

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

AB-9770

File: 21-477872; Reg: 18086569

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy Store #9214
1558 Trancas Street, Napa, CA 94558,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: David W. Sakamoto/Alberto Roldan

Appeals Board Hearing: July 25, 2019
Los Angeles, CA

ISSUED AUGUST 12, 2019

Appearances: *Appellants:* Ralph Barat Saltsman and Donna J. Hooper, of
Solomon, Saltsman & Jamieson, as counsel for Garfield Beach
CVS, LLC and Longs Drug Stores California, LLC,

Respondent: Sean Klein, as counsel for the Department of
Alcoholic Beverage Control.

OPINION

Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing
business as CVS Pharmacy Store #9214, appeal from a decision of the Department of
Alcoholic Beverage Control¹ suspending their license for 10 days because their clerk
sold an alcoholic beverage to a police minor decoy, in violation of Business and
Professions Code section 25658, subdivision (a).

¹The decision of the Department, dated November 21, 2018, is set forth in the
appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on June 22, 2009. There is no record of departmental discipline against the license.

On February 27, 2018, the Department filed a single-count accusation against appellants charging that, on August 29, 2017, appellants' clerk, Aziza Khan (the clerk), sold an alcoholic beverage to 19-year-old Haley Lynn Olson (the decoy). Although not noted in the accusation, the decoy was working for the Napa Police Department at the time.

An administrative hearing was initially set for May 30, 2018 before administrative law judge (ALJ) David W. Sakamoto. Evidence was presented that the decoy had been subpoenaed to appear, but that she did not. The Department requested a continuance. The ALJ, finding that good cause existed for a continuance, granted the continuance over appellants' objection.

A second administrative hearing was held on August 9, 2018, before ALJ Alberto Roldan, and the decoy appeared at this hearing. The decoy testified that she did not receive the subpoena for the May 30, 2018 hearing because she was not in Napa County at the time, but was attending college in San Luis Obispo County.

Documentary evidence was received and testimony concerning the sale was presented by the decoy, and by Brandt Keawn, a Napa Police Department officer. Appellants presented no witnesses.

Testimony established that on August 29, 2017, the decoy assisted the Napa Police Department in a decoy operation. She entered the licensed premises and selected a 12-pack of Coors Light beer which she took to the register. When it was her turn, she presented it for purchase and the clerk asked if she had a CVS card . The

decoy replied that she did not. The clerk then completed the sale without asking for identification and without asking any age-related questions. Later, the decoy made a face-to-face identification of the clerk to the officers. These facts are not in dispute.

The ALJ issued a proposed decision on August 20, 2018, sustaining the accusation and recommending a 10-day suspension. The Department adopted the proposed decision in its entirety on October 16, 2018, and a Certificate of Decision was issued on November 21, 2018. The Department further ordered, on December 19, 2018, that the suspension was to become operative upon service of notice.

Appellants then filed a timely appeal contending that the ALJ erred when he found that good cause existed to continue the original hearing.

DISCUSSION

Appellants contend that the ALJ failed to proceed in a manner required by law when he continued the original hearing without requiring evidence of good cause for a continuance and without requiring proof that the decoy had been properly served with the subpoena. Accordingly, they contend the decision should be reversed. (AOB at pp. 7-15.)

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.App.4th 332, 56 Cal.Rptr.2d 774.)

The “broad discretion” of the ALJ has been noted to be very broad indeed:

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], emphasis added.)

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 Court of Appeal decision,² 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.

Appellants maintain the matter should be reversed for failure of the Department to produce evidence that the decoy was properly subpoenaed. They maintain that Government Code section 11450.20, subdivision (b), requires such proof. That section states, in pertinent part:

A party requesting a continuance based upon the failure of a witness to appear at the time and place required for the appearance or testimony pursuant to a subpoena, **shall prove that the party has complied with this section**. The continuance shall only be granted for a period of time that would allow personal service of the subpoena and in no event longer than that allowed by law.

²*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.

(Gov. Code § 11450.20(b), emphasis added.)

