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

AB-7789

File: 21-307743 Reg: 00049824

THE VONS COMPANIES, INC. dba Vons
3550 Murphy Canyon Road, San Diego, CA 92123,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: December 6, 2001
Los Angeles, CA

ISSUED JANUARY 29, 2002

The Vons Companies, Inc., doing business as Vons (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for fifteen days for its clerk having sold an alcoholic beverage to a minor, contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code §25658, subdivision (a).

Appearances on appeal include appellant The Vons Companies, Inc., appearing through its counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon Logan.

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[1]The decision of the Department, dated March 22, 2001, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on August 21, 1995. Thereafter, the Department instituted an accusation against appellant charging that Paul E. Wadman, an employee, sold an alcoholic beverage (beer) to David West, an 18-year-old minor. Although not stated in the accusation, West was acting as a decoy for the San Diego Police Department

An administrative hearing was held on February 2, 2001. At that hearing, West (hereinafter "the decoy"), called as a witness by the Department, described the circumstances surrounding his purchase of a six-pack of Coronitas beer[2] while participating in a police decoy operation. Appellant, in turn, presented the testimony of San Diego police officer Larry Darwent, the officer who accompanied the decoy in the operation.

Subsequent to the hearing, the Department issued its decision which determined that the sale to the decoy violated §25658, subdivision (a), of the Business and Professions Code, and ordered a 15-day suspension.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant contends there was no compliance with Rule 141(b)(2) and (b)(5).

DISCUSSION

Appellant contends there was no compliance with the provisions of Rule 141 relating to the appearance of the decoy (Rule 141(b)(2)) and the requirement that the decoy make a face-to-face identification of the decoy (Rule 141(b)(5)). Appellant

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[2] Coronitas beer appears to be Corona beer packaged in 7-ounce bottles.

asserts the Administrative Law Judge (ALJ) erred in relying on the "non-credible" testimony of the decoy concerning the face-to-face identification, and in concluding that the decoy, despite his extensive experience in decoy operations, displayed an appearance which could generally be expected of a person under 21 years of age, as required by the rule.

The scope of the Appeals Board's 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.[3]

The Department is authorized by the California Constitution to exercise its discretion whether to deny, suspend, or revoke an alcoholic beverage license, if the Department shall reasonably determine for "good cause" that the granting or the continuance of such license would be contrary to public welfare or morals.

It is not the function of the Appeals Board to try a case de novo. If the Department has correctly construed and applied the law, and there is substantial evidence in support of the decision, the Board's duty is to affirm the Department, even

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

if, had the Board been the trier of fact, it might have reached a contrary result.

When the Department intensified its decoy program several years back, and the Legislature enacted the "three strike" legislation embodied in Business and Professions Code §25658.1, prominent attorneys for the industry recommended that appeals be taken in every case. The view was expressed that the consequences of a strike had reached a level of significance that no Department sale-to-minor decision should go unchallenged. As a consequence, the Appeals Board has seen its case load virtually double, and the number of frivolous or near-frivolous appeals multiply many fold. This appeal is one such example.

At the hearing itself, appellant's counsel focused his attack on the decoy's experience as a decoy, and, in his closing arguments to the ALJ, did not question the sufficiency of the decoy's testimony regarding the circumstances of the face-to-face identification. Now, however, appellant contends (App.Br., at page 1) that the ALJ should not have relied upon the decoy's testimony, because the decoy "had almost no independent recollection of the decoy operation and ... could not remember rudimentary facts surrounding his purported face-to-face identification."

Appellant would have us believe that these "rudimentary facts" included such matters as the time of night of the sale; whether the beer was on a conveyor belt or a "plain old check out stand;" how many of around 10 registers were open; whether the decoy stood in an "express" lane or a standard check-out lane; whether he had to wait in line; whether there was anyone in line behind him; what the clerk was doing when he was identified as the seller; and what other customers may have been doing.

We would prefer to consider as more important the things the decoy did recall

with particularity, such as whether he was asked for identification (he was); that the clerk looked at the identification (which showed that the decoy was only 18); that there was only one employee at the check-out counter (the clerk who sold the beer); that he was only five feet from the clerk when he identified him; that he was photographed with the clerk; and that he was present when the citation was written.

It is apparent that appellant's tactic at the hearing was to ask the decoy about trivial or extraneous matters, with the hope of blunting the damaging impact of his direct testimony, which we (and the ALJ) found persuasive and amply sufficient to support the charge.

In his closing argument at the administrative hearing, appellant's attorney did not question the sufficiency of the decoy's testimony, nor did he suggest it lacked credibility. Instead, he limited his argument to what he defined as "the issue," whether the decoy, who had been in as many as eight decoy operations, could display the appearance of a person under the age of 21.

The ALJ had no difficulty in concluding that he could. Perhaps the decoy's age (eighteen), his slender stature (six feet, 135 pounds), and the manner in which he conducted himself at the hearing were enough, in the ALJ's mind, to offset any inner confidence or suggestion of maturity the decoy may have acquired from his experience as a decoy and a police explorer. But it is not this Board's role to speculate. We do not see the decoy. The ALJ, on the other hand, observes the decoy as he testifies, and, as the trier of fact, has the duty to assess the decoy's appearance, mannerisms, demeanor, and other indicia of age. When, as here, he has made that assessment, it is not this Board's prerogative to substitute its own judgment, one necessarily based upon a cold record.

We are satisfied that the ALJ complied in all respects with the obligations imposed upon him by Rule 141.

ORDER

The decision of the Department is affirmed.[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.