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

AB-7894
File: 20-357160 Reg: 01050804

ALBERTSON'S, INC., dba Sav On
731 Weir Canyon Road, Anaheim, CA 92808,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: November 14, 2002
Los Angeles, CA

ISSUED FEBRUARY 4, 2003

Albertson's, Inc., doing business as Sav On (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days for appellants' clerk selling an alcoholic beverage to a minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Albertson's, Inc., appearing through its counsel, Ralph B. Saltsman, Stephen W. Solomon, and R. Bruce Evans, and the Department of Alcoholic Beverage Control, appearing through its counsel, Roxanne B. Paige.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on November 17, 1999. Thereafter, the Department instituted an accusation against appellant charging the sale

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[1]The decision of the Department, dated September 27, 2001, is set forth in the appendix.

of an alcoholic beverage, on December 27, 2000, by appellant's clerk to 18-year-old Derek Marsden. At the time of the sale, Marsden was working as a decoy for the Anaheim Police Department.

An administrative hearing was held on August 10, 2001, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred as alleged and no defense had been established.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) Appellant was denied due process when the Administrative Law Judge denied its motion to disqualify himself and all other administrative law judges employed by the Department; (2) the decoy lacked the appearance required by Rule 141(b)(2); and (3) the decoy operation did not comply with Rule 141(a).

DISCUSSION

I

Appellant contends its right to a fair and impartial hearing was violated by use of an ALJ selected, employed, and paid by the Department. It does not appear to seriously contend that this ALJ was actually biased or prejudiced, since it offers no evidence to that effect. Rather, it argues that all the Department's ALJ's must be disqualified because the Department's arrangement with the ALJ's creates an appearance of bias that "would cause a reasonable person to entertain serious doubts" concerning the impartiality of the ALJ's.

Appellant bases its contention principally upon the hiring and payment of the ALJ's by the Department and on the transcribed testimony of Edward P. Conner, an assistant director of the Department, in the hearing on an accusation against 7-Eleven,

Inc., and Kritsnee and Mark Phatipat, File #20-355455, Reg. #01050320, on May 23, 2001. At the time of his testimony, Conner was in charge of field operations for the Department's Southern Division.

A. Appellant contends that disqualification of the ALJ is required because "the Department's arrangement with the Administrative Law Judges would cause a reasonable person to entertain serious doubts concerning the Administrative Law Judge's impartiality."

This contention is premised on the applicability to ALJ's of section 170.1, subdivision (a)(6)(C), of the Code of Civil Procedure, which provides that "A judge shall be disqualified if . . . [f]or any reason . . . a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial."

However, appellant's basic premise is flawed, because this section applies only to "judges of the municipal and superior courts, and court commissioners and referees," not to ALJ's. (Code Civ. Proc., §170.5; see *Gai v. City of Selma* (1998) 68 Cal.App.4th 213, 233 [79 Cal.Rptr.2d 910].)

The disqualification of ALJ's is governed by sections 11425.30,[2] 11425.40,[3] and

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[2]Section 11425.30 precludes a person from serving as presiding officer in an administrative hearing if that person has served as, or been subject to the authority, direction, or discretion of a person who has served as, "investigator, prosecutor, or advocate in the proceeding or its preadjudicative stage."

[3]Section 11425.40 provides that a presiding officer may be disqualified "for bias, prejudice, or interest in the proceeding," but not solely because the presiding officer

> (1) Is or is not a member of a racial, ethnic, religious, sexual, or similar group and the proceeding involves the rights of that group. [¶] (2) Has experience, technical competence, or specialized knowledge of, or has in any capacity expressed a view on, a legal, factual, or policy issue presented in the proceeding. [¶] (3) Has as a lawyer or public official participated in the drafting of laws or regulations or in the effort to pass or defeat laws or regulations, the meaning, effect, or application of which is in issue in the proceeding. . . .

