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

AB-7973
File: 20-330356 Reg: 02052176

7-ELEVEN, INC., ACHAMMA THOMAS, and STEVE MANNICKAROTTU
dba 7-Eleven #2172-27937
108 Katella Avenue, Orange, California 92667,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: February 13, 2003
Los Angeles, CA

ISSUED APRIL 10, 2003

7-Eleven, Inc., Achamma Thomas, and Steve Mannickarottu, doing business as 7-Eleven #2172-27937 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days for their clerk, Ricardo Cordova, having sold a six-pack of Budweiser beer to Manuel Ybarra, a minor decoy, in violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., Achamma Thomas, and Steve Mannickarottu, appearing through their counsel, Ralph Barat Saltsman, Steven Warren 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 7, 1997.

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

Thereafter, on January 7, 2002, the Department filed an accusation against appellants charging the unlawful sale of an alcoholic beverage on June 8, 2001.

An administrative hearing was held on March 26, 2002, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Roger Melville, a City of Orange police officer; Manuel Ybarra, the decoy; Ricardo Cordova, appellants' clerk; and co-licensee Achamma Thomas.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established and appellants had failed to establish a defense to the charge.

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) appellants were denied due process by the refusal of the Administrative Law Judge to disqualify himself and all other ALJ's employed by the Department; (2) Rule 141(b)(5) (4 Cal. Code Regs., §141(b)(5)) was violated; and (3) Rule 141(b)(2) (4 Cal. Code Regs., §141(b)(2)) was violated. Appellants concede that there was a sale of an alcoholic beverage.

DISCUSSION

I

In a large number of cases which it has heard in recent months, the Appeals Board has sustained decisions of the Department which rejected attempts by appellants to disqualify, on the basis of perceived bias, administrative law judges employed by the Department.[2] Appellants in those cases contended that the Department's arrangement

[2] In legislation enacted 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

with the ALJ's created an appearance of bias that would cause a reasonable person to entertain serious doubts regarding their impartiality.

The Board concluded that appellants' reliance on Code of Civil Procedure section 170.1, subdivision (a)(6)(C), was misplaced, because that section applied only to judges of the municipal and superior courts, court commissioners and referees. Instead, the Board stated that the disqualification of ALJ's is governed by sections 11425.30, 11425.40, and 11512, subdivision (c), of the Administrative Procedure Act (Gov. Code §11400 et seq.), and concluded that appellants had failed to make a showing sufficient to invoke those provisions.

In addition, the Board rejected contentions that the Department's practice and arrangement with its ALJ's violated due process because it created a financial interest in the outcome of the proceeding arising from the ALJ's prospect of future employment with the Department and its good will. Appellants 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], 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.

11500) of Part 1 of division 3 of Title 2 of the Government Code. (Bus. and Prof. Code, § 24210.)

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

In *CMPB Friends, Inc.*, *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 v. County of San Bernardino, 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 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 1017, 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.

In this case as well, we are satisfied that the Department ruled correctly in denying appellants' motion to disqualify the Department's ALJ's.

II

Appellants contend that the decoy's identification of the clerk as the seller did not comply with Rule 141(b)(5). The gist of appellants' argument appears to be that, when the decoy identified the clerk as the seller, the clerk was unaware that he was being identified.

We agree with the ALJ that the identification complied with the rule.

Rule 141(b)(5) requires that the police officer have the decoy make a face-to-face identification of the seller.

The clerk's own testimony (see RT 77) satisfies us that there was compliance with Rule 141(b0(5):

> Q. All right. So do you recall that your photograph was taken with that young man, right?
>
> A. Yes.
>
> Q. Do you recall that the young man was pointing to you; right?
>
> A. Yes, I do.

Q. Were you aware that he was pointing to you as the person who sold him the beer?

A. Yes.

III

Appellants also contend that the decoy did not display the appearance required by Rule 141(b)(2), that which could generally be expected of a person under 21 years of age. Appellant argues that the weight of the evidence at the hearing "indicates that the decoy had the maturity, size, and demeanor of an individual 21 years of age or older." Appellants point to the decoy's experience as a police explorer and police cadet, and his prior experience as a decoy, and say that the added confidence he would have acquired would have led the clerk to believe he was older than 21.

The ALJ found that neither Ybarra's physical appearance nor his experience as a cadet and police explorer made him appear older than his actual age of 19 (see Findings of Fact VI-B, VI-C and VI-D):

> Decoy Ybarra appeared at the hearing. His height and weight were about the same at the hearing as they were on the day in question. He said that he had gained about five pounds since June 8, 2001. His hair was cut about the same as well. Ybarra's appearance at the hearing was substantially the same as it was before Respondents' clerk on June 8, 2001. By the time of the hearing, Ybarra was 20 years of age. Based on physical appearance alone, that is, as he appeared before clerk Cordova and as he appeared at the hearing, Ybarra displayed the appearance generally expected of a person his age, under 21 years of age.
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> Manuel Ybarra had worked before as a decoy on several occasions, between five and ten in number. He had visited an estimated 10 to 20 locations on each occasion. He had also been a Police Explorer and was working as a paid Police Cadet with officers of the Orange Police Department in June 2001, although he was a volunteer for the decoy operation. Nothing, however, indicated that Ybarra appeared in any respect older than his actual age, either at the hearing or in front of Ricardo Cordova. Despite the number of decoy operations he had been on, Ybarra testified that he was a little nervous when he purchased beer from Cordova, although he did not display any outward signs of nervousness while testifying.

> 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 Ybarra's overall appearance and conduct at Respondents' store on June 8, 2001. In the court's informed judgment, decoy Ybarra gave the appearance at the hearing and before Ricardo Cordova that could generally be expected of a person under the age of 21 years.

Judge McCarthy elaborated upon his findings in Determination of Issues I, second paragraph, where he stated:

> Compliance with Rule 141(b)(2) was established for the reasons set forth in Findings of Fact, paragraph VI. Ybarra's experience as an Explorer and as a cadet did not make him appear older than his actual age. Cordova's testimony that he believed Ybarra was 27 years of age at the time of the sale is not dispositive even if that is Cordova's true belief. There is no conceivable way that decoy Ybarra looked that old, even if to some he may have looked 21 years of age. Ybarra gave the appearance generally expected of one his age, less than 21 years.

The ALJ is the trier of fact, and has the opportunity, which this Board does not, of observing the decoy as he testifies. It would be presumptuous of us to substitute our judgment for his, especially given his carefully articulated reasons for concluding as he did.

The rule, through its use of the phrase "could generally be expected" implicitly recognizes that not every person will think that a particular decoy is under the age of 21. Thus, the fact that a particular clerk mistakenly believes the decoy to be older than he or she actually is, is not a defense if in fact, the decoy's appearance is one which could generally be expected of that of a person under 21 years of age.

ORDER

The decision of the Department is affirmed.[3]

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[3] 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.

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

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.