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

**AB-8136**
File: 47-079260 Reg: 02053773

EL TORITO RESTAURANTS, INC. dba Las Brisas
361 Cliff Drive, Laguna Beach, CA 92651,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: February 19, 2004
Los Angeles, CA

**ISSUED MAY 17, 2004**

El Torito Restaurants, Inc., doing business as Las Brisas (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 10 days for its bartender having sold an alcoholic beverage to a minor, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant El Torito Restaurants, Inc., appearing through its counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on September 4, 1979. Thereafter, on September 19, 2002, the Department instituted an accusation

[1]The decision of the Department, dated April 24, 2003, is set forth in the appendix.

against appellant charging that its agent, employee, or servant, Oswaldo Vasquez, sold an alcoholic beverage (beer) to John Hedges III, a person then approximately 18 years of age. Although not disclosed in the accusation, Hedges was acting as a minor decoy for the Laguna Beach Police Department.

An administrative hearing was held on March 14, 2003, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Chris Heuberger, a Laguna Beach police officer who witnessed the transaction, and by Hedges, the decoy. Both testified that Vasquez examined a driver's license presented by Hedges, and then sold him the beer.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established, and that appellant had not established any affirmative defense to the charge.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) there was no compliance with Rule 141(b)(5); (2) the Department improperly excluded testimony of other sellers' observations of the decoy's appearance; and (3) the failure of the administrative law judge (ALJ) to disqualify himself pursuant to Title 1, Cal. Code Regs., section 1034, violated the equal protection clauses of the California and United States Constitutions.

DISCUSSION

I

Rule 141(b)(5) (4 Cal. Code Regs., §141(b)(5)) provides:

> Following any completed sale, but not later than the time a citation, if any, is issued, the peace officer directing the decoy shall make a reasonable attempt to enter the licensed premises and have the minor decoy who purchased alcoholic beverages make a face-to-face identification of the alleged seller of the alcoholic beverages.

Appellant contends that it was Laguna Beach police officer Heuberger, rather than the decoy, who identified Vasquez as the seller. As a consequence, appellant asserts, the identification was overly suggestive.

Appellant's contention depends upon a selective and strained reading of both the record and the decision. Our review of the testimony of police officer Heuberger and the decoy persuades us that the identification process was conducted in a fair manner.

Police officer Heuberger testified on direct examination that after he observed the sale of the beer, he identified himself to the bartender and told him he had just sold an alcoholic beverage to a minor. He directed the bartender to retrieve the marked $10 bill from the register, and then asked the decoy to point to the person who sold him the alcohol and say if it was that person who sold to him. The decoy was seated at the bar and pointed to Vasquez.[2]

Appellant relies upon Heuberger's affirmative answers on cross-examination to two leading questions [RT 29] :

> Q. And was it at that point that you told Vasquez to point – strike that. You told Hedges to point to Vasquez?
>
> A. I believe so.
>
> Q. But it wasn't [police officer] Calvert who told Hedges to point to Vasquez, it was you?
>
> A. Well, we were all in there. At that point I believe it was me.

We do not read Heuberger's response to counsel's carefully phrased leading questions as an unambiguous acknowledgment that he directed Hedges to point to

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[2] A photograph was taken of the decoy pointing to Vasquez. Heuberger testified that he did not believe the scene in the photograph was a reenactment. Hedges agreed that the scene was not a reenactment.

Vasquez in particular. In context, Heuberger was doing no more than agreeing to what he had testified to on direct examination, i.e., that he directed Hedges to identify the seller.

Hedges testified, on direct examination, that he was told to point out the bartender who sold him the alcoholic beverage. His response was, in words to that effect, "This is the bartender that sold me the alcoholic beverage." Although appellant's counsel attempted with his questions to suggest to Hedges that he had been steered to identify a specific person, he was unable to do so.

The argument that the identification was suggestive is itself strained. Where, as here, there was only one bartender present during the decoy operation, who else but that bartender might be identified as the seller? (Compare *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (Keller)* (2003) 109 Cal.App.4th 1687 [1 Cal.Rptr.3d 339] (identification conducted outside premises not unduly suggestive).)

II

Appellant contends that the ALJ erred when he refused to permit its attorney to elicit testimony from a police officer about what other sellers may have said about the decoy's apparent age. The ALJ sustained the Department's objections, stating: "Hearsay and relevance. Both or either. Mainly relevance." [RT 33.]

We think the ALJ ruled correctly on either ground.

The Appeals Board has routinely sustained objections to both expert and lay testimony consisting of opinions of minor decoy's age. (See e.g., *The Southland Corp./Gill* (2000) AB-7380; *Yakow* (1999) AB-7268.)

The administrative law judge addressed the appearance of the minor as follows:

> John H. Hedges [Hedges] was born January 19, 1984. He served as a minor decoy during an operation conducted by the Laguna Beach Police Department [LBPD] on June 6, 2002. At the time, Hedges was 18 years of age.
> [Finding of Fact 3.]
>
> Hedges appeared at the hearing. He stood about 6 feet tall, weighed about 175 pounds and his reddish-brown hair was cut quite short all over. There had been no change in Hedges' height or weight since the June 6, 2003, decoy operation. Hedges also wore the same clothes to the hearing as he wore at Respondent's Licensed Premises during the decoy operation. He wore faded blue jeans and a blue T-shirt with a design of some sort on the front. He wore a wristwatch but no other jewelry. At the hearing, Hedges had attained the age of 19 years, but in all respects looked substantially the same as he did at Respondent's Licensed Premises on the date of the decoy operation. (Exhibit 2.)
> [Finding of Fact 4.]
>
> Hedges was selected as a decoy because he was known to the LBPD through work as an Explorer. Hedges testified competently, but showed some nervousness, testifying rapidly with a small voice.
> [Finding of Fact 11.]
>
> Based on his overall appearance, *i.e.*, his physical appearance, dress, poise, demeanor, maturity and mannerisms shown at the hearing, and his appearance/conduct in front of bartender Vasquez at the Licensed Premises on June 6, 2002, Hedges displayed the appearance that could generally be expected of a person under 21 years of age under the actual circumstances presented to Vasquez. Hedges, both at the hearing and before, looked his age.
> [Finding of Fact 12.]
>
> Respondent argued that the decoy's apparent age did not meet the standard that his appearance be that generally expected of a person under 21 years of age. Respondent did not specify the basis on which the argument was made. That argument is rejected. There was nothing remarkable about the appearance of decoy Hedges. He appeared his age, 19 years of age, at the hearing, even younger at the Licensed Premises.
> [Conclusion of Law 6.]

