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

AB-8168
File: 20-377045 Reg: 02053795

7-ELEVEN, INC., BALWINDER KAUR DHILLON, and JASPREET S. DHILLON
dba 7-Eleven #2136
6766 Tampa Avenue, Reseda, CA 91335,
Appellants/Licensees

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

7-Eleven, Inc., Balwinder Kaur Dhillon, and Jaspreet S. Dhillon, doing business as 7-Eleven #2136 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days for a co-licensee having sold an alcoholic beverage to a minor, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., Balwinder Kaur Dhillon, and Jaspreet S. Dhillon, appearing through their 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

Appellants' off-sale beer and wine license was issued on July 6, 2001.

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[1] The decision of the Department, dated July 17, 2003, is set forth in the appendix.

Thereafter, the Department instituted an accusation against appellants charging that, on May 30, 2002, co-licensee Balwinder Kaur Dhillon sold beer to Gerardo Vallejos, a person then approximately 18 years of age. Although not stated in the accusation, Vallejos was acting as a decoy for the Los Angeles Police Department.

An administrative hearing was held on April 18 and May 30, 2003, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Los Angeles police officer Ben Herskowitz and by Vallejos ("the decoy"). Both Vallejos and Herskowitz testified that co-licensee was talking on the telephone during the transaction, and asked neither for his age nor identification when making the sale. Jaspreet Dhillon testified about training received by his co-licensee and his efforts, in cooperation with the police, to improve the area where the store is located.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established, and appellants had failed to prove any affirmative defense.

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) The decoy did not display the appearance required by Rule 141(b)(2); (2) there was no compliance with the face to face identification required by Rule 141(b)(5); and (3) the motion to disqualify the retired annuitant administrative law judge (ALJ) was improperly denied.

DISCUSSION

I

Appellants contend that they were 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 the 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.

Appellants now contend 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 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

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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 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.

II

Appellants argue that the decoy's experience and training (he had been a police Explorer for two years, and worked with Los Angeles police detectives as an assistant office clerk; this was his first experience as a decoy), his physical size, and "his apparent ability to procure alcohol" indicate that he failed to comply with the requirements of Rule 141(b)(2). That rule requires a decoy to present an 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.

After describing the decoy's physical appearance and dress, the ALJ noted: "The minor has a boyish looking face and at the hearing he appeared to be uncomfortable as he displayed nervousness and fidgeted frequently. His demeanor was somewhat immature and he had childlike mannerisms." In his legal conclusions, in which he conclude that Vallejos's appearance satisfied Rule 141(b)(2), Judge Gruen wrote:

> With respect to Rule 141(a) & 141(b)(2), it is argued that the evidence showing that the minor was able to purchase from 7 of 11 licensees on the evening of the subject violation shows that the police department was unfair in selecting a minor who appeared over 21 years of age to 7 of the licensees involved in the "sting" operation. It is claimed that the minor's experience as a police explorer; his height of 6' 1" and military style haircut created a misleading impression of his age to co-licensee Balwinder Dhillion.
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> Balwinder never testified at the hearing so there is no way of knowing whether she reasonably believed that the minor was the age of majority, or whether she was so preoccupied with her telephone conversation during her sale to the minor, that she paid little or no attention to the age of the minor.
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> The fact that 7 of 11 licensees sold to the minor on the evening of May 30, gives one pause as to the true age of the minor, but is of itself not the entire story. It is

> only one factor to be considered. Other factors taken into account are the demeanor, mannerisms, and youthful physical appearance displayed by the minor as set forth in findings of fact 6. The minor's experience as a police explorer did not manifest itself in any apparent way to create a misleading impression that he appeared older than he actually was.
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> Most likely, this violation occurred simply because of Balwinder's inattention to the minor at the time of the sale as set forth in findings of fact 4.

We cannot fault Judge Gruen's reasoning, and the record supports his findings. This is just another of the many cases where appellate counsel want the Board to substitute its judgment for that of the ALJ. In the absence of very exceptional circumstances, the Board will not do this. There are no exceptional circumstances here.[3]

III

Appellants contend that the face-to-face identification in this case was faulty because the decoy "was given no choice but to identify the person being interrogated by the police department by prior statements in the decoy's presence." (App.Br., page 14.) Appellants characterize this as a "one person show up."

The record is clear that there was only one person behind the counter. Balwinder was the only clerk. It is true, then, that the decoy had little choice but to identify her as the seller.

We think appellants make far too much of the fact that a decoy may hear an officer tell a clerk he or she has just made a sale to a minor. The sale in question will invariably have occurred only minutes earlier. In many cases, like this case, there will be only one clerk in the store. But even where there may be more than one clerk, it is

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[3] While the photo depicted in Exhibit 2 does show that the decoy is taller than the co-licensee, it can hardly be said, as appellants claim, that it shows him "towering" over her.

difficult to see how the decoy will be misled to identify a clerk who did not sell to him. In the absence of any evidence of confusion, real or apparent, we think the argument that a police officer's remarks to the seller can result in an unduly suggestive identification lacks merit.

In the case appellants cite, *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2003) 109 Cal.App.4th 1678 [1 Cal.Rptr.3d 339], the court did not find unduly suggestive an identification made after the police brought the clerk outside the store to be confronted by the decoy. The instant case is far more benign.

ORDER

The decision of the Department is affirmed.[4]

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

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[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.