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

AB-7974
File: 20-344271 Reg: 02052179

EQUILON ENTERPRISES, LLC, dba Texaco Starmart # 3114
1815 North Tustin Street, Orange, CA 92865,
Appellant/Licensee

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

Equilon Enterprises, LLC, doing business as Texaco Starmart # 3114 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days for appellant's clerk selling an alcoholic beverage to a minor decoy, in violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Equilon Enterprises, LLC, appearing through its counsel, Ralph B. Saltsman, Stephen W. Solomon, and James S. Eicher, Jr., and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon Logan.

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[1]The decision of the Department, dated May 20, 2002, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on January 11, 1999. Thereafter, the Department instituted an accusation against appellant charging that, on March 30, 2001, appellant's clerk, Dora Mahoney (the clerk), sold an alcoholic beverage to 19-year-old Manuel Ybarra. Ybarra was acting as a decoy for the City of Orange Police Department at the time of the sale.

An administrative hearing was held on March 26, 2002, at which time documentary evidence was received and testimony concerning the transaction was presented by Detective Roger Belville of the City of Orange Police Department and by Ybarra (the decoy). Prior to the testimony, appellant made a motion to disqualify the Administrative Law Judge (ALJ), which the ALJ denied.

Subsequent to the hearing, the Department issued its decision which sustained the charge of the accusation and determined that no defense had been established.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) Appellant's right to due process was violated by the Administrative Law Judge's (ALJ's) failure to disqualify himself and all other ALJ's employed by the Department, (2) Rule 141(b)(5) was violated, and (3) Rule 141(b)(2) was violated.

DISCUSSION

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.

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, 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 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.)

Appellant also contends 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, appellant argues, 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

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

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 out prior decisions regarding the contentions raised by appellant. The ALJ properly rejected appellant's motion to disqualify.

II

Appellant contends that there was not compliance with Rule 141(b)(5), which requires, after a sale to a minor decoy, that the "officer directing the decoy shall make a reasonable attempt to enter the licensed premises and have the minor decoy . . . make a face to face identification of the alleged seller of the alcoholic beverages."

The ALJ made the following finding with regard to the face-to-face identification (Finding V):

> After the sale, decoy Ybarra met with Orange Detective Sergeant Matt Miller, gave him the beer, and was escorted back into the store. Detectives Belville and Miller then approached clerk Mahoney and identified themselves to her as police officers. Detective Belville advised her that she had sold beer to a "minor." Mahoney said she had checked his identification and he was old enough.[2] Both at the time of the sale and during the short conversation between Detective Belville and clerk Mahoney, store manager "Mo" Mostafa was not more than five feet away from the clerk, behind the sales counter. Decoy Ybarra was then asked to point out who had sold him the beer. He pointed at clerk Mahoney. (Exhibits 2 and 3-a.) Any contention that Ybarra's identification was ambiguous as to whether he pointed at Mahoney or Mostafa is rejected, as Ybarra credibly testified he pointed at the female and the photographs, Exhibits 2 and 3-a, show him pointing to Mahoney and no one else. A Notice to Appear was issued to clerk Mahoney after the identification was accomplished. (Exhibit 4.)

[2]Clerk Mahoney apparently believed the legal age for purchasing alcoholic beverages was 18.

The rule imposes two separate duties on the officer - to attempt to reenter,[3] and to conduct a face-to-face identification. In this case, both duties were performed.

Appellant contends that this case is similar to *Keller* (2002) AB-7848, in which the Appeals Board reversed the Department because the face-to-face identification

[3] Although the rule uses the term “reenter,” in many cases the officer has observed the transaction from outside the premises, so can only attempt to “enter.” The Board has always considered this to comply with the rule.

took place after the police brought the clerk out from the store and the decoy, who had already made his exit from the store, only then made the identification. The Board compared the identification process in *Keller* with a "one-person line-up," in which it was inevitable that the decoy would identify the person brought out as the seller.

This case is different. In this case, the decoy re-entered the store with the officers, while the clerk was still behind the counter. The decoy pointed to the clerk when asked who had sold the alcoholic beverage to him. These facts are not in dispute.

Appellants argue that the officers' statement to the clerk that she had just sold an alcoholic beverage to a minor, made before the decoy's identification of her as the seller, created a biased identification process. Additionally, appellants argue, the process was biased because there were two employees behind the counter at the time, and the officers singled out one of them before the decoy's identification of the seller.

This Board has approved the apparently common practice of law enforcement officers first identifying themselves and informing the clerk that he or she had made a sale to a minor, before having the decoy make the required face-to-face identification. Indeed, this practice has been seen as evidence indicating that the clerk knew or should have known that he or she was being identified as the seller of alcoholic beverages. Appellant has pointed out no actual bias that was created in this instance, and we do not see such inherent bias in the practice generally as to cause the kind of unfairness we saw present in *Keller*.

We also reject appellant's allegation of biased identification caused by the officers' "singling out" one of the two employees behind the counter. The decoy expressed no hesitation over whether it was the female clerk or the male store manager

who sold to him and there is no evidence that he was influenced to make an error by the officers' action.

Appellants quote from *Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board* (1998) 67 Cal.App.4th 575 [79 Cal.Rptr.2d 126], but the language about "strict adherence" to the rule does not support their argument about a "biased identification process." *Acapulco* also had facts substantially different from those in the present case; the identification there was made not by the decoy, but, instead, by the police officer who had witnessed the transaction.

III

Appellant contends that the decoy had prior experience as a police Explorer, a police cadet, and a police decoy. This experience, appellant argues, would have given the decoy added confidence during the decoy operation, and the ALJ did not adequately consider the effect of such experience in determining that the decoy met the requirement of Rule 141(b)(2) that he display to the seller of alcoholic beverages the appearance generally to be expected of a person under the age of 21. Appellant does not contend that the decoy's physical appearance violated the rule.

The ALJ discussed the decoy's appearance in Finding VI. In paragraphs A. and B., he described the decoy's physical appearance and concluded that, "[b]ased on physical appearance alone, . . . [the decoy] displayed the appearance generally expected of a person his age, under 21 years of age." In the following two paragraphs, the ALJ discussed the decoy's experience and his apparent age:

> C. [The decoy] had worked as a decoy on several occasions. He had been on as many as six different decoy operations and had visited as many as 60 different premises. He had worked as a Police Explorer and as a paid Police Cadet with officers of the Orange Police Department prior to his visit to [appellant's] store. As a Police Explorer, [the decoy] had

> worked in traffic control for various street fairs and as a cadet he did miscellaneous tasks for the detectives in the Detective Bureau. Nothing, however, indicated that [the decoy] appeared in any respect older than his actual age, either at the hearing or in front of [the clerk]. [The decoy] testified that he was nervous when he purchased beer from her and he displayed some nerves [sic] at the hearing by constantly working his left leg while testifying.
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> 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 [the decoy's] overall appearance and conduct at [appellant's] store on March 30, 2001. In the court's informed judgment, [the decoy] gave the appearance at the hearing and before [the clerk] that could generally be expected of a person under the age of 21 years.

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 his 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 appellant's 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.

Appellant cites the language from *Azzam*, *supra*, but only the first two sentences quoted above. It ignores 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. The ALJ saw no evidence of this at the hearing and, although appellant asserts that the evidence at the hearing contradicts the ALJ's finding, it has pointed out no such evidence.

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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[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.