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

AB-7890
File: 20-360160 Reg: 01050983

7-ELEVEN, INC., PARAG S. VEERA, and NISHA P. VEERA
dba 7-Eleven Store # 2172-16927
10950 Warner Avenue, Fountain Valley, CA 92708,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: November 14, 2002
Los Angeles, CA

ISSUED FEBRUARY 5, 2003

7-Eleven, Inc., Parag S. Veera, and Nisha P. Veera, doing business as 7-Eleven Store #2172-16927 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days for appellants' clerk selling an alcoholic beverage to a minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., Parag S. Veera, and Nisha P. Veera, appearing through their counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Roxanne B. Paige.

---

[1]The decision of the Department, dated September 20, 2001, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on February 4, 2000. Thereafter, the Department instituted an accusation against appellants charging that, on February 28, 2001, co-appellant Nisha Veera sold an alcoholic beverage to 19-year-old Michelle Shahin. Shahin was working as a minor decoy for the Fountain Valley Police Department at the time.

An administrative hearing was held on August 15, 2001, at which time documentary evidence was received and testimony was presented concerning the transaction. Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred as alleged and no defense had been established.

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) Appellants' rights to due process were violated by the failure of the Administrative Law Judge (ALJ) to disqualify himself; (2) the face-to-face identification was not conducted according to Rule 141(b)(5) (4 Cal. Code Regs., §141, subd. (b)(5)); and (3) the Department did not establish that the decoy operation was conducted in accordance with Rule 141(a) (4 Cal. Code Regs., §141, subd. (a)).

DISCUSSION

I

Appellants contend their right to a fair and impartial hearing was violated by use of an ALJ selected, employed, and paid by the Department. They do not appear to seriously contend that this ALJ was actually biased or prejudiced, since they offer no evidence to that effect. Rather, they argue that all the Department's ALJ's must be disqualified because the Department's arrangement with the ALJ's creates an

appearance of bias that "would cause a reasonable person to entertain serious doubts" concerning the impartiality of the ALJ's.

Appellants base their contention principally upon the hiring and payment of the ALJ's by the Department and on the transcribed testimony of Edward P. Conner, an assistant director of the Department, in the hearing on an accusation against 7-Eleven, Inc., and Kritsnee and Mark Phatipat, File #20-355455, Reg. #01050320, on May 23, 2001. At the time of his testimony, Conner was in charge of field operations for the Department's Southern Division.

A. Appellants contend that disqualification of the ALJ is required because "the Department's arrangement with the Administrative Law Judges would cause a reasonable person to entertain serious doubts concerning the Administrative Law Judge's impartiality."

This contention is premised on the applicability to ALJ's of section 170.1, subdivision (a)(6)(C), of the Code of Civil Procedure, which provides that "A judge shall be disqualified if . . . [f]or any reason . . . a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial."

However, appellants' basic premise is flawed, because this section applies only to "judges of the municipal and superior courts, and court commissioners and referees," not to ALJ's. (Code Civ. Proc., §170.5; see *Gai v. City of Selma* (1998) 68 Cal.App.4th 213, 233 [79 Cal.Rptr.2d 910].)

The disqualification of ALJ's is governed by sections 11425.30,[2] 11425.40,[3] and

---

[2]Section 11425.30 precludes a person from serving as presiding officer in an administrative hearing if that person has served as, or been subject to the authority, direction, or discretion of a person who has served as, "investigator, prosecutor, or advocate in the proceeding or its preadjudicative stage."

[3]Section 11425.40 provides that a presiding officer may be disqualified "for bias, prejudice, or interest in the proceeding," but not solely because the presiding officer

11512, subdivision (c),[4] of the Administrative Procedure Act (APA) (Gov. Code, §11400 et seq.). With certain limited exceptions, which we discuss below, an ALJ can be disqualified under these provisions only upon a showing of *actual* bias or prejudice; the appearance of bias is not sufficient. (*Andrews v. Agricultural Labor Relations Board* (1981) 28 Cal.3d 781, 792 [171 Cal.Rptr. 590] (*Andrews*); *McIntyre v. Santa Barbara County Employees' Retirement System* (2001) 91 Cal.App.4th 730, 735 [110 Cal.Rptr.2d 565]; *Gai v. City of Selma*, *supra*, 68 Cal.App.4th at pp. 220-221; *Burrell v. City of Los Angeles* (1989) 209 Cal.App.3d 568, 582 [257 Cal.Rptr. 427].)