11512, subdivision (c),[4] of the Administrative Procedure Act (APA) (Gov. Code, §11400 et seq.). With certain limited exceptions, which we discuss below, an ALJ can be disqualified under these provisions only upon a showing of *actual* bias or prejudice; the appearance of bias is not sufficient. (*Andrews v. Agricultural Labor Relations Board* (1981) 28 Cal.3d 781, 792 [171 Cal.Rptr. 590] (*Andrews*); *McIntyre v. Santa Barbara County Employees' Retirement System* (2001) 91 Cal.App.4th 730, 735 [110 Cal.Rptr.2d 565]; *Gai v. City of Selma*, *supra*, 68 Cal.App.4th at pp. 220-221; *Burrell v. City of Los Angeles* (1989) 209 Cal.App.3d 568, 582 [257 Cal.Rptr. 427].)

In the present case, no evidence has been presented that this ALJ was actually biased or prejudiced. "A party must allege concrete facts that demonstrate the challenged judicial officer is contaminated with bias or prejudice. 'Bias and prejudice are never implied and must be established by clear averments.'" (*Andrews*, *supra*, 28 Cal.3d at p. 792, quoting *Shakin v. Board of Medical Examiners* (1967) 254 Cal.App.2d 102, 117 [62 Cal.Rptr. 274].)

Even assuming, arguendo, that Code of Civil Procedure section 170.1,

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[4]Section 11512, subdivision (c), provides, in pertinent part:

> An administrative law judge . . . shall voluntarily disqualify himself or herself and withdraw from any case in which there are grounds for disqualification, including disqualification under Section 11425.40. The parties may waive the disqualification by a writing that recites the grounds for disqualification. A waiver is effective only when signed by all parties, accepted by the administrative law judge, . . . and included in the record. Any party may request the disqualification of any administrative law judge . . . by filing an affidavit, prior to the taking of evidence at a hearing, stating with particularity the grounds upon which it is claimed that the administrative law judge . . . is disqualified. . . . Where the request concerns the administrative law judge, . . . the issue shall be determined by the administrative law judge. . . .

subdivision (a)(6)(C), were to apply, we agree with the ALJ that one could not reasonably conclude that disqualification of this ALJ, or the Department's ALJ's in general, is required.

A declaration filed on behalf of appellant[5] (Exhibit C), states that the Department ALJ's in general, and the specific ALJ in the present case, fail to present an appearance of impartiality because they have access to the Department's Southern Division offices, including those of the Department's attorneys, the law library, photocopying and facsimile machines, the Department's computer and e-mail systems, case files, and "investigation material and all files maintained" in the Southern Division offices.

This part of the declaration is based on the transcript of Conner's testimony; however, the declaration omits certain pertinent facts. Conner's testimony showed that two hearing rooms and two offices for the use of the ALJ's had recently been completed in the same building as the Department's Southern Division offices. There were previously no hearing rooms or offices for the ALJ's in the building. The new rooms, at the time of Conner's testimony, had been used for only one or two weeks and were not yet fully furnished. The ALJ's rooms are not physically connected to the offices of the Southern Division and the ALJ's do not have keys to the Southern Division offices.

The Southern Division offices house administrative personnel, Department attorneys and investigators, and support staff. The ALJ's[6] were allowed to use the fax

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[5]The declaration was made by Paulette Dewire, whose relationship to appellant is not disclosed.

[6]At most, it appears that appellant's contention could apply only to those ALJ's who worked in the Department's Southern Division.

machine, the copy machine, and the law library located in the Southern Division suite of offices because they did not yet have those facilities in their own new offices and hearing rooms. Any ALJ's who may have taken advantage of the Southern Division facilities[7] were required to be escorted to these destinations by Southern Division staff, where they were allowed to use the facilities undisturbed, and then escorted out of the Southern Division office suite. The ALJ's were allowed into the suite only during regular business hours and were not allowed to roam through the offices unattended. Conner stated that the ALJ's did not have access to the Department's internal computer database, although they could, along with the general public, access limited licensee information through the Department's web site.

