

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

AB-9448

File: 21-194360 Reg: 13079208

THE VONS COMPANIES, INC., dba Vons 3237
9467-79 West Olympic Boulevard, Beverly Hills, CA 90212,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: March 5, 2015
Los Angeles, CA

ISSUED MARCH 24, 2015

The Vons Companies, Inc., doing business as Vons 3237 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ conditionally revoking its license because appellant's clerk sold an alcoholic beverage to a minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances include appellant The Vons Companies, Inc., through its counsel, Beth Aboulafia and Rebecca Stamey-White of the law firm Hinman and Carmichael LLP, and the Department of Alcoholic Beverage Control, through its counsel, Jennifer M. Casey.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on March 2, 1987. On

¹The decision of the Department, dated May 9, 2014, is set forth in the appendix.

September 10, 2013, the Department filed an accusation against appellant charging that, on March 7, 2013, appellant's clerk, Jonathan Stapleton (the clerk), sold an alcoholic beverage to seventeen-year-old Marco W. Although not noted in the accusation, Marco was working as a minor decoy in a joint operation between the Beverly Hills Police Department and the Department of Alcoholic Beverage Control at the time.

The bifurcated administrative hearing was held on December 3, 2013 and March 27, 2014. During the hearing, documentary evidence was received and testimony concerning the violation charged was presented by Marco (the decoy); by Eduardo O., a second minor decoy who entered appellant's premises with Marco on March 7, 2013; and by Andrea Florentinus, a Department agent. In addition, appellant presented testimony of its clerk, and of Joseph Morchy, its loss prevention investigator.

Testimony established that on the date of the operation, Agent Florentinus entered the licensed premises, followed shortly by the decoy and Eduardo. The decoy and Eduardo proceeded to the beer section. The decoy selected a three-pack of Coors Light beer in cans, and he and Eduardo walked to the check-out stand and stood in line. When it was the decoy's turn to be served, he placed the beer on the conveyor belt. The clerk asked the decoy for identification, and the decoy handed the clerk his California driver's license. The license listed the decoy's correct date of birth, 5/19/1995, and contained a red stripe indicating "AGE 21 IN 2016 PROVISIONAL UNTIL AGE 18 IN 2013." The clerk looked at the license for a few seconds and asked the decoy for the year in which he was born. The decoy responded that he was born in 1995, and the clerk returned the license to the decoy, stated the price, took ten dollars

tendered by the decoy, provided the decoy with some change, and bagged the beer.

Eduardo was standing within approximately two feet of the decoy during the sale, and Eduardo neither handled nor paid for the beer. The clerk did not ask Eduardo for identification. After the sale, the decoy and Eduardo exited the premises and made contact with officers.

Following the hearing, the Department issued its decision that the violation charged was proved and no defense was established. Because this was appellant's third violation of section 25658(a) within 36 months, counsel for the Department recommended a penalty of revocation, conditionally stayed for one year, and 40 days' suspension. In light of appellant's mitigating evidence, however, the administrative law judge (ALJ) proposed, and the Department adopted, a stayed revocation with 30 days' suspension.

Appellant filed a timely appeal raising the following issues: (1) the Department did not proceed in a manner that promotes fairness, in violation of rule 141(a);² and (2) the decision of the Department is not supported by substantial evidence. These issues will be discussed together.

DISCUSSION

Appellant contends the minor decoy operation was not conducted in a fashion that promotes *fairness* because Eduardo's presence distracted the clerk from accurately verifying Marco's identification and age. (See App.Br. at p. 5.)

Rule 141(a) requires "fairness" in the use of minor decoys:

²References 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.

A law enforcement agency may only use a person under the age of 21 years to attempt to purchase alcoholic beverages to apprehend licensees, or employees or agents of licensees who sell alcoholic beverages to minors . . . and to reduce sales of alcoholic beverages to minors in a fashion that *promotes fairness*.

