

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

AB-7961

File: 20-214665 Reg: 01052132

7-ELEVEN, INC., LUCRETIA A. PARGA, and WILLIAM PARGA
dba 7-Eleven #2131-13586
913 Otay Lakes Road, Chula Vista, CA 91913,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: April 3, 2003
Los Angeles, CA

ISSUED MAY 20, 2003

7-Eleven, Inc., Lucretia A. Parga, and William Parga, doing business as 7-Eleven #2131-13586 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 days for having sold an alcoholic beverage to an 18-year-old police decoy, in violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., Lucretia A. Parga, and William Parga, appearing through their counsel, Ralph B. Saltsman, Stephen Warren Solomon, and James S. Eicher, Jr., and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

¹The decision of the Department, dated April 4, 2002, is set forth in the appendix.

Appellants' off-sale beer and wine license was issued on July 1, 1988.

Thereafter, the Department instituted an accusation against appellants on December 28, 2001, charging that, on October 6, 2001, appellants' employee, Brandon Loder, sold beer to Victoria Majewski, an 18-year-old minor.

An administrative hearing was held on February 20, 2002, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Anton Ybarra, a National City police officer; by Victoria Majewski, the police decoy; by Brandon Loder, appellants' clerk; and by William Parga, a co-licensee and appellant herein.

Subsequent to the hearing, the Department issued its decision which determined that there had been a violation of section 25658, subdivision (a), and that no defense had been established. At the commencement of the hearing, the Administrative Law Judge (ALJ) denied appellants' motion to disqualify the ALJ's employed by the Department.

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) appellants were denied due process by the denial of their motion to disqualify the ALJ's employed by the Department.; and (2) Rule 141(b)(2) was violated.

DISCUSSION

I

At the commencement of the hearing, appellants moved to disqualify the ALJ and all other ALJ's in the employ of the Department. The motion was denied, and appellants claim this resulted in a denial of due process.

Appellants contend their right to a fair and impartial hearing was violated by use of an ALJ selected, employed, and paid by the Department. They do not appear to seriously contend that this ALJ was actually biased or prejudiced, since they offer no evidence to that effect. Rather, they argue 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.

The Appeals Board has rejected this argument in other cases in which licensees attempted to disqualify, on the basis of perceived bias, administrative law judges employed by the Department.² The Board concluded in those cases that the reliance of those appellants on Code of Civil Procedure section 170.1, subdivision (a)(6)(C), was misplaced, because that section applies only to judges of the municipal and superior courts, court commissioners and referees. The Board noted that the disqualification of ALJ's is governed by sections 11425.30, 11425.40, and 11512, subdivision (c), of the Administrative Procedure Act (Gov. Code, §11340 et seq.), and concluded that the appellants had failed to make a showing sufficient to invoke those provisions. (See, e.g., *7-Eleven, Inc./Veera* (2003) AB-7890; *El Torito Restaurants, Inc.* (2003) AB-7891.)

Appellants also contend that the Department's ALJ's had disqualifying financial interests in the outcome of proceedings arising from their prospect of future

² In legislation effective in 1995, the Department was authorized to delegate the power to hear and decide to an administrative law judge appointed by the Director of the Department. Hearings before any judge so appointed were to 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. (Bus. & Prof. Code, § 24210.)

employment with the Department being dependent on the Department's goodwill. Such an arrangement, appellants argue, violates due process.

The Board has previously rejected this contention as well. (See, e.g., *7-Eleven, Inc./Veera, supra*; *El Torito Restaurants, Inc., supra*.) Appellants making this contention relied upon the recent decision of 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 governmental agency unilaterally selected and paid the officer on an ad hoc basis and the officer's income from future adjudicative work depended entirely on the agency's good will. In that case, the County of San Bernardino hired a local attorney to hear Haas's appeal from the Board of Supervisor's revocation of his massage parlor 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.

