ISSUED SEPTEMBER 24, 1997

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

ROBERT J. VIEIRA and STEPHEN A.B. WATERBURY dba Nicola's 960 South Gerhart Avenue Commerce, California 90022, Appellants/Licensees,	)	AB-6806
	)	File: 48-57755
	)	Reg: 96035550
	)	Administrative Law Judge at the Dept. Hearing: John A. Willd
v.	)	
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	Date and Place of the Appeals Board Hearing: August 6, 1997 Los Angeles, CA

Robert J. Vieira and Stephen A.B. Waterbury, doing business as Nicola's (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which ordered their license suspended for 20 days, with 10 days thereof stayed for a probationary period of one year, for entertainers in their employ having violated Rule 143.3, subdivisions (1)(b) and (2), being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from violations of Business and Professions Code §24200, subdivisions (a) and (b) and Rule 143.3.

[1] The decision of the Department dated January 30, 1997, is set forth in the appendix.

Appearances on appeal include appellants Robert J. Vieira and Stephen A.B. Waterbury, appearing through their counsel, Ralph Barat Saltsman; and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general public premises license was issued on March 3, 1976. Thereafter, the Department instituted an accusation alleging that on March 18, 1996, female dancers in appellants' employ fondled their breasts on two occasions and on one occasion one of the entertainers exposed her buttocks to the view of patrons while not on an elevated stage.

An administrative hearing was held on December 3, 1996, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the charges of the accusation. Subsequent to the hearing, the Department issued its decision which determined that the conduct in question had been established by the evidence, and ordered appellants' license suspended for the period stated above. Appellants thereafter filed a timely notice of appeal.

In their appeal, appellants raise the following issues: (1) appellants' request that the Administrative Law Judge (ALJ) disqualify himself was improperly denied; and (2) the penalty is excessive.

DISCUSSION

I

Appellants contend that the ALJ should have disqualified himself from hearing the matter because their counsel had been required to cross-examine him in an earlier Department proceeding.

The ALJ had presided over an earlier Department proceeding involving an unrelated licensee, and entered a proposed decision which took into account certain testimony from the licensee involving factors which went toward mitigation. Thereafter, the Department instituted another accusation against that same licensee, alleging that he committed perjury when testifying about those mitigating factors. In the course of the subsequent proceedings in this new accusation, the Department subpoenaed the ALJ. Over his own objection and that of the licensee, the ALJ was required to testify concerning the testimony in the first proceeding. He was cross-examined on that testimony by Mr. Saltsman, also counsel in the present proceeding, in an examination he recalled as being brief and "gentle," and which present appellants assert, but without elaboration, involved issues of credibility (App.Br. 4; and see RT 6).[2]

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[2] The ALJ minimized the significance in his mind of his testimony in the earlier proceeding [RT 7]:

"Counsel, I totally had forgotten that you were counsel on that matter until you brought it up. It had completely left me because I thought my appearance was a rather insignificant affair. I simplified [sic - I simply testified about?] my proposed decision, which I submitted to the Department, and I said why I mitigated the penalty based upon the testimony of that licensee."

Appellants' disqualification request was made pursuant to Government Code §11512, subdivision (c), partially quoted in appellants' brief. As of the date of the administrative hearing, the statute read,[3] in pertinent part, as follows:

"(c) An administrative law judge or agency member shall voluntarily disqualify himself or herself and withdraw from any case in which he or she cannot accord a fair and impartial hearing or consideration. Any party may request the disqualification of any administrative law judge or agency member by filing an affidavit, prior to the taking of evidence at a hearing, stating with particularity the grounds upon which it is claimed that a fair and impartial hearing cannot be accorded. ... Where the request concerns an administrative law judge, the issue shall be decided by the agency itself if the agency itself hears the case with the administrative law judge, otherwise the issue shall be determined by the administrative law judge.

No formal affidavit was filed. However, appellants appear not to have known until the day of the hearing who the ALJ would be [RT 6]. Given the lack of prior notice, appellants' counsel's statement of the facts upon which the disqualification request was based would seem to be a sufficient substitute for the required affidavit, in the absence of any disagreement from the ALJ. The ALJ waived the requirement of an affidavit, and ruled on the merits of appellants' motion. We see no reason why this Board should not do so as well.

Appellants contend that a request that an ALJ disqualify himself on the ground a reasonable person aware of the facts may reasonably entertain doubts that he or she may not be able to be impartial, although made pursuant to Government Code §11512, subdivision (c), should be tested by the standard set forth in Code of Civil Procedure §170.1, subdivision (a)(6)(C), which provides:

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[3] 1995 amendments to this section which became effective July 1, 1997, do not appear to affect the test for disqualification which is required in this case.

