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

AB-8154
File: 41-265102 Reg: 02053395

CEC ENTERTAINMENT, INC. dba Chuck E. Cheese 418
8375 Laurel Canyon Boulevard, Sun Valley, CA 91352,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen

Appeals Board Hearing: June 10, 2004
Los Angeles, CA

ISSUED JULY 29, 2004

CEC Entertainment, Inc., doing business as Chuck E. Cheese 418 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days, all of which were conditionally stayed for one year, for a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant CEC Entertainment, Inc., appearing through its counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine public eating place license was issued on February 13, 1992. Thereafter, the Department instituted an accusation against appellant charging that, on April 12, 2002, an employee of appellant sold a cup of beer

[1]The decision of the Department, dated June 5, 2003, is set forth in the appendix.

to a minor decoy.

An administrative hearing was held on April 9, 2003, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established and appellant had failed to establish any affirmative defense. The decision also rejected appellant's peremptory challenge and motion to disqualify the administrative law judge assigned to the case.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) the decoy did not display the appearance required by Rule 141(b)(2); (2) the identification of the seller did not comply with Rule 141(b)(5); and (3) the administrative law judge (ALJ) did not manifest the appearance of impartiality.

DISCUSSION

I

Appellant contends that the decoy did not display the appearance required by Rule 141(b)(2) because of his "unfortunately large size." (App.Br., page 7.) They also discount the fact that he displayed nervousness or lack of self-assurance at the hearing, pointing out that there is no evidence that he did so at the time of the transaction.

Rule 141(b)(2) requires a decoy to display the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to the seller. Since the ALJ does not see the decoy until he is a witness at the hearing, he or she can only assume, in the absence of evidence suggesting the

contrary, that the decoy's appearance at the hearing is substantially the same as it was at the time of the sale.

Appellant's attack on the decoy's appearance concentrates on his size - the decoy is six feet tall and weighs 190 pounds.

The ALJ took the decoy's size into account, along with a number of other indicia of age (Finding 7 and Conclusion 7):

> Minor Miller had a markedly youthful appearance, especially with respect to his face. He wore no jewelry except a wristwatch. He was then 6 feet tall and weighed 190 pounds and was clean-shaven. He had worn a hooded sweatshirt, blue jeans and black shoes or boots. His hair was cut short in a "marine style" haircut. Although he was large for his age, he appeared somewhat unsure of himself and nervous at the hearing. His carriage, poise and demeanor appeared to be that of an adolescent. The subject decoy operation was his first experience a minor decoy.
>
> The minor did display the appearance which could generally be expected of a person under 21 years of age by reason of findings of fact 7.

The Board has said many times that, absent unusual circumstances, none of which are present here, it will not second guess an ALJ on the issue of a decoy's appearance under the rule. The ALJ has an opportunity to observe the decoy; this Board does not. When it appears to this Board that the ALJ has made an assessment according to the rule which takes into account the whole person of the decoy, as it does here, we will let that decision stand.

II

Appellant offers several reasons in support of its contention that there was no face-to-face identification of the kind required by Rule 141(b)(5): the photograph is not proof of a face-to-face identification because it only shows two individuals facing the camera and saying nothing; the clerk did not comprehend she was being identified; and

the police officer was unfamiliar with Rule 141(b)(5).

We do not believe any of the reasons offered by appellant are sufficient to persuade us that there was no compliance with Rule 141(b)(5).

