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

AB-9056
File: 20-385031 Reg: 09070315

7-ELEVEN, INC., and ROHIT BHATIA, dba 7-Eleven Store 2173-33025
2600 North Main Street, Los Angeles, CA 90031,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley

Appeals Board Hearing: December 2, 2010
Los Angeles, CA

ISSUED FEBRUARY 10, 2011

7-Eleven, Inc., and Rohit Bhatia, doing business as 7-Eleven Store 2173-33025 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days for their clerk, Kazi Islam, selling an alcoholic beverage to Tina Flores, a 19-year-old police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., and Rohit Bhatia, appearing through their counsel, Ralph B. Saltsman, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

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[1]The decision of the Department, dated July 13, 2009, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on May 2, 2002. On January 13, 2009, the Department instituted an accusation against appellants charging that, on August 21, 2008, appellants' clerk, Kazi Islam (the clerk), sold an alcoholic beverage to 19-year-old Tina Flores. Although not noted in the accusation, Flores was working as a minor decoy for the Los Angeles Police Department at the time.

An administrative hearing was held on June 2, 2009, at which time documentary evidence was received, and testimony concerning the sale was presented by Flores (the decoy) and by Manuel Segura, a Los Angeles police officer. Rohit Bhatia, the franchisee, testified about training furnished to employees, including clerk Islam, and other measures aimed at complying with the law relating to sales to minors.

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

Appellants filed an appeal making the following contentions: (1) the administrative law judge (ALJ) was biased, and should have disqualified himself; and (2) the ALJ failed to consider evidence in mitigation. The two issues are interrelated, and will be discussed together.

DISCUSSION

Appellants contend that ALJ Matthew Ainley, who conducted the administrative hearing, should have disqualified himself from hearing the case because previously, as a staff counsel to the Department, he prosecuted many cases against co-licensee 7-Eleven, Inc. Appellants assert that Judge Ainley was still a prosecutor when the violation occurred, and when the accusation was signed and filed, but do not allege that he had any involvement in this particular case.

An ALJ "shall voluntarily disqualify himself or herself and withdraw from any case in which there are grounds for disqualification, including disqualification under Section 11425.40." (Gov. Code, § 11512, subd. (c).) A party may request disqualification of an ALJ. (*Ibid*.)

Government Code section 11425.40, subdivision (a), states that an ALJ is "subject to disqualification for bias, prejudice, or interest in the proceeding."

Appellants rely on application of the Code of Judicial Ethics (CJE) which, with some exceptions and modifications to conform it to the circumstances of administrative adjudication, is incorporated by reference in the Administrative Adjudication Code of Ethics (AACE) (Gov. Code, § 11475 et seq.) and "governs the hearing and nonhearing conduct of an administrative law judge." (Gov. Code, § 11475.20.)

Canon 3E of the CJE provides:

> (1) A judge shall disqualify himself or herself in any proceeding in which disqualification is required by law.
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> (2) In all trial court proceedings, a judge shall disclose on the record information that is reasonably relevant to the question of disqualification under Code of Civil Procedure section 170.1, even if the judge believes there is no actual basis for disqualification.

Code of Civil Procedure section 170.1 (hereafter section 170.1)[2] sets out

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[2] Code of Civil Procedure section 170.1provides, in the parts relied upon by appellants:

> (a) A judge shall be disqualified if any one or more of the following is true:
> [¶] . . . [¶]
> (2)(A) The judge served as a lawyer in the proceeding, or in any other proceeding involving the same issues he or she served as a lawyer for any party in the present proceeding or gave advice to any party in the present proceeding upon any matter involved in the action or proceeding.
> (B) A judge shall be deemed to have served as a lawyer in the proceeding if within the past two years:

(continued...)

grounds for disqualification of judges. Appellants argue that under this section, a judge is disqualified if, within the past two years, he or she served as a lawyer for a public agency that is a party to the proceeding, "personally advis[ing] or in any way represent[ing] the public agency concerning the factual or legal issues in the proceeding."

The Department points out that section 170.1 is applicable only to "judges of the superior courts, and court commissioners and referees." (Code Civ. Proc., § 170.5, subd. (a).) Appellants argue (or at least imply) that case law supports the application of section 170.1 to administrative proceedings. They quote *Gai v. City of Selma* (1998) 68 Cal.App.4th 213, 222 [79 Cal.Rptr.2d 910] (Gai):

> In *Gray v. City of Gustine* (1990) 224 Cal.App.3d 621 [273 Cal.Rptr. 730] we acknowledged that *Andrews* held that section 170.1, subdivision (a)(1), and sections 170.2 through 170.4, although written for state court judges, should apply to administrative hearings as well. (224 Cal.App.3d at p. 632.)

