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

AB-8040
File: 42-262776 Reg: 02052672

DAVID R. BURCHFIELD and OFELIA C. BURCHFIELD, dba Snuffy's
17832-34 South Clark Avenue, Bellflower, CA 90706,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: August 14, 2003
Los Angeles, CA

ISSUED OCTOBER 7, 2003

David R. Burchfield and Ofelia C. Burchfield, doing business as Snuffy's (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 10 days, with all 10 days stayed for a probationary period of one year, for their bartender serving an alcoholic beverage to an obviously intoxicated patron, a violation of Business and Professions Code section 25602, subdivision (a).

Appearances on appeal include appellants David R. Burchfield and Ofelia C. Burchfield, appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and James S. Eicher, Jr., and the Department of Alcoholic Beverage Control, appearing through its counsel, Roxanne B. Paige.

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[1]The decision of the Department, dated October 3, 2002, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale beer and wine public premises license was issued on August 1, 1991. Thereafter, the Department instituted an accusation against appellants charging that, on December 13, 2001, appellants' bartender, Sarah Viray, furnished beer to Sally Bennett, who was obviously intoxicated at the time of service.

At the administrative hearing on August 21, 2002, documentary evidence was received and testimony concerning the violation charged was presented. Before testimony began, appellants presented a motion to disqualify the administrative law judge (ALJ) and all other ALJ's employed by the Department, which the ALJ denied.

Department investigator Brad Beach testified that, while in the premises doing a plainclothes investigation for alcoholic beverage law violations, he observed a patron, later identified as 69-year-old Sally Bennett, enter the premises with a slow, unsteady gait. Bennett had difficulty seating herself at the fixed bar. Beach testified that the bartender, Viray, watched Bennett from about five feet away while Bennett tried to seat herself. Beach observed that Bennett's face was red, her eyes bloodshot and glassy, and her eyelids were drooping. With a slow and deliberate motion, Bennett took a drink from a small glass mug that was on the bar in front of her. Beach later ascertained that the mug contained beer.

After taking a drink, Bennett slumped forward, with her eyes closed, and appeared to fall asleep. After a few minutes, she sat up and finished her beer. She said something that was unintelligible to Beach, but Viray heard her and walked over to her. Bennett spoke to Viray, but Beach could not understand what she said. Viray, however, seemed to understand Bennett and asked her if she wanted another schooner. Bennett responded with more words that Beach could not understand, but

Viray got a glass mug from the cooler and filled it with beer from the spigot marked "Budweiser." She put the mug on the counter in front of Bennett, who took a drink from the mug. Beach testified that, at that point, he formed the opinion that Bennett was intoxicated and called a backup team.

Beach testified that Viray told him that she only serves Bennett one and a half beers so that Bennett will not get drunk, and she had telephoned Bennett that evening asking her to come to the bar to help.

Co-appellant David Burchfield testified that Bennett has been a fairly regular patron of the bar for over six years, that she lives across the street, and is friendly with Viray. Burchfield stated that Bennett told him that she had injured her back and took medication for that. He testified that Bennett's usual gait is unsteady, her face is red, her eyes bloodshot, and she had difficulty speaking. His employees are familiar with Bennett and limit her to one and a half drinks each visit because they know she is on medication. Burchfield did not know if Bennett was taking any medication at the time.

Donna Hess, a care provider at the Bellflower Christian Retirement Center where Bennett resides, testified that she had known Bennett for about four years. She said that Bennett has arthritis and a back problem, does not stand straight, walks unsteadily, has a red face and eyes, and may fall asleep at inopportune times. Hess also testified Bennett was taking medication at the time of the incident that would cause her to display symptoms similar to those of intoxication.

Bennett testified at the hearing that she went to the bar on December 13, 2001, at Viray's request, to help out. She said that she drank one small beer and only a few sips from a second one.

Subsequent to the hearing, the Department issued its decision which determined

that the violation had occurred as charged. Appellants filed a timely notice of appeal in which they raise the following issues: (1) Substantial evidence does not support the finding that the patron, Sally Bennett, was obviously intoxicated, and (2) appellants' right to due process was violated by the ALJ's failure to disqualify himself and all other ALJ's employed by the Department.

DISCUSSION

I

Section 25602, subdivision (a), of the Business and Professions Code provides:

> Every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any habitual or common drunkard or to any obviously intoxicated person is guilty of a misdemeanor.

The term "obviously" denotes circumstances "easily discovered, plain, and evident" which place upon the seller of an alcoholic beverage the duty to see what is easily visible under the circumstances. (*People v. Johnson* (1947) 81 Cal.App.2d Supp. 973 [185 P.2d 105].) Signs of intoxication may include incontinence, unkempt appearance, bloodshot or glassy eyes, flushed face, alcoholic breath, loud or boisterous conduct, impaired judgment, slurred speech, loss of balance, unsteady walking, or argumentative behavior. (*Jones v. Toyota Motor Co.* (1988) 198 Cal.App.3d 364, 370 [243 Cal.Rptr. 611].)

