

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

AB-8169

File: 21-267521 Reg: 03054522

CIRCLE K STORES, INC., dba Circle K Store # 1940
1600 West Main Street, Turlock, CA 95380,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Jerry Mitchell

Appeals Board Hearing: March 11, 2004
San Francisco, CA

ISSUED MAY 25, 2004

Circle K Stores, Inc., doing business as Circle K Store # 1940 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ suspending its license for 10 days for its clerk selling an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Circle K Stores, Inc., appearing through its counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean R. Lueders.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on December 9, 1993. On February 19, 2003, the Department instituted an accusation against appellant charging that, on July 30, 2002, appellant's clerk sold an alcoholic beverage to 17-year-old

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

Joshua Snodgrass. Although not noted in the accusation, Snodgrass was working as a minor decoy for the Turlock Police Department at the time.

An administrative hearing was held on June 6, 2003, at which time documentary evidence was received, and testimony concerning the sale was presented by Snodgrass (the decoy); by Vanessa Gomez, an 18-year-old decoy who accompanied Snodgrass; and by Joseph Esquivel, a Turlock police officer. Store manager Fred Hernandez testified regarding the store's policies and training.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged had been proven, and no defense had been established.

Appellant filed an appeal making the following contentions: 1) Rule 141(b)(2)² was violated, and 2) the administrative law judge (ALJ), as a retired annuitant, should have been disqualified.

DISCUSSION

I

Rule 141(b)(2) states that "[t]he decoy shall 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 contends that, in finding that the decoy's appearance complied with the rule, the ALJ used a "flawed and restricted analysis," relying on the decoy's physical appearance alone as shown in a photograph of him taken that night at a location other than that of appellant's premises.

²References to Rule 141 and its subdivisions are to section 141 of title 4 of the California Code of Regulations, and to the various subdivisions of that section.

The only finding in the decision referring to the decoy's appearance is Factual

Finding 2:

On July 30, 2002, Joshua Snodgrass, a male Explorer Scout who was then 17 years old, entered the licensed premises, accompanied by Vanessa Gomez, a female Explorer Scout who was then 18 years old. They entered the licensed premises as decoys, acting under the supervision of a Turlock, California Police Services investigator named Joseph Esquivel. In a photograph taken on July 30, 2002, Joshua and Vanessa each displayed the appearance which could generally be expected of a person under 21 years of age, and at the hearing on June 6, 2003, neither of them appeared to be older than 19.

Appellant asserts that examining the decision and the record "it is absolutely impossible to determine . . . any standard" the ALJ used to determine the apparent age of the decoy at the time of the sale.

Appellant is correct that the decision does not reveal an analysis of the decoy's appearance. The ALJ states that *in a photograph*, Snodgrass and Gomez each had the appearance generally to be expected of a person under the age of 21, and at the hearing, they appeared to be no older than 19.

This Board has reversed decisions in cases where the ALJ based his assessment of the decoy's apparent age solely on the decoy's physical appearance (e.g., *Circle K Stores, Inc.* (1999) AB-7080), and where the ALJ relied solely on photographs of the decoy (e.g., *Circle K Stores, Inc.* (2000) AB-7378).

In AB-7080, the Board was faced with a finding that discussed only physical attributes of the decoy, with no indication that characteristics such as poise, demeanor, maturity, and mannerisms had been considered. The Board said:

It is not the Appeals Board's expectation that the Department, and the ALJ's, be required to recite in their written decisions an exhaustive list of the indicia of appearance that have been considered. We know from many of the decisions we have reviewed that the ALJ's are capable of delineating enough of these aspects of appearance to indicate that they

are focusing on the whole person of the decoy, and not just his or her physical appearance, in assessing whether he or she could generally be expected to convey the appearance of a person under the age of 21 years.

Here, however, we cannot satisfy ourselves that has been the case, and are compelled to reverse. We do so reluctantly, because we share the Department's concern, and the concern of the general public, regarding underage drinking. But Rule 141, as it is presently written, imposes certain burdens on the Department when the Department seeks to impose discipline as a result of police sting operations. And this Board has been pointedly reminded that the requirements of Rule 141 are not to be ignored. (See *Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board* (1998) 67 Cal.App.4th 575 [79 Cal.Rptr. 126]).

In AB-7378, the ALJ appeared to have relied solely on a photograph of the decoy in determining that the decoy's appearance complied with rule 141(b)(2), despite having the decoy before him in person at the hearing. The Board said that the decision:

falls short of giving any assurance that the ALJ considered more than just the decoy's physical appearance when he stated that the decoy "appeared to be under 21 years old." Even though the ALJ had the opportunity to see the decoy at the hearing, he relied for his finding entirely on the photograph taken of the decoy the night of the decoy operation. It is hard to see how he could have considered anything other than physical appearance under these circumstances.

In that case, the Board remanded the matter to the Department to allow a proper analysis of the decoy's appearance.

The present decision has no analysis of the decoy's appearance nor does it indicate that the decoy's non-physical attributes were taken into consideration. No finding is made regarding the decoy's physical appearance at the time of the sale besides that based on the photograph.³ Under the circumstances, the matter must be remanded to the Department for further findings.

³It is questionable whether the photograph is evidence of the decoy's appearance at the time of the sale, since it was not taken at appellant's premises, but at another premises some time that night.

II

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 based on *Haas* 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].)

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

[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.

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."⁴ 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 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.

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

⁴The 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.)

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 reversed and remanded to the Department for further proceedings in accordance with part I of the foregoing opinion.⁵

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

⁵This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code section 23090 et seq.