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

**AB-8146**
File: 21-357066 Reg: 02053838

ALBERTSON'S, INC. dba Albertson's
3181 Crow Canyon Road, San Ramon, CA 94583,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Stewart A. Judson

Appeals Board Hearing: July 8, 2004
San Francisco, CA

**ISSUED AUGUST 20, 2004**

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

Appearances on appeal include appellant Albertson's, Inc., appearing through its counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Robert Wieworka.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on November 17, 1999. Thereafter, the Department instituted an accusation against appellant charging the

[1]The decision of the Department, dated May 15, 2003, is set forth in the appendix.

unlawful sale of an alcoholic beverage to a minor.

An administrative hearing was held on March 26, 2003, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Lamagra, the decoy, and by Richard Pearson of the Contra Costa County Sheriff's Office. No one testified on behalf of appellant.

Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred as alleged, and that appellant had not established any defense to the charge.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) the Department's "Policy on Assignments of Administrative Law Judges" (the Policy) is violative of Government Code sections 11340.50, subdivision (a), and 11425.50, subdivision (e); (2) the Policy fails to specify how and pursuant to what criteria retired annuitant administrative law judges are added to or removed from the lists of such judges; and (3) the decision fails to address an irreconcilable conflict between the decoy's testimony and that of one of the officers involved in the decoy operation. The first two issues will be discussed together.

DISCUSSION

I

Appellant contends that the Department's Policy on Assignment of Administrative Law Judges is violative of Government Code sections 11340.5, subdivision (a), and 11425.50, subdivision (e), because it was not first adopted as a regulation and filed with the Secretary of State. Appellant also contends that the 15-day suspension is improper because it is a penalty imposed by an administrative law judge (ALJ) appointed pursuant to that policy. Finally, appellant contends that the Policy fails to adequately

specify how the Department decides whom to add and whom to exclude from the lists of retired annuitants, or how a retired annuitant may be removed from the list. Appellant argues that it may reasonably be assumed the Department has chosen to add to its list those retired annuitant ALJ's who, in the system in place before mid-2002, had tended to favor the Department in their rulings.

Government Code section 11340.5 provides:

> No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

Government Code section 11425.50, subdivision (e), provides:

> A penalty may not be based on a guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule subject to Chapter 3.5 (commencing with Section 11340) unless it has been adopted as a regulation pursuant to Chapter 3.5 (commencing with Section 11340.)

At the hearing in the present case, the Department placed in evidence its "Policy on Assignment of Administrative Law Judges," dated January 23, 2003. (Exhibit 2.) This document outlines the procedure to be used in appointing and assigning retired annuitant ALJ's, and "is intended to comply with the mandates of *Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017 [119 Cal.Rptr.3d 341] and insure that the appointment of retired annuitant administrative law judges shall be conducted in a manner that avoids both the appearance and actuality of impropriety or financial incentive to rule in favor of the Department in any given case." (Policy, introduction, 2d ¶.)

The Policy provides that assignments are to be made in the following order of priority: first, full-time Department ALJ's; second, retired annuitant ALJ'S; and third,

ALJ's from the Office of Administrative Hearings (OAH). (OAH is an independent agency that provides ALJ's for state administrative hearings.) "Payment for duties performed, continued or future appointment, or termination of any relationship shall not be based upon any recommendation contained within Proposed Decisions prepared by the retired annuitant administrative law judge but shall be based upon such factors as the needs of the Department, timeliness and professional standards." (Policy, part 3, 2d ¶.)

The Department will maintain separate lists of "eligible retired annuitant ALJ's" for northern and southern California. Assignments will be offered to the first retired annuitant on the particular list, and progress through the list in order.

In *7-Eleven, Inc./Phatipat (2003) AB-7875*, the Board was concerned with "whether the Department's method of employing retired annuitants on an hourly basis has been done 'in a way that does not create the risk that favorable decisions will be rewarded with future remunerative work,' as *Haas* would seem to require."[2] The court in *Haas*, on page 1037, footnote 22, suggested "some procedures that might suffice to eliminate the risk of bias." One of the ways the court mentioned to eliminate the risk was by "appoint[ing] a panel of attorneys to hear cases under a preestablished system of rotation." This is exactly what the Department Policy provides.

Appellant argues that the Policy does not address the issue of the pecuniary interest of retired annuitant ALJ's in future employment by the Department, since, appellant asserts, placement on the list is wholly within the discretion of the

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[2]The court said in *Haas*: "To satisfy due process, all a county need do is exercise whatever authority the statute confers in a manner that does not create the risk that hearing officers will be rewarded with future remunerative employment for decisions favorable to the county." (*Haas*, *supra*, 27 Cal.4th at p. 1037.)

Department. While placement and retention on the list would be at the discretion of the Department, the method described in footnote 22 of *Haas* does not appear to contemplate any more stringent requirements to comply with due process.

Appellant points out that retention of a retired annuitant ALJ on the Department's list "is not assured by any status such as a civil service status." A lack of civil service protections does not appear to be a disqualifying factor, however, because the positions approved by the Supreme Court in *Haas* would almost certainly be "at will" positions; that is the nature of ad hoc employment.

With the addition of the Department's Policy for assigning retired annuitant ALJ's to already existing protections of the Administrative Procedure Act, under which all the ALJ's must work, and the separation of the Department's adjudicatory function from the investigatory and enforcement functions by the establishment of the AHO, we believe that the financial interest of the retired annuitant ALJ's in future employment by the Department is sufficiently attenuated to meet the due process concerns expressed in *Haas*. Absent some evidence to the contrary, we are not willing to assume that the Department will not comply with its Policy in good faith. This being so, we do not believe the Policy needs to address the finer points of retired annuitant employment.