The requirements of rule 141 must be strictly obeyed: "The Department's increasing reliance on decoys demands strict adherence to the rules adopted for the protection for the licensees, the public, and the decoys themselves." (*Acapulco Restaurants, Inc. v. Alcoholic Bev. Control Appeals Bd.* (1998) 67 Cal.App.4th 575, 581 [79 Cal.Rptr.2d 126].) However, rule 141(a) provides an affirmative defense, and the burden is on the appellant to show non-compliance. (*Chevron Stations, Inc.* (2015) AB-9445; *7-Eleven, Inc./Lo* (2006) AB-8384.)

Subsection (b)(5) of rule 141 expresses "minimum standards" that inform the meaning of "fairness" in the conduct of a minor decoy operation.³ Appellant concedes that all but one of these criteria were met here. The one arguably not satisfied, according to appellant, is the first because the decision "fails to address the argument that . . . [the decoy] appeared over the age of twenty-one under the actual conditions as presented to the seller, which was in comparison to Eduardo, not as he may have

³Those standards include: (1) At the time of the operation, the decoy shall be less than 20 years of age; (2) The 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; (3) A decoy shall either carry his or her own identification showing the decoy's correct date of birth or shall carry no identification; a decoy who carries identification shall present it upon request to any seller of alcoholic beverages; (4) A decoy shall answer truthfully any questions about his or her age; (5) 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 make a face to face identification of the alleged seller of the alcoholic beverages.

appeared alone during an operation or at the hearing." (App.Br. at pp. 8-9.) This argument is unpersuasive.

As provided by rule 141(b)(2), the critical inquiry in cases such as this is the appearance of the *decoy*, not of other persons. On this subject, the ALJ found as follows:

F. The decoy's overall appearance including his demeanor, his poise, his mannerisms, his maturity, his size and his physical appearance were consistent with that of a person under the age of twenty-one and his appearance at the time of the hearing was similar to his appearance on the day of the decoy operation except that he was approximately fifteen pounds lighter on the day of the hearing.

1. The decoy is a youthful looking male who has a very young looking face. On the day of the sale, the decoy was six feet one inch in height, he weighed slightly less than two hundred pounds, he was clean-shaven, his hair was fairly short and his clothing consisted of dark shorts, a brown T-shirt, a tan jacket and skate shoes. The photograph depicted in Exhibit 5 was taken at the premises and the photographs depicted in Exhibits 6 and 7 were taken prior to going out on the decoy operation. All three of these photographs depict what the decoy looked like and what he was wearing when he was at the premises.

2. The decoy had not participated in any prior decoy operations. However, he had served as an Explorer with the Beverly Hills Police Department for about twelve months. As an Explorer, he volunteered at City events and he also went on some ride-alongs with the police.

3. The evidence established that the decoy went to five locations on March 7, 2013 and that he was able to purchase an alcoholic beverage at two locations.

4. There was nothing remarkable about the decoy's nonphysical appearance and there was nothing about his speech, his mannerisms or his demeanor that him appear older than his actual age.

5. After considering the photographs depicted in Exhibits 5, 6 and 7, 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.

(Findings of Fact ¶¶ F.1-5.) Appellant has cited no authority to support its contention that the ALJ was obligated to include findings contrasting the decoy's appearance with that of Eduardo, and the Board is aware of none. Indeed, because the record reflects that the clerk was unaware whether Eduardo and the decoy were even together (see RT, Vol. II at p. 21), it defies reason to impose upon an ALJ the obligation to make findings contrasting the decoy's appearance with that of a second, potentially unrelated minor who in no way participated in the transaction. Appellant's argument is therefore rejected.

Besides the express "minimum standards" for "fairness" provided by rule 141(b), decisions by this Board and courts have limned it to further flesh out the meaning of "fairness" and its opposite, "unfairness," in a variety of circumstances where the operation of minor sting operations is challenged on the ground they failed to comply with the rule's mandate that they "promote fairness." For example, in *7-Eleven, Inc./Mousavi* (2002) AB-7833, this Board concluded that an unsuccessful attempt by a second decoy to purchase an alcoholic beverage, after another decoy had successfully done so, transgressed the requirement of Rule 141 that a decoy operation be conducted "in a manner which promotes fairness." The Board was influenced by two primary considerations: (1) the premises in that case was the only one of those visited during the decoy operation which was subjected to multiple purchase attempts; and (2) had both been successful, the clerk and the licensee could each have been charged with two violations, exposing the licensee to possible revocation in the event of a third violation. In reversing the decision of the Department which had found a violation of