Conner confirmed, during examination by appellant's counsel, that it could be possible for an ALJ to see a fax relating to a case while the ALJ was using the fax machine; that it could be possible for an ALJ to see documents relating to a case inadvertently left in the copier; that it could be possible for an ALJ to see notes or documents of Southern Division staff left on the table in the library; and that it could be possible for ALJ's to overhear conversations between attorneys or investigators that might relate to pending or potential cases.

It is obvious from reading the transcript of Conner's testimony that appellant has grossly overstated, and sometimes misstated, the "access" the ALJ's had to material or facilities of the Southern Division's offices. Appellant attempts to create, by innuendo, the appearance of the ALJ's being privy, through the carelessness or indifference of the Department's management and staff, to numerous sources of confidential information

[7]It is not clear whether or not any ALJ's had, in fact, used these facilities. If any did, they were not identified by name.

potentially damaging to licensees who have hearings before the ALJ's. We cannot believe that a reasonable person, in possession of all the facts, would "reasonably entertain a doubt that the judge would be able to be impartial" based on the vague and remote possibilities that some ALJ's might have access at some time to material from the Department's Southern Division pertaining to cases that might be heard by those ALJ's. Therefore, even under the standard of Code of Civil Procedure section 170.1, subdivision (a)(6)(C), neither the ALJ in this case, nor the Department's ALJ's generally, would be disqualified.

Appellant cites the case of *Linney v. Turpen* (1996) 42 Cal.App.4th 763 [49 Cal.Rptr.2d 813] (*Linney*) in support of its position. However, *Linney* did not involve the APA provisions that govern disqualification of Department ALJ's. For that reason, and a number of other reasons, we do not find *Linney* supportive of appellant's position.

Linney, an airport police officer, contended that he was deprived of due process in a disciplinary action against him because of the method of selecting the hearing officer and because the hearing officer was paid by Linney's employer. Although the court held that Linney's failure to use the procedure set up to challenge a hearing officer's competence precluded him from raising the issue on appeal, it went on to discuss, and reject, Linney's contention. Notably, the court said "Due process does not require a perfectly impartial hearing officer for, indeed, there is no such thing. . . . [T]he principle our Supreme Court has established is that due process in these circumstances requires only a '*reasonably* impartial, noninvolved reviewer.'" (*Linney*, *supra*, 42 Cal.App.4th at pp. 770-771, quoting (with added italics) *Williams v. County of Los Angeles* (1978) 22 Cal.3d 731, 737 [150 Cal.Rptr. 5].) The court noted the language of the California Supreme Court in *Andrews*, *supra*, 28 Cal.3d at p. 792, that

disqualification of a judge required a showing that the judge was biased or prejudiced "against a particular party" and that prejudice must be "sufficient to impair the judge's impartiality so that it appears probable that a fair trial cannot be held." The court in *Linney* also cited with approval the opinion in *Burrell v. City of Los Angeles*, *supra*, 209 Cal.App.3d 568, which "highlight[ed] the less exacting due process requirements applicable to administrative hearings as compared to judicial proceedings." (*Linney*, *supra*, 42 Cal.App.4th at pp. 772.)

Appellant may be relying on the court's statement in *Linney* that where prejudice or actual bias was not shown to exist, Code of Civil Procedure section 170.1, subdivision (a)(6)(C), was "an alternative standard for possible disqualification." (*Linney*, *supra*, 42 Cal.App.4th at p. 776.) However, the court in *Gai v. City of Selma*, *supra*, 68 Cal.App.4th at pages 232-233, concluded that *Linney* had little precedential value with regard to use of section 170.1, subdivision (a)(6)(C), in an administrative setting because the discussion of the statute in that case was dicta, the views expressed were only those of the lead opinion's author, and the lead opinion is not clear in stating whether the statute should or should not apply to administrative hearing officers. The *Gai* court specifically declined to find the statute applicable to administrative hearing officers. We find the reasoning of the *Gai* court persuasive on this issue.

