ISSUED DECEMBER 22, 1997

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

AMERICAN GOLF CORPORATION dba Seascape Golf Course 610 Clubhouse Drive Aptos, CA 95003, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6815 File: 47-197851 Reg: 96036560 Administrative Law Judge at the Dept. Hearing: Michael B. Dorais Date and Place of the Appeals Board Hearing: September 3, 1997 Sacramento, CA

American Golf Corporation, doing business as Seascape Golf course (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which ordered its on-sale general public eating place license suspended for 10 days, for its bartender having sold an alcoholic beverage (Corona beer) to a 19-year-old police decoy, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Business and

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

Professions Code §25658, subdivision (a).

Appearances on appeal include appellant American Golf Corporation, appearing through its counsel, John A. Hinman; and the Department of Alcoholic Beverage Control, appearing through its counsel, Thomas M. Allen.

FACTS AND PROCEDURAL HISTORY

Appellant's license was issued on February 6, 1987. Thereafter, the Department instituted an accusation alleging that on April 19, 1996, appellant's bartender sold an alcoholic beverage (beer) to Kayla Gray, a 19-year-old police decoy working with the Santa Cruz Police Department.

An administrative hearing was held on November 19, 1996, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the circumstances of the sale which formed the basis for the accusation.

Subsequent to the hearing, the Department issued its decision which sustained the allegations of the accusation, and ordered appellant's license suspended for 10 days. Appellant thereafter filed a timely notice of appeal.

Appellant contends that the Department violated the requirement in Rule 141 (Cal.Code Regs., title 4, §141) that the minor decoy present to the seller the appearance that could generally be expected of a person under the age of 21 under the actual circumstances of the transaction. Appellant further contends that the Department denied it due process by conducting the hearing before an administrative law judge who had presided over earlier hearings at which the same minor decoy

testified.

DISCUSSION

I

Appellant asserts that the decoy program operated by the Santa Cruz Police Department ignored Rule 141's requirement that it be operated in a manner which promotes fairness. Appellant's challenge to the Department's decision and order focuses on the Department's LEAD training materials. Appellant asserts that it is unfair for the Department to furnish decoy program training materials to police departments which do not contain or mention the materials used in the LEAD program to train licensees, and equally unfair to train licensees to look for certain behavioral characteristics and mannerisms which the decoys are encouraged by their police mentors not to display.

Appellant cites a portion of the Department's LEAD materials (Exhibit C) concerning identification of minors, which lists thirty items of dress, behavior, and appearance which are said to be some of the clues a seller can rely upon or should look for in detecting minors attempting to purchase alcoholic beverages. Appellant asserts that as the result of the training and directions given to the decoy in question by her police mentors, she exhibited none of those characteristics. Appellant argues that this non-compliance with the clear intent of Rule 141 led to its bartender being

misled when the minor decoy ordered a beer from him on a rainy Friday afternoon, and was fundamentally unfair.

Appellant presented evidence of an extensive training program it has developed for its operations in more than thirty states, including a training manual (Exhibit D) which those of its employees who serve and sell alcoholic beverages are expected to read. Appellant's bartender testified that he had "glanced through" the manual [RT 44], and acknowledged having seen an employee acknowledgment form (Exhibit E) bearing what would appear to be his signature, confirming his understanding of the rules governing the sale of alcoholic beverages. One of these rules requires him to ask for identification if the person seeking to buy alcoholic beverages appears to be under 30 years old.

The training manual does not contain any of the LEAD materials of which appellant complains. It devotes approximately 10 of its 23 pages to sales to obviously intoxicated patrons, and only one-half of one page to sales to minors. This portion of the manual instructs employees that picture identification should be required from all persons appearing to be under 30 years of age, and requires the posting of signs stating that ID will be required from persons appearing to be under 30. Appellant's bartender did not comply with the admonition that he request ID, even though, at the hearing, he testified he thought the decoy appeared to be about 28 years old.

