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

AB-7875
File: 20-355455 Reg: 01050320

7-ELEVEN, INC., KRITSNEE PHATIPAT, and MARK PHATIPAT
dba 7-Eleven Store #2136-16560
7400 Stewart & Gray Road, Downey, CA 90241,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen

Appeals Board Hearing: November 14, 2002
Los Angeles, CA

ISSUED MARCH 20, 2003

7-Eleven, Inc., Kritsnee Phatipat, and Mark Phatipat, doing business as 7-Eleven Store No. 2136-16560 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days for their clerk, Jonathan King, having sold an alcoholic beverage (a six-pack of Miller beer), to Brook Bujanowski, a minor decoy who was then 19 years of age, such sale being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, section §22, arising from a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., Kritsnee Phatipat, and Mark Phatipat, appearing through their counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing

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[1]The decision of the Department, dated August 30, 2001, is set forth in the appendix.

through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on August 16, 1999. Thereafter, on February 2, 2001, the Department instituted an accusation against appellants charging an unlawful sale of an alcoholic beverage to a minor.

An administrative hearing was held on May 23, 2001 Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established, and that there was no legal reason for disqualification of the Administrative Law Judge.

Appellants thereafter filed a timely appeal, focusing only on the disqualification issue.

DISCUSSION

In a large number of cases which it has heard in recent months, the Appeals Board has sustained decisions of the Department which rejected attempts by appellants to disqualify, on the basis of perceived bias, administrative law judges employed by the Department.[2] Appellants in those cases contended that the Department's arrangement with the ALJ's created an appearance of bias that would cause a reasonable person to entertain serious doubts regarding their impartiality.

The Board concluded that appellants' reliance on Code of Civil Procedure section 170.1, subdivision (a)(6)(C), was misplaced, because that section applied only to judges of the municipal and superior courts, court commissioners and referees.

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[2] In legislation enacted in 1995, the Department was authorized to delegate the power to hear and decide to an administrative law judge appointed by the Director of the Department. Hearings before any judge so appointed were to be pursuant to the procedures, rules, and limitations prescribed in Chapter 5 (commencing with Section 11500) of Part 1 of division 3 of Title 2 of the Government Code. (Bus. and Prof. Code § 24210.)

Instead, the Board stated that the disqualification of ALJ's is governed by sections 11425.30, 11425.40, and 11512, subdivision (c), of the Administrative Procedure Act (Gov. Code §11400 et seq.), and concluded that appellants had failed to make a showing sufficient to invoke those provisions.

In addition, the Board also rejected contentions that the Department's practice and arrangement with its ALJ's violated due process because it created a financial interest in the outcome of the proceeding arising from the ALJ's prospect of future employment with the Department and its good will. Appellants 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], 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 Board* (2002) 100 Cal.App.4th 1250 [122 Cal.Rptr.2d 914] and *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (Vicary)* (2002) 99 Cal.App.4th 880 [121 Cal.Rptr.2d 753].)

In *CMPB Friends, Inc.*, *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 v. County of San Bernardino, 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 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 1017, 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.
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> *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.
>
> The *Vicary* court appears to have assumed that the ALJ involved in the

proceeding was one permanently employed by the Department and, thus, entitled to the panoply of protections afforded by the Civil Service laws. (Gov. Code §18500 et seq.) And, until this case, in none of the cases in which the Appeals Board has sustained the Department in its rejection of challenges to its ALJ's has there been any suggestion that the ALJ involved was not entitled to those same assurances against "arbitrary or retaliatory dismissal."

Appellants have filed a declaration in support of their request for this case to be remanded so that a stipulation regarding Judge Gruen's status as a retired annuitant, employed on an hourly basis, may be made part of the record. It is appellants' position that the compensation arrangement between the Department and Judge Gruen creates an impermissible financial interest in the outcome of the case arising from the prospect of future employment dependent upon the Department's good will. Appellants' say "that Judge Gruen's income as an adjudicator was dependent upon the good will of the Department is underscored by the circumstances in which he and the other retired annuitant ALJ's were summarily dismissed by the Department in light of the *Haas* case." Appellants maintain that the Department's action taken following the *Haas* decision*,* to discontinue its hourly employment of retired annuitant ALJ's, is an admission that their employment status did not pass muster under *Haas.*,

The Department argues that the *Haas* case does not apply because, unlike the "*ad hoc*" arrangement in that case, the Department ALJ's are organized under a separate Administrative Hearing Office as a branch of the Department, pursuant to the Administrative Procedure Act and Business and Professions Code section 24210.

