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

AB-7966
File: 21-337397 Reg: 01051182

THE VONS COMPANIES, INC., dba Vons # 2107
10675 Scripps Poway Parkway, San Diego, CA 92131,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: April 3, 2003
Los Angeles, CA

ISSUED MAY 21, 2003

The Vons Companies, Inc., doing business as Vons # 2107 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days for appellants' clerk selling an alcoholic beverage to a minor decoy, in violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant The Vons Companies, Inc., appearing through its counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on March 3, 1998. Thereafter, the Department instituted an accusation against appellant charging that, on April 14,

[1]The decision of the Department, dated April 25, 2002, is set forth in the appendix.

2001, appellant's clerk, Leslie Georggin (the clerk), sold an alcoholic beverage to 19-year-old Juan Garcia. Garcia was acting as a minor decoy for the San Diego Police Department at the time.

An administrative hearing was held on March 12, 2002, at which time oral and documentary evidence was received. At that hearing, testimony concerning the transaction was presented by San Diego State University police officer Ruben Villegas, Garcia (the decoy), the clerk, and Shannon Fletcher, another clerk at Vons.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged had been proven and no defense was established.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) Rule 141(b)(2)[2] was violated; (2) Rule 141(b)(5) was violated; and (3) appellant was denied due process when the Administrative Law Judge (ALJ) denied its motion to disqualify himself and all other administrative law judges employed by the Department.

DISCUSSION

I

Appellant contends that Rule 141(b)(2), which requires that the decoy display the appearance generally to be expected by a person under the age of 21, was violated because the decoy wore a baseball cap. The cap, appellant asserts, made it more difficult for the clerk to observe the decoy, and she concluded that the decoy was over the age of 21.

The ALJ addressed the decoy's appearance in Finding II.D.:

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[2]References to Rule 141 and its subdivisions are to section 141 of title 4 of the California Code of Regulations, and to the various subdivisions of that section.

> The decoy's overall appearance including his demeanor, his poise, his mannerisms, his maturity, his size and his physical appearance were consistent with that of a nineteen year old and his appearance at the time of the hearing was substantially the same as his appearance on the day of the decoy operation except that he had a light mustache at the hearing and he may have been five to ten pounds heavier at the hearing. The decoy is approximately five feet eight inches in height, he weighs approximately one hundred forty pounds and he was clean-shaven when he was at the premises on the date of the sale. A photograph (Exhibit 2) was taken shortly after the sale and it depicts the decoy as he appeared at the premises. On the day of the sale, the decoy was wearing a gray jacket with a white T-shirt under it, black casual pants and a San Diego Padres baseball cap with the letters "SD" written on the front of the cap. According to the decoy, the bill of the cap was tilted upward when he was at the premises so that his forehead was not covered and so that one to two inches of his hairline was visible. The decoy testified that he wore the cap the same way as it is depicted in Exhibit 2. He also testified that he took his cap off briefly at the counter before he paid for the beer as he had been instructed to do so by the police officers, and that he put the cap back on with the bill tilted upward as indicated in Exhibit 2. The decoy wore an almost identical cap during the hearing and the parties had an opportunity to see the decoy with and without his cap. [Fn. omitted.]

In Finding II.E., the ALJ recounted the decoy's experience in decoy operations and as a volunteer cadet with the San Diego Police Department. In Finding II.F., the ALJ noted that the decoy was "soft-spoken," he looked nervous at the hearing, and he testified that he was nervous at the premises. The ALJ concluded in Finding II.G., based on all the evidence, that the decoy complied with Rule 141(b)(2).

Whether or not the hat was worn differently, as testified to by the clerk, is irrelevant unless it influenced the clerk's judgment of the decoy's age. That it did not do so is clear from the clerk's testimony. Despite repeated attempts by appellant's counsel to elicit a different response, the clerk answered "No" when asked if the decoy's clothing, or his hat, or the way he wore his hat, made the decoy look older. [RT 101-103.]

The ALJ considered numerous aspects of the decoy's appearance, including the cap he was wearing, and concluded that the decoy's appearance met the requirement

of Rule 141(b)(2). Appellant has presented no evidence or argument that suggests we should abandon our usual deference to the ALJ's determination of the decoy's appearance.

II

Rule 141(b)(5) requires, after a sale to a minor decoy, that the "officer directing the decoy shall make a reasonable attempt to reenter the licensed premises and have the minor decoy make a face to face identification of the alleged seller of the alcoholic beverages." The violation of the rule occurred, appellant contends, when the officer contacted the clerk before the decoy made his identification.

The rule imposes two separate duties on the officer - to attempt to reenter,[3] and to conduct a face-to-face identification. In this case, both duties were performed.

After the sale, the decoy reentered the store with the officer. The officer identified himself to the clerk and asked the clerk how old she thought the decoy was, before asking the decoy to identify the clerk. Appellant argues that the officer's identification of the clerk as the seller, and the clerk's confirmation that she had sold to the decoy, meant that the decoy "had no choice but to identify this person as the seller."

Appellant's assertion that the decoy was coerced into identifying the clerk as the seller has no basis in the record. What occurred here appears to be fairly standard practice in decoy operations, and this Board has long approved the practice. The fact that the officer first contacts the clerk and informs him or her of the sale to a minor has been used to show that the clerk was aware of being identified by the decoy. (See,

[3] Although the rule uses the term "reenter," in many cases the officer has observed the transaction from outside the premises, so can only attempt to "enter." The Board has always considered this to comply with the rule.

e.g., *Southland / Anthony* (2000) AB-7292; *Southland / Meng* (2000) AB-7158a.) As long as the decoy makes a face-to-face identification of the seller, and there is no proof that the police misled the decoy into making a misidentification or that the identification was otherwise in error, we do not believe that the officer's contact with the clerk before the identification takes place causes the rule to be violated.

III

Appellant contends its right to a fair and impartial hearing was violated by use of an ALJ selected, employed, and paid by the Department. It does not appear to seriously contend that this ALJ was actually biased or prejudiced, since it offers no evidence to that effect. Rather, it argues 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.[4] The Board concluded in those cases that the reliance of those appellants 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

[4]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.).

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.)

Appellant also contends 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, appellant argues, 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.
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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.

(*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 affirmed.[5]

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

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[5]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.