In the present case, no evidence has been presented that this ALJ was actually biased or prejudiced. "A party must allege concrete facts that demonstrate the challenged judicial officer is contaminated with bias or prejudice. 'Bias and prejudice

---

> (1) Is or is not a member of a racial, ethnic, religious, sexual, or similar group and the proceeding involves the rights of that group. [¶] (2) Has experience, technical competence, or specialized knowledge of, or has in any capacity expressed a view on, a legal, factual, or policy issue presented in the proceeding. [¶] (3) Has as a lawyer or public official participated in the drafting of laws or regulations or in the effort to pass or defeat laws or regulations, the meaning, effect, or application of which is in issue in the proceeding. . . .

[4]Section 11512, subdivision (c), provides, in pertinent part:

> An administrative law judge . . . shall voluntarily disqualify himself or herself and withdraw from any case in which there are grounds for disqualification, including disqualification under Section 11425.40. The parties may waive the disqualification by a writing that recites the grounds for disqualification. A waiver is effective only when signed by all parties, accepted by the administrative law judge, . . . and included in the record. Any party may request the disqualification of any administrative law judge . . . by filing an affidavit, prior to the taking of evidence at a hearing, stating with particularity the grounds upon which it is claimed that the administrative law judge . . . is disqualified. . . . Where the request concerns the administrative law judge, . . . the issue shall be determined by the administrative law judge. . . .

are never implied and must be established by clear averments.'" (*Andrews*, *supra*, 28 Cal.3d at p. 792, quoting *Shakin v. Board of Medical Examiners* (1967) 254 Cal.App.2d 102, 117 [62 Cal.Rptr. 274].)

Even assuming, arguendo, that Code of Civil Procedure section 170.1, subdivision (a)(6)(C), were to apply, we agree with the ALJ that one could not reasonably conclude that disqualification of this ALJ, or the Department's ALJ's in general, is required.

A declaration signed by co-appellant Parag Veera (Exhibit C) states that the Department ALJ's in general, and the specific ALJ in the present case, fail to present an appearance of impartiality because they have access to the Department's Southern Division offices, including those of the Department's attorneys, the law library, photocopying and facsimile machines, the Department's computer and e-mail systems, case files, and "investigation material and all files maintained" in the Southern Division offices.

This part of the declaration is based on the transcript of Conner's testimony; however, the declaration omits certain pertinent facts. Conner's testimony showed that two hearing rooms and two offices for the use of the ALJ's had recently been completed in the same building as the Department's Southern Division offices. There were previously no hearing rooms or offices for the ALJ's in the building. The new rooms, at the time of Conner's testimony, had been used for only one or two weeks and were not yet fully furnished. The ALJ's rooms are not physically connected to the offices of the Southern Division and the ALJ's do not have keys to the Southern Division offices.

The Southern Division offices house administrative personnel, Department attorneys and investigators, and support staff. The ALJ's[5] were allowed to use the fax machine, the copy machine, and the law library located in the Southern Division suite of offices because they did not yet have those facilities in their own new offices and hearing rooms. Any ALJ's who may have taken advantage of the Southern Division facilities[6] were required to be escorted to these destinations by Southern Division staff, where they were allowed to use the facilities undisturbed, and then escorted out of the Southern Division office suite. The ALJ's were allowed into the suite only during regular business hours and were not allowed to roam through the offices unattended. Conner stated that the ALJ's did not have access to the Department's internal computer database, although they could, along with the general public, access limited licensee information through the Department's web site.

Conner confirmed, during examination by appellant's counsel, that it could be possible for an ALJ to see a fax relating to a case while the ALJ was using the fax machine; that it could be possible for an ALJ to see documents relating to a case inadvertently left in the copier; that it could be possible for an ALJ to see notes or documents of Southern Division staff left on the table in the library; and that it could be possible for ALJ's to overhear conversations between attorneys or investigators that might relate to pending or potential cases.

It is obvious from reading the transcript of Conner's testimony that appellants

---

[5]At most, it appears that appellant's contention could apply only to those ALJ's who worked in the Department's Southern Division.

