

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

THE VONS COMPANIES, INC. dba Von's
350 West El Norte Parkway, Escondido, CA 92026,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent
AB-7568

File: 21-160424 Reg: 99046843

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: December 12, 2000
Los Angeles, CA

ISSUED MARCH 26, 2001

The Vons Companies, Inc., doing business as Von's (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 25 days for appellant's clerk selling an alcoholic beverage to a person under the age of 21, being 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, J. Daniel Davis, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

¹The decision of the Department, dated December 23, 1999, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on November 29, 1984.

Thereafter, the Department instituted an accusation against appellant charging that appellant's clerk had sold an alcoholic beverage (beer) to a minor on January 22, 1999. The minor was acting as a police decoy at the time.

An administrative hearing was held on November 3, 2000, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Richard Callister, an Escondido police officer, Jamie Lenos, the minor decoy ("the decoy"); and Joan Nettlehorst, assistant manager of the premises involved.

Subsequent to the hearing, the Department issued its decision which determined that the violation alleged in the accusation had been established.

Appellant thereafter filed a timely appeal in which it contends that the decoy operation did not comply with Rule 141(b)(2) (4 Cal. Code Regs. §141, subd. (b)(2)).

DISCUSSION

Appellant contends that the decoy operation violated Rule 141(b)(2) because "the decoy had already made approximately 240 prior attempts in three years to purchase alcoholic beverages as a Department decoy"² and, therefore, "could not and did not display the appearance and demeanor which could generally be expected of a person under 21 years of age" (App. Opening Br. at 3.)

The Administrative Law Judge (ALJ) made the following finding of fact (Finding II) regarding the decoy's appearance:

² The decoy was not working for the Department, but for the Escondido Police Department.

"D. The decoy is youthful looking and her appearance at the time of her testimony was essentially the same as her appearance at the time of the sale. A photograph of the decoy (Exhibit 2) was taken on January 22, 1999, at the police station before going out that night and it accurately depicts the decoy's appearance when she entered the premises on that date.

"E. Even though the decoy had participated in several decoy operations prior to January 22, 1999, a finding is made that the decoy displayed the appearance and demeanor 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.

"F. It was not established that the manner in which the decoy operation was conducted rendered it 'unfair' or that there was a violation of Rule 141 of Chapter 1, Title 4, California Code of Regulations."

Appellant appears to be arguing that any young person who had participated in as many decoy operations as had this decoy could not, *per se*, present the appearance that is generally to be expected of a person under the age of 21. Common sense tells us that a young person who has attempted to buy alcoholic beverages as many times as this decoy did will undoubtedly not be as nervous about an attempt as a young person who has never, or rarely, attempted to purchase alcoholic beverages. However, common sense also tells us that lack of nervousness when attempting to purchase alcoholic beverages is not the only indication of age to be evaluated before one sells an alcoholic beverage to a person.

While the appearance of a decoy comprises more than just physical appearance, the decoy's physical appearance is an important indicia of age. It would be sheer foolishness, at the least, for a clerk to ignore the physical appearance of a purchaser, simply because the purchaser was not nervous.

Appellant's argument, carried to its logical conclusion, is that a seller may ignore *all other indicia of age* if the purchaser is not nervous. This comports with neither the law nor common sense.

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 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, as required by Rule 141. In the present case, the ALJ understood the requirements of Rule 141(b)(2) and applied them appropriately in evaluating the decoy's appearance.

The ALJ made an express finding that "the decoy displayed the appearance and demeanor which could generally be expected of a person under 21 years of age" We have only appellant's assessment and a photograph of the decoy upon which to base a judgment as to her appearance. Under such circumstances, this Board is not in a position to substitute its judgment for that of the trier of fact. We agree with the ALJ's finding that appellant has not established that there was a violation of Rule 141.

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 §23088, and shall become effective 30 days following the date of the filing of this order as provided by §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 §23090 et seq.