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

AB-7994
File: 21-354495 Reg: 01051212

GURMEET SINGH WARAICH dba Shell
9151 Foothills Boulevard, Roseville, CA 95747,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Jeevan S. Ahuja

Appeals Board Hearing: March 13, 2003
San Francisco, CA

ISSUED APRIL 30, 2003

Gurmeet Singh Waraich, doing business as Shell (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended his license for 15 days for his clerk, Tanvir Dhanoa, having sold a six-pack of Budweiser beer to Michael Goin, an 18-year-old police decoy, in violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Gurmeet Singh Waraich, appearing through his counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean Lueders.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on January 18, 2000. Thereafter, the Department instituted an accusation against appellant charging the unlawful sale of

[1]The decision of the Department, dated June 13, 2002, is set forth in the appendix.

an alcoholic beverage to a minor. An administrative hearing was held on April 16, 2002, at which time oral and documentary evidence was received.

Subsequent to the hearing, the Department issued its decision which determined that the unlawful sale had occurred as alleged, and that appellant had established no defense to the charge of the accusation.

Appellant thereafter filed a timely notice of appeal. In his appeal, appellant raises the following issues: (1) appellant was denied due process by the denial of his motion to disqualify the Administrative Law Judges employed by the Department; and (2) Rule 141(b)(2) was violated.

DISCUSSION

I

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

[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.)

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 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.

> *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 appellant. The ALJ properly rejected appellant's motion to disqualify.

II

Appellant argues that the decoy did not have the appearance of a person under 21 years of age, referring to his height (6' 0") and weight (180 pounds), his experience as a police explorer and law enforcement training, his short "military style" haircut, his clothing (an army ranger T-shirt), and his lack of nervousness.

The ALJ saw all of these characteristics, and disagreed with appellant's impression of the decoy's apparent age (Findings of Fact VI A-C):

> On the date of this decoy operation, the decoy was 6 feet tall and weighed 180 pounds. He was wearing an army ranger tee-shirt and jeans. He was clean-shaven, and had short hair. State's exhibit No. 2 depicts the minor as he appeared on the date of the sale of the alcoholic beverage to him. It is found that the minor displayed the physical appearance which could generally be expected of a person under 21 years of age.
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> On the date of the hearing, the decoy was not nervous. He was matter-of-fact in his responses to the questions he was asked.
>
> At the time of the hearing, the minor presented the overall appearance, including his demeanor and level of maturity, which could generally be expected of a person under 21 years of age. There is no evidence that the decoy presented a significantly different appearance in front of Mr. Dhanoa, Respondent's clerk, on May 22, 2001.

We see nothing about the decoy's appearance, as described by the ALJ, sufficient to warrant our overriding the ALJ's judgment of the decoy's apparent age. The "military style" T-shirt and haircut could be found on any 18-year-old, whether or not in the military. Nor is the decoy's size atypical for an 18-year-old male. Counsel's description of the decoy is that of an advocate, and is the kind of argument typically made to a finder of fact. But this Board is not the fact-finder, and will not interfere with an ALJ's findings regarding the apparent age of a decoy in the absence of extraordinary circumstances. None are present here.

ORDER

The decision of the Department is affirmed.[3]

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

[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.

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.