Our concern is that the arrangement between the Department and the ALJ in this

case is too close to what the *Haas* court found unacceptable. There is too much we do not know about the Department's employment relationship with retired annuitant ALJ's. Our review of the statutes and regulations relating to the employment of retired annuitants leaves us with many questions concerning such things as possible limits on arbitrary or retaliatory firing, tenure, employment terms and conditions and the like. The mere fact that the ALJ's, either permanent or temporary, all operate out of the same Administrative Hearing Office of the Department does not answer the questions we have.

Haas framed the issue as well as its result in its opening paragraph:

> "In this case we consider a due process challenge to the manner in which some counties select temporary administrative hearing officers. The Government Code authorizes counties to appoint hearing officers to preside when a state law or local ordinance provides that a hearing be held or that findings of fact or conclusions of law be made by any county board, agency, commission or committee. [Citation and footnote omitted.] Exercising this statutory authority, some counties have adopted the practice of selecting temporary administrative hearing officers on an ad hoc basis and paying them according to the duration or amount of work performed. Plaintiff contends this practice gives hearing officers an impermissible financial interest in the outcome of the cases they are appointed to decide, because the officers' prospects for obtaining future ad hoc appointments depend solely on the county's goodwill and because the county, in making such appointments, may prefer those officers whose past decisions have favored the county. We agree. Counties that appoint temporary administrative hearing officers must do so in a way that does not create the risk that favorable decisions will be rewarded with future remunerative work. The ad hoc procedure used here does create that risk.

(27 Cal.4th at 1020-1021.)

After setting out the context in which the case arose, the court began its discussion with an broader delineation of its views:

> The question presented is whether a temporary administrative hearing officer has a pecuniary interest requiring disqualification when the government unilaterally selects and pays the officer on an ad hoc basis and the officer's income from future adjudicative work depends entirely on the government's good will. We conclude the answer is yes. To summarize the governing principles,

> due process requires fair adjudicators in courts and administrative tribunals alike. While the rules governing the disqualification of administrative hearing officers are in some respects more flexible than those governing judges, the rules are not more flexible on the subject of financial interest. Applying those rules, courts have consistently recognized that a judge has a disqualifying financial interest when plaintiffs and prosecutors are free to choose their own judge and the judge's income from judging depends on the number of cases handled. No persuasive reason exists to treat administrative hearing officers differently. (Footnotes omitted.)

(27 Cal.4th at 1024-1025.)

Throughout its opinion the court voices its concern regarding the importance that the adjudicator not be tempted "not to hold the balance nice, clear and true" by having a financial interest in the case:

> Of all the types of bias that can affect adjudication, pecuniary interest has long received the most unequivocal condemnation and the least forgiving scrutiny.
> ...
> The high court has "ma[de] clear that [a reviewing court is] not required to decide whether in fact [an adjudicator challenged for financial interest] was influenced, but only whether sitting on the case ... 'would offer a possible temptation to the average ... judge to ... lead him not to hold the balance nice, clear and true.'"
> ...
> [T]he prosecuting authority may select its adjudicator at will, the only formal restriction here being that the person selected must have been licensed to practice law for at least five years. ... [W]hile the adjudicator's pay is not formally dependent on the outcome of the litigation, his or her future income as an adjudicator is entirely dependent on the goodwill of a prosecuting agency which is free to select its adjudicators and that must, therefore, be presumed to favor its own rational self-interest by preferring those who tend to issue favorable rulings. Finally, adjudicators selected and paid in this manner, for the same reason ... have a 'possible temptation ... not to hold the balance nice, clear and true.

(Haas, supra, 27 Cal.4th at 1025-1029.)

By no means do we mean to impugn the integrity of the ALJ to whom this case was assigned, or, indeed, any ALJ employed by the Department as a retired annuitant. However, we are unable to tell from the record before us whether the Department's method of employing retired annuitants on an hourly basis has been done "in a way that

does not create the risk that favorable decisions will be rewarded with future remunerative work," as *Haas* would seem to require.

Therefore, we have concluded that a further hearing is necessary, directed at exploring the employment arrangement between the Department and the retired annuitants who served it as ALJ's, to determine whether, under the terms of that arrangement, those ALJ's were sufficiently secure in their employment as to be insulated against any temptation to favor the Department in return for future work.

ORDER

The decision of the Department is reversed and the case is remanded to the Department for further proceedings not inconsistent with the views expressed herein.[3]

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

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[3] 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 final 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.