerk sold alcohol to a minor — regardless of whose testimony is accurate.

Appellants also direct this Board to an inconsistency between the decoy's testimony and a hearsay statement made by the clerk to Deputy Tann:

> The record also reflects conflicting evidence regarding whether [the clerk] scanned [the decoy's] identification. [The decoy] testified that [the clerk] did not try to swipe [the decoy's] driver's license. (RT 35:16-17.) Deputy Tann, however, unequivocally testified that [the clerk] said he . . . had scanned [the decoy's] ID.

(App.Br. at p. 12.) Appellants insist that "[i]n a record plagued with inconsistencies and ambiguity, this point is uniquely clear." Appellants do not, however, state any reason why an ALJ should discredit the firsthand testimony of a percipient witness — the decoy — because of an isolated a hearsay statement made by a self-interested clerk to a citing officer. Not surprisingly, the ALJ credited the decoy's testimony and found only that the clerk had "looked at the ID for a few seconds" before handing it back. (Findings of Fact ¶ 6.) The clerk's hearsay statement is simply insufficient to undermine the decoy's testimony.

Finally, appellants claim the decoy's memory was so faulty as to constitute flawed testimony:

> Additionally, [the decoy] couldn't remember which investigator gave him instructions. (RT 50:23-25, 51:1.) He couldn't remember if his regular protocol for shaving included shaving regularly in the morning. (RT 48:9-11.) He could not remember if he worked on February 7, 2014, (RT 49:3-5) or if it was a school day (RT 48:21-22.) [The decoy] could not remember where this location was in the chronology of investigations, not even if it was towards the beginning or towards the end. (RT 49:15-22.)

(App.Br. at p. 12.) As above, the decoy's failure to remember these tangential facts does nothing to undermine his testimony regarding the salient events. It is irrelevant, for example, who gave the decoy instructions, whether the decoy went to school that morning, or whether this particular location was among the first or last he visited. It is

hardly surprising that a witness would fail to recall irrelevant details.

Moreover, while the decoy's shaving habits may be of some relevance to a rule 141(b)(2) defense, as noted above, appellants bear the burden of proof on that issue. They offered absolutely no evidence, testimonial or otherwise, to show that the decoy was unshaven on the date of the operation, or that his facial hair — if it existed at all — made him appear over 21.

In sum, while there are certain inconsistencies in the testimony, they are inconsequential, as is the decoy's failure to recall, in exquisite detail, every moment of the day in question. The testimony offered by the decoy and Deputy Tann — notably, the only witnesses — was sufficiently consistent to prove a violation of section 25658(a). No credibility findings were necessary.

ORDER

The decision of the Department is affirmed.[2]

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

[2]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.