Appellant's bartender, a 56-year old male, had between 20 and 30 years experience as a bartender [RT 42]. He testified he had not undergone any training from

appellant prior to the day the sale to the decoy occurred [RT 43], but admitted being shown the employee acknowledgment form nearly a month earlier. There is no evidence in the record that he attended any LEAD program of the Department, nor did appellant present any evidence that the LEAD program materials had been shown to or discussed with him. Consequently, there is no evidence in the record that would indicate that the bartender's actions or judgment were in any way influenced by, or misled as a consequence of, the content of the LEAD materials.[2]

Appellant's position, in essence, is that it is unfair, and violative of the letter and spirit of Rule 141, for the police to use a minor decoy who displays none of the elements listed in the LEAD materials as clues to detecting an underage purchaser of alcoholic beverages. Appellant asserts that the decoy in this case displayed none of those characteristics.

The Department defends the LEAD materials as a product developed years before the adoption of Rule 141. The Department states that they are presently undergoing redrafting and updating, and suggests that this process of revision may take into account how minors attempting to purchase alcoholic beverages may attempt to look

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[2] We accord little weight to the testimony of appellant's food and beverage director, who, in his capacity as regional food director had instructed food and beverage directors in the use of the training manual and the LEAD materials. Although he testified he had gone over the materials with the local food and beverage director, that person did not testify. As a consequence, whatever inference might be drawn that company policy had been followed with regard to the type and content of training the bartender would have received is overcome by the testimony of the bartender himself that his training had been perfunctory, at best.

and act like sophisticated adults, and attempt to alert licensees to these techniques. Although not disputing appellant's contention that the decoy presented none of the clues listed in the LEAD materials, the Department stressed the Administrative Law Judge's (ALJ's) determination, after seeing and hearing her testify, that the decoy presented a youthful looking appearance such as to be considered under 21 years of age.

Appellant's arguments might have considerable weight were the facts other than they are here. We have reviewed the LEAD materials, and compared them to what we have seen in other minor decoy cases with regard to the training and advice given to the decoys as to how to look, dress and act. It is clear there is room for improvement and/or modernization in those materials. But, in this case, appellant is not in a position to claim it was prejudiced. The absence of any evidence that appellant's bartender had ever seen the LEAD materials in question, or attended a LEAD program, coupled with the facts of his 20 to 30 years experience as a bartender and his failure to comply with appellant's policy of requiring ID from anyone appearing to be under the age of 30, suggests more than anything else a lack of diligence in the performance of his duties, for which appellant must be held responsible.

While it is true that clues such as those listed by the Department can assist in identifying a minor, it is also true that many minors nearing adulthood will display few, if any, of the obvious characteristics some of their younger friends and companions exhibit. It is important that the server of alcoholic beverages observe the whole

person, and not look only for obvious indicators of an underage person. In this case, the ALJ personally observed the decoy, and saw her as "a youthful looking female, whose physical appearance is such as to be reasonably considered as being under twenty-one years of age" (Finding III-1). It is this youthful appearance, he concluded, that made it such that a reasonable person would ask for identification with proof of age of majority before serving her alcohol. That the decision whether or not to ask for identification is not always the easiest is reflected in the policy of many, if not most, sellers of alcoholic beverages to have an internal policy of asking for identification from any person appearing to be under the age of 30. Indeed, appellant itself had such a policy, and ignored it in the present case.

II

Appellant contends it was denied due process because the Department conducted the hearing before an ALJ who, unknown to appellant, had presided over earlier hearings where the same minor testified. Appellant first made this argument in its closing brief, prompted by the disclosure in the Department's reply brief that the minor decoy had completed nine cases which resulted in discipline, five of which involved hearings in which the minor testified.[3] Appellant analogizes the situation to the receipt of an ex parte communication, which, under the governing statute at the

[3] Appellant initially contended that the ALJ had occasion to observe the same decoy in four other cases. This was a reasonable, but erroneous reading of the statement in the Department's reply brief, as made clear by the information furnished subsequently in response to the Board's request.

time would warrant the ALJ's disqualification. Appellant essentially argues that the ALJ decided the case based upon personal knowledge outside of the disputed evidence presented at the hearing.