section 25658, subdivision (a), the Board concluded that “it is how the decoy operation is conducted, not its result, that must be judged in determining fairness.”⁴ Here, however, it is undisputed that the second decoy did not attempt to purchase any alcohol, an important fact distinguishing this case from the multiple decoy operation described in *Mousavi*. (See also *The Lost Isle Partners, LP* (2004) AB-8127, at p. 5 [“The evidence does not establish with any certainty that any decoy other than Romero sought to make a purchase.”].)

Appellant is correct that “the real question to be asked when more than a single decoy is used is whether the second decoy engaged in some activity intended or having the effect of distracting or otherwise impairing the ability of the clerk to comply with the law.” (*7-Eleven, Inc./Janizeh Corp.* (2002) AB-7790 at p. 4.) To support its argument that the presence of Eduardo rendered the decoy operation unfair, appellant principally relies on two previous decisions of this Board, *Hurtado* (2000) AB-7246 and *7-Eleven, Inc./Smith* (2001) AB-7740; but these cases are readily distinguishable from the instant case on their facts.

In *Hurtado*, a 27-year old, plain-clothed police officer sat at a table with the decoy in a bar, and each ordered a beer. (AB-7246 at pp. 2-3.) The Board reversed

⁴As noted in *Mousavi*, “[u]nfairness has generally been found where the
(continued . . .)

⁴(. . . continued)
presence of the second decoy was obviously distracting or created the impression that the purchasing decoy was old enough to purchase the alcoholic beverage. The presence of two decoys, by itself, has not been enough to find a decoy operation unfair.”

the Department's decision, finding "the officer's active participation in the decoy operation to be highly likely to affect how the decoy appeared and to mislead the seller." (*Id.* at p. 5.) Similarly, in *Smith*, the second decoy's appearance as a person under the age

of 21 was in serious doubt, and her actions at the sales counter,⁵ coupled with instructions given to the decoys by the Department, were found to have created the potential for distraction. (AB-7740 at pp. 3-4.) Thus, the Board found the operation was not conducted in a fashion that promotes fairness and reversed the Department's decision. (*Id.* at p. 5.)

In both *Hurtado* and *Smith*, the decoys' respective companions were, or at least appeared to be, of the appropriate age to purchase alcoholic beverages, and actively participated in the minor decoy operation. Neither circumstance is present in this case.

First, according to the clerk's own testimony, unlike the additional persons present during the respective operations in *Hurtado* and *Smith*, Eduardo did not look older than 21, but instead came across as 18 or 19 years old. (RT, Vol. II at pp. 21-22.) Appellant argues that Eduardo's youthful appearance, coupled with the fact that he changed position relative to the decoy prior to the transaction, made the decoy appear older by contrast because of the decoy's apparent calmness, confidence, height, and

⁵The second decoy, Hernandez, accompanied the decoy to the sales counter and stood next to the decoy while he purchased the beer. (See *Smith, supra*, at pp. 2-3.) The decoy paid for the beer, but the purchase also included chips and sunflower seeds, the latter having been brought to the counter by Hernandez. (*Id.* at p. 3.) Also, Hernandez might have engaged in conversation with the decoy while the transaction was taking place. (*Ibid.*)

physical build. (App.Br. at p. 7, citing RT, Vol. II at pp. 20-21.) The Board is not convinced. If anything, the presence of a second teenager whose apparent age is well under the legal age to purchase alcoholic beverages would make a diligent clerk examine the identification of the purchaser more carefully — particularly when the purchaser himself is found to have displayed an overall appearance which could generally be expected of a person under twenty-one years of age. (See Findings of Fact II.F.1-5.) Notably, the clerk did not at first think Eduardo and the decoy were together.⁶ For the clerk to have formulated an opinion concerning the decoy's apparent age by comparing his appearance to that of a sixteen-year-old who, as far as the clerk knew, was unknown and unrelated to the decoy, is not only bizarre, but indicates a problem in the clerk's reasoning, not a deficiency in the "fairness" of the decoy operation.