Appellant also cites the case of *Teachers v. Hudson* (1986) 475 U.S. 292 [89 L.Ed.2d 232] (*Chicago Teachers Union*), in the declaration, but do not explain in what way it believes that case supports its position. In *Chicago Teachers Union*, non-union teachers challenged the procedure in which an employee objecting to the "proportionate share payment" deducted from the non-union employee's paycheck went

before an arbitrator selected by the union president and paid by the union; the arbitrator's decision on the employee's objection was final. The District Court upheld the procedure, the Court of Appeals reversed, and the United States Supreme Court affirmed the judgment of the Court of Appeals. The Supreme Court held that the procedure giving the union an unrestricted choice of arbitrator from a list maintained by the state board of education was inadequate, but also rejected the notion that a full evidentiary administrative hearing was required.

The lead opinion in *Linney, supra*, found *Chicago Teachers Union* inapposite for a number of reasons, in particular the view that the California Supreme Court rulings in *Williams v. County of Los Angeles*, *supra*, 22 Cal.3d 731, and *Andrews*, *supra*, 28 Cal.3d 781, were "controlling as to how expansive the courts of this state can and should be in applying the admittedly flexible concept of due process." (*Linney*, *supra*, 42 Cal.App.4th at p. 775.) We do not see that *Chicago Teachers Union* provides appellant with support for its position.

In summary, appellant has not established that the "appearance of bias or prejudice" is the standard to be applied to the ALJ's, and it has not shown actual bias or prejudice, which is the proper standard for disqualification in this instance.

B. Appellant contends that "The Department's practice and arrangement with its Administrative Law Judges violates due process because it creates a financial interest in the outcome of the proceeding arising from the Administrative Law Judges' prospect of future employment with the Department and its good will."

Appellant bases this contention on the recent decision by the California Supreme Court in *Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017 [119 Cal.Rptr.2d 341] (*Haas*), in which the court held that a temporary administrative hearing officer had a pecuniary interest requiring disqualification when the government unilaterally selected

and paid the officer on an ad hoc basis and the officer's income from future adjudicative work depended entirely on the government's good will. In that case, the County of San Bernardino hired a local attorney to hear Haas's appeal from the Board of Supervisors' revocation of his massage clinic license, because the county had no hearing officer. The possibility existed that the attorney would be hired by the county in the future to conduct other hearings.

The court explained that,

> [w]hile the rules governing the disqualification of administrative hearing officers are in some respects more flexible than those governing judges, the rules are not more flexible on the subject of financial interest. Applying those rules, courts have consistently recognized that a judge has a disqualifying financial interest when plaintiffs and prosecutors are free to choose their judge and the judge's income from judging depends on the number of cases handled. [Fns. omitted.]

(*Haas*, *supra*, 27 Cal.4th at pp. 1024-1025.)

Appellant contends that the present case should be controlled by *Haas*, asserting that, as was the case with the hearing officer in *Haas*, the Department's ALJ's have disqualifying financial interests because their future income is dependent on the good will of the Department, Business and Professions Code section 24210, subdivision (a), gives the Department's director (the Director) "unfettered discretion without limitation to appoint anyone he wants[,] and [the Director] is presumed to prefer those who issue favorable rulings." (App. Br. at p. 15).

Business and Professions Code section 24210, subdivision (a), provides:

> The department may delegate the power to hear and decide to an administrative law judge appointed by the director. Any hearing before an administrative law judge shall be pursuant to the procedures, rules, and limitations prescribed in Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.

Contrary to appellant's assertions, we do not read the statute as giving the Director "unfettered discretion" in appointing ALJ's to hear cases under the Alcoholic Beverage Control Act. The Director's discretion is circumscribed by the requirements of the APA, in the same way that the appointment of ALJ's in the Office of Administrative Hearings (OAH) is circumscribed. The court in *CMPB Friends, Inc. v. Alcoholic Beverage Control Appeals Board* (2002) 100 Cal.App.4th 1250 [122 Cal.Rptr.2d 914] (*CMPB*), confirmed this view when it rejected the licensee's argument that the Department's use of an ALJ appointed by the Director violated the licensee's rights to due process and equal protection. The court stated:

> The Legislature has determined that the Department may properly delegate the power to hear and decide licensing issues to an administrative law judge appointed by the Department's director. ([Bus. & Prof. Code] § 24210, subd. (a).) Those administrative law judges must possess the same qualifications as are required for administrative law judges generally, and are precluded from presiding in matters in which they have an interest. (§ 24210, subd. (a); see, e.g., Gov. Code, §§ 11425.40, 11512, subd. (c).)

