

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

AB-8001

File: 20-214181 Reg: 01051942

7-ELEVEN, INC., and BARRY A. GAUTHIER dba 7-Eleven Food Store #2174-14009
109 West Lambert Road, Brea, CA 92621,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

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

ISSUED SEPTEMBER 3, 2003

7-Eleven, Inc., and Barry A. Gauthier, doing business as 7-Eleven Food Store #2174-14009 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 days for their clerk having sold an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., and Barry A. Gauthier, appearing through their counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Roxanne Paige.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 1, 1998. Thereafter, the Department instituted an accusation against appellants charging that

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

their agent, employee, or servant, Catherine Jimeno Villanueva, sold an alcoholic beverage (beer) to Michael Denny Bryant, a person who was then approximately 19 years of age, in violation of Business and Professions Code section 25658, subdivision (a).

An administrative hearing was held on April 30, 2002, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Michael Denny Bryant (“the decoy”) and Naureen Zaidi, an investigator with the Department of Alcoholic Beverage Control. Appellant Barry A. Gauthier testified on behalf of the licensees.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been sustained, and that no defense to the charge had been proven. Appellants’ motion to disqualify Administrative Law Judge (ALJ) Echeverria and all other administrative law judges employed by the Department was denied at the outset of the hearing.

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) They were denied due process by the denial of their motion to disqualify all administrative law judges employed by the Department; and (2) there was no compliance with Rule 141(b)(2).

DISCUSSION

I

Appellants moved to disqualify all administrative law judges employed by the Department, and now claim that the denial of their motion resulted in a denial of due process.

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 other 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.)

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

² In legislation effective 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.

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 the decoy lacked the appearance required by Rule 141(b)(2). That rule specifies that a decoy "shall 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.” Appellants assert that the decoy had the maturity, size and demeanor of an individual 21 years of age or older, stressing his training as a police cadet and exposure to law enforcement, and argue that the ALJ failed to make an adequate determination as to the effect his law enforcement experience would have had upon his appearance.

Appellants’ arguments are much the same as those heard in many minor decoy case which reach the Board - that the ALJ failed to properly assess the decoy’s appearance in light of his or her experience as a police explorer or police cadet.

Appellants would have the Board, on a typewritten record and a photograph, substitute its judgment for that of the ALJ who saw, heard, and even questioned the decoy during his appearance as a witness. The very indicia of appearance that appellants stress - maturity, size and demeanor - can only be considered by viewing the decoy in the flesh, a privilege the Board does not enjoy.

The ALJ considered these factors and others in his findings (Finding of fact II-D:

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 person under the age of twenty-one years of age and his appearance at the hearing was substantially the same as his appearance on the day of the decoy operation except that he was approximately ten pounds heavier on the date of the sale.

On the date of the sale, the decoy was approximately five feet eight inches in height and he weighed one hundred eighty-five pounds. His clothing consisted of blue jeans, a blue, short sleeve shirt and white tennis shoes. He was clean-shaven and his hair was short as indicated in the photograph depicted in Exhibit 4 that was taken at the premises on the day of the sale. This photograph depicts how the decoy was dressed on the day of the sale.

The decoy testified that he had not participated in any prior decoy operations and that he was employed as a police cadet for the Placentia Police Department.

After considering the photograph depicted in 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.

It is readily apparent that the ALJ considered the same indicia of age appellants rely upon, as well as others that appellants have not mentioned, and reached a result contrary to that appellants urge. We are not persuaded that appellants' less-than-objective assessment of the decoy's appearance is more accurate than that the ALJ made.

ORDER

The decision of the Department is affirmed.³

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
KAREN GETMAN, 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.