[6]It is not clear whether or not any ALJ's had, in fact, used these facilities. If any did, they were not identified by name.

have grossly overstated, and sometimes misstated, the "access" the ALJ's had to material or facilities of the Southern Division's offices. Appellants attempt to create, by innuendo, the appearance of the ALJ's being privy, through the carelessness or indifference of the Department's management and staff, to numerous sources of confidential information potentially damaging to licensees who have hearings before the ALJ's. We cannot believe that a reasonable person, in possession of all the facts, would "reasonably entertain a doubt that the judge would be able to be impartial" based on the vague and remote possibilities that some ALJ's might have access at some time to material from the Department's Southern Division pertaining to cases that might be heard by those ALJ's. Therefore, even under the standard of Code of Civil Procedure section 170.1, subdivision (a)(6)(C), neither the ALJ in this case, nor the Department's ALJ's generally, would be disqualified.

Appellants cite the case of *Linney v. Turpen* (1996) 42 Cal.App.4th 763 [49 Cal.Rptr.2d 813] (*Linney*) in support of its position. However, *Linney* did not involve the APA provisions that govern disqualification of Department ALJ's. For that reason, and a number of other reasons, we do not find *Linney* supportive of appellants' position.

Linney, an airport police officer, contended that he was deprived of due process in a disciplinary action against him because of the method of selecting the hearing officer and because the hearing officer was paid by Linney's employer. Although the court held that Linney's failure to use the procedure set up to challenge a hearing officer's competence precluded him from raising the issue on appeal, it went on to discuss, and reject, Linney's contention. Notably, the court said "Due process does not require a perfectly impartial hearing officer for, indeed, there is no such thing. . . . [T]he principle our Supreme Court has established is that due process in these

circumstances requires only a '*reasonably* impartial, noninvolved reviewer.'" (*Linney*, *supra*, 42 Cal.App.4th at pp. 770-771, quoting (with added italics) *Williams v. County of Los Angeles* (1978) 22 Cal.3d 731, 737 [150 Cal.Rptr. 5].) The court noted the language of the California Supreme Court in *Andrews*, *supra*, 28 Cal.3d at p. 792, that disqualification of a judge required a showing that the judge was biased or prejudiced "against a particular party" and that prejudice must be "sufficient to impair the judge's impartiality so that it appears probable that a fair trial cannot be held." The court in *Linney* also cited with approval the opinion in *Burrell v. City of Los Angeles*, *supra*, 209 Cal.App.3d 568, which "highlight[ed] the less exacting due process requirements applicable to administrative hearings as compared to judicial proceedings." (*Linney*, *supra*, 42 Cal.App.4th at pp. 772.)

Appellants may be relying on the court's statement in *Linney* that where prejudice or actual bias was not shown to exist, Code of Civil Procedure section 170.1, subdivision (a)(6)(C), was "an alternative standard for possible disqualification." (*Linney*, *supra*, 42 Cal.App.4th at p. 776.) However, the court in *Gai v. City of Selma*, *supra*, 68 Cal.App.4th at pages 232-233, concluded that *Linney* had little precedential value with regard to use of section 170.1, subdivision (a)(6)(C), in an administrative setting because the discussion of the statute in that case was dicta, the views expressed were only those of the lead opinion's author, and the lead opinion is not clear in stating whether the statute should or should not apply to administrative hearing officers. The *Gai* court specifically declined to find the statute applicable to administrative hearing officers. We find the reasoning of the *Gai* court persuasive on this issue.

Appellants also cite the case of *Teachers v. Hudson* (1986) 475 U.S. 292 [89

L.Ed.2d 232] (*Chicago Teachers Union*), in the declaration, but do not explain in what way they believe that case supports their position. In *Chicago Teachers Union*, non-union teachers challenged the procedure in which an employee objecting to the "proportionate share payment" deducted from the non-union employee's paycheck went before an arbitrator selected by the union president and paid by the union; the arbitrator's decision on the employee's objection was final. The District Court upheld the procedure, the Court of Appeals reversed, and the United States Supreme Court affirmed the judgment of the Court of Appeals. The Supreme Court held that the procedure giving the union an unrestricted choice of arbitrator from a list maintained by the state board of education was inadequate, but also rejected the notion that a full evidentiary administrative hearing was required.

