

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

AB-9167

File: 21-477568 Reg: 10072842

GARFIELD BEACH CVS LLC and LONGS DRUG STORES CALIFORNIA LLC,
dba CVS Pharmacy Store 9221
2120 Newbury Road, Thousand Oaks, CA 91320-3363,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley

Appeals Board Hearing: February 2, 2012
Los Angeles, CA

ISSUED MARCH 1, 2012

Garfield Beach CVS LLC and Longs Drug Stores California LLC, doing business as CVS Pharmacy Store 9221 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 days for their clerk selling an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants Garfield Beach CVS LLC and Longs Drug Stores California LLC, appearing through their counsel, Ralph B. Saltsman and Andrew Quigley, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry K. Winters.

¹The decision of the Department, dated April 15, 2011, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on June 22, 2009. On April 15, 2010, the Department filed an accusation against appellants charging that, on October 2, 2009, appellants' clerk sold an alcoholic beverage to 18-year-old Maritza Ahumada. Although not noted in the accusation, Ahumada was working as a minor decoy for the Ventura County Sheriff's Department at the time.

At the administrative hearing held on February 1, 2011, documentary evidence was received and testimony concerning the sale was presented by Ahumada (the decoy) and by William Hutton, a Ventura County Sheriff's deputy. Caesar Fernandez, the premises' assistant store manager at the time of the decoy operation, testified for the appellants.

The Department's decision determined that the violation charged was proved and no defense to the charge was established.

Appellants then filed an appeal contending that their motion to disqualify the administrative law judge (ALJ) was improperly denied. They do not otherwise contest the decision itself.

DISCUSSION

Appellants contend that ALJ Matthew Ainley, who conducted the administrative hearing, should have disqualified himself from hearing the case because previously, as a staff counsel for the Department, he had prosecuted many cases against co-licensee Garfield Beach CVS LLC. Therefore, they assert, it was error for him to deny the motion, and the decision must be reversed because the Department did not proceed in the manner required by law.

Appellants argue that ALJ Ainley should be disqualified under Government Code section 11425.10, which provides that when an agency conducts an adjudicative proceeding "[t]he adjudicative function shall be separated from the investigative, prosecutorial, and advocacy functions within the agency as provided in Section 11425.30." (Gov. Code, § 11425.10, subd. (a)(4).) Subdivisions (a)(1) and (a)(2) of section 11425.30 provide that a person may not serve as a presiding officer if he or she "has served as" or "is subject to the authority, direction, or discretion of a person who has served as investigator, prosecutor, or advocate in the proceeding or its preadjudicative stage." Appellants allege that ALJ Ainley "participated in all style and manner of these functions delineated in Section 11425.10 as against this licensee Appellant, Garfield Beach CVS, LLC." (App. Br. at p. 4.) However, section 11425.30 restricts one from serving as a presiding officer where there has been an overlap of functions in the course of a particular proceeding. There is absolutely no evidence that ALJ Ainley participated as anything other than adjudicator with respect to *this proceeding*.

Appellants also argue that ALJ Ainley should have disqualified himself based on Government Code section 11425.40, Canon 3E of the Code of Judicial Ethics, and Code of Civil Procedure section 170.1.

An ALJ "shall voluntarily disqualify himself or herself and withdraw from any case in which there are grounds for disqualification, including disqualification under Section 11425.40." (Gov. Code, § 11512, subd. (c).) Government Code section 11425.40, subdivision (a), states that an ALJ "is subject to disqualification for bias, prejudice, or interest in the proceeding."

Appellants have not shown that ALJ Ainley should have been disqualified for bias, prejudice, or interest in the proceeding. The *appearance* of bias is not sufficient for disqualification of an ALJ: "[T]he moving party [must be] able to demonstrate concretely the actual existence of bias." (*Andrews, supra*, 28 Cal.3d at p. 793.) In addition, " 'the prejudice must be against a particular party . . . and sufficient to impair the judge's impartiality so that it appears probable that a fair trial cannot be held.' " (*Andrews, supra*, at p. 792, quoting from and adding italics to *Ensher, Alexander & Barsoom v. Ensher* (1964) 225 Cal.App.2d 318, 322 [37 Cal.Rptr. 327].) Simply reciting that ALJ Ainley previously represented the Department and his duties included filing and prosecuting disciplinary proceedings against co-appellant Garfield Beach CVS LLC, does not establish that concrete, particularized bias required to be shown for disqualification.

Canon 3E of the Code of Judicial Ethics provides, in relevant part:

(1) A judge shall disqualify himself or herself in any proceeding in which disqualification is required by law.

(2) In all trial court proceedings, a judge shall disclose on the record information that is reasonably relevant to the question of disqualification under Code of Civil Procedure section 170.1, even if the judge believes there is no actual basis for disqualification.

Code of Civil Procedure section 170.1 (hereafter section 170.1) sets out grounds for disqualification of judges:

(a) A judge shall be disqualified if any one or more of the following is true:

[¶] . . . [¶]

(2)(A) The judge served as a lawyer in the proceeding, or in any other proceeding involving the same issues he or she served as a lawyer for any party in the present proceeding or gave advice to any party in the present proceeding upon any matter involved in the action or proceeding.

[¶] . . . [¶]

(C) A judge who served as a lawyer for or officer of a public agency that is a party to the proceeding shall be deemed to have served as a lawyer in

the proceeding if he or she personally advised or in any way represented the public agency concerning the factual or legal issues in the proceeding.

Appellants contend that ALJ Ainley should have disqualified himself under Canon 3E and section 170.1 because "[c]learly," he represented the Department "until just recently," filing and prosecuting cases against co-appellant Garfield Beach CVS LLC. (App. Br. at pp. 6-7.) Section 170.1, however, is specifically made applicable only to "judges of the superior courts, and court commissioners and referees." (Code Civ. Proc., § 170.5, subd. (a).)

Appellants cite several cases from the California Courts of Appeal in support of their argument. We disregard them, as appellants have not seen fit to provide page citations for the principles or quotations they rely on. We noted with disapproval the same lack in the previous appeals on this issue (AB-9059 and AB-9064²) brought by counsel, and warned that failure to provide proper citations could result in the Board disregarding the cases cited.

The Appeals Board recently addressed, and rejected, these same arguments in two cases, *7-Eleven, Inc./Jamreonvit* (2010) AB-9064 and *7-Eleven, Inc./Kirmani* (2010) AB-9059. Appellants have provided no evidence that would cause us to treat this appeal any differently from those previous ones.

²Footnote 3 in AB-9059 and footnote 4 in AB-9064 both stated:

We note with disapproval appellants' failure to provide pinpoint cites for this quoted language and in all but one of the six other case citations used in appellants' brief. This Board is not required to search through the pages of a decision to find a quotation appellants have used to support their argument. If appellants cannot properly cite the authority they use, we may be compelled simply to ignore it.

ORDER

The decision of the Department is affirmed.³

FRED ARMENDARIZ, CHAIRMAN
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

³This 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.