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

AB-7970
File: 20-214424 Reg: 01051938

7-ELEVEN, INC., DIANE C. SMITH, and WILLIAM T. SMITH,
dba 7-Eleven # 2121-13623
1305 Garnet Avenue, San Diego, CA 92109,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

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

ISSUED JULY 31, 2003

7-Eleven, Inc., Diane C. Smith, and William T. Smith, doing business as 7-Eleven # 2121-13623 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days for their clerk selling an alcoholic beverage (a 40-ounce bottle of Budweiser beer) to a minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., Diane C. Smith, and William T. Smith, appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and James S. Eicher, Jr., and the Department of Alcoholic Beverage Control, appearing through its counsel, Roxanne B. Paige.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 1, 1988. Thereafter, the Department instituted an accusation against appellants charging that,

[1]The decision of the Department, dated May 2, 2002, is set forth in the appendix.

on March 17, 2001, appellant's clerk, Joseph DeCarlo, sold an alcoholic beverage to 17-year-old Bryan Howes.

An administrative hearing was held on February 1, 2002, at which time oral and documentary evidence was received. Before testimony began, appellants moved to disqualify all administrative law judges (ALJ's) employed by the Department. The ALJ denied the motion. Testimony was presented by Bryan Howes, by San Diego police detective Larry Darwent, and by co-appellant Diane Smith.

The testimony revealed that Howes was acting as a minor decoy for the San Diego Police Department on March 17, 2001, engaged in a "shoulder-tap" operation, in which a minor decoy approaches an adult outside a licensed premises and tries to get the person to purchase an alcoholic beverage for the decoy. Howes asked a person outside appellants' premises to purchase an alcoholic beverage for him, but the person refused. One of appellants' employees, later identified as DeCarlo, was smoking a cigarette outside the premises at the time. DeCarlo approached Howes and offered to sell beer to him if Howes went inside and showed some kind of identification.

After DeCarlo went inside, the officers accompanying Howes instructed him to go inside and attempt to purchase beer. Howes entered, got a bottle of beer from the cooler, and took it to the counter, where DeCarlo was working. DeCarlo asked for identification, and Howes showed him his California driver's license, which showed him to be under 21 years of age. DeCarlo then sold the beer to Howes.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been proven and that appellants had not established an affirmative defense to the charge.

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) Their due process rights were violated when the ALJ refused to disqualify himself and all other ALJ's employed by the Department, and (2) the decoy's appearance violated Rule 141(b)(2) (4 Cal. Code Regs., §141, subd. (b)(2)).

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.

The Appeals Board has rejected this argument in a large number of recent cases in which licensees attempted to disqualify, on the basis of perceived bias, ALJ's 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] Business and Professions Code section 24210, effective January 1, 1995, authorized the Department to delegate the power to hear and decide to an ALJ appointed by the Director. Hearings before any judge so appointed are pursuant to the procedures, rules, and limitations prescribed in Chapter 5 (commencing with Section 11500) of the Administrative Procedure Act (Gov. Code, § 11340 et seq.).

Administrative Procedure Act, 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.

II

Appellants contend that, because of the decoy's size (six feet two inches tall and 230 pounds) and his training and experience (police cadet for 13 months, including eight sessions of law enforcement training; two prior decoy operations involving alcoholic beverages), he did not display the appearance generally to be expected of a person under the age of 21, as required by Rule 141(b)(2). They also contend that the ALJ failed to make an adequate determination regarding the effect of the decoy's training and experience on his appearance.

The ALJ evaluated the decoy's appearance as follows (Finding II.E.):

> The overall appearance of the decoy including his demeanor, his poise, his size, his mannerisms, and his physical appearance were consistent with that of a seventeen year old and his appearance at the time of the hearing was substantially the same as his appearance on the day of the decoy operation except that the decoy was approximately twenty pounds heavier at the time of the hearing. On the day of the sale, the decoy was six feet two inches in height, he weighed two hundred thirty pounds, he was clean-shaven and his hair was short. He was wearing blue jeans, a hooded sweatshirt, tennis shoes and a silver chain around his neck. The decoy testified that he had served as a police cadet for the San Diego Police Department for approximately thirteen months prior to the date of the instant sale, that he had participated in two prior decoy operations involving alcoholic beverages and that he is a high school student. Exhibit 4 was taken at the premises on the night of the sale and the photograph

> depicts what the decoy looked like on the night of the sale. Although the decoy is a large teenager, he is quite youthful appearing facially, in demeanor, in attitude and in his mannerisms. After considering the photograph (Exhibit 4), the decoy's overall appearance when he testified and the way he conducted himself at the hearing, a finding is made that the decoy displayed an overall appearance which could generally be expected of a person under twenty-one years of age under the actual circumstances presented to the seller at the time of the alleged offense.

The ALJ clearly considered the decoy's training and experience and found that they did not cause him to appear older than his actual age at the time he purchased the beer. Nothing indicates that the ALJ's determination in this regard was inadequate.

We have said many times that we are not inclined to substitute our judgment for that of the ALJ on the question of the decoy's apparent age, absent very unusual circumstances, none of which are present here. In the appeal of *Idrees* (2001) AB-7611, we said:

> As this Board has said on many occasions, the ALJ is the trier of fact, and has the opportunity, which this Board does not, of observing the decoy as he or she testifies, and making the determination whether the decoy's appearance met the requirement of Rule 141, that he or she possessed 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.
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> This Board is not in a position to second-guess the trier of fact, especially where all we have to go on is a partisan appeal that the decoy did not have the appearance required by the rule, and an equally partisan response that she did.

Similarly, this Board has previously addressed appellants' contention that the decoy's experience necessarily made him appear to be over the age of 21. The Board rejected this type of contention in *Azzam* (2001) AB-7631:

> Nothing in Rule 141(b)(2) prohibits using an experienced decoy. A decoy's experience is not, by itself, relevant to a determination of the decoy's apparent age; it is only the *observable effect* of that experience that can be considered by the trier of fact. While extensive experience as a decoy or working in some other capacity for law enforcement (or any

> other employer, for that matter) may sometimes make a young person appear older because of his or her demeanor or mannerisms or poise, that is not always the case, and even where there is an observable effect, it will not manifest itself the same way in each instance. There is no justification for contending that the mere fact of the decoy's experience violates Rule 141(b)(2), without evidence that the experience actually resulted in the decoy displaying the appearance of a person 21 years old or older.

Appellants cite the language from *Azzam*, *supra*, but only the first two sentences quoted above. They ignore the language after that which makes clear that there must be evidence presented that the decoy's experience actually made the decoy appear to be 21 years of age or older.[3] The ALJ saw no evidence of this at the hearing and, although appellants assert that the evidence at the hearing contradicts the ALJ's finding, they have not pointed out the evidence to which they refer.

ORDER

The decision of the Department is affirmed.[4]

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

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[3]They also ignore the clerk's actual knowledge that the decoy was, in fact, under 21: the clerk watched the decoy ask an adult outside the store to buy beer for him; he offered to sell the beer to the decoy; he suggested the subterfuge of looking at the decoy's identification; and he saw the decoy's identification that showed he was under 21 years of age. The clerk could not have thought the decoy was over 21.

[4]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.