

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

AB-7925

File: 21-324967 Reg: 01051391

GLORIA SOZA LORENZANO and J. GUADALUPE PEDRAZA
dba F & H Castroville Liquors
10694 Merritt Street, Castroville, CA 95012,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Stewart A. Judson

Appeals Board Hearing: October 24, 2002
San Francisco, CA

ISSUED MARCH 20, 2003

Gloria Soza Lorenzano (“Lorenzano”) and J. Guadalupe Pedraza (“Pedraza”), doing business as F & H Castroville Liquors (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which revoked their off-sale general license for co-licensee J. Guadalupe Pedraza having possessed cocaine for sale, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, section 22, arising from a violation of Health and Safety Code section 11351.5, in conjunction with Business and Professions Code section 24200, subdivision (a).²

Appearances on appeal include appellant Gloria Soza Lorenzano, appearing

¹The decision of the Department, dated January 10, 2002, is set forth in the appendix.

² Although both licensees are named in the caption, the appeal appears to be prosecuted only by co-licensee Lorenzano. According to a declaration filed by Lorenzano’s attorney, Pedraza has been deported to Mexico.

through her counsel, Cristina A. Biegel, and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean Lueders.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on January 31, 1997. Thereafter, the Department instituted an accusation against appellants charging that, on or about May 18, 2001, co-licensee Pedraza entered a plea of guilty to a violation of Health and Safety Code section 11351.5 (count 1), and on or about February 10, 2001, he possessed, at the premises, cocaine for sale (count 2), in violation of Health and Safety Code section 11351.5.

An administrative hearing was held on November 20, 2001. At that hearing, co-licensee Lorenzano stipulated to the truth of the facts alleged in counts 1 and 2. She also testified that since her husband had been incarcerated, her brother-in-law had been operating the business, with the assistance of Jose Reyes, her husband's nephew. Lorenzano disclaimed any knowledge of her husband's involvement with cocaine. She had worked for a time as cashier at the store, but soon found it necessary to remain home with her children, aged five, four, and two.

She further testified that she and her husband had purchased the business with money she had earned working in the fields, and loans. She indicated that, if permitted to retain the license, she planned to sell the business when she found the right person. Her husband is facing deportation, and she no longer wants any involvement with him.

Lorenzano's attorney argued that the facts supporting mitigation were strong, and urged the Administrative Law Judge (ALJ) to enter an order which would afford her the opportunity to sell the business. The Department's attorney argued that the continuing involvement in the business of Reyes militated against mitigation, contending

that Reyes, although not charged with a crime, may have helped Pedraza sell cocaine.

Subsequent to the hearing, the ALJ issued his proposed decision, which the Department adopted, determining that the charges of the accusation had been established, and ordering the license revoked.

Appellants have filed a timely appeal in which they raise the following issues: (1) Lorenzano was denied due process when the Department employed a retired annuitant to conduct the administrative hearing; (2) appellant is entitled to hold an ABC license in her own right, the conviction of her husband notwithstanding; (3) a strict liability standard is inappropriate under Department Rule 58; (4) co-licensee Pedraza's immigration status ensures that he cannot participate in any future operation of the business; and (5) the ALJ's determination that appellant was incapable of ensuring compliance with ABC regulations was not supported by substantial evidence. Issues 2, 3, and 4 are related, and will be discussed together.

DISCUSSION

I

Appellant contends that she was denied due process of law because the ALJ who presided over the hearing and wrote the proposed decision which the Department adopted as its own 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].

Appellant did not raise this issue at the hearing. Appellant contends, however, that the *Haas* decision should be given retroactive application because it involves issues of fairness and due process, citing *Newman v. Emerson Radio Corp.* (1989) 48 Cal.3d 973, 978 [258 Cal.Rptr. 592].

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. Two appellate courts have ruled in similar fashion. (See *CMPB Friends v. Alcoholic Beverage Control Appeals Board* (2002) 100 Cal.App.4th 1250, 1258 [122 Cal.Rptr.2d 914], and *Department of Alcoholic Beverage Control v. Alcoholic beverage Control Appeals Board (Vicary)* (2002) 99 Cal.App.4th 880, 883-886 [121 Cal.Rptr.2d 753].)

The issue is admittedly less clear in this case, because, although the ALJ is a retired annuitant,³ appellants here did not raise the issue at the administrative hearing level. The general rule is that an issue may not be raised for the first time on appeal. It is apparent from the declaration filed by appellants' counsel that she was inspired to raise the disqualification issue by the *Haas* decision, and not by any belief prior to the hearing that the ALJ assigned to the case was inclined to favor the Department.

The *Newman* case, *supra*, involved the question of the extent, if any, a ruling should be given retroactive application in the context of court law. It did not address the issue of a party who did not, until appeal, raise the issue which was the subject of the ruling.

Nonetheless, we believe the case should be remanded to the Department for further hearings to permit the Department the opportunity to convince us that the arrangement between it and a retired annuitant judge does not come within the *Haas* proscription, or, in the alternative, to retry the case before a permanently employed ALJ.

³ Appellant's counsel has stated in a declaration that, upon inquiry to the Department, she was informed that ALJ Judson was employed by the Department as a retired annuitant. The Department has not disputed this.

We think the situation is akin to one where there is a question of jurisdiction, where the failure to raise it at the trial level is not a bar to raising the issue on appeal. (See 9 Witkin, California Procedure (4th ed. 1997) Appeal, §398, pp. 450-451.)

We think the importance of a hearing before an impartial adjudicator is such a fundamental matter of fairness that any doubts should be resolved in a way that will best meet that goal.

In light of our intended disposition of this matter, we do not address appellant's remaining contentions.

ORDER

The decision of the Department is reversed and the case is remanded to the Department for such further proceedings as may be necessary and appropriate in accordance with the views expressed herein.⁴

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

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.