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

AB-8031
File: 20-373115 Reg: 01051141

CHEVRON STATIONS, INC. dba Chevron
8001 Washington Boulevard, Roseville, CA 95678,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Michael B. Dorais

Appeals Board Hearing: June 12, 2003
San Francisco, CA

ISSUED AUGUST 28, 2003

Chevron Stations, Inc., doing business as Chevron (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days for its clerk having sold a six-pack of Budweiser beer to an eighteen-year-old minor, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Chevron Stations, Inc., appearing through its counsel, Ralph Barat Saltsman , Steven Warren Solomon, and James S. Eicher, Jr., and the Department of Alcoholic Beverage Control, appearing through its counsel, Robert Wieworka.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on March 5, 2001. An accusation charging a violation of Business and Professions Code section 25658,

[1]The decision of the Department, dated September 19, 2002, is set forth in the appendix.

subdivision (a), was filed on July 20, 2001. The accusation charged that Fabricio S. Granados, an agent, employee or servant of appellant, sold beer to Michael Goin, who was approximately 18 years of age at the time of the transaction.

An administrative hearing was held on August 22, 2002, at which time oral and documentary evidence was received. At that hearing, the Department presented the testimony of Michael Goin and Edward Rosenbrook. Goin was acting as a police decoy when he purchased the beer; Rosenbrook was a Roseville police officer who witnessed the transaction. Goin and Rosenbrook described the purchase transaction and the process of identifying the clerk after the sale took place. Elsa Abonasser, an area trainer of new employees for Chevron, and one-time manager of the store in question, testified on behalf of appellant, and described the training the clerk had undergone.

At the commencement of the hearing, Administrative Law Judge Dorais denied a motion by appellant seeking the disqualification of all administrative law judges employed by the Department. Subsequent to the hearing, the Department issued its decision which determined that the unlawful sale alleged in the accusation had been proven, and appellant had failed to establish any affirmative defense.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) there was no compliance with Rule 141(b)(2), and (2) the denial of its motion to disqualify all administrative law judges employed by the Department deprived appellant of due process.

DISCUSSION

I

Appellant contends that decoy Goin did not present the appearance required by

Rule 141(b)(2), i.e., that he did not 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. The failure to comply with this rule gives rise to an affirmative defense to the charge of the accusation. Appellant has the burden of proof on this issue.

Appellant points to the decoy's size (5' 11" to 6' tall, 165-170 pounds), his experience as a Police Explorer supervisor, holding the rank of sergeant, and his employment in asset protection, which involved investigating employees involved in theft and making shoplifting arrests. Appellant argues that the decoy's added experience with law enforcement personnel would reduce any fear and apprehension that might otherwise occur, and this, combined with his size, could lead one to believe he was over the age of 21.

Without the Board even having had the benefit of seeing the decoy, appellant asks it to reject the careful consideration given to this issue by the ALJ and instead accept the partisan assessment of the decoy's apparent age simply on appellant's say-so. We respectfully decline to do so.

The ALJ, the primary trier of fact, considered all of the factors relied upon by appellant and reached an opposite result (Finding of Fact IV and Determination of Issues II-A):

> On May 22, 2001, Michael Goin was five feet eleven inches tall and weighed about 165 pounds. He wore blue jeans and a black short-sleeve shirt. He did not wear any jewelry and had shaved that morning.
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> At the hearing, the decoy testified that he weighed 185 pounds and was now six feet one inch tall. He testified in a calm manner and was forthright when he was unable to remember specific information.
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> On May 22, 2001, the decoy was an Explorer Scout, a volunteer organization

with the Roseville Police Department, where he has received training. He is employed as an asset protector by a retailer. In this work, he acts as a shopper to detect thieves.

Goin began his work as a police decoy in May, 2001. He visited fourteen licensed premises on May 22, 2001, as part of the decoy operation. He was able to purchase alcohol at three or four locations.

After observing the decoy's overall appearance, including his demeanor and taking into consideration all of the evidence surrounding his appearance on May 22, 2001, it is found that the minor decoy displayed the appearance of a person who could generally be expected to be under the age of 21 years when the sale of beer was made to him on May 22, 2001. At the hearing the minor was somewhat bigger than he was fifteen months earlier, but he looked and acted his age.

...

Pursuant to Findings of Fact No. IV, the decoy in this case displayed the appearance, both physical and otherwise, which could generally be expected of a person under the age of 21 years at both the administrative hearing and at the time of the alleged offense. Respondent has failed to establish any violation of Rule 141(b)(2).

This Board does not sit as a trier of fact. The scope of its review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. The Appeals Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing.[2]

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[2]The California Constitution, article XX, section 22; Business and Professions Code sections 23084 and 23085; and *Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

We have reviewed the record, and we are satisfied that there is substantial evidence to support the findings.

II

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.

The Appeals Board has rejected this argument in other cases in which licensees attempted to disqualify, on the basis of perceived bias, ALJ's 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, 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.)

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[3]Business and Professions Code section 24210, effective January 1, 1995, authorized the Department to delegate the power to hear and decide to an ALJ appointed by the Director. Hearings before any judge so appointed are pursuant to the procedures, rules, and limitations prescribed in Chapter 5 (commencing with section 11500) of the Administrative Procedure Act (Gov. Code, § 11340 et seq.).

Appellant also contends 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, appellant argues, 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.
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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 appellant's motion to disqualify.

ORDER

The decision of the Department is affirmed.[4]

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
KAREN GETMAN, 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.