Second, the record does not support appellant's contention that Eduardo's participation in the operation was "active." Eduardo neither handled nor paid for the beer, and he engaged neither the clerk nor the decoy in conversation during the

⁶ [MS. STAMEY-WHITE:]

Q. Did you think these customers were together?

A. No, I did not.

Q. Were they talking to each other?

A. They did not at all.

Q. Did they look at each other?

A. No, they did not.

(RT, Vol. II at p. 22.)

transaction. (See RT, Vol. I at pp. 16-19; Vol. II at pp. 21-22.) Additionally, the clerk did not see Eduardo hand the decoy any money. (RT, Vol. II at p. 26.) While "active participation" may be a subjective standard, *no participation* is not *active participation*, and Eduardo's mere presence near the checkout stand — regardless of whether he moved from Marco's side to behind him — when the transaction occurred, without more, simply is not enough to create unfairness. (*Janizeh Corp.*, *supra*, at pp. 4-5 [the presence of a second decoy whose physical appearance was not at issue, and who simply stood silent at the sales counter was not sufficient involvement in the transaction to create unfairness]; *CEC Entertainment, Inc.* (2004) AB-8189 at p. 3 ["the mere fact that a second decoy accompanied the decoy who made the purchase is not, in and of itself, enough to persuade use that the decoy operation was unfair."].)

Third, appellant's claim that the clerk was somehow distracted by Eduardo's presence, thereby precluding him from making an accurate assessment of the decoy's age, rings hollow because it ignores that the clerk had definitive proof of the decoy's age: (1) the decoy's California driver's license — which the clerk viewed for a few seconds — listing the decoy's true date of birth and indicating "AGE 21 IN 2016 PROVISIONAL UNTIL AGE 18 IN 2013;" (2) that the clerk asked the decoy in what year he was born, to which the decoy responded with his true birth year of 1995 (RT, Vol. I at pp. 16-19, 47-49); and (3) that, to finalize the transaction, the clerk had to clear the prompt on the register, which would have alerted him that the decoy was underage. (RT, Vol. II at pp. 28-29.)

Finally, according to Agent Florentinus' testimony, which the ALJ found credible, the clerk informed her on the night of the operation that he knew from the decoy's

driver's license and answer to his question that the decoy was born in 1995:

[MS. CASEY:]

Q. And when you spoke to [the clerk], what did you tell him?

A. I advised him that he sold alcohol to someone under the age of 21 approximately a few minutes ago.

Q. And did [the clerk] say anything in response?

A. Yes. He told me that he looked at the I.D. and he read 1995 on the I.D.

Q. That he read 1995 on the I.D.?

A. Yes.

Q. And what did you say in response?

A. He also said that he asked the decoy what year he was born and the decoy said 1995.

Q. And when [the clerk] said that he asked the decoy what year he was born and that he said he was born in 1995, did you say anything in response?

A. Yes. I asked him, "How old would you be if you were born in 1995?"

Q. An what did [the clerk] do?

A. He thought about it for five seconds and then said, "Oh, yeah. I messed up."

(RT, Vol. I at pp. 21-22.)

The record reflects that the clerk knew or, based on information provided him before the sale, should have known of the decoy's true age, but nevertheless proceeded to sell him alcohol. This is not an instance where a third party's active participation in a minor's attempt to purchase alcoholic beverages resulted in the

deception of an otherwise diligent seller. Instead the facts demonstrate licensee inattentiveness or irresponsibility, not unfair conduct by the Department in the decoy operation..

