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

AB-7987
File: 48-308411 Reg: 02052153

3610 FIFTH AVENUE INC., dba The Loft
3610 Fifth Avenue, San Diego, CA 92103,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: February 13, 2003
Los Angeles, CA

ISSUED APRIL 16, 2003

3610 Fifth Avenue, Inc., doing business as The Loft (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days for appellant's bartender selling an alcoholic beverage to a minor decoy, in violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant 3610 Fifth Avenue, Inc., appearing through its counsel, Ralph B. Saltsman, Stephen W. Solomon, and James S. Eicher, Jr., and the Department of Alcoholic Beverage Control, appearing through its counsel, Roxanne B. Paige.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on June 26, 1995. Thereafter, the Department instituted an accusation against appellant charging

[1]The decision of the Department, dated May 23, 2002, is set forth in the appendix.

that, on September 27, 2001, appellant's bartender, Andrew Clark (the bartender), sold an alcoholic beverage to 19-year-old David West. West was acting as a decoy for the San Diego Police Department at the time of the sale.

An administrative hearing was held on April 5, 2002, at which time documentary evidence was received and testimony concerning the transaction was presented by West (the decoy) and by San Diego police detective Richard Metz.

Subsequent to the hearing, the Department issued its decision which sustained the charge of the accusation and determined that no defense had been established.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) Appellant's right to due process was violated by the Administrative Law Judge's (ALJ's) failure to disqualify himself and all other ALJ's employed by the Department, and (2) Rule 141(b)(2) was violated.

DISCUSSION

I

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 a large number of recent cases in which licensees attempted to disqualify, on the basis of perceived bias, administrative

law judges employed by the Department.[2] 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 Administrative Procedure Act (Gov. Code, §11400 et seq.), 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

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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. & Prof. Code, § 24210.)

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.

II

Appellant contends that the decoy had extensive prior experience as a police cadet and a police decoy. This experience, appellant argues, would have given the decoy added confidence during the decoy operation, and the ALJ did not adequately consider the effect of such experience in determining that the decoy met the requirement of Rule 141(b)(2) that he display to the seller of alcoholic beverages the

appearance generally to be expected of a person under the age of 21. In addition, appellant contends that the decoy's height (six feet tall) would have also made him appear to be older than 21.

The ALJ made the following finding regarding the appearance of the decoy (Finding II.E.):

> The decoy is a tall and lanky young man who is six feet in height and who weighs approximately one hundred thirty-five pounds. His overall appearance including his demeanor, his poise, his size, his mannerisms and his physical appearance were consistent with that of a person under the age of twenty-one years. Furthermore, the decoy's appearance at the time of the hearing was substantially the same as his appearance on the day of the decoy operation except that his hair was slightly longer at the time of the decoy operation, perhaps one half to one inch longer. On the date of the sale, the decoy was clean-shaven, his hair was combed back, he wore no jewelry and his clothing consisted of blue jeans, a blue and gray short-sleeve shirt and black shoes. The decoy testified that he had volunteered as a police cadet since January of 2000, that he went through a cadet academy and that he had participated in approximately twenty prior decoy operations. The evidence also established that the decoy attempted to purchase an alcoholic beverage at eleven locations on September 27, 2001 and that he was able to purchase an alcoholic beverage at two locations. Exhibit 2 was taken at the premises on the night of the sale and the photograph depicts what the decoy looked like and what he was wearing on that night. After considering the photograph (Exhibit 2), the decoy's overall appearance when he testified, the way he conducted himself at the hearing and his prior experience as a decoy, a finding is made that the decoy displayed an overall appearance which could generally be expected of a person under twenty-one years of age under the actual circumstances presented to the seller at the time of the alleged offense.

The ALJ clearly considered the decoy's training, experience, and physical appearance and found that they did not cause him to appear older than his actual age at the time he purchased the beer. We have said many times that we are not inclined to substitute our judgment for that of the ALJ on the question of the decoy's apparent age, absent very unusual circumstances, none of which are present here. Nothing has been presented that indicates the ALJ's determination in this regard was inadequate.

This Board has previously rejected the contention that a decoy's experience necessarily made him appear to be over the age of 21. In *Azzam* (2001) AB-7631, the Board said:

> Nothing in Rule 141(b)(2) prohibits using an experienced decoy. A decoy's experience is not, by itself, relevant to a determination of the decoy's apparent age; it is only the *observable effect* of that experience that can be considered by the trier of fact. While extensive experience as a decoy or working in some other capacity for law enforcement (or any other employer, for that matter) may sometimes make a young person appear older because of his or her demeanor or mannerisms or poise, that is not always the case, and even where there is an observable effect, it will not manifest itself the same way in each instance. *There is no justification for contending that the mere fact of the decoy's experience violates Rule 141(b)(2), without evidence that the experience actually resulted in the decoy displaying the appearance of a person 21 years old or older.* [Emphasis added to last sentence.]

Appellant also cites the language from *Azzam*, *supra*, but only the first two sentences quoted above. It ignores the language after that which makes clear that there must be evidence presented that the decoy’s experience actually made the decoy appear to be 21 years of age or older. The ALJ saw no evidence of this at the hearing and, although appellant asserts that the evidence at the hearing contradicts the ALJ’s finding, it has not pointed out the evidence to which it refers.

ORDER

The decision of the Department is affirmed.[3]

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

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[3]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.