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

AB-8008
File: 20-321145 Reg: 02052474

CHEVRON STATIONS, INC., dba Chevron
770 Plaza Court, Chula Vista, CA 91910,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

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

ISSUED NOVEMBER 4, 2003

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

Appearances on appeal include appellant Chevron Stations, 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, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on October 10, 1996. Thereafter, the Department instituted an accusation against appellant charging that, on

[1]The decision of the Department, dated July 11, 2002, is set forth in the appendix.

November 30, 2001, appellant's clerk, Luzceneida Perez (the clerk), sold a can of Budweiser beer to 19-year-old Patricia Sanchez-Valdez.

At the administrative hearing held on May 31, 2002, documentary evidence and testimony concerning the violation charged were presented. Prior to any testimony, appellant made a motion to disqualify the ALJ and all other ALJ's employed by the Department, which the ALJ denied. Subsequent to the hearing, the Department issued its decision which determined that the violation charged in the accusation was proven and no defense was established.

Appellant filed a timely notice of appeal in which it raises the following issues: (1) Rule 141(b)(2) was violated, and (2) appellant's right to due process was violated by the failure of the administrative law judge (ALJ) to disqualify himself and all other ALJ's employed by the Department.

DISCUSSION

I

Appellant contends that the decoy had prior experience as a police Explorer 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 she display to the seller of alcoholic beverages the appearance generally to be expected of a person under the age of 21.

The ALJ discussed the decoy's appearance in Finding II.E.:

> The decoy's overall appearance including her demeanor, her poise, her mannerisms, her size and her physical appearance were consistent with that of a person under the age of twenty-one years and her appearance at the time of the hearing was substantially the same as her appearance on the day of the decoy operation except that the golden streaks on her hair were more pronounced on the day of the hearing. On the date of the

> sale, the decoy was five feet three inches in height, she weighed one hundred twenty pounds and her hair was pinned back and had golden streaks which were fading out. Her clothing consisted of black jeans, a white T-shirt and a black Nike sports jacket. The photograph depicted in Exhibit 5 was taken at the premises on the night of the sale and it depicts how the decoy appeared that night. At the hearing, the decoy testified that she had participated in about seven prior decoy operations, that she was an Explorer scout and that she was comfortable when she entered the premises. At the hearing, the decoy was soft-spoken, she fidgeted with her hands and she appeared nervous. After considering the photograph depicted in Exhibit 5, the decoy's overall appearance when she testified and the way she conducted herself at the hearing, 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 and experience and found that they did not cause her to appear older than her actual age at the time she purchased the beer. Nothing indicates that his determination in this regard was inadequate.

We have said many times that we will not 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. In the appeal of *Idrees* (2001) AB-7611, we said:

> As this Board has said on many occasions, the ALJ is the trier of fact, and has the opportunity, which this Board does not, of observing the decoy as he or she testifies, and making the determination whether the decoy's appearance met the requirement of Rule 141, that he or she possessed the appearance which could generally be expected of a person under 21 years of age, under the actual circumstances presented to the seller of alcoholic beverages.
>
> This Board is not in a position to second-guess the trier of fact, especially where all we have to go on is a partisan appeal that the decoy did not have the appearance required by the rule, and an equally partisan response that she did.

Similarly, this Board has previously addressed appellant's contention that the decoy's experience necessarily made her appear to be over the age of 21. The Board rejected this type of contention in *Azzam* (2001) AB-7631:

> 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.

Appellant 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 pointed out no such evidence.

Appellant tacks on to the end of this argument the contention that "the ALJ failed to consider Appellant's argument at the conclusion of the hearing that the actual ID utilized and produced by the decoy was not available at the hearing." (The photocopy of the ID was in black and white and of very poor quality.)

At the hearing, appellant's counsel stated specifically that he had no objection to admitting the photocopy of the ID into evidence as Exhibit 6 [RT 49]. The argument made at the hearing was simply that, since the clerk told the officer that she thought the decoy looked over 21, based only on looking at the decoy's ID, the lack of the ID card made it impossible for counsel to show that the photograph on the card was "helpful or hurtful to the Department's case or to Respondent's case." [RT 52.]

Because appellant's counsel did not object to introduction of the photocopy, this appears to be "invited error," from which appellant is not entitled to benefit. In addition, the relevance of the actual ID card escapes us. Whether the decoy appeared to be over 21 years of age in the picture on the ID is irrelevant; the rule requires that the *decoy* appear to be under 21, and the clerk should have judged the decoy's age by looking at the decoy, not her picture. In any case, it is hard to see how the clerk could have thought the ID made the decoy appear to be 21, when it bore a prominent stripe saying "AGE 21 IN 2003" right next to the photograph.

II

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.[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

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[2]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.).

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, 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.

> *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.[3]

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
KAREN GETMAN, 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.