In concluding that appellants' due process rights had not been violated, the Appeals Board relied on two recent appellate court decisions which rejected challenges to the Department's use of ALJ's appointed by the Director: *CMPB Friends, Inc. v. Alcoholic Beverage Control Appeals Bd.* (2002) 100 Cal.App.4th 1250 [122 Cal.Rptr.2d 914] (*CMPB*) and *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2002) 99 Cal.App.4th 880 [121 Cal.Rptr.2d 753] (*Vicary*).

In *CMPB, supra*, the court, citing the authority granted the Department in Business and Professions Code section 24210, noted that ALJ's so appointed "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.” The court cited *Haas, supra*; briefly referred to its holding that the presumption of impartiality of an administrative hearing officer is not applicable when the officer appointed on an ad hoc basis has a financial interest in reappointment for future hearings; and concluded that the appellant had not suggested any particular bias on the part of the ALJ sufficient to warrant disqualification.

In *Vicary, supra*, the court also addressed the question whether the kind of financial interest condemned by the court in *Haas* was present when the ALJ was employed by the Department. It concluded:

Vicary’s position is that because the ALJ was employed by the Department he necessarily had a bias in favor of the Department which would be prompted by a perceived need to please the Department in order to keep his job. We recognize that no showing of *actual* bias is necessary if the challenged adjudicator has a strong, direct financial interest in the outcome. (*Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017, 1032-1034 [119 Cal.Rptr.2d 341, 45 P.3d 280] (*Haas*)). 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.

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 pp 885-886.)

We have been presented with no reason that would persuade us to deviate from our prior decisions regarding the contentions raised by appellants. The ALJ properly rejected appellants' motion to disqualify.

II

Appellants contend that the decoy did not display the appearance required by Rule 141(b)(2). The rule provides that a 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."

Appellants tell the Board that the decoy, who was five feet, six inches tall, and weighed 125 pounds, had the maturity, size, and demeanor of an individual 21 years of age or older. They further assert that she had prior experience with law enforcement and participation in three decoy operations, and that, together with the fact that one of the officers in the decoy operation was a friend of the family, gave her added confidence and explained why she displayed no nervousness while at the premises.

Appellants' counsel did not raise this issue at the hearing. The Board is entitled to consider it waived. (See 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, §394, p. 444.)

At the hearing, appellants' counsel focused on what he described as "the fairness issue," contending that it was unfair for the operation to be conducted while the clerk was preparing to place a large sum of money in a safe: "The fairness is the key issue in this case, and the facts show that the operation, *while it complied with certain aspects of 141B*, did not comply with that main core fairness requirement of decoy

operations.” [RT 143.]³

The ALJ thoroughly considered the decoy’s appearance with respect to Rule 141(b)(2), and rejected appellants’ claim that her appearance did not comply with the rule (Finding of Fact II-F):

The decoy’s overall appearance including her demeanor, her poise, her mannerisms, her size, and her physical appearance were consistent with that of an eighteen year old and her appearance at the time of the hearing was substantially the same as her appearance on the day of the decoy operation except that she was about five pounds heavier and her hair was about three inches shorter at the time of the hearing. On the date of the sale, the decoy was five feet six inches in height, she weighed one hundred twenty-five pounds, her hair was in a ponytail, she wore no makeup and she wore blue jeans, a dark gray tank-top shirt and a zip-up sweatshirt. The photograph depicted in Exhibit 5 was taken on the night of the sale and it depicts how the decoy appeared that night. At the hearing, the decoy testified that she had participated in three prior decoy operations, that she was a college student, that she had not taken any law enforcement courses and that she was not paid to be a decoy. The decoy is very youthful-looking and a very youthful-acting young lady. At the hearing, the decoy was very soft-spoken and appeared nervous. She was also observed fidgeting with her hands and in her chair. After considering the photograph depicted in Exhibit 5, the decoy’s overall appearance when she testified and the way she conducted herself at the hearing, a finding is made that the decoy displayed an overall appearance which could generally be expected of a person under twenty-one years of age under the actual circumstances presented to the seller at the time of the alleged offense.

We find nothing in appellants’ arguments to persuade this Board to substitute its judgment for that of the ALJ.

ORDER

The decision of the Department is affirmed.⁴

³ Appellants have not raised the fairness issue in this appeal.

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.

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

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.