

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

AB-7959

File: 21-317312 Reg: 01051941

VONS COMPANY, INC. dba Vons
4848 Valley View Avenue, Yorba Linda, CA 92686,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: December 3, 2002
Los Angeles, CA

ISSUED FEBRUARY 6, 2003

Von's Company, Inc., doing business as Von's (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 15 days for having sold an alcoholic beverage to a minor, in violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Von's Company, Inc., appearing through its counsel, Ralph Barat Saltsman, Stephen Warren Solomon, and Bruce R. Evans, and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on July 29, 1997. Thereafter, on November 21, 2001, the Department instituted an accusation against appellant charging that, on May 18, 2001, appellant's employee, Jason Schaefer, sold a six-pack

¹The decision of the Department, dated March 21, 2002, is set forth in the appendix.

of Budweiser beer in cans to Bryan Galbreath, a person then 19 years of age.

An administrative hearing was held on February 8, 2002, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Galbreath, who was acting as a police decoy at the time of the transaction; by Michael Petronella, one of two Brea police officers who witnessed the transaction; and by Jason Schaefer. Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been proven, and appellant had failed to establish any defense to the charge.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) appellant was denied due process by the refusal of the Administrative Law Judge (ALJ) to disqualify himself and all other ALJ's employed by the Department; (2) there was no compliance with Rule 141(b)(2); and (3) there was no compliance with Rule 141(b)(5).

I

Appellant contends its right to a fair and impartial hearing was violated by use of an ALJ selected, employed, and paid by the Department. It does not appear to seriously contend that this ALJ was actually biased or prejudiced, since it offers no evidence to that effect. Rather, it argues 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.

Appellant bases its 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. Appellant contends 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, appellant's 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

²Section 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."

³Section 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

(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. . . .

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 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,

⁴Section 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. . . .

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.

The declaration of Jason Schaefer 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's⁵ 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

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

facilities⁶ 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 appellant has grossly overstated, and sometimes misstated, the "access" the ALJ's had to material or facilities of the Southern Division's offices. Appellant attempts 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

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

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.

Appellant cites 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 appellant's 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.)

Appellant 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.

Appellant also cites 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 it believes that case supports its 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 appellant with support for its position.

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

B. Appellant contends 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."

Appellant bases 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.)

Appellant contends 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 appellant's 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 appellant's 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 (Vicary)* (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 appellant's 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.

⁶We 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 appellant's "speculative and factually bare concerns about the ALJ's presumed 'coziness' with the Department." The ALJ properly rejected appellant's motion to disqualify.

II

Appellant contends that the decoy did not display the appearance required by Rule 141(b)(2). Rule 141(b)(2) requires that a minor decoy 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. Appellant asserts that this decoy possessed the maturity, size, and demeanor of a person older than 21, stressing the fact that the decoy had attended criminal justice courses in college, and had received training from two police departments.

The Administrative Law Judge found as follows with respect to the issue of whether the decoy presented the appearance required by the rule (Findings of Fact VI and Determination of Issues I):

A. On May 18, 2001, Bryan Galbreath was about 5 feet, 11 inches tall, and weighed between 160 and 170 pounds.² His dark hair was cut in what he called a 'buzz cut,' short all over. He wore a white T-shirt, blue jeans and Van's tennis shoes. He also wore a wristwatch, but no other jewelry.

² The ABC-Form 312 executed by decoy Galbreath on the night in question said he was 5 feet, 10 inches tall and weighed 148 pounds. (Exhibit B.) Galbreath credibly testified that those numbers were taken from his California Driver License by the Department investigator who filled out the form.

B. Decoy Galbreath appeared at the hearing. His height and weight were about the same as they were on the date in question. His hair was cut about the same. Galbreath's appearance at the hearing was substantially the same as it was before Respondent's clerk on May 18, 2001.³ By the time of the hearing, Galbreath was 20 years of age. Based on physical appearance alone, that is, as he appeared before clerk Schaefer and as he appeared at the hearing, Galbreath displayed the appearance generally expected of a person under 21 years of age.