The lead opinion in *Linney, supra*, found *Chicago Teachers Union* inapposite for a number of reasons, in particular the view that the California Supreme Court rulings in *Williams v. County of Los Angeles*, *supra*, 22 Cal.3d 731, and *Andrews*, *supra*, 28 Cal.3d 781, were "controlling as to how expansive the courts of this state can and should be in applying the admittedly flexible concept of due process." (*Linney*, *supra*, 42 Cal.App.4th at p. 775.) We do not see that *Chicago Teachers Union* provides appellants with support for their position.

In summary, appellants have not established that the "appearance of bias or prejudice" is the standard to be applied to the ALJ's, and they have not shown actual bias or prejudice, which is the proper standard for disqualification in this instance.

B. Appellants contend that "The Department's practice and arrangement with its Administrative Law Judges violates due process because it creates a financial interest in the outcome of the proceeding arising from the Administrative Law Judges' prospect of future employment with the Department and its good will."

Appellants base this contention on the recent decision by the California Supreme Court in *Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017 [119 Cal.Rptr.2d 341] (*Haas*), in which the court held that a temporary administrative hearing officer had a pecuniary interest requiring disqualification when the government unilaterally selected and paid the officer on an ad hoc basis and the officer's income from future adjudicative work depended entirely on the government's good will. In that case, the County of San Bernardino hired a local attorney to hear Haas's appeal from the Board of Supervisors' revocation of his massage clinic license, because the county had no hearing officer. The possibility existed that the attorney would be hired by the county in the future to conduct other hearings.

The court explained that,

> [w]hile the rules governing the disqualification of administrative hearing officers are in some respects more flexible than those governing judges, the rules are not more flexible on the subject of financial interest. Applying those rules, courts have consistently recognized that a judge has a disqualifying financial interest when plaintiffs and prosecutors are free to choose their judge and the judge's income from judging depends on the number of cases handled. [Fns. omitted.]

(*Haas*, *supra*, 27 Cal.4th at pp. 1024-1025.)

Appellants contend that the present case should be controlled by *Haas*, asserting that, as was the case with the hearing officer in *Haas*, the Department's ALJ's have disqualifying financial interests because their future income is dependent on the good will of the Department, Business and Professions Code section 24210, subdivision (a), gives the Department's director (the Director) "unfettered discretion without limitation to appoint anyone he wants[,] and [the Director] is presumed to prefer those who issue favorable rulings." (App. Br. at p. 15).

Business and Professions Code section 24210, subdivision (a), provides:

> The department may delegate the power to hear and decide to an administrative law judge appointed by the director. Any hearing before an administrative law judge shall be pursuant to the procedures, rules, and limitations prescribed in Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.

Contrary to appellants' assertions, we do not read the statute as giving the Director "unfettered discretion" in appointing ALJ's to hear cases under the Alcoholic Beverage Control Act. The Director's discretion is circumscribed by the requirements of the APA, in the same way that the appointment of ALJ's in the Office of Administrative Hearings (OAH) is circumscribed. The court in *CMPB Friends, Inc. v. Alcoholic Beverage Control Appeals Board* (2002) 100 Cal.App.4th 1250 [122 Cal.Rptr.2d 914] (*CMPB*), confirmed this view when it rejected the licensee's argument that the Department's use of an ALJ appointed by the Director violated the licensee's rights to due process and equal protection. The court stated:

> The Legislature has determined that the Department may properly delegate the power to hear and decide licensing issues to an administrative law judge appointed by the Department's director. ([Bus. & Prof. Code] §24210, subd. (a).) Those administrative law judges must possess the same qualifications as are required for administrative law judges generally, and are precluded from presiding in matters in which they have an interest. (§24210, subd. (a); see, e.g., Gov. Code, §§11425.40, 11512, subd. (c).)

(*Id.* at p. 1258.)

Based on the language of the statute and the recent appellate court decision in *CMPB*, *supra*, we conclude that the Director does not possess the type of "unfettered discretion" the court found objectionable in *Haas*, *supra*.