Appellant also claims the Department's decision is not supported by substantial evidence. When an appellant contends that a Department decision is not supported by substantial evidence, the Appeals Board's review of the decision is limited to determining, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. (Bus. & Prof. Code § 23084; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113].) In making this determination, the Board may not exercise its independent judgment on the effect or weight of the evidence, but must resolve any evidentiary conflicts in favor of the Department's decision and accept all reasonable inferences that support the Department's findings. (*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Masani)* (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826]; *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734].) "Substantial evidence" is relevant evidence which reasonable minds would accept as reasonable support for a conclusion. (*Universal Camera Corp. v. Labor Bd.* (1951) 340 U.S. 474, 477 [71 S.Ct. 456]; *Toyota Motor Sales U.S.A., Inc. v. Superior Ct.* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].)

Appellant argues that the decision "fails to address the weight of the evidence that Eduardo's presence was a very active part of the operation as observed by Stapleton." (App.Br. at p. 8.) On this point, the ALJ found as follows:

J. The arguments that the second decoy, Eduardo O, distracted the clerk and that the decoy operation was carried out in an unfair manner are rejected. The evidence established that Eduardo O was only sixteen years old on the date of the sale, that Eduardo simply stood near the decoy and that he did not take part in the sales transaction. Even Stapleton stated that he did not know whether Eduardo O was with the decoy, that he did not see Eduardo O give any money to the decoy, that he did not ask Eduardo O for identification and that he did not ask Eduardo O what year he was born in.

(Findings of Fact ¶ J.)

We fail to see what more the ALJ needed to include in his decision explaining why he rejected appellant's argument that Eduardo actively participated in the operation. Appellant relies exclusively on the clerk's testimony that he did not know what to think of Eduardo (App.Br. at p. 9, citing RT, Vol. II. at pp. 22-23), and claims that it proves that the operation was conducted unfairly. Appellant fails to note, however, that the ALJ found said testimony to be less than credible in at least one aspect:

H. Although Respondent's clerk, Jonathan Stapleton, testified that he believes that the decoy stated he was born in 1993, *Stapleton's testimony in this regard is not credible*. First of all, the decoy credibly testified that he stated he was born in 1995 when the clerk asked for the year in which he was born. Secondly, Agent Florentinus credibly testified that she witnessed the sales transaction and that the decoy replied that he was born in 1995 when the clerk asked him what year he was born in. Furthermore, Stapleton told Florentinus shortly after the sale had taken place, that he had asked the decoy for identification, that the identification gave a date of birth of 1995 and that the decoy stated that he was born in 1995. When Florentinus then asked Stapleton how old a person would be if he was born in 1995, Stapleton thought about it and then stated that he had messed up.

(Findings of Fact ¶ H, emphasis added.) It was perfectly within the ALJ's discretion to apply whatever weight he deemed appropriate to the various witnesses' testimony, particularly because it was his province, as the trier of fact, to ascertain credibility.

(*Lorimore v. State Personnel Bd.* (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640]; *Brice v. Dept. of Alcoholic Bev. Control* (1957) 153 Cal.2d 315 [314 P.2d 807].) Contrary to appellant's contention, its mere disagreement with the ALJ's assessment that the evidence supports the decision does not render the evidence insubstantial.

Finally, appellant contends that the Department failed to rebut evidence that Eduardo's presence made the decoy appear older by contrast and distracted the clerk. (App.Cl.Br. at p. 5.) This argument is likewise without merit. The physical appearance of a minor who did not participate in the transaction, and who the clerk did not even initially think was with the decoy, has no reasonable relation to a clerk's assessment of the decoy's apparent age. The Department should not be required to prove a negative, which in essence is what appellant seeks to achieve by its argument. There is ample evidence the clerk was aware that the purchasing decoy was born in 1995, regardless of the alleged "distraction" created by Eduardo. (See RT, Vol. I at pp. 21-22.) There was no need for the Department to have specifically labeled it as "rebutting" because its character speaks for itself in countering appellant's argument.

The ALJ's proposed decision shows he considered the evidence in its entirety, and found appellant's argument unconvincing. Appellant is asking this Board to now reweigh the evidence by considering the same set of facts and reaching the opposite conclusion as the ALJ, despite substantial evidence to support his findings. The Board has repeatedly rejected similar invitations in the past, and does so here for the aforementioned reasons.

ORDER

The decision of the Department is affirmed.⁷

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
PETER J. RODDY, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁷This final decision 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 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.