³ No photograph showing how Galbreath appeared on the night in question was presented. Supervisor Jason Schaefer had ample opportunity to observe Galbreath at the hearing and gave no indication whatever that Galbreath's appearance was different in any respect from what it had been on May 18, 2001.

C. Bryan Galbreath had not worked before as a decoy. He had worked as a Police Explorer with officers of the Ontario Police Department for about a year while he was in high school. He was at the time of the decoy operation working in a part-time paid position with the Brea Police Department as a cadet. In both these positions he had undergone training in various police-related areas and participated in a wide variety of activities, always under direct supervision of sworn officers. Nothing, however, indicated that Galbreath appeared in any respect older than his actual age, either at the hearing or in front of Jason Schaefer.

D. The court has observed the decoy's overall appearance, considering his

physical appearance, his dress, his poise, demeanor, maturity and mannerisms as shown at the hearing. The court has considered all the evidence concerning Galbreath's overall appearance and conduct at Respondent's store on May 18, 2001. In the court's informed judgment, decoy Galbreath gave the appearance at the hearing and before Jason Schaefer that could generally be expected of a person under the age of 21 years.

...

Compliance with Rule 141(b)(2) was established for the reasons set forth in Findings of Fact, paragraph VI. Galbreath's experience as an Explorer and as a cadet did not make him appear older than his actual age.

As these findings indicate, the ALJ, who observed the decoy as he testified, considered the very same factors that, according to appellant, cause the decoy to appear older than 21 years of age, and reached an opposite conclusion. We are not persuaded by appellant that he erred in doing so.

III

Rule 141(b)(5) requires that, following any completed sale, and prior to the issuance of any citation, the police officer directing the decoy must make a reasonable attempt to enter the licensed premises "and have the decoy make a face to face identification of the alleged seller of the alcoholic beverages." Appellant contends there is no evidence of compliance with this rule, because there is no evidence the clerk was aware he was being identified. Appellant cites the decision of the Board in *Chun* (1999) AB-7287, in which the Board described a face-to-face identification as one in which "the two, 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."

This contention was not raised at the administrative hearing. Appellant instead

argued that the clerk was distracted by events occurring in the store's parking lot. It is well settled that an issue may not be raised for the first time on appeal. (See 9 Witkin, California Procedure (4th Ed. 1997), Appeals, §394, p.444, and cases cited therein.)

Nonetheless, our own review of the record satisfies us that the requisite identification took place, and the clerk's mere inability to recall whether he was aware he was being identified does not establish a defense under the rule.

The decoy testified that, as he was leaving the store after he made his purchase, he was met by two police detectives who asked him to return to where he was. He did so, and they then asked him to identify the person who sold him the alcohol. He did that as well: "I pointed to the gentleman at the register who had sold me the alcohol, and they took a picture of us." Although the photograph is not part of the record, appellant has not challenged the decoy's testimony that one was taken.

Brea police detective Michael Petronella confirmed the decoy's testimony, stating that the clerk had remained at the register, that the decoy came to the area where the clerk was, that he was asked to point to the clerk who sold him the beer, and he did so.

We think language we used in *7-Eleven, Inc./Swedelson* (2002) is appropriate here:

In the present case, the clerk's testimony that he did not see or hear the decoy identify him is not controlling. There is no question that the decoy actually made the identification while within reasonable proximity to the clerk. The clerk had just been informed by the officer that he had sold an alcoholic beverage to a minor, and the presence of the decoy with the officer within four to ten feet of the clerk when the identification was made, is enough to satisfy both the rule and the standard in *Chun*. The clerk may not have yet accepted the fact that he had made an unlawful sale, but he clearly knew that he was accused, and by whom.

The clerk admitted he had seen the decoy after being told he had made a sale to a minor, and that he had been photographed with the decoy. This being so, we place

little weight on the clerk's statement that he could not recall being identified by the decoy.

ORDER

The decision of the Department is affirmed.⁷

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

⁷ This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate district court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.