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

AB-8022
File: 20-344271 Reg: 02052820

EQUILON ENTERPRISES, LLC dba Texaco Starmart #3114
1815 North Tustin Street, Orange, CA 92865,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

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

ISSUED AUGUST 28, 2003

Equilon Enterprises, LLC, doing business as Texaco Starmart #3114 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days for a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Equilon Enterprises, LLC, appearing through its counsel, Ralph Barat Saltsman, Stephen W. Solomon, and James S. Eicher, Jr., and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on January 11, 1999. Thereafter, the Department instituted an accusation against appellant charging that

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[1]The decision of the Department, dated September 5, 2002, is set forth in the appendix.

appellant's agent, employee, or servant, Rita Magdaleno Mayorga, sold an alcoholic beverage (malt liquor) to Kathy Palacio, a person who was then approximately 19 years of age.

An administrative hearing was held on July 19, 2002, at which time oral and documentary evidence was received. At that hearing, the Department presented the testimony of Roger Belville, a detective with the City of Orange Police Department, and Kathy Palacio, the minor. Palacio was acting as a decoy when she purchased a six-pack of Smirnoff Ice malt beverage. Antonia Cortes Melgoza, an employee of El Metate Market, testified on behalf of appellant. Melgoza also sold an alcoholic beverage to Palacio on the same evening.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been proven, and appellant had failed to establish an affirmative defense under Rule 141(b)(2).

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) Appellant was denied due process by the Department's denial of its motion to disqualify all administrative law judges employed by the Department; and (2) there was no compliance with Rule 141(b)(2); and (3) the ALJ's refusal to allow testimony from an additional seller was a violation of due process. Issues 2 and 3 will be discussed together.

DISCUSSION

I

At the outset of the hearing appellant moved to disqualify Administrative Law

Judge (ALJ) McCarthy and all other ALJ's employed by the Department. Its motion was denied. Appellant now 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 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

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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.).

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.

II

Appellant contends that Palacio did not present the appearance required by Rule 141(b)(2), i.e., that she did not display 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 at the time of the alleged offense. Appellant asserts that the decoy had the "maturity, size, and demeanor" of one 21 years of age or older (Palacio testified that she was five feet tall and weighed 122 pounds), and, because of her experience with law enforcement (Palacio had been a police explorer and cadet for several years) would not have displayed any fear or apprehension that another might have. Appellant also contends that the ALJ improperly refused to permit another person who sold an alcoholic beverage to Palacio to testify that she believed Palacio appeared to be 24 or 25 years of age.

The ALJ said this regarding the decoy's appearance (Finding of Fact VI):

> A. On December 14, 2001, Kathy Palacio stood only five feet tall and weighed about 122 pounds. Her long dark hair was gathered in a bun. (Exhibits 4-a and 4-b.) She wore a black long-sleeved, zippered-front sweatshirt over a yellow top. She also wore blue jeans. (*Id*.) She wore a light application of lipstick, some foundation, mascara and eyeliner. She wore contact lenses and no spectacles. The contact lenses she wore were clear so that her natural brown eyes were visible.
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> B. Decoy Palacio appeared at the hearing. Her height and weight were about the same at the hearing as they were on December 14, 2001. She had cut her hair so that it came just below shoulder length. At the hearing she wore it

hanging down with curls at the end. She also wore contact lenses, but with a green color tint, so that her brown eyes were for the most part hidden. In all other respects, her appearance at the hearing, including makeup, was substantially the same as it was before Respondent's clerk on December 14, 2001. By the time of the hearing, Palacio was 20 years of age. Based on physical appearance alone, that is, as she appeared before clerk Mayorga and as she appeared at the hearing, Palacio displayed the appearance generally expected of a person her age, under 21 years of age.

C. Kathy Palacio had worked before December 14, 2001, as a decoy on several earlier occasions. She had been on as many as four different decoy operations and had visited between 20 and 40 premises. She had worked as a Police Explorer and as a paid Police Cadet with officers of the Orange Police Department prior to her visit to Respondent's store. As a Police Explorer, Palacio had worked in traffic control for various street fairs and as a cadet she works the front desk in the traffic division, where she works with the public, answering questions and dealing with parking permit and bike licensing issues. Nothing, however, indicated that Palacio appeared in any respect other than her actual age, either at the hearing or in front of Rita Mayorga.