(*Id.* at p. 1258.)

Based on the language of the statute and the recent appellate court decision in *CMPB*, *supra*, we conclude that the Director does not possess the type of "unfettered discretion" the court found objectionable in *Haas*, *supra*.

We turn now to appellant's assertion that the future income of the Department's ALJ's is dependent on the good will of the Department, thus creating for the ALJ's a disqualifying pecuniary interest in the outcome of the cases they hear. The court in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2002) 99 Cal.App.4th 880 [121 Cal.Rptr.2d 753] (*Vicary*), provided a cogent response to this assertion. Vicary argued that the ALJ's "implicit bias" deprived her of

due process. The court acknowledged that actual bias need not be shown if the "challenged adjudicator has a strong, direct financial interest in the outcome," citing *Haas*, *supra*, but also stated:

> However, it has been consistently recognized that the fact that the agency or entity holding the hearing also pays the adjudicator does not automatically require disqualification (see *McIntyre v. Santa Barbara County Employees' Retirement System* (2001) 91 Cal.App.4th 730, 735 [110 Cal.Rptr.2d 565]; *Linney*, *supra*, 42 Cal.App.4th at pp. 770-771), and *Haas* confirms this. (*Haas*, *supra*, 27 Cal.4th at p. 1031.) As the Supreme Court also noted in *Haas*, such a rule would make it difficult or impossible for the government to provide hearings which it is constitutionally required to hold.

(*Vicary*, *supra*, at pp. 885-886.)

The court went on to distinguish the situation in *Vicary*, involving the Department's ALJ's, from that in *Haas*:

> *Haas* involved a county which had no regular "hearing officer," but simply hired attorneys to serve on an ad hoc basis. The vice of the system was that an attorney who desired future appointments had a financial stake in pleasing the county, and that the county had almost unrestricted choice for future appointments. In this case, ALJ's are protected by civil service laws against arbitrary or retaliatory dismissal. (See [Gov. Code] § 18500 et seq.) Thus, there is no basis upon which to conclude that the ALJ was influenced to rule in favor of the Department by a desire for continued employment.

(*Id*. at p. 886.)

Vicary is persuasive authority rejecting appellant's contention that the Department's ALJ's have a disqualifying financial interest in the outcomes of the cases they hear.

The *Vicary* court also mentions possible disqualification under Code of Civil Procedure section 170.1, subdivision (a)(6)(C), but dispels the notion immediately:

> Given that the ALJ's financial interest in the result is too attenuated to require disqualification without a showing of actual bias, we find Vicary's other speculative and factually bare concerns about the ALJ's presumed "coziness" with the Department insufficient to raise a suspicion of bias.[6]

> The record contains no information on the manner in which an ALJ is selected by the Department for any given hearing which would suggest any possibility of bias.

[6]We note that under Vicary's theory, members of the Board could be similarly challenged, as they are subject to – or "fearful of" – removal by the Governor at his pleasure, or by majority vote of the Legislature for dereliction of duty, corruption, or incompetence. (Cal. Const., art. XX, § 22.) Furthermore, they are just as likely to be "cozy" with the Department enforcement personnel as are the ALJ's. Such an approach to disqualification however, would essentially prevent the government from ever holding hearings on matters of public importance.

(*Vicary*, *supra*, 99 Cal.App.4th at p. 886.)

The court in *Vicary* concluded this part of its analysis with the following rejection of Vicary's contention that the Department should use ALJ's from OAH rather than its own:

> [I]t is speculative to state that such ALJ's would be "more impartial" than those employed directly by a particular agency. We will not presume that state-employed professional ALJ's cannot, will not, or do not bring a constitutional level of impartiality to the cases they hear, even if one side is the agency that directly employs them.

