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

AB-7983
File: 20-361020 Reg: 01052131

7-Eleven, INC., and M&N ENTERPRISES, INC., dba 7-Eleven Store # 2121-13642
2920 Adrian Street, San Diego, CA 92110,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: February 13, 2003
Los Angeles, CA

ISSUED APRIL 16, 2003

7-Eleven, Inc., and M&N Enterprises, Inc., doing business as 7-Eleven Store # 2121-13642 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days for appellants' clerk selling an alcoholic beverage to a minor decoy, in violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., and M&N Enterprises, Inc., appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and James S. Eicher, Jr., and the Department of Alcoholic Beverage Control, appearing through its counsel, Roxanne B. Paige.

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[1]The decision of the Department, dated May 16, 2002, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on December 29, 1999. Thereafter, the Department instituted an accusation against appellants charging that, on October 12, 2001, appellant's clerk, Jack Carpenter (the clerk), sold an alcoholic beverage (beer) to 18-year-old Joshua Pennington. Pennington was working as a minor decoy for the San Diego Police Department at the time of the sale.

An administrative hearing was held on April 5, 2002, at which time oral and documentary evidence was received. At that hearing, testimony concerning the sale was presented by San Diego police officer Corinne Hard and by Pennington (the decoy); Nancy Shearon, president of co-appellant M&N Enterprises, Inc., testified regarding employee training and store procedures.

Following the hearing, the Department issued its decision which determined that the charge of the accusation had been proven and no defense had been established.

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) Appellants were denied due process when the Administrative Law Judge (ALJ) denied their motion to disqualify himself and all other administrative law judges employed by the Department; (2) Rule 141(b)(5)[2] was violated; and (3) Rule 141(b)(2) was violated.

DISCUSSION

I

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

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[2]References to Rule 141 and its subdivisions are to section 141 of title 4 of the California Code of Regulations, and to the various subdivisions of that section.

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 a large number of recent cases in which licensees attempted to disqualify, on the basis of perceived bias, administrative law judges employed by the Department.[3] 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, §11400 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 employment with the Department being dependent on the Department's goodwill. Such an arrangement, apellants argue, violates due process.

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[3] In legislation enacted 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.)

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.
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> *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 appellant. The ALJ properly rejected appellants' motion to disqualify.

II

Appellants contend that the decoy's identification of the seller following the purchase of the beer was not in compliance with Rule 141(b)(5).[4] The violation occurred, appellants contend, when the officer contacted the clerk before the decoy made his identification. This situation, according to appellants, was disapproved by the Appeals Board in *Keller* (2002) AB-7848.

A writ of review was granted in *Keller* on November 27, 2002, and the case is pending on appeal.[5] In any event, because of factual differences between the two cases, we do not consider *Keller* controlling.

In *Keller*, the Appeals Board reversed the Department because the decoy made the face-to-face identification only after the police brought the clerk out from the store to the decoy, who had exited the store and not re-entered it.

In the present case, the decoy left the store after the sale, and was immediately brought back to the sales counter to make the identification. The same clerk who, moments before, had sold beer to the decoy, was completing a transaction with another customer. Out of courtesy, the officer and the decoy waited until that transaction was completed, and then the officer identified herself to the clerk and showed him her badge. She asked the clerk one or two questions, and then asked the decoy who had sold the beer to him. The decoy looked at the clerk, who stood about three feet away, facing the decoy, and said "That's him."

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[4] Rule 141(b)(5) (4 Cal. Code Regs., subd. (b)(5)) provides: "Following any completed sale, but not later than the time a citation, if any, is issued, the peace officer directing the decoy shall make a reasonable attempt to enter the licensed premises and have the minor decoy who purchased alcoholic beverages to make a face to face identification of the alleged seller of alcoholic beverages."

[5] Case No. D040790, Court of Appeal, Fourth Appellate District, Division One.

The facts of this case are significantly different from those in *Keller* and require a different result. Here, the decoy was brought back into the store to identify the seller, which he did, clearly and unequivocally.

The rule requires a police officer to make "a reasonable attempt to enter the premises" and "have the minor decoy . . . make a face to face identification." The rule imposes two separate duties on the officer – to attempt to reenter,[6] and to conduct a face-to-face identification. In this case, both duties were performed.