The ALJ found that Bennett "displayed symptoms of obvious intoxication, including having bloodshot eyes, a red face, walking with an unsteady, staggering gait, stumbling into a barstool, apparent drifting off as if to sleep, and showing unsteady balance as she approached and tried to sit on her barstool." (Finding of Fact II.)

Appellants contend the evidence showed "that Ms. Bennett was not intoxicated on the night of the incident but simply displaying the symptoms of someone in poor

health." (App. Br. at 8.) They argue that the symptoms observed by the investigator were not caused by intoxication, but were characteristics caused by Bennett's age and ill health, of which appellants' employees were fully aware. Viray did not fail to observe symptoms or ignore what was apparent, appellants argue; she saw Bennett's usual characteristics, and knew that Bennett was not displaying signs of intoxication.

"Substantial evidence" is relevant evidence which reasonable minds would accept as reasonable support for a conclusion. (*Universal Camera Corp. v. Labor Board* (1951) 340 U.S. 474, 477 [95 L.Ed. 456, 71 S.Ct. 456].)

> Substantial evidence, of course, is not synonymous with "any" evidence, but is evidence which is of ponderable legal significance. It must be "reasonable in nature, credible, and of solid value; it must actually be 'substantial' proof of the essentials which the law requires in a particular case." (*Estate of Teed* (1952) 112 Cal.App.2d 638, 644 [247 P.2d 54]; *Kruse v. Bank of America* (1988) 202 Cal.App.3d 38, 51.) Thus, the focus is on the quality, not the quantity of the evidence. Very little solid evidence may be "substantial," while a lot of extremely weak evidence might be "insubstantial."

(Toyota Motor Sales U.S.A., Inc. v. Superior Court (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].)

When an appellant charges that a Department decision is not supported by substantial evidence, the Appeals Board's review of the decision is limited to determining, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. (Cal. Const., art. XX, § 22; Bus. & Prof. Code, §§ 23084, 23085; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].) In making this determination, the Board may not exercise its independent judgment on the effect or weight of the evidence, but must resolve any evidentiary conflicts in favor of the Department's decision and accept all reasonable

inferences that support the Department's findings. (*Kirby v. Alcoholic Bev. Control App. Bd.* (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857] (in which the positions of both the Department and the license-applicant were supported by substantial evidence); *Kruse v. Bank of America* (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 271]; *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925]; *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734]; *Gore v. Harris* (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

Appellants do not dispute that Bennett displayed the symptoms described by the investigator, but argue that Bennett's symptoms were caused by conditions other than intoxication. These contentions made at the hearing were rejected by the ALJ. The ALJ's observation of Bennett at the hearing led him to conclude, in the third and fourth paragraphs of the Determination of Issues:

> The Court had an opportunity to observe Sally Bennett at fairly close range during the hearing. Some of what Investigator Beach saw on December 13, 2001, is attributed to Bennett's age and condition. This refers to her walking and moving slowly and that she stands and walks a bit stooped over. Significantly, however, Bennett did not at the hearing exhibit a red face or eyes, poor balance, a staggered and/or unsteady gait or slurred, unintelligible speech. She did not stumble at the hearing. [Appellants'] witnesses Hess and David Burchfield testified that Bennett usually exhibits such characteristics. Bennett's appearance at the hearing belied such testimony.
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> "Obvious intoxication" is defined by a person's appearance. (*Jones v. Toyota* (1988), 198 Cal.App.3d 364, 368, 243 Cal.Rptr. 611, 613.) Sally Bennett had the appearance of a person who was obviously intoxicated at the time bartender Viray served Bennett the large mug of beer. That is enough to sustain the alleged violation. Donna Hess testified that Bennett was taking medication on December 13, 2001, and she showed symptoms of intoxication. David Burchfield testified that it would be difficult to tell if Bennett were intoxicated. Bennett had been to Snuffy's twice that day and Viray intended to limit Bennett's beer consumption. All these facts support the conclusion that the service to Bennett of an alcoholic beverage violated Section 25602(a).

It is the province of the ALJ, as trier of fact, to make determinations as to credibility and to resolve conflicts in the evidence. This Board has often said that it will not interfere with those determinations in the absence of a clear abuse of discretion. In the present case, two parts of the ALJ's determination lead us to conclude that there was an abuse of discretion.

First, the ALJ unreasonably relied on Bennett's appearance at the hearing in making his determination. He acknowledged that Bennett's slow movements and stooped posture were attributable to her age and condition. However, because she did not stumble or display "a red face or eyes, poor balance, a staggered and/or unsteady gait or slurred, unintelligible speech," at the hearing, he rejected the testimony of appellants' witnesses that these were characteristics that Bennett usually displayed.