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

"(6) For any reason ... (C) a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial. Bias or prejudice towards a lawyer in the proceeding may be grounds for disqualification.

Appellants have cited cases where the courts have accepted that view. (See Andrews v. Agricultural Labor Relations Board (1981) 28 Cal.3d 781 [171 Cal.Rptr. 590]; Gray v. City of Gustine (1990) 224 Cal.App.3d 621, 632 [273 Cal.Rptr. 730]. However, none of the cases cited by appellants present factual situations in any way resembling that in this case.

In United Farm Workers v. Superior Court (1985) 170 Cal.App.3d 97 [216 Cal.Rptr. 4], the trial court had denied a motion, made pursuant to then newly-enacted Code of Civil Procedure §§170.1, subdivision (a)(6)(C), to disqualify a superior court judge whose wife had, six years earlier, worked for two days as a replacement worker for the defendant employer during a farm workers' strike. The parties, after four weeks of having attempted to pick a jury, had agreed to a court trial. After 32 days of trial, the trial judge recalled the fact of his wife's employment, his recollection having been refreshed by testimony regarding replacement workers. He informed counsel for the farm workers, and the motion to disqualify was filed six days later. The farm workers contended the judge's failure to disclose his wife's employment prevented them from exercising an informed challenge under CCP §170.6, and, further, the facts would cause a person to reasonably entertain a doubt as to the judge's impartiality.

Judge Wiener, writing for the Court of Appeal, stated, after reviewing the authorities, that the situation must be observed through the eyes of the objective person - that is, neither the litigants nor the judge, but rather, "'a judge faced with a potential ground for disqualification ought to consider how his participation in a given case looks to the average person on the street."

This last assessment, based on the new language in the Code creating a basis for disqualification if "a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial," is the basis for the contention appellants make in this case, but in a greatly different factual context.

In Flier v. Superior Court (1994) 23 Cal.App.4th 165 [28 Cal.Rptr.2d 383], the court granted a writ of mandate and reversed a superior court decision which had disqualified a superior court judge, pursuant to Code of Civil Procedure §170.1, subdivision (a)(6)(C). The Flier court held that where the facts were not in dispute, the question whether a reasonable person would doubt the judge's ability to be impartial was one of law, governed by the fundamentally objective standard that "if a reasonable member of the public at large, aware of all the facts, would fairly entertain doubts concerning the judge's impartiality, disqualification is mandated. The existence of actual bias is not required." (Flier v. Superior Court, supra, 23 Cal.App.4th at 170-171.) In that case, the moving defendant, an African-American, had alleged that the trial judge's use of the term "good boy" in reference to another African-American defendant in an earlier proceeding demonstrated the requisite bias and prejudice. The

appellate court rejected the contention, noting that the African-American defendant in the earlier case had not made such a claim after the remark was made, but went forward with his change of plea without objection. Thus, whether the remark was unseemly rude, racially insensitive or simply thoughtless, it was not, at least to the court of appeal, indicative of any general prejudice against African-American defendants sufficient to bar the trial judge from hearing other cases involving such defendants.

Appellants also cite and rely upon the California Supreme Court's decision in Adams v. Commission on Judicial Performance (1995) 10 Cal.4th 866 [42 Cal.Rptr.2d 606], quoting what appellants say is its holding that where counsel for a licensee is required to cross-examine the administrative law judge, that would be a basis for entertaining a doubt that the judge would be able to be impartial in that case and in any case where that same counsel was attorney of record.

If, in fact, that were the holding in Adams, the Board would have little alternative but to reverse the Department, since those are also the facts of the instant case. However, the opinion in Adams does not support appellants' statement of its holding. We can only conclude that the writer of the brief confused what the court actually did in the Adams case with what he or she wanted the Board to hold in this case.

Adams involved a claim of actual bias, allegedly as a result of the Commission's combined roles as investigator, prosecutor and adjudicator, as well as litigation adversary, in the course of an investigation into allegations the judge accepted gifts and financial favors from attorneys appearing before him. The court rejected this claim,

relying on earlier precedents, including its own decision in Kloepfer v. Commission on Judicial Performance (1990) 50 Cal.3d 297 [267 Cal.Rptr. 293], and the decision of the United States Supreme Court in Withrow v. Larkin (1975) 421 U.S. 35 [95 S.Ct. 1456].