The quote, taken out of context, does not support their position. Later in the *Gai* decision the court stated, referring to the language just quoted: "To the extent our comment in *Gray* may be construed as suggesting the Supreme Court decided that question, we were obviously in error." The court went on to explain the context of its

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[2](...continued)

> (I) A party to the proceeding or an officer, director, or trustee of a party was a client of the judge when the judge was in the private practice of law or a client of a lawyer with whom the judge was associated in the private practice of law.
>
> [¶] . . . [¶]
>
> (C) A judge who served as a lawyer for or officer of a public agency that is a party to the proceeding shall be deemed to have served as a lawyer in the proceeding if he or she personally advised or in any way represented the public agency concerning the factual or legal issues in the proceeding.

statement in *Gray* and the dissimilarity of that case to *Gai*, concluding: "This was the context in which we made the perhaps overly expansive statement that *Andrews* [*v. Agricultural Labor Relations Bd.* (1981) 28 Cal.3d 781 [171 Cal.Rptr. 590] (*Andrews*)] held that 'these sections should apply to administrative hearing officers as well' as judges." (*Gai*, *supra*, 68 Cal.App.4th at p. 231.)

We believe an ALJ cannot be disqualified under section 170.1 because that statute does not apply to ALJ's. (Code Civ. Proc., § 170.5, subd. (a); cf. *County of San Diego v. Alcoholic Beverage Control Appeals Bd.* (2010) 184 Cal.App.4th 396, 406 [109 Cal.Rptr.3d 59].) Specific provisions in the Administrative Procedure Act (APA) (Gov. Code §§ 11340-11529) deal with disqualifications of ALJ's – e.g., Government Code sections 11512 and 11425.40. For purposes of the AACE, the provisions of the CJE are considered and applied only to the extent they are relevant in the context of administrative proceedings. Section 170.1 is not made applicable to administrative law judges simply because the CJE mentions that section.

Appellants have not shown that ALJ Ainley should have been disqualified pursuant to Government Code section 11425.40, subdivision (a), for bias, prejudice, or interest in the proceeding. The appearance of bias is insufficient for disqualification of an ALJ: "[T]he moving party [must be] able to demonstrate concretely the actual existence of bias." (*Andrews*, supra, 28 Cal.3d at p. 793.) In addition, " 'the prejudice must be against a particular party . . . *and* sufficient to impair the judge's impartiality so that it appears probable that a fair trial cannot be held.' " (*Andrews*, *supra*, at p. 792, quoting from and adding italics to *Alexander & Barsoom v. Ensher* (1964) 225 Cal.App.2d 318, 322 [37 Cal.Rptr. 327].) Simply reciting that ALJ Ainley represented

the Department and may have provided advice to Department investigators and administrators in cases involving co-appellant 7-Eleven, Inc., does not establish that concrete, particularized bias required to be shown for disqualification.

Appellants also argue that ALJ Ainley should be disqualified under Government Code section 11425.30, which provides that specified persons are not to serve as presiding officers. They appear to rely on subdivision (a)(1) of section 11425.30, which provides that a person may not serve as a presiding officer if he or she "has served as investigator, prosecutor, or advocate in the proceeding or its preadjudicative stage." Appellants allege that ALJ Ainley participated in the investigation and advocacy against appellants as well as being the adjudicator. However, there is absolutely no evidence that ALJ Ainley participated as anything other than adjudicator with respect to this proceeding.

Appellants have provided no evidence that would justify the disqualification of ALJ Ainley. It was not error for him to deny appellants' Motion to Disqualify.

Appellants' reliance (App. Br., pp. 7-8) on the decision of the California Supreme Court *in Morongo Band of Mission Indians v. State Water Resources Board* [(2009) 45 Cal.4th 731 [88 Cal.Rptr.3d 610], is misplaced. The court held that in the absence of actual prejudice or an unacceptable risk of bias, it was not improper for an attorney who was an advisor in one matter to participate as a prosecutor in an unrelated matter:

> In the absence of financial or other personal interest, and when rules mandating an agency's internal separation of functions and prohibiting ex parte communications are observed, the presumption of impartiality can be overcome only by specific evidence demonstrating actual bias or a particular combination of circumstances creating an unacceptable risk of bias. Unless such evidence is produced, we remain confident that state administrative agency adjudicators will evaluate factual and legal arguments on their merits, applying the law to the evidence in the record to reach fair and reasonable decisions.

(*Id*. at pp. 741-742.)

Nor do we think that the imposition of the standard 15-day suspension for a sale-to-minor violation in and of itself is enough to warrant a conclusion that the ALJ must have entertained a bias or prejudice against appellants. It is self-evident from the facts of this case that the steps taken by appellants to avoid sales to minors were unsuccessful. The weight to be given mitigating evidence is a matter within the reasonable discretion of the Department, and we are unable to find an abuse of that discretion. It is worth noting that co-licensee Bhati, the person in charge of training employees, did not himself attend LEAD training until after the incident in question.

ORDER

The decision of the Department is affirmed.[3]

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, 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.