The photograph is, at best, a frozen moment in time, and does not represent all that preceded it. The photograph is simply one stage of a continuing process of identification. Officer Vasquez testified as follows:

> Q. When you went outside with her, what did you do?
>
> A. We walked up to Jeremy Miller and I asked Jeremy, 'Is this the person who sold you the alcohol?"
>
> Q. And what was Jeremy's response?
>
> A. "Yes."
>
> Q. Okay. I would like you to take a look at what we have marked as Exhibit Number 5. Do you recognize that?
>
> A. Yes.
>
> Q. What is it?
>
> A. It's a photograph of Jeremy pointing at the clerk who sold him the alcohol.
>
> Q. Do you know who took the photograph?
>
> A. I did.
>
> Q. When did you take it in relation to when you asked Jeremy who sold him the beer?
>
> A. After.
>
> Q. Okay. You know, that question wasn't quite clear. You asked him twice, once inside and once outside. I'm referring to the outside time you asked him.
>
> A. Yes. It was outside after I had asked him to verify that I had the right clerk as well, and he said, "Yes." Then I retrieved my camera and took the picture.

This testimony clearly supports the ALJ's finding that the identification complied

with the rule. Assuming it to be true that the identification which took place inside the premises was faulty, there is nothing to suggest the clerk would not have been aware of being identified once she was outside the store.

Nor do we find it particularly significant that Vasquez was not familiar with Rule 141. It is enough that she knew she was to conduct a face-to-face identification.

The ALJ disbelieved the clerk's testimony that she was unaware the decoy had identified her as the seller. As the trier of fact, that was his call. (See *Brice v. Dept. of Alcoholic Bev. Contro*l (1957) 153 Cal.App.2d 315, 323 [314 P.2d 807]; *Lorimore v. State Personnel Board* (1965) 232 Cal.App.2d 183, 189 [42 Cal.Rptr. 640].)

Again, the photograph does not show what preceded its taking. The clerk and the decoy posed for the photograph after the decoy had identified her as the seller.

III

Appellant contends that it was denied due process of law because the ALJ who presided over the hearing and wrote the proposed decision which the Department adopted possessed a financial interest in the outcome of the case of the type condemned in *Haas v. County of San Bernardino* (2002) 27 Cal.4th 1016 [119 Cal.Rptr.2d 341] (*Haas*).

This Board has ruled that, where the ALJ's were permanent employees of the Department, protected against arbitrary dismissal or retaliation by civil service laws, they were not in a position to be tempted to bend their rulings to favor the Department, and motions for disqualification should be denied. (See, e.g., *Chevron Stations, Inc*. (2003) AB-8011; *7-Eleven/Veera* (2003) AB-7890.) Two appellate courts have ruled in

similar fashion. (*CMPB Friends v. Alcoholic Beverage Control Appeals Bd.* (2002) 100 Cal.App.4th 1250, 1258 [122 Cal.Rptr.2d 914]; *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd. (Vicary)* (2002) 99 Cal.App.4th 880, 883-886 [121 Cal.Rptr.2d 753].)

In *7-Eleven, Inc./Phatipat* (2003) AB-7875 (*Phatipat*), the Appeals Board considered the impact of *Haas*, *supra*, in a case where the Department employed a retired annuitant as an ALJ. The matter was reversed and remanded to the Department for further proceedings. The Board said:

> [W]e are unable to tell from the record before us 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.
>
> Therefore, we have concluded that a further hearing is necessary, directed at exploring the employment arrangement between the Department and the retired annuitants who served it as ALJ's, to determine whether, under the terms of that arrangement, those ALJ's were sufficiently secure in their employment as to be insulated against any temptation to favor the Department in return for future work.

Appellant now contends that the Board should apply the holding of *Phatipat* to this case.

At the hearing in the present case, the Department placed in evidence its "Policy on Assignment of Administrative Law Judges" ("Policy"), dated January 23, 2003. (Exhibit 4.) This document outlines the procedure to be used by the Department 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 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 from the Administrative Hearing Office (AHO); 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 *Phatipat*, 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

[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.)

attorneys to hear cases under a preestablished system of rotation." This is exactly what the Department policy provides.

Appellants argue that the Policy does not address the issue of the pecuniary interest of retired annuitant ALJ's in future employment by the Department, "since placement on the list is wholly within the discretion of the 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.

Appellants point 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.

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.