

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

AB-7993

File: 20-214616 Reg.: 02052172

7-ELEVEN, INC., and ILYAS ALI KHAN, dba 7-Eleven # 2171-13954
2384 Arden Avenue, San Bernardino, CA 92404,
Licensees/Appellants

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 Ilyas Ali Khan, dba 7-Eleven # 2171-13954 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended appellants' license for 15 days for co-appellant Ilyas Ali Khan 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 Ilyas Ali Khan, 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 Paige.

¹The decision of the Department, dated June 6, 2002, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

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

Thereafter, the Department issued an accusation against appellants charging that on October 3, 2001, co-appellant Ilyas Ali Khan sold an alcoholic beverage to 19-year-old Enrique Jimenez, a police minor decoy.

During the hearing held on March 19 and April 24, 2002, documentary evidence and testimony concerning the transaction was presented. Prior to the testimony, appellants made a motion to disqualify the Administrative Law Judge (ALJ), which the ALJ denied. Subsequently, the Department issued its decision which determined that the charge of the accusation had been proven, and no defense had been established.

Appellants filed a timely appeal, contending that: 1) The Administrative Law Judge (ALJ) violated appellants' right to due process by failing to disqualify himself and all other ALJ's employed by the Department, and 2) Rule 141(a) 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 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.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, §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, 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

² 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.)

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

II

Appellants contend that the decision must be reversed because the Department did not demonstrate that the decoy operation was conducted fairly and the ALJ failed to make a finding that the decoy operation complied with the fairness requirement of Rule 141(a).

Appellants' contention is based on the testimony of appellants' witnesses that the decoy interrupted a transaction being conducted by Khan with two teenaged girls who

were at the counter when the decoy approached with the beer. Appellants assert that the evidence shows the decoy took advantage of the situation and Khan was not able to give his full attention to the decoy during his purchase of the beer.

The problem with appellant's contention is that the ALJ specifically rejected the testimony of appellants' witnesses on this point as not credible and gave greater weight to the testimony of the decoy and officer Valdivia.

The ALJ found as follows in Finding II, paragraphs B., C., and D.:

B. There is a conflict in the evidence as to what occurred after the decoy approached the counter with the beer. After evaluating the credibility of the witnesses pursuant to the factors set forth in Evidence Code Section 780, including their demeanor, their capacity to recollect and the existence or nonexistence of a bias or motive, greater weight was given to the testimony of Officer Valdivia and the testimony of the minor decoy than that of [appellant's] witnesses in resolving the conflict in the evidence. The fact that the testimony of Officer Valdivia and the testimony of the minor decoy were consistent in all material matters was an important factor in making this credibility evaluation. Furthermore, the clerk's testimony as to what occurred after the decoy approached the counter is found not to be credible.

C. When the decoy approached the sales counter, no one was in line. However, two girls were standing approximately three feet away from the counter talking and counting their change. The decoy placed the beer on the counter and he did not cut in front of the two girls as alleged by [appellants]. The male clerk who was on duty behind the counter and who was later identified as [co-appellant] Ilyas Ali Khan rang up the sale, took the money tendered by the decoy and gave him some change. After paying for the beer, the decoy exited the premises with the beer.

D. Officer Valdivia was already inside the premises when the decoy entered the store on October 3, 2001 and he witnessed the sale of the beer to the decoy. [Fn. omitted.]

It is the responsibility of the trier of fact to resolve credibility issues and conflicts in the evidence, and this Board will not interfere with such determinations unless they are shown to be clearly unreasonable. The ALJ here made reasonable determinations of credibility and resolved the conflicts reasonably.

The Department obviously satisfied the ALJ that the decoy operation was conducted in a fashion that promoted fairness as required by Rule 141(a). The ALJ's rejection of appellants' version of what happened also inherently rejects appellants' contention that the decoy operation was conducted unfairly. This being so, there was no need for the ALJ to make a more specific finding that the decoy operation complied with Rule 141(a).

ORDER

The decision of the Department is affirmed.³

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

³This 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.