(*Vicary*, *supra*, 99 Cal.App.4th at p. 886.)

The court in *CMPB*, *supra*, concluded its discussion of possible disqualification on a similar note:

> We cannot presume bias simply because the Department appointed the administrative law judge. [Citations.] The petitioner has not suggested any particular bias on the part of the administrative law judge in this case to warrant disqualification. Thus, petitioner was not deprived of a fair hearing because of the nature of the administrative law judge's appointment.

(*CMPB*, *supra*, 100 Cal.App.4th at p. 1258.)

We likewise will not presume bias on the part of the ALJ in the present matter, and we reject appellant's "speculative and factually bare concerns about the ALJ's presumed 'coziness' with the Department." The ALJ properly rejected appellant's motion to disqualify.

II

Appellant contends that the decoy lacked the requisite appearance under Rule 141(b)(2). It asserts that his size (6 feet tall and 150 pounds) and his three-months' experience in the Anaheim Police Department Explorer program would make the decoy appear to be over the age of 21.

The ALJ found that the decoy complied with Rule 141(b)(2), based on his overall appearance, including his physical appearance, his dress, his poise, demeanor, maturity, and mannerisms exhibited at the hearing; the photograph of him on the date of the decoy operation; and the evidence concerning his appearance and conduct while in appellant's premises. (Finding VI.C.)

In Determination of Issues I (second paragraph), the ALJ said:

> It is near ludicrous to ascribe any age over 20 years to the Derek Marsden who appeared at the hearing in this matter. He looked substantially the same at the hearing as he did before clerk Ackley. Nothing he could have done and nothing he failed to do could possibly have made him appear over that age to any reasonable person.

Appellant asserts on appeal that the decoy's size, combined with the added confidence that would have resulted from his experience as an Explorer, would have made him appear to the clerk to be over the age of 21. This assertion is as nonsensical as the assertion made at the hearing that the decoy looked as if he were 25 or 30; the decoy had been an Explorer for only three months at the time of this decoy operation and his height and weight are clearly not unusual for a young man in his late teens.

The absence of nervousness alleged by appellant was only one factor to be considered. As this Board said in *The Vons Companies* (2001) AB-7568, "Appellant's argument, carried to its logical conclusion, is that a seller may ignore *all other indicia of age* if the purchaser is not nervous. This comports with neither the law nor common

sense." (*The Vons Company*, *supra*, original italics; see also *7-Eleven/Virk* (2001) AB-7597.)

We have said many times that we are not inclined to substitute our judgment for that of the ALJ on the question of the decoy's apparent age, absent very unusual circumstances, none of which are present here. One of the cases in which we discussed this was *Idrees* (2001) AB-7611, where we said:

> As this Board has said on many occasions, the ALJ is the trier of fact, and has the opportunity, which this Board does not, of observing the decoy as he or she testifies, and making the determination whether the decoy's appearance met the requirement of Rule 141, that he or she possessed 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.
>
> This Board is not in a position to second-guess the trier of fact, especially where all we have to go on is a partisan appeal that the decoy did not have the appearance required by the rule, and an equally partisan response that she did.

We see no reason to depart from these principles in the present appeal.

III

Appellant contends the decoy operation was not conducted in a fashion designed to promote fairness, as required by Rule 141(a), because the store was very busy at the time.

The clerk, Carolyn Ackley, testified that the store was extremely busy at the time, with 30 people in line at the three cash registers that were open. She claimed she felt pressured to move the customers through check-out quickly. She said she glanced at the decoy and he appeared to her to be at least 30 years old, so she did not ask him for identification. Although the registers had only two feet or less between them, Ackley could not remember who the other cashiers were that afternoon.

Larry Cruz, the assistant manager on duty at the time of the sale, described the store as quite busy at that time, and believed that all three registers were open for business. He also could not remember the names of any cashiers, other than Ackley, who were working at the time.