We turn now to appellants' assertion that the future income of the Department's ALJ's is dependent on the good will of the Department, thus creating for the ALJ's a disqualifying pecuniary interest in the outcome of the cases they hear. The court in

Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (2002) 99 Cal.App.4th 880 [121 Cal.Rptr.2d 753] (*Vicary*), provided a cogent response to this assertion. Vicary argued that the ALJ's "implicit bias" deprived her of due process. The court acknowledged that actual bias need not be shown if the "challenged adjudicator has a strong, direct financial interest in the outcome," citing *Haas*, *supra*, but also stated:

> However, it has been consistently recognized that the fact that the agency or entity holding the hearing also pays the adjudicator does not automatically require disqualification (see *McIntyre v. Santa Barbara County Employees' Retirement System* (2001) 91 Cal.App.4th 730, 735 [110 Cal.Rptr.2d 565]; *Linney*, *supra*, 42 Cal.App.4th at pp. 770-771), and *Haas* confirms this. (*Haas*, *supra*, 27 Cal.4th at p. 1031.) As the Supreme Court also noted in *Haas*, such a rule would make it difficult or impossible for the government to provide hearings which it is constitutionally required to hold.

(*Vicary*, *supra*, at pp. 885-886.)

The court went on to distinguish the situation in *Vicary*, involving the Department's ALJ's, from that in *Haas*:

> *Haas* involved a county which had no regular "hearing officer," but simply hired attorneys to serve on an ad hoc basis. The vice of the system was that an attorney who desired future appointments had a financial stake in pleasing the county, and that the county had almost unrestricted choice for future appointments. In this case, ALJ's are protected by civil service laws against arbitrary or retaliatory dismissal. (See [Gov. Code] § 18500 et seq.) Thus, there is no basis upon which to conclude that the ALJ was influenced to rule in favor of the Department by a desire for continued employment.

(*Id*. at p. 886.)

Vicary is persuasive authority rejecting appellants' contention that the Department's ALJ's have a disqualifying financial interest in the outcomes of the cases they hear.

The *Vicary* court also mentions possible disqualification under Code of Civil Procedure section 170.1, subdivision (a)(6)(C), but dispels the notion immediately:

> Given that the ALJ's financial interest in the result is too attenuated to require disqualification without a showing of actual bias, we find Vicary's other speculative and factually bare concerns about the ALJ's presumed "coziness" with the Department insufficient to raise a suspicion of bias.[6] The record contains no information on the manner in which an ALJ is selected by the Department for any given hearing which would suggest any possibility of bias.
>
> [6]We note that under Vicary's theory, members of the Board could be similarly challenged, as they are subject to – or "fearful of" – removal by the Governor at his pleasure, or by majority vote of the Legislature for dereliction of duty, corruption, or incompetence. (Cal. Const., art. XX, § 22.) Furthermore, they are just as likely to be "cozy" with the Department enforcement personnel as are the ALJ's. Such an approach to disqualification however, would essentially prevent the government from ever holding hearings on matters of public importance.

(*Vicary*, *supra*, 99 Cal.App.4th at p. 886.)

The court in *Vicary* concluded this part of its analysis with the following rejection of Vicary's contention that the Department should use ALJ's from OAH rather than its own:

> [I]t is speculative to state that such ALJ's would be "more impartial" than those employed directly by a particular agency. We will not presume that state-employed professional ALJ's cannot, will not, or do not bring a constitutional level of impartiality to the cases they hear, even if one side is the agency that directly employs them.

(*Vicary*, *supra*, 99 Cal.App.4th at p. 886.)

The court in *CMPB*, *supra*, concluded its discussion of possible disqualification on a similar note:

> We cannot presume bias simply because the Department appointed the administrative law judge. [Citations.] The petitioner has not suggested any particular bias on the part of the administrative law judge in this case to warrant disqualification. Thus, petitioner was not deprived of a fair hearing because of the nature of the administrative law judge's appointment.

(*CMPB*, *supra*, 100 Cal.App.4th at p. 1258.)

We likewise will not presume bias on the part of the ALJ in the present matter, and we reject appellants' "speculative and factually bare concerns about the ALJ's

presumed 'coziness' with the Department." The ALJ properly rejected appellants' motion to disqualify.