Against this background, appellant's contention that the Policy is an unlawful underground rule can be quickly disposed of. Government Code section 11340.9, part of the same chapter as the Government Code sections relied upon by appellant, provides that the chapter "does not apply to any of the following: ... (d) a regulation that relates only to the internal management of the state agency." It seems clear that the policy, one which clearly relates in all respects to the employment and assignment of ALJ personnel, is one of internal management, not subject to the strictures of

Government Code section 11340.5, subdivision (a).

It also follows that a penalty imposed by an ALJ assigned pursuant to that Policy is not tainted by that fact alone.

Appellant also contends that the Policy contravenes the mandate of section 2 of Executive Order S-2-03, issued November 17, 2003. That section provides:

> Within 30 days of the date of this executive order, each Agency shall assess and identify any present issuance, utilization, enforcement or attempt at enforcement of any guideline, criterion, bulletin, manual, instruction, order, or standard of general application which has not been adopted as a regulation in potential violation of California Government Code section 11340.5(a) and submit its findings to OAL pursuant to California Government Code section 11340.5(a) and the Legal Affairs Secretary.

Appellant asserts that until there is compliance with section 2, the Department may only use the Policy on an "opinion only" basis, and that its use in employing and assigning retired annuitants as ALJ's exceeds an "opinion only" basis.

We do not agree with appellant that Executive Order S-2-03 limits the Department's use of the Policy to an "opinion only" basis. Even if the Policy can be characterized as a regulation, about which we have doubt, it does not fall within the intended scope of section 2 of S-2-03. That section is aimed at guidelines, etc. which would be subject to Government Code section 11340.5, subdivision (a). And, as we have pointed out above, the Policy is not subject to that section because it relates only to the internal management of the Department, and is exempted from that section by Government Code section 11340.9.

II

Appellant contends that the decoy and the officer provided conflicting accounts of the face to face identification conducted pursuant to Rule 141(b)(5), and complain that the decision does not explain why the ALJ chose the officer's version of what took

place over that of the decoy. Appellant argues that this did not "bridge the analytic gap between the raw evidence and the ultimate decision or order" as required by the California Supreme Court's holding in *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515 [113 Cal.Rptr. 836] (*Topanga*).

Appellant also asserts that, if the identification was conducted as described by the decoy, this resulted in an unduly suggestive identification, citing *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (7-Eleven, Inc.)* 109 Cal.App.4th 1687 [1 Cal.Rptr.3d 339].[3]

Appellants misapprehend *Topanga*. It does not hold that findings must be explained, only that findings must be made. This is made clear when one reads the entire sentence that includes the phrase on which appellants rely: "We further conclude that implicit in section 1094.5 is a requirement that the agency which renders the challenged decision *must set forth findings* to bridge the analytic gap between the raw evidence and ultimate decision or order. [Italics added.]" (*Topanga*, *supra*, 11 Cal.3d 506, 515.)

In *No Slo Transit, Inc. v. City of Long Beach* (1987) 197 Cal.App.3d 241, 258-259 [242 Cal.Rptr. 760], the court quoted with approval, and added italics to, the comment regarding *Topanga* made in *Jacobson v. County of Los Angeles* (1977) 69 Cal.App.3d 374, 389 [137 Cal.Rptr. 909]: " 'The holding in Topanga was, thus, that *in the total absence of findings in any form on the issues supporting the existence of conditions justifying a variance*, the granting of such variance could not be sustained.' "

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[3] The decoy testified that the officer asked her “if this is the man that sold [the beer] to you” [RT 32], while the officer testified that he asked her to “point out the individual that had sold the beer.” [RT 47.]

In the present appeal, there was no "total absence of findings" that would invoke the holding in *Topanga*.

Appellants' demand that the ALJ "explain how [the conflict in testimony] was resolved" (App. Br. at p. 2) is little more than a demand for the reasoning process of the ALJ. The California Supreme Court made clear in *Fairfield v. Superior Court of Solano County* (1975) 14 Cal.3d 768, 778-779 [122 Cal.Rptr. 543], that, as long as findings are made, a party is not entitled to attempt to delve into the reasoning process of the administrative adjudicator:

> As we stated in *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515 [113 Cal.Rptr. 836, 522 P.2d 12]: "implicit in section 1094.5 is a requirement that the agency which renders the challenged decision must set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order."[Fn.]
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> In short, in a quasi-judicial proceeding in California, the administrative board should state findings. If it does, the rule of *United States v. Morgan* [(1941)] 313 U.S. 409, 422 [85 L.Ed. 1429, 1435 [61 S.Ct. 999]] precludes inquiry outside the administrative record to determine what evidence was considered, and reasoning employed, by the administrators.

In any case, appellants' argument is fundamentally flawed because it relies on the erroneous conclusion that the face-to-face identification would not have complied with the rule if the officer asked the decoy "Is this the person who sold to you?" rather than asking "Who sold you the beer?". The Board has rejected this type of argument in a number of cases, and the same rationale applies here. (*7-Eleven, Inc./Vameghi* (2004) AB-8065; *The Vons Companies, Inc.* (2004) AB-8058.) We do not regard either form of the question as unduly suggestive, especially since both witnesses are describing a small part of an event which took place nearly a year earlier. What is important is that there was a face to face identification, not that there is some semantic

difference in the testimony of different witnesses as to how it was sought.

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.