We see little likelihood that the hearsay evidence offered by appellant would have been in any way helpful to the trier of fact. The ALJ did not err in refusing to hear it.

III

Before the administrative hearing, appellant filed with the Administrative Hearing Office (AOH) of the Department, a "Notice of Peremptory Challenge" (Exhibit A), seeking the disqualification of ALJ McCarthy, who was assigned to hear this case. The notice stated that "Pursuant to section 11425.40(d) of the Business and Professions Code [sic; should be "Government Code"], section 1034 of the California Code of Regulations, Respondent is entitled to one disqualification without cause of the assigned ALJ which will be granted in any APA hearing." Attached was a declaration of appellant's counsel setting out the matters required by the California Code of Regulations, title 1, section 1034 (rule 1034).

ALJ McCarthy declined to disqualify himself, stating his belief rule 1034 applies only to ALJ's from the Office of Administrative Hearings (OAH).

On appeal, appellant argues that the Department violates the equal protection clauses of the state and federal Constitutions by allowing peremptory challenges to ALJ's in some cases before it and not in others.

The equal protection provisions of the California and United States Constitutions "in general assure that persons in like circumstances be given equal protection and security in the enjoyment of their rights." (*Whittaker v. Superior Court* (1968) 68 Cal.2d 357, 367 [66 Cal.Rptr. 710]. )

Appellant contends that the practice of the Department (through AHO) of employing ALJ's from OAH to hear some Department cases causes a denial of equal protection. It asserts that this practice results in some licensees having the opportunity to peremptorily challenge an ALJ while others do not have that opportunity, and, because of this difference, two licensees, one appearing before an ALJ from AHO and the other appearing before an ALJ from OAH, "would be treated significantly differently

in their administrative hearings with the only underlying difference being the source of their judges."

The usual equal protection challenge is to an act of the Legislature creating classifications that cause similarly situated persons to be treated differently. However, the acts of state officials in administering the laws may also be found to violate equal protection, where a statute is applied in a discriminatory manner.

Appellant is objecting to the practice of the Department using two groups of ALJ's, some of whom are subject to peremptory challenge and some of whom are not. In some sense, this is a statutorily created classification. However, the statutes and regulation involved – OAH rule 1034, Government Code section 11525.40, and Business and Professions Code section 24210 – are neutral on their faces. Where a statute is fair and nondiscriminatory on its face, and the contention is that it is applied in a discriminatory manner, an equal protection violation will be found only if the objector can show an *intentional and arbitrary discrimination* by the state in applying the statute.

> Unequal application of a statute or rule to persons entitled to be treated alike is not a denial of equal protection "unless there is shown to be present in it an element of intentional or purposeful discrimination." (*Snowden v. Hughes* (1944) 321 U.S. 1, 8 [64 S. Ct. 397, 401, 88 L. Ed. 497].) What the equal protection guarantee prohibits is state officials "purposefully and intentionally singling out individuals for disparate treatment on an invidiously discriminatory basis." (*Murgia v. Municipal Court* (1975) 15 Cal. 3d 286, 297 [124 Cal. Rptr. 204, 540 P.2d 44].)

*(Cilderman v. Los Angeles* (1998) 67 Cal.App.4th 1466, 1470 [80 Cal.Rptr.2d 20].)

Appellant does not allege any intentional and arbitrary discrimination by the Department in its practice of employing ALJ's from OAH. It does not even allege a "classification" created by legislation or the Department's practice. It merely alleges that, "[a]t random, two precisely similarly situated licensees could receive significantly different treatment based upon simply whether their judge is from OAH or from the

AOH."

There is nothing in the record to suggest that the assignment of ALJ McCarthy to this case by AHO was other than a routine assignment in accordance with the customary procedures of that office. Under such circumstances, appellant has not shown "intentional or arbitrary discrimination" in the Department's action. Therefore, the action does not violate equal protection guarantees.

Even if we were to approach appellant's contention using the standard applicable in challenging a legislatively created classification, appellant's contention would fail. The right to a peremptory challenge is not constitutionally protected, but has been created by statute. Since the challenge does not involve a suspect classification or a fundamental right, the "rational relationship" standard is used. (*People v. Leung* (1992) 5 Cal.App.4th 482, 494 [7 Cal.Rptr.2d 290].) This means that a statutory classification will be found valid if it bears a rational relationship to a legitimate governmental purpose. (*Board of Supervisors v. Local Agency Formation Com.*, 3 Cal. 4th 903, 913 [13 Cal.Rptr.2d 245].)

The need to provide timely hearings is clearly a legitimate governmental purpose, and the Department's temporary use of additional ALJ's from OAH, the agency created with the purpose of providing ALJ's for other state agencies, is rationally related to that purpose. The Department's practice of using ALJ's from OAH would satisfy the rational relationship test if it were used here.

ORDER

The decision of the Department is affirmed.[3]

TED HUNT, CHAIRMAN
KAREN GETMAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[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.