In Withrow, the Court acknowledged the legal system's refusal to tolerate proceedings in which the risk of actual bias is inconsistent with the guarantee of due process. However, the Court rejected a challenge to the procedures of the medical licensing board which possessed both investigatory and adjudicatory functions, concluding that, in general, it is appropriate to presume the integrity of those serving as adjudicators in an administrative proceeding. Accordingly, a challenge on that ground carries a very high burden of persuasion.

We find it difficult to agree with appellants that a reasonable person would entertain doubts as to the ALJ's ability to be impartial. While, of course, the test of impartiality occurs before rather than after the fact, it is not totally irrelevant that the record indicates a fair and even-handed conduct of the proceedings, and findings and conclusions reasonably based upon the evidence - findings and conclusions which, except for the penalty, are not challenged.

The "evidence," such as it is, regarding the earlier proceeding and Mr. Saltsman's cross-examination of the ALJ with respect to his findings in that case, is devoid of any hint of acrimony, hard feelings or other suggestion of bitterness or enmity. Indeed, the discussion of the incident between Mr. Saltsman and the ALJ

indicates more than anything else a situation where two long-standing members of the bar viewed the incident as one where each was simply doing the job that, at that moment in time, was assigned to him by his role in the legal profession.

We are mindful of the language of CCP §170.1, subdivision (a)(6)(C), stating that bias or prejudice towards a lawyer in the proceeding may be grounds for disqualification. However, appellants have made no claim of actual bias or prejudice, and we do not read the statute as extending to counsel the lesser showing of a mere appearance of bias.

Our review of the record indicates nothing to support the notion that the ALJ might have been biased or prejudiced against appellants' counsel, or might even have appeared so. To the contrary, the exchange between the two in the course of the discussion of the issue, and the ALJ's willingness to accommodate counsel, if that had been possible, hardly suggests a bias or prejudice on the ALJ's part.

The ALJ dismissed his testimony in the unrelated Department proceeding as involving little more than reiterating the factors he took into account in connection with mitigation. Appellants' counsel has provided no particulars regarding his cross-examination, other than to generalize that it involved unstated issues of credibility. There has been no suggestion that the ALJ was guilty of any wrongdoing in the proceeding about which he was examined. We find it difficult to think that the public at large would, in turn, think that a seasoned administrative law judge with an unquestioned reputation for fairness might harbor hard feelings toward a respected

attorney, charged with the duty of representing a client in a proper, albeit vigorous, manner, for having performed that duty in a professional manner.

We believe that a reasonable person, aware of all of these facts, and, perhaps, intrigued by the notion that an attorney could cross-examine a judge, is unlikely to think it inappropriate or improper for that same judge to preside over a later hearing involving different issues and different clients represented by that attorney.

II

Appellant contends that the penalty is excessive.[4]

The Appeals Board will not disturb the Department's penalty orders in the absence of an abuse of the Department's discretion. (Martin v. Alcoholic Beverage Control Appeals Board & Haley (1959) 52 Cal.2d 287 [341 P.2d 296].) However, where an appellant raises the issue of an excessive penalty, the Appeals Board will examine that issue. (Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183].)

We do not read appellants' papers on appeal as presenting any claim that the rule violations did not occur. Appellants argue instead that the conduct involved was

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[4] Appellants point out (App.Br. 4) that the Department's decision mistakenly states a 1996 date, rather than 1986, for one of the matters making up appellants previous disciplinary record (see Finding V). This is obviously a typographical error, since the same entry reflects that the penalty was imposed on March 2, 1987, and served April 15, 1987.

It is also worth noting that the ALJ indicated (RT 106-107) that he was inclined to place little significance on prior discipline imposed longer ago than five years. Based on the relatively mild penalty he did impose, it is clear he gave neither prior discipline very much weight.

"modest,"[5] and that the prior disciplines merely resulted in a fine and a short suspension.

The ALJ apparently accorded little significance to appellants' prior record of discipline. This is suggested by the fact that, even though the most recent instance of previous discipline, in 1989, also involved a violation of rule 143, the penalty imposed in the present case is, assuming appellants comply with the conditions of the stay, only one-third that of the 1989 matter. Under such circumstances, we cannot conclude the Department abused its discretion in imposing the penalty in question.

CONCLUSION

The decision of the Department is affirmed.[6]

BEN DAVIDIAN, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
JOHN B. TSU, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[5] The ALJ did find "rather modest" the "misconduct" involving the entertainer's exposure of her buttocks, and his proposed decision reflected his view that the violation was mitigated by the circumstances in which it occurred.

[6] 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 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.