The decoy testified that there was only one person in line in front of him when he went to the check-out counter. [RT 16.]

Officer Kelly Jung, who entered the store just before the decoy, and stood about a foot behind him while he was at the cash register, did not recall any lines at the cash registers, nor did she recall any other persons in the immediate area while the decoy was purchasing the beer. She was not sure how many cash registers there were, but she did not recall any other store employees behind the counter besides Ackley and Cruz, when he was called from the office after the sale. She did not observe anyone else in the store wearing the blue shirt that was the store uniform.

The ALJ found the store was "not nearly as busy as clerk Ackley and assistant manager Cruz testified," but neither was it "as empty as Investigator Jung testified." (Finding X.)

In the final paragraph of Determination of Issues I, the ALJ discusses, and rejects, appellant's contention that the fairness requirement of Rule 141(a) was violated, saying:

> Law enforcement personnel are entitled to operate in the setting presented by the licensee, absent extraordinary circumstances. The fact that [appellant's] store was busy, even extremely busy, does not constitute an extraordinary circumstance. As found here, the store was not extremely busy. (Findings of Fact, ¶ X.) There was no evidence that customers waiting in line were yelling at clerks or other wise diverting clerks' attention from the customer being served. Clerk Ackley said she felt pressured, but no evidence suggested she was distracted or confused by conditions. The reason she made the sale was her unfounded belief that decoy Marsden

> was over the age of 21 years. There was no showing that the fairness requirement of Rule 141(a) was violated.

Appellant contends that the decoy operation was not conducted fairly because the store was busy at the time the decoy purchased the alcoholic beverage, and the clerk felt "pressured." In *Southland / Amir* (2001) AB-7464a, the Board addressed a contention similar to that made by appellants, and rejected it, saying:

> The prevention of sales to minors requires a certain level of vigilance on the part of sellers. It is nonsense to believe a minor will attempt to buy an alcoholic beverage only when the store is not busy, or that a seller is entitled to be less vigilant simply because the store is busy.
>
> We believe it asks too much to require law enforcement to predict the time of day that, for a particular premises, would fairly be considered "rush hour."
>
> It is conceivable that where an unusual level of patron activity that truly interjects itself into a decoy operation to such an extent that a seller may be legitimately distracted or confused, and the law enforcement officials seek to take advantage of such distraction or confusion, relief might be appropriate.

Appellant argues that the ALJ used the wrong standard while applying the rule set out in *Southland / Amir*, *supra*, because he based his conclusion on the fact that "There was no evidence that customers waiting in line were yelling at clerks or otherwise diverting clerks' attention from the customer being served." (Determination I., ¶ 4.) While a finding of unfairness does not necessarily require customers yelling at the clerks, it does require that the clerk be actually "distracted or confused" and that the law enforcement personnel take advantage of the that distraction or confusion. We do not believe that the ALJ used the wrong standard; he was merely using customers yelling as an example of a situation that might be unfair. He properly concluded that there was no unfairness because "no evidence suggested [the clerk] was distracted or confused by conditions."

Appellant also suggests that the Department did not meet its initial burden of establishing a prima facie case that the decoy operation was conducted fairly. It points out that the ALJ rejected the investigator's testimony about the lack of people in the store, saying, "Respondent's store was not nearly as empty as Investigator Jung testified." (Finding X.) Even if, as the ALJ concluded, the store was not as empty as the investigator thought it was, that does not mean that the evidence failed to establish a prima facie case of fairness. The store did not need to be empty for the decoy operation to be fair.

Appellant argues that the evidence showed "the clerk was at a disadvantage" when the decoy operation was conducted. However, the ALJ found that the "store was not nearly as busy as clerk Ackley and assistant manager Cruz testified" (Finding X), and he concluded that whatever "disadvantage" the clerk experienced, it was not such as to cause the decoy operation to be unfair. We agree.

ORDER

The decision of the Department is affirmed.[8]

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[8]This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this order as provided by §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 §23090 et seq.