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

**AB-9059**
File: 20-260795 Reg: 09070727

7-ELEVEN, INC., NELOFER ISMET KIRMANI, and TANVEER AKHTAR KIRMANI,
dba 7-Eleven 2175-20269
2717 East Colorado Boulevard, Pasadena, CA 91107-4369,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

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

**ISSUED NOVEMBER 10, 2010**

7-Eleven, Inc., Nelofer Ismet Kirmani, and Tanveer Akhtar Kirmani, doing business as 7-Eleven 2175-20269 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days for their 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 appellants 7-Eleven, Inc., Nelofer Ismet Kirmani, and Tanveer Akhtar Kirmani, appearing through their counsel, Ralph B. Saltsman, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry K. Winters.

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[1]The decision of the Department, dated July 22, 2009, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on June 7, 1991. On March 19, 2009 the Department filed an accusation against appellants charging that their clerk sold an alcoholic beverage to 19-year-old Tara Valenzuela on December 16, 2008. Although not noted in the accusation, Valenzuela was working as a minor decoy for the Pasadena Police Department at the time.

At the administrative hearing held on June 2, 2009, documentary evidence was received and testimony concerning the sale was presented by Valenzuela (the decoy) and by Steven Rappuchi, a Pasadena police officer.[2] Before testimony began, appellants presented a Motion to Disqualify the administrative law judge (ALJ) hearing the case, along with a supporting declaration by appellants' attorney. The ALJ denied the motion.

The Department's decision determined that the violation charged was proved and no defense was established. Appellants do not contest the determination that a violation occurred, but have filed an appeal contending the ALJ erred in denying appellants' motion to disqualify him.

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 for the Department, he had prosecuted many cases against co-licensee 7-Eleven, Inc., and he represented the Department in opposing a Motion to Compel

[2]. A statement of the specific facts of the case is not necessary or relevant to resolution of the issue raised in this appeal.

filed by the present appellants in a earlier disciplinary matter.[3] Therefore, they assert, it was error for the ALJ to deny the motion, and the decision must be reversed because the Department did not proceed in the manner required by law.

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), specifically Canon 3E, which provides, in relevant part:

> (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) sets out grounds for disqualification of judges:

> (a) A judge shall be disqualified if any one or more of the following is true:
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> [¶] . . . [¶]

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[3]The information that ALJ Ainley represented the Department opposing a Motion to Compel in a prior disciplinary action against this same license was not included in the declaration filed in support of appellants' Motion to Disqualify. However, it was alleged at the hearing and discussed by both counsel and the ALJ. Counsel for the Department and ALJ Ainley clearly conceded that ALJ Ainley represented the Department in some manner with regard to a Motion to Compel filed in the prior disciplinary action. It appears from the discussion at the hearing and the disciplinary history shown in the accusation for the present matter, that the prior disciplinary action was the result of a sale-to-minor violation in 2007. At the time of the hearing in the present matter, that prior matter was on appeal and not yet final.

> (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.
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> (B) A judge shall be deemed to have served as a lawyer in the proceeding if within the past two years:
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> (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.

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." ALJ Ainley, they assert, falls squarely within this provision.

Section 170.1, however, is specifically made 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, relying on language in *Gai v. City of Selma* (1998) 68 Cal.App.4th 213, 222 [79 Cal.Rptr.2d 910][4] (*Gai*):

> In *Gray v. City of Gustine* (1990) 224 Cal.App.3d 621 [273 Cal.Rptr. 730] we acknowledged that *Andrews* [*v. Agricultural Labor Relations Bd.* (1981) 28 Cal.3d 781 [171 Cal.Rptr. 590] (*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.)

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[4]We note with disapproval appellants' failure to provide pinpoint cites for this quoted language and in all but one of the six other case citations used in appellants' brief. This Board is not required to search through the pages of a decision to find a quotation appellants have used to support their argument. If appellants cannot properly cite the authority they use, we may be compelled simply to ignore it.

The quote, however, is taken out of context. 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 statement in *Gray* and the dissimilarity of that case to *Gai*, concluding that, "our comments implying that the same rules apply to administrative hearing officers as apply to judges must be construed either as limited to the sections discussed or as dicta." (*Gai*, *supra*, 68 Cal.App.4th at p. 231.) As if its position on this issue were not clear enough, the court then proceeded to distinguish the cases relied on by Gai, and by extension, appellants in the matter presently before this Board:

> In any event, neither *Andrews* nor *Gray* leads to the conclusion sought by Gai. Both of those cases referred to the judicial disqualification statutes as support for a decision that administrative hearing officials should not be disqualified. In essence, they stand for the proposition that even if the decisionmakers were judges they would not be disqualified on the facts shown. That statement does not logically convert to one that because a judge would be disqualified under these facts, so should an administrative hearing officer.

*(Id*. at p. 232.)

We conclude that an ALJ cannot be disqualified under section 170.1 because that statute does not apply to ALJ's. Specific provisions in the Administrative Procedure Act (APA) (Gov. Code §§ 11340-11529) deal with disqualification of ALJ's – e.g., Government Code sections 11512 and 11425.40.

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 *Ensher, 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. Even though ALJ Ainley represented the Department in opposing a pre-hearing motion made in appellants' prior disciplinary matter, this also fails to demonstrate the actual bias required for an ALJ's disqualification, where that motion was one of perhaps a dozen identical pre-hearing motions that were consolidated for telephonic hearing, none of which were separately argued.

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.

ORDER

The decision of the Department is affirmed.[5]

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[5]This 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.