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

AB-7954
File: 21-361080 Reg: 01051868

GLENN ALLEN BROOKING and JOANNA LEE BROOKING,
dba Crossroads Liquor & Deli
3211 Broad Street, Suite 101, San Luis Obispo, CA 93401,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: April 3, 2003
Los Angeles, CA

ISSUED MAY 22, 2003

Glenn Allen Brooking and Joanna Lee Brooking, doing business as Crossroads Liquor & Deli (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days for their clerk, Stephen Pettis, having sold a six-pack of Budweiser beer to Meaghan Beaudoin, a 19-year-old minor decoy, in violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants Glenn Allen Brooking and Joanna Lee Brooking, appearing through their counsel, Ralph Barat Saltsman, Stephen Warren Solomon, and James S. Eicher, Jr.; and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

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[1]The decision of the Department, dated March 7, 2002, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on January 31, 2000. Thereafter, on November 9, 2001, the Department instituted an accusation against appellants charging a sale to a 19-year-old minor on July 27, 2001.

An administrative hearing was held on February 6, 2002, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred as alleged in the accusation, and appellants had failed to establish any defense to the charge.

Appellants have filed a timely appeal, and contend that Rules 141(b)(2) and 141(b)(5) (4 Cal. Code Regs., §141, subds. (b)(2), (5)) were violated. In addition, appellants contend that they were denied due process by the Department's denial of their motion to disqualify the Administrative Law Judges employed by the Department.

DISCUSSION

I

Appellants contend that the decoy involved in the transaction in this case did not display the appearance required by Rule 141(b)(2). The rule 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."

Appellants say that the decoy, who was five feet, four inches tall and weighed 145 pounds, had the maturity, size and demeanor of a person 21 years of age or over. Appellants place particular emphasis on the decoy's apparent lack of nervousness, owing, appellants say, to her service as a Community Service Officer at Cal Poly San Luis Obispo.

This is another example of the Board being asked to sit as a trier of fact on the issue of the decoy's apparent age.

The ALJ's findings (Findings of Fact VII A-C) regarding the decoy's appearance address the same factors stressed by appellants, and reach an opposite conclusion:

> On July 27, 2001, the decoy was 5' 4" tall and weighed approximately 145 pounds. She wore a watch, but no jewelry. A photograph taken of the decoy on that day shows that she displayed the physical appearance which could generally be expected of a person under twenty-one years old. The decoy felt "fine," not nervous while in Respondent's store.
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> On the day of the hearing, the decoy's height and weight were essentially the same as on July 27, 2001. As she testified, the decoy sat with her hands folded most of the time, occasionally fidgeting with her driver license. She was polite and did not appear nervous, answering the questions asked of her with brief, to-the-point answers.
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> The Administrative Law Judge observed the decoy's physical appearance, demeanor, mannerism, poise, and maturity at the hearing. Based on that observation, the testimony about the decoy's appearance, and the photograph taken on July 27, the Administrative Law Judge finds that the decoy displayed the appearance of a person who could generally be expected to be under twenty-one years old at the time that she purchased the beer from Respondent's clerk.

The Board does not see or hear the decoy. The ALJ does. It would be inappropriate under the circumstances for the Board to substitute its judgment on a factual issue for that of the ALJ.

II

Appellants make several arguments in support of their contention that there was no compliance with Rule 141(b)(5). First, they say that the ALJ failed to make a determination that there was compliance with the rule. Second, they contend that the absence of any reference to a face to face identification in the initial police report suggests that no identification took place. Third, they argue that the identification was conducted in an improper manner, citing the recent decision of the Board in *Keller*

(2002) AB-7848.

The assertion that the ALJ failed to make a determination that there was compliance with Rule 141(b)(5) is nothing more than a quibble. Finding of Fact VI demonstrates that he squarely addressed the issue:

> After buying the beer, the decoy exited the store with the beer and was met by Sergeant Hubbard outside. She then reentered the store, with Sergeant Hubbard and a Department investigator. While in the front of the store, the decoy identified Steven Pettis as the person who sold her the beer. The identification was made to Sergeant Hubbard, the police officer who was directing the decoy. At the time of the identification, the decoy and Pettis were facing each other. After the identification was made, Sergeant Hubbard issued a citation to the clerk.

The ALJ also addressed, and rejected, appellants' contention that the absence of any reference to the identification process in the initial police report, and the request by the Department for a supplemental report, suggested that the identification requirement had been overlooked. The ALJ was unwilling to believe that both the police officer and the decoy had perjured themselves when they testified to the contrary. He saw and heard both witnesses, and was in a far better position than is this Board to gauge the truthfulness of their testimony.