In the decision, ALJ Roldan makes the following findings in regard to the continuance granted by ALJ Sakamoto:

1. . . . The matter had been previously set for hearing on May 30, 2018. On that date, the assigned administrative law judge found good cause for a continuance because of the unexpected non-appearance of Hayley Lynn Olson (Olson), the decoy used in this investigation. The Department presented evidence that it had subpoenaed Olson to appear by sending the subpoena to the Napa Police Department (NPD) for service on Olson. The Department was unaware why Olson had not appeared. The administrative law judge at that hearing concluded that there was good cause for a continuance and continued the matter over the objection of the Respondent. Olson appeared at this hearing on August 9, 2018. She testified that she did not receive the subpoena for May 30, 2018. She was not in Napa County at the time that prior subpoena issued because she was attending college in San Luis Obispo County. Olson believed that NPD officers were aware of this but she did not elaborate on why she believed this. The Respondent renewed their objection to the May 30, 2018 continuance on August 9, 2018. Other than referencing the increased cost of representation, the Respondent did not cite any impact that the continuance has on its ability to present evidence on behalf of the Respondent.

(Findings of Fact, ¶ 1.) In sum, the finding above, that the “Department presented evidence that it had subpoenaed Olson to appear by sending the subpoena to the Napa Police Department (NPD) for service on Olson” indicates that the ALJ believed the requirement of §11450.20(b) had been met — i.e., that there was sufficient proof to show that the decoy had been properly subpoenaed. The Board is prohibited from looking behind the ALJ’s findings to reach a different conclusion.

ALJ Roldan reached the following conclusions in response to appellants’ reassertion, at the August 9, 2018 hearing, of their objection to the continuance:

1. “Section 11524 of the Government Code provides that a continuance of an administrative hearing may be granted in the discretion of the hearing officer upon a showing of good cause.^[7] (Gov.Code, § 11524, subd. (a); *Powers v. Commission on Professional Competence* (1984) 157 Cal.App.3d 560, 570) Government Code section 11524, subdivision (b)

includes a requirement of reasonable diligence when a party seeks a continuance: “When seeking a continuance, a party shall apply for the continuance within 10 working days following the time the party discovered or reasonably should have discovered the event or occurrence which establishes the good cause for the continuance. A continuance may be granted for good cause after the 10 working days have lapsed if the party seeking the continuance is not responsible for and has made a good faith effort to prevent the condition or event establishing the good cause.” *Bussard v. Department of Motor Vehicles* (2008) 164 Cal.App.4th 858, 863-864[.]

2. “A continuance may be granted on motion of a party or on the hearing officer’s own motion.^[9] (Gov.Code, § 11524, subd. (b); *Powers v. Commission on Professional Competence*, supra, 157 Cal.App.3d at p. 571; *Young v. Governing Board* (1974) 40 Cal.App.3d 769, 773-774 [congested calendar is good cause for continuance on hearing officer’s own motion].) In exercising the power to grant or deny a continuance, an administrative law judge is guided by the same principles applicable to continuances generally in adjudicative settings. *Arnett v. Office of Admin. Hearings* (1996) 49 Cal.App.4th 332, 342-343. “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.” (*Taylor v. Bell*, supra, 21 Cal.App.3d at p. 1007; 7 *Witkin, Cal. Procedure*, supra, Trial, § 10, p. 36.) “And, since it is impossible to foresee or predict all of the vicissitudes that may occur in the course of a contested proceeding [citation], **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, at p. 343, 56 Cal.Rptr.2d 774.” (Emphasis added.) *Bussard v. Department of Motor Vehicles* (2008) 164 Cal.App.4th 856, 864.

3. Given the above, the ruling by the previous administrative law judge that there was good cause for a continuance must be left intact. The May 30, 2018 request for the continuance by the Department was in compliance with Section 11524 of the Government Code. That judge made a determination that there was good cause for a continuance on the facts that were presented at that time. It would be improper to revisit the exercise of discretion that was made by that administrative law judge with facts that were not available to that judge. The motion for reconsideration is denied and the May 30, 2018 granting of the continuance is left undisturbed.

(Conclusions of Law, ¶¶ 1-3.)

We concur with ALJ Roldan’s conclusion that the continuance was properly granted. Case law instructs us that an ALJ has broad discretion to grant a continuance. When, as here, the decoy was subpoenaed at the police department from which the decoy operation was conducted—but failed to receive notice of the subpoena because she was out of town attending college at the time of the original hearing—and, when a brief continuance of less than three months makes it possible for her to appear and testify, as she is required to do by section 25666, a continuance seems reasonable. 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 continuance, nor have they demonstrated how the ALJ’s granting of the continuance constitutes an abuse of discretion.

ORDER

The decision of the Department is affirmed.³

SUSAN A. BONILLA, CHAIR
MEGAN McGUINNESS, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

³This 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.