What occurred in the present case with regard to the face-to-face identification appears to be fairly standard practice in decoy operations, and this Board has long approved the practice. The fact that the officer first contacts the clerk and informs him or her of the sale to a minor has been used to show that the clerk was aware of being identified by the decoy. (See, e.g., *Southland & Anthony* (2000) AB-7292; *Southland & Meng* (2000) AB-7158a.)

In *Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board* (1998) 67 Cal.App.4th 575 [79 Cal.Rptr.2d 126], which appellants cite as authority for their position, the identification was made not by the decoy, but by the police officer who had witnessed the transaction.

In this case, the officer, with the decoy right next to her, identified herself to the clerk and asked the clerk how old she thought the decoy was, before asking the decoy to identify the clerk. However, this prior contact by the officer is not alleged to, and does not appear to have had any effect on the identification. As long as the decoy

[6] Although the rule uses the term "reenter," in many cases the officer has observed the transaction from outside the premises, so can only attempt to "enter." The Board has always considered this to comply with the rule.

makes a face-to-face identification of the seller, and there is no proof that the police misled the decoy into making a misidentification or that the identification was otherwise in error, we do not believe that the officer's contact with the clerk before the identification takes place causes the rule to be violated.

III

Appellants contend that, because of the decoy's "rather large stature" (5'8" and 190-200 pounds) and his "training and experience" (police cadet, no prior decoy operations), he "could not have displayed" the appearance generally to be expected of a person under the age of 21, as required by Rule 141(b)(2). They assert that the ALJ failed to make an adequate determination regarding the effect of the decoy's training and experience on his appearance.

The ALJ evaluated the decoy's appearance as follows (Finding II.D.):

> The overall appearance of the decoy including his demeanor, his poise, his size, his mannerisms, and his physical appearance were consistent with that of an eighteen year old and his appearance at the time of the hearing was substantially the same as his appearance on the day of the decoy operation except that he was perhaps ten pounds heavier at the time of the hearing.
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> 1. The decoy is a youthful and chubby looking male who has a baby face. He is five feet eight inches in height and he weighed between one hundred ninety and two hundred pounds on the date of the sale. On that date, he was clean shaven, his hair was short, he wore no jewelry and his clothing consisted of black pants and blue T-shirt.
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> 2. The decoy testified that he is a cadet with the San Diego Police Department, that he attended a cadet academy and that he had not participated in any prior operations.
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> 3. The photograph depicted in Exhibit 4 was taken inside the premises on the night of the sale and it depicts how the decoy appeared when he was

> at the premises. The two photographs depicted in Exhibit 5[7] were taken at the police station prior to going out on the decoy operation of October 21, 2001.
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> 4. The decoy was soft-spoken when he testified. Additionally, the decoy was observed to be fidgeting with his hands and he appeared nervous.
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> 5. After considering the photograph taken inside the premises (Exhibit 2), the decoy's overall appearance when he testified and the way he conducted himself 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.

The ALJ clearly considered the decoy's training and experience and found that they did not cause him to appear older than his actual age at the time he purchased the beer. Nothing indicates that the ALJ's determination in this regard was inadequate.

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. In the appeal of *Idrees* (2001) AB-7611, 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.
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> 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.

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[7] "The decoy is holding a black baseball cap in one of the photographs depicted in Exhibit 5. However, the decoy testified that he was not wearing the cap when he visited the premises."

Similarly, this Board has previously addressed appellants' contention that the decoy's experience necessarily made him appear to be over the age of 21. The Board rejected this type of contention in *Azzam* (2001) AB-7631:

> Nothing in Rule 141(b)(2) prohibits using an experienced decoy. A decoy's experience is not, by itself, relevant to a determination of the decoy's apparent age; it is only the *observable effect* of that experience that can be considered by the trier of fact. While extensive experience as a decoy or working in some other capacity for law enforcement (or any other employer, for that matter) may sometimes make a young person appear older because of his or her demeanor or mannerisms or poise, that is not always the case, and even where there is an observable effect, it will not manifest itself the same way in each instance. There is no justification for contending that the mere fact of the decoy's experience violates Rule 141(b)(2), without evidence that the experience actually resulted in the decoy displaying the appearance of a person 21 years old or older.

Appellants also cite the language from *Azzam*, *supra*, but only the first two sentences quoted above. They ignore the language after that which makes clear that there must be evidence presented that the decoy's experience actually made the decoy appear to be 21 years of age or older. The ALJ saw no evidence of this at the hearing and, although appellants assert that the evidence at the hearing contradicts the ALJ's finding, they have not pointed out the evidence to which they refer.

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 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.