However, "usually" does not mean "at all times" and, as the caregiver, Hess, testified with regard to Bennett's speech, "Some days it's worse than others." [RT 52.] No evidence was presented that Bennett's usual appearance at the time of the hearing was the same as at the time of the alleged violation, over eight months previously. Undoubtedly, Bennett's appearance at the hearing would be somewhat different from her usual appearance, given the formal adjudicatory circumstances. Without some assurance that Bennett's appearance at the hearing was the same as her "usual appearance" at the time of the alleged violation, it was not reasonable to use that appearance as the determinative factor in this case.

Even if we were to assume that it was appropriate for the ALJ to base his decision on Bennett's appearance at the hearing, we could not say that the ALJ's decision was reasonable. If we look at the evidence and the findings, we see that they do not clearly support the ALJ's determinations. The ALJ noted that at the hearing,

Bennett had no difficulty taking her seat, in apparent contrast to the difficulty she had getting onto the barstool in appellants' premises. Taking her seat at the hearing, however, cannot legitimately be compared to taking her seat at appellants' premises. At the hearing, she sat in an ordinary chair; at appellants' premises, the seat of the barstool was much higher and appears to swivel. (See exhibit 4.) Obviously, it would be more difficult for Bennett, or anyone with arthritis and a bad back, to take a seat on the barstool. The ALJ stated in the Determination of Issues that, at the hearing, Bennett did not have "slurred, unintelligible speech." However, earlier, in Finding of Fact VIII, he acknowledged that Bennett's speech became slurred or difficult to understand when she spoke too quickly.[2] The ALJ also stated in the Determination of Issues that Bennett did not "exhibit a red face or eyes," yet in Finding of Fact VIII he said it was not apparent that Bennett's eyes and face were red "[w]ithout close inspection." The findings indicate that, at the hearing, Bennett displayed many of the same characteristics observed by the investigator. The discrepancies between the findings and the determination raise serious questions about the basis for the ALJ's decision.

Second, the ALJ applied the wrong legal standard to the facts, apparently believing that he must base his conclusion on Bennett's appearance alone, to the exclusion of all other evidence. He said, in his Determination of Issues:

> "Obvious intoxication" is defined by a person's appearance. (*Jones v. Toyota* (1988), 198 Cal.App.3d 364, 368, 243 Cal.Rptr. 611, 613.) Sally Bennett had the appearance of a person who was obviously intoxicated at the time bartender Viray served Bennett the large mug of beer. That is enough to sustain the alleged violation."

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[2]We question whether Bennett's testimony is truly comparable to her conversation at appellants' premises. In Bennett's 45 responses at the hearing, 29 consisted of only one word; only nine responses consisted of more than five words.

The ALJ took the statement from *Jones v. Toyota Motor Co.*, *supra*, out of context, omitting the comparison that the court was making between the definitions of "under the influence," which may be proved by blood alcohol level, and "obviously intoxicated," which is not proved by blood alcohol level. What the court said was: "'Under the influence' is defined by a person's capability to drive safely, whereas, 'obvious intoxication' is defined by a person's appearance." The quote, therefore, does not necessarily mean that appearance is the only criterion.

While a person's appearance is the initial determining factor in a violation of section 25602, subdivision (a), the appearance must be caused by intoxication. If the appearance is actually attributable to some other cause, such as illness or disability, it makes no sense to consider the person "obviously intoxicated." In *Rice v. Alcoholic Beverage Control Appeals Bd.* (1981) 118 Cal.App.3d 30, 37, 38 [173 Cal.Rptr. 232], the court found that section 25602 was intended to "prohibit[] the distribution of alcohol to a class of persons who are likely to misuse it," and that the section applies "whether the existing intoxication was caused by alcohol alone or by other drugs or a combination of substances." The court also noted that, "Obviously a neurological or physical handicap . . . is not a form of intoxication." (*Ibid*, at page 35.) Neither, we would add, are age and arthritis.

The ALJ erred, therefore, in finding that Bennett was obviously intoxicated based solely on her appearance, without considering whether that appearance was caused by her consumption of alcohol or by her age- and health-related physical limitations.

Bennett's behavior and appearance described by the investigator consisted of only a few of the generally accepted signs of intoxication. The uncontradicted evidence of appellant's witnesses was that the appearance and behaviors described by the

investigator were part of Bennett's usual appearance and behaviors. The evidence established that Bennett was 69 years old and suffered from arthritis and a back injury; that she has difficulty walking and standing upright; that her speech is sometimes slurred and difficult to understand; that she takes medication for pain; that some of her medications make her sleepy or appear to be tired; and that she was taking medication on December 13, 2001.

Considering the record as a whole, there is not substantial evidence to support the determination of the Department. In addition, the ALJ's analysis and the legal standard he used were erroneous.

II

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, ALJ's employed by the Department.[3] The Board concluded in those cases that the reliance of those appellants

[3]Business 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.).

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.)

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 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.

ORDER

The decision of the Department is reversed.[4]

TED HUNT, CHAIRMAN
KAREN GETMAN, 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.