II

Appellants contend that the decoy and the officers did not comply with Rule 141(b)(5), which requires that "a reasonable attempt" be made after the sale, but before any citation is issued to the seller, to have the decoy make "a face to face identification" of the seller. Appellants point out that, in the photograph showing the decoy identifying the seller, the seller is looking at the camera, not the decoy, and when the decoy testified, she could not remember if the clerk ever looked at her during the identification. Therefore, they argue, there is no proof that the seller was aware she was being identified under the standard set out in *Chun* (1999) AB-7287. In *Chun*, the Board said that "face to face" means that " the decoy and the seller, in some reasonable proximity to each other, acknowledge each other's presence, by the decoy's identification, and the seller's presence such that the seller is, or reasonably ought to be, knowledgeable that he or she is being accused and pointed out as the seller."

The ALJ stated, in Finding V:

> After decoy Shahin left the store with the beer, she met officers and detectives of the Fountain Valley Police Department. Fountain Valley Police Investigators Sandra Bodnar and Carr took possession of the beer and discussed with decoy Shahin what had happened inside the store. The three, along with other investigators, then entered the store and Investigator Bodnar identified herself to and interviewed cashier Veera. The buy money and a video recording of the cash register area were retrieved. Decoy Shahin identified cashier Veera on more than one occasion as the one who had sold her the beer. She first identified Veera verbally to Investigator Bodnar as the decoy reentered the store with the police officers. Later in the investigation a formal identification was done where Shahin pointed to cashier Veera as the seller and verbally identified her again while standing in close proximity to cashier Veera. (Exhibit 5.) A citation was issued to cashier Veera after both identifications had been done.

In Determination of Issues I, the ALJ concluded that there had been compliance with Rule 141(b)(5). Later in that Determination, he explained:

> The direction the clerk is looking in the photograph, Exhibit [5], and whether that photograph actually caught the decoy speaking is not dispositive of whether a satisfactory identification occurred. In context with the testimony of Investigator Bodnar, Exhibit [5] shows compliance with Rule 141(b)(5).

It is not necessary that the seller actually be aware that he or she is being identified; all that is necessary is that he or she "reasonably ought to be" aware of the identification. (*Greer* (2000) AB-7403; *Chun*, *supra*.)

Where there are conflicts in the testimony, the ALJ is the one charged with resolving them, and this Board must accept all reasonable inferences which support the Department's findings. The ALJ's conclusion that the testimony of the officer and the decoy, combined with Exhibit 5, established compliance with Rule 141(b)(5), is supported by substantial evidence, and appellants have given us no reason to question that conclusion.

III

Appellants contend that the decoy operation was not conducted in "a fashion that promotes fairness" as required by Rule 141(a) because the store was busy at the time the decoy brought the beer to the counter and the decoy cut in line ahead of other customers.

With regard to this issue, the ALJ found (Finding of Fact VII, par. 2 and 3):

> Nisha Veera testified that decoy Shahin "cut the line" of about five customers at a time when Veera was working with another customer who was having difficulty with his ATM card. The store was busy, partly due to a high dollar California Lottery prize that night. Another employee had already been called from other store duties to work a second cash register and the customer Veera was dealing with left the store annoyed at the ATM card problem. Veera then "took" the decoy, scanned the beer and

> was stopped by the cash register system that asked for an identification. Veera said she asked the decoy for an identification, accepted the one offered and "miscalculated the date since it does not scan." She said she looked at the date of birth and thought she had the identification of a person over the age of 21 due to miscalculation. She handed the card back to Shahin and completed the sale.
>
> When the issue of Shahin's cutting the line was pursued with Nisha Veera at the hearing, her testimony was very confusing, leading to the conclusion that while the store was busy and customers were around the sales area, Shahin did not cut in front of any customer who was both in front of her and ready to make a purchase. Veera indicated that she felt rushed because there were people in line.