D. The court has observed the decoy's overall appearance, considering her physical appearance, her dress, her poise, demeanor, maturity and mannerisms as shown at the hearing. The court has considered all the evidence concerning Palacio's overall appearance and conduct at Respondent's store on December 14, 2001. In the court's informed judgment, decoy Palacio gave the appearance at the hearing and before Rita Mayorga that could generally be expected of a person under the age of 21 years.

Appellant cites the Board's decision in *The Southland Corporation/Rogers* (2000) AB-7030a, in which the Board ruled that a licensee charged with a sale to a minor decoy was entitled to discover the names of other licensees who had been charged with a sale to that decoy on the same day. The Board there said:

> "We find appellants' arguments persuasive up to a point. In certain situations we can see some potential value to appellants in the experience of other sellers with the same decoy. The relevance of these experiences, however, sharply dissipates as they become more removed in time from the transaction in question."

However, the Board was not focusing on a licensee's right to present opinion evidence of appearance, as appellant now argues. Instead, as the language of the decision preceding that quoted by appellant illustrates, the Board was moved primarily

by the argument that other current sellers might assist in testing the credibility of decoy witnesses:[3]

> Appellants have argued that §11507.6 does not limit the "witnesses" in this subdivision to percipient witnesses, or those who observed the acts alleged in the accusation. They assert that they are merely trying to ascertain the names of people who could provide information that would go to testing the credibility of the decoy who will be called as a witness by the Department.
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> . . .
> There is implicit in appellants' argument a basic appeal to fairness in the application of Rule 141. They argue that knowledge of the decoy's experience and actions in other establishments is essential to a meaningful cross-examination, to ensure that the decoy has not confused the transaction in their premises with what occurred in another on the same night or other nights during the period for which such information was requested.
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> For example, appellants point out (and the transcripts of almost every minor decoy case that has come to this board confirm) that a decoy will almost invariably visit a number of licensed premises on a single evening, and make purchases at several. The decoy's testimony regarding what occurred with the sellers at those locations where he or she was successful in purchasing an alcoholic beverage is, appellants assert, critical, and the ability to test the veracity and reliability of such testimony crucial. They argue that other clerks who sold to that decoy will be able to offer relevant and admissible evidence of such things as the decoy's physical appearance, mannerisms, demeanor, manner of dress, and as well as other circumstances of the decoy operation, such as timing and sequence, which would assist in their efforts to effect a full and fair cross-examination.

It is clear that the Board was attempting to assist appellants in gaining factual information about the decoy which might expose mistakes or weaknesses in the decoy's testimony, and certainly did not intend to invite an opinion survey of the decoy's

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[3] Appellants in *The Southland Corporation/Rogers*, supra, argued that the information sought - the identity of other sellers - "is clearly calculated to lead to evidence of the decoy's habits and customs ... . It is reasonable that the identities of other licensees that have had contact with the minor will provide evidence of habit or custom of the minor decoy... . Certainly, the credibility of the decoy is at issue. The memory and ability to recall if (sic) the decoy is at issue. If the decoy testifies that his/her recollection stands out because that was the first place that sold to her, Appellants should know, already, if other locations sold to him/her and when this occurred." (Brief of appellants at pages 10-11.)

apparent age. As we have said so many times, the issue of the decoy's appearance under Rule 141(b)(2) is a question for the trier of fact.

There may be any number of explanations why a sale was made to a minor. One reason may indeed be a mistaken belief the minor appeared to be older than 21. It may also be that the seller was confused.

It is one thing to invite seller testimony as to what a decoy said or did, in order to contradict or impeach that decoy. It is quite another to offer opinion evidence from a seller intended to justify his or her having sold to the decoy; that is exculpatory, and has little bearing on the issue of a decoy's credibility.

We do not ignore the fact that this decoy was able to purchase an alcoholic beverage in four of the ten establishments she visited. While this suggests that she may have presented a more mature appearance to some sellers than she did to others, we must assume that the ALJ took this into account in his deliberations. There is nothing about the appearance of this decoy that varies from the norm.

Appellant also complains that the ALJ not only refused to permit Melgoza to state her opinion of Palacio's age, but also "specifically refused to allow any questioning related to the other seller's observations regarding demeanor, mannerisms, and overall appearance." (App. Br., p.6.)

Melgoza's testimony covers only four pages of transcript, and is preceded by three pages of colloquy concerning her proposed testimony. We do not find in these pages any limitation imposed by the ALJ on Melgoza's testimony other than about age. (See RT 63-70.) Appellant's complaint is without basis.

ORDER

The decision of the Department is affirmed.[4]

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

[4] 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.