Finally, appellants' reliance on *Keller* is misplaced. There was nothing in the facts of this case resembling the facts in *Keller*. In *Keller*, the clerk was taken outside the store where the decoy was waiting. Here, the decoy was brought back into the store before identifying the clerk as the seller.

Appellants cite the decoy's testimony that Sergeant Hubbard introduced her to the clerk before she was asked to identify him, and say this tainted the identification.

We suspect it is possible that, merely hearing a clerk being told the decoy was a minor could confuse the decoy, but there is nothing to suggest that happened in this

case.

We are satisfied that there was compliance with the rule.

III

At the commencement of the hearing, appellants moved to disqualify the ALJ and all other ALJ's in the employ of the Department. The motion was denied, and appellants claim this resulted in a denial of due process.

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.

The Appeals Board has rejected this argument in other cases in which licensees attempted to disqualify, on the basis of perceived bias, administrative law judges employed by the Department.[2] The Board concluded in those cases that the reliance of those appellants on Code of Civil Procedure section 170.1, subdivision (a)(6)(C), was misplaced, because that section applies only to judges of the municipal and superior courts, court commissioners and referees. The Board noted that the disqualification of ALJ's is governed by sections 11425.30, 11425.40, and 11512, subdivision (c), of the

[2] In legislation effective in 1995, the Department was authorized to delegate the power to hear and decide to an administrative law judge appointed by the Director of the Department. Hearings before any judge so appointed were to 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. (Bus. & Prof. Code, § 24210.)

Administrative Procedure Act (Gov. Code, §11400 et seq.), and concluded that the appellants had failed to make a showing sufficient to invoke those provisions. (See, e.g., *7-Eleven, Inc./Veera* (2003) AB-7890; *El Torito Restaurants, Inc.* (2003) AB-7891.)

Appellants also contend that the Department's ALJ's had disqualifying financial interests in the outcome of proceedings arising from their prospect of future employment with the Department being dependent on the Department's goodwill. Such an arrangement, appellants argue, violates due process.

The Board has previously rejected this contention as well. (See, e.g., *7-Eleven, Inc./Veera*, *supra*; *El Torito Restaurants, Inc.*, *supra*.) Appellants making this contention relied upon the recent decision of 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 governmental agency unilaterally selected and paid the officer on an ad hoc basis and the officer's income from future adjudicative work depended entirely on the agency's good will. In that case, the County of San Bernardino hired a local attorney to hear Haas's appeal from the Board of Supervisor's revocation of his massage parlor 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.

In concluding that appellants' due process rights had not been violated, the Appeals Board relied on two recent appellate court decisions which rejected challenges to the Department's use of ALJ's appointed by the Director: *CMPB Friends, Inc. v. Alcoholic Beverage Control Appeals Bd.* (2002) 100 Cal.App.4th 1250 [122 Cal.Rptr.2d

914] (*CMPB*) and *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2002) 99 Cal.App.4th 880 [121 Cal.Rptr.2d 753] *(Vicary)*.

In *CMPB*, *supra*, the court, citing the authority granted the Department in Business and Professions Code section 24210, noted that ALJ's so appointed "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." The court cited *Haas, supra*; briefly referred to its holding that the presumption of impartiality of an administrative hearing officer is not applicable when the officer appointed on an ad hoc basis has a financial interest in reappointment for future hearings; and concluded that the appellant had not suggested any particular bias on the part of the ALJ sufficient to warrant disqualification.

In *Vicary, supra,* the court also addressed the question whether the kind of financial interest condemned by the court in *Haas* was present when the ALJ was employed by the Department. It concluded:

> Vicary's position is that because the ALJ was employed by the Department he necessarily had a bias in favor of the Department which would be prompted by a perceived need to please the Department in order to keep his job. We recognize that no showing of *actual* bias is necessary if the challenged adjudicator has a strong, direct financial interest in the outcome. (*Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017, 1032-1034 [119 Cal.Rptr.2d 341, 45 P.3d 280] (*Haas*).) 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.
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> *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 pp 885-886.)

We have been presented with no reason that would persuade us to deviate from our prior decisions regarding the contentions raised by appellants. The ALJ properly rejected appellants' motion to disqualify.

ORDER

The decision of the Department is affirmed.[3]

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

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[3]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.