In Determination of Issues I (par. 6), the ALJ rejected appellants' contention that the store was too busy to conduct a fair decoy operation:

> Law enforcement personnel are entitled to operate in the setting presented by the licensee absent extraordinary circumstances. The fact that [appellants'] store was busy, even extremely busy, does not constitute an extraordinary circumstance. While cashier Veera testified that decoy Shahin cut in line, no other evidence supports that conclusion. Veera's testimony on that point was confusing. (Findings of Fact, ¶ VII.) Whatever happened, no one complained and Veera served her without comment. There was a second cash register available and a cashier was on the way. (*Id*.) There was no evidence that customers waiting in line were yelling at Veera or otherwise diverting her attention from the customer being served. Veera said she felt pressured, but no evidence suggested she was distracted or confused by conditions. Cashier Veera did not mention crowded conditions to Investigator Bodnar at the time. It is hard to understand what "miscalculation" Veera made when looking at Shahin's identification, since no calculation was needed. All she had to do was notice and read the red stripe or notice that the picture was on the right side of the document instead of on the left. In any event, her mistake was not shown to have been caused by crowded conditions. There was no showing that the fairness requirement of Rule 141(a) was violated.

Appellants also argue that evidence showing the operation was unfair is not required until the Department has first demonstrated that there is substantial evidence to conclude that the decoy operation was conducted in a fair manner. The Department failed in its burden, appellants allege, and therefore the ALJ erred when he based his conclusion on the lack of evidence showing that the clerk's mistake in reading the

decoy's identification was caused by the crowded conditions in the store.

Our review of the record convinces us that the ALJ's conclusion regarding Veera's testimony is reasonable, supported by substantial evidence, and well within his discretion as trier of fact.

This Board addressed the "rush hour defense" in *Circle K Stores, Inc.* (2001) AB-7476, saying:

> The prevention of sales to minors requires a certain level of vigilance on the part of sellers. It is nonsense to believe a minor will attempt to buy an alcoholic beverage only when the store is not busy, or that a seller is entitled to be less vigilant simply because the store is busy.
>
> We believe it asks too much to require law enforcement to predict the time of day that, for a particular premises, would fairly be considered "rush hour."
>
> It is conceivable that, where an unusual level of patron activity that truly interjects itself into a decoy operation to such an extent that a seller may be legitimately distracted or confused, and the law enforcement officials seek to take advantage of such distraction or confusion, relief might be appropriate. This does not appear to be such a situation.

The ALJ used similar reasoning in rejecting appellants' argument here, and we cannot say that he abused his discretion in doing so.

Appellants assert that the Department must, at the outset, "demonstrate that there is substantial evidence to conclude that the decoy operation was conducted in a fair manner," before appellants are required to present any evidence that the decoy operation was conducted unfairly. Appellants misunderstand the differing natures of the various burden-of-proof standards. The requirement of "substantial evidence" to support a Department decision is the standard used by this Board, and the appellate courts, when reviewing a decision. The ultimate burden of persuasion at the administrative hearing is the preponderance of the evidence. The Department's initial

burden of producing evidence, however, is merely to make a prima facie case, that is, to produce sufficient evidence to support a finding in its favor in the absence of rebutting evidence.

Appellant cites this Board's decision in *The Southland Corporation/R.A.N.* (1998) AB-6967, in support of its contention that the Department failed to meet its burden of proof. In *7-Eleven/Azzam* (2001) AB-7631, the appellants argued that the Department had not met its burden of proving that Rule 141(b)(5) had been complied with because no specific evidence was presented of the sequence of events to show that the face-to-face identification was made before the citation was issued to the clerk who sold the alcoholic beverage to the decoy. They cited the Board's decision in *The Southland Corporation/R.A.N.*, *supra*, as the basis for their contention. The Appeals Board disagreed, saying,

> In our view, once there has been affirmative testimony that the face to face identification occurred, the burden shifts to appellants to demonstrate why it did not comply with the rule, i.e., that the normal procedure, for the issuance of a citation following the identification of the accused, was not followed. We are unwilling to read our decision in The Southland Corporation/R.A.N. as expanding the affirmative defense created by Rule 141 to the point where appellants need produce no evidence whatsoever to support a contention that there was a violation of that rule.

We reiterate here that a Rule 141 defense requires evidence that there was a violation of the rule.

The evidence presented by the Department in the present case was clearly sufficient to allow the ALJ to conclude that the violation had occurred and that the decoy operation was conducted fairly; it was appellants' burden at that point to present evidence rebutting that evidence. If appellants chose not to present any evidence, but to rely solely on their mistaken belief that the Department had not met its initial burden

of producing evidence, they have no basis for complaint on appeal.

ORDER

The decision of the Department is affirmed.[7]

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

---

[7]This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this order as provided by §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 §23090 et seq.