

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

AB-8011

File: 20-373115 Reg: 01052067

CHEVRON STATIONS, INC., dba Chevron
8001 Washington Boulevard, Roseville, CA 95678,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Michael B. Dorais

Appeals Board Hearing: June 12, 2003
San Francisco, CA

ISSUED JULY 30, 2003

Chevron Stations, Inc., doing business as Chevron (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 10 days for appellant's clerk selling an alcoholic beverage to a minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Chevron Stations, Inc., appearing through its counsel, Ralph B. Saltsman, Stephen W. Solomon, and R. Bruce Evans, and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean R. Lueders.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on March 5, 2001. Thereafter, the Department instituted an accusation against appellant charging that, on September 25, 2001, appellant's clerk, Samer M. Abdeen (the clerk), sold an alcoholic

¹The decision of the Department, dated July 18, 2002, is set forth in the appendix.

beverage to 19-year-old Michael Goin. Goin was working as a minor decoy for the Roseville Police Department at the time.

An administrative hearing was held on June 6, 2002, at which time oral and documentary evidence was received. At that hearing, testimony concerning the sale was presented by Goin (the decoy) and by Timothy Guter, a Roseville police officer. Elia Obonasser, store manager of the premises on September 25, 2001, testified about the store's training policies with regard to alcoholic beverage sales.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged had been proven, and no defense had been established.

Appellant thereafter filed a timely appeal in which it raises the following issues: (1) Appellant's right to due process was violated by the failure of the administrative law judge (ALJ) to disqualify himself and all other ALJ's employed by the Department, and 2) appellant was denied due process of law by the ALJ's interference with its right to cross examine witnesses.

DISCUSSION

Appellant makes two arguments in support of ALJ disqualification: one general, dealing with all ALJ's employed by the Department, and one specific to ALJ Dorais, who presided at the administrative hearing. The latter argument overlaps to a significant extent with the argument concerning the interference of ALJ Dorais with appellant's right to cross examine witnesses, and we will discuss these two contentions together.

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 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 other 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 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.)

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

²Business 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.).

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 contends that ALJ Dorais violated its right to due process of law in two ways: First, he interfered with appellant's ability to cross-examine the Department's

witnesses by sustaining nine objections during cross-examination. Secondly, appellant asserts that the sustaining by ALJ Dorais of "a glut of erroneous objections" is a "manifestation of partiality." This, along with other "manifestations of partiality" shows that ALJ Dorais should have disqualified himself for cause, according to appellant.

Appellant is seeking to make an evidentiary issue into a constitutional one. Appellant was not, as far as we can tell from reviewing the transcript, prevented from cross-examining the Department's witnesses. Any inability to effectively cross-examine the witnesses must be attributed to appellant's counsel, not to the evidentiary rulings of the ALJ.

Appellant asserts that inquiry into whether the requirements of Rule 141 were met is relevant and important to the outcome of the proceeding, but that its inquiries into these areas were "disallowed as being 'irrelevant'." (App. Br. at 9.) We agree that such inquiries are relevant and important. However, appellant fails to acknowledge that there may be a vast difference between the relevance of the areas of inquiry and the relevance of the particular questions that are asked. Here, it was not the areas of inquiry that were "disallowed as 'irrelevant'," but the particular questions that counsel asked.

We have reviewed the record and, while there were a substantial number of objections made during cross-examination, most of which were sustained by the ALJ, we found none that we could say unequivocally were erroneously decided. Appellant takes the objections and rulings out of context and fails to acknowledge the sometimes extensive discussion engaged in by the ALJ with both attorneys before making his rulings.

Even if the nine rulings had been erroneous, they did not preclude appellant from pursuing its inquiries; they merely required that different questions be asked or, in some instances, that the questions be asked in a different way. The failure to pursue the inquiries, in almost every instance, was the choice of appellant. There clearly was no denial of due process.

The ALJ's evidentiary rulings also did not constitute grounds for disqualification of the ALJ for partiality. Appellant's list of "manifestation[s] of partiality"³ is composed primarily of generalized, broad restatements of the allegations made in its due process argument, which we have already rejected. There are only two additional allegations made in support of appellant's disqualification argument.

Appellant charges as a basis for disqualification the ALJ's statement at the outset of the hearing that he recognized the decoy from a previous hearing.⁴ This means, appellant argues, that the ALJ had previously ruled on the decoy's compliance with Rule 141, and therefore had prior knowledge of whether the decoy complied with the rule.

³Appellant lists the following "manifestations of [ALJ Dorais's] partiality": directing a response from a witness; allowing a witness to change earlier testimony as part of an evidentiary ruling on an objection; making findings about a witness' demeanor after disallowing questions regarding maturity and experience; restricting inquiry into facts about the face-to-face identification; and admitting that he recognized the decoy from a previous hearing.

⁴The ALJ's entire statement on the subject is found on page 5 of the transcript:

Okay. I do want to say I recognize the decoy seated at the end of the table. I can't recall much about the circumstances of having seen him before, but I do remember he was seated, I believe, to my immediate left when he was testifying last time; and we were here with, I think, your colleague, Mr. Jamieson; that's about it.

Appellant does not expand on how this would be cause for disqualification and the Board is not required to make appellant's arguments. In any case, immediately following the ALJ's statement, appellant's counsel, in explaining the motion for disqualification he had just filed, said: "The argument is essentially that the arrangement the Department of ABC has with its administrative law judges is violative of due process because not of the actual bias of Your Honor or any other ALJ but because of the appearance of bias." No mention was made of the ALJ's recognition of the decoy as a disqualification factor.

Finally, appellant makes an obtuse reference to bias or prejudice towards a lawyer as a ground for disqualification, but again does not explain or expand upon the reference. We see no need to address this comment.

ORDER

The decision of the Department is affirmed.⁵

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

⁵This 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.