Appellant cites and quotes Government Code §11513.5, as it read at the time the administrative hearing took place, which proscribes ex parte communications and provides that the receipt of an ex parte communication may be a basis for disqualification pursuant to Government Code §11512, subdivision (c), which requires an ALJ voluntarily to disqualify himself from any case in which he cannot afford a fair and impartial hearing or consideration. Appellant argues that by presiding over an earlier hearing in which the minor testified, the ALJ was exposed to the equivalent of an ex parte communication which made it impossible for him to have afforded appellant a fair hearing later that same day.

The Department characterizes the minor decoy as an "item of evidence ... but a different item of evidence at each hearing, " and argues that it is an insult to the intelligence and integrity of the ALJ to suggest it is impossible for him to consider the minor anew from one hearing to another.

In response to the Board's request, the Department has identified for the Board the cases in which the minor decoy involved in this matter testified, the dates on which she did so, and the ALJ who conducted the hearing. The cases (including the present case) are as follows:

Licensee	Hearing Date	ALJ	Decision

T.Nader & H. Pyghambarzadeh File 20-306491 Reg. 96035290	9/26/96	Jeevan S. Ajuha	11/7/96 15/10 day susp.
Southland Corp. & Jalaedin Naderi File 20-252101 Reg. 96036712	10/29/96	Sonny Lo	11/21/96 10 day susp.
Day & Soon, Inc. File 41-313016 Reg. 96037348	11/19/96	Michael Dorais	12/26/96 10 day susp.
American Golf Corporation File 47-197851 Reg. 96036560	11/19/96	Michael Dorais	1/30/97 10 day susp.
Nob Hill General Stores, Inc. File 21-271330 Reg. 96038085	2/25/97	Michael Dorais	3/27/97 10 day susp.
Sir Froggy's Pub, Inc. File 48-237020 Reg. 97038598	4/10/97	Michael Dorais	6/5/97 10/10 day susp.

From the above, it can be seen that Michael Dorais, the ALJ who conducted the administrative hearing in the present case, had presided in only one other matter involving Ms. Gray's testimony at the time of that hearing, that occurring on the morning of the same day on which this present matter was heard. The fact that he heard an additional matter at which the same witness testified after his decision in this case is irrelevant to the present appeal.

Whether one case or four, the issues are still essentially the same. Should the ALJ have disqualified himself once he learned that the witness who acted as the minor decoy in the instant case[4] was the same witness he had seen and heard testify in the earlier proceeding? Was he the recipient of an ex parte communication? Did he decide this matter on the basis of personal knowledge derived outside the evidence presented in this proceeding? Was appellant denied a fair hearing as a consequence of what occurred?

The arguments of both appellant and the Department are burdened by hyperbole. Neither really addresses the issues which should be considered in assessing the propriety of what occurred. We do not believe appellant's analogy to an ex parte communication is a sound analogy, nor do we agree with the Department that appellant has insulted the intelligence and integrity of the ALJ. We think the question boils down to whether the appellant suffered any prejudice from not having been informed of the witness's earlier appearance before the ALJ.

We also do not believe it can be said that Judge Dorais decided this case on the basis of personal knowledge, as that term is used in the statutes regarding disqualification. Whatever knowledge he had about Kayla Gray, he learned in the course of the quasi-judicial proceeding. There is nothing to suggest that he knew

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[4] As the Department points out, it is obligated by statute to call the decoy as a witness. (See Business and Professions Code §25666.)

anything about the witness other than what may have been conveyed to him in the preceding hearing that morning, and what he learned that same afternoon.. As observed in 2 Witkin, California Procedure, Courts, §121, at p. 160: "Ordinarily, ... a judge's prior expression of views on legal or factual issues presented in the proceeding ... do not disqualify," citing Code of Civil Procedure §170.2, subdivisions (b) and (c).

The case authority, although helpful, is not dispositive.

