

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

AB-7788

File: 21-309476 Reg: 00048713

THE VONS COMPANY, INC. dba Vons #71
2250 Otay Lakes Road, Chula Vista, CA 91915,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: November 1, 2001
Los Angeles, CA

ISSUED DECEMBER 28, 2001

The Vons Company, Inc., doing business as Vons #71 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 20 days for its clerk, Andrea Lagler (“the clerk”), having sold an alcoholic beverage (a six-pack of Bud Light beer) to Melinda Joy Blakley-Bowen (“the decoy”), a minor decoy working with the Chula Vista Police Department, in violation of Business and Professions Code §25658, subdivision (a).

Appearances on appeal include appellant The Vons Company, Inc., appearing through its counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

¹The decision of