Evans v. Superior Court (1930) 107 Cal.App. 372 [290 P. 662], involved a total of twelve pending actions for damages filed by twelve individual plaintiffs against a number of defendants. While those cases were pending, the judge to whom the cases were eventually assigned filed an opinion in another case involving two of the defendants, in the course of which he severely castigated them in connection with their testimony in that case. The two defendants then moved to disqualify the judge from hearing any of their remaining cases on the grounds of bias and prejudice, contending that his comments on their credibility showed that they could not get a fair trial.

The court concluded that the conventional rules regarding judicial disqualification did not fit the case before it:

> "The rules above stated are not conclusive of the situation in the instant case, for, as it fully appears from the record herein, the trial judge will not only be called to pass upon the questions of law which may be presented to him in the cases, but he will nevertheless be called upon to pass upon the issues of fact, and the evidence upon those issues of fact will no doubt be conflicting. His conclusions upon the issues of fact may be determinative of the case. In other words, the judge will be in the position of a juror, as every trial judge is when hearing and trying a non-jury case where issues of fact are involved. He will be

> obliged to consider and weigh the evidence and the credibility of the witnesses. ... It has been held by some of the highest courts of the states of the Union that, when judges are obligated to pass upon the facts, no good reason why the test of apparent disqualification should be different from that in the case of jurors, for the judge, under such circumstances, is in reality a juror passing upon questions of fact. [Citations] So far as we have been able to ascertain, this test has not as yet been imposed in this state."

(Evans v. Superior Court, supra, 107 Cal.App. 662 at 666.)

Stating that knowledge of the facts would not warrant disqualification in some cases, but in others might, the court concluded in the case before it that the judge should have disqualified himself:

> "[C]an it be said as a matter of law that the petitioners would not be afforded a fair and impartial trial as required by law? ... Would a reasonable person hesitate as to whether or not the trial judge could, under the circumstances, considering the weaknesses of human nature, entirely ignore such facts - the belief that petitioners had committed perjury? Can the judge ignore his opinion and belief, though honest it may be, that these petitioners have willfully testified falsely? We think not. ... Furthermore, it would be unfair to ask a judge, under these circumstances, to again try issues of fact involving honor, integrity, and veracity of men whom he had so recently condemned and denounced.
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> "Assuming that the trial judge was correct in his fierce discommendation of petitioners, they nevertheless are entitled to go before a judge of another department of the court, one who will assume that they are telling the truth until the contrary has been shown and where no attaint of perjury will follow them. There they may present their defense, if any they have, to a judge who has not a fixed or settled opinion of their integrity or veracity."

(Evans v. Superior Court, supra, 107 Cal.App. 662 at 666-667.)

In Kreling v. Superior Court (1944) 25 Cal.2d 305 [153 P.2d 734, 739], the trial judge had ruled on the factual issues involved in an affirmative defense, the effect of

which would be to resolve all of the four cases pending before him involving the same parties. The Court denied an application for a writ of prohibition, thus sustaining the ruling of another Superior Court judge who had denied the motion to disqualify the trial judge from hearing the remaining cases .

The Court, after a review of pertinent cases, observed that:

> "[T]he rule appears to be that when the state of mind of the trial judge appears to be adverse to one of the parties but is based upon actual observance of the witnesses and the evidence given during the trial of an action, it does not amount to that prejudice against a litigant which disqualifies him in the trial of the action. It is his duty to consider and pass upon the evidence produced before him, and when the evidence is in conflict, to resolve that conflict in the favor of the party whose evidence outweighs that of the opposition party. The opinion thus formed, being the result of a judicial hearing, does not amount to that bias and prejudice contemplated by section 170, subdivision 5, of the Code of Civil Procedure as a basis for change of venue or a change of judges. We think that no one will dispute the applicability of this rule to the trial of a single action, where during the progress of the trial the judge decides a question of fact which amounts virtually to a decision of the whole case before him. The question before us is whether this rule may be applied to the situation which was before the court here, when more than one case was to be tried. In our opinion, the rule does so apply.

(Kreling v. Superior Court, supra, 153 P.2d at 738.)

The Court in Kreling distinguished the earlier Evans case, pointing out that while, in Evans, there were a number of cases between the same parties ready for trial, the facts did not appear to be similar, and there was no stipulation that the cases should be tried together or that the evidence from the first case would be used in the other cases.

While the discussion of these two cases provides some insight into the thinking of the courts on the question of judicial bias and disqualification, they are not

particularly helpful in resolving the merits of the present case. Unlike those cases, where the evidence was clear that issues already decided by a judge would or might control issues to be decided in cases not yet tried, there is nothing that would suggest that occurred in the present case.

Much of appellant's indignation is directed at the fact that it was not informed that the minor decoy had testified in a hearing that morning. Appellant has not said what it would have done had it known. It does seem appropriate to ask how appellant may have been prejudiced by the fact that the Department did not disclose to opposing counsel at the outset of the afternoon hearing the fact that the minor decoy had appeared before the ALJ earlier that day. Would appellant have altered its litigation strategy? We think it unlikely.

It was clear throughout the hearing that appellant's defense was premised on its challenge to the minor decoy's appearance as observed by the bartender on the night in question.

While the ALJ heard both cases the same day, he later decided them, or at least submitted his proposed decisions, on different dates. His proposed decision in the present matter is dated January 13, 1997, while, according to the Department's supplemental response, the decision of the Department in the Day & Soon, Inc. matter was entered December 26, 1996. Accordingly, his proposed decision in that matter would have been rendered at some earlier date.

There is absolutely nothing in the record to suggest that the ALJ had made any finding or decision regarding the minor's appearance prior to the rendition of his proposed decisions. Thus, unlike the facts of the Kreling and Evans cases, the ALJ did not, so far as the record reveals, indicate in any way that he had predetermined a critical factual issue before hearing the case. Indeed, we do not even know if, in the Day & Soon, Inc. matter, the minor's youthful looking appearance was even an issue.

We have reviewed the decisions cited to us by counsel at the oral hearing before this Board, and do not find them helpful. In English v. City of Long Beach (1950) 35 Cal.2d 155 [217 P.2d 22], members of the city's civil service board interviewed physicians and took evidence outside the hearing and in the absence of English and his attorney. The Court held this conduct denied English a fair hearing, because he was denied the opportunity to object to the evidence improperly gathered by the board, or explain or test it, or introduce countervailing evidence. Citing one of its earlier decisions, La Prade v. Department of Water and Power of City of Los Angeles (1945) 27 Cal.2d 47 [162 P.2d 13], the Court made it clear that the evil was the denial of the respondent's ability to confront the evidence against him in order to refute, test and explain it. In the instant case, there was no evidence against appellant taken in secret, the vice in the cases cited. Appellant was given full opportunity to confront the witness, to test her veracity, to argue to the ALJ that her appearance belied her age, and that its bartender acted reasonably.

Appellant also cites Zaheri Corporation v. New Motor Vehicle Board (June 20, 1997) 55 Cal.App.4th 1305 [64 Cal.Rptr.2d 705]. That case held that the receipt of an ex parte communication by an administrative law judge did not constitute a denial of due process in the absence of proof that the ALJ relied upon the information contained in the communication in making his decision. Here, there is no proof that the ALJ's decision was based on anything he may have gleaned from the minor's appearance as a sworn witness in an earlier proceeding the same day that was not also conveyed to him again that afternoon, at a time when appellant's counsel could, and did, cross-examine the minor at length.

Thus it does not appear to us to be at all inconceivable - indeed, it probably must be assumed - that the ALJ approached each of the two cases with an open mind, even though the minor decoy was an element common to both cases. Nor is it inconceivable that, depending upon the evidence and the issues in each case, the ALJ could have reached a different result in each case as to whether the decoy presented the youthful looking appearance that Rule 141 requires.

CONCLUSION

The decision of the Department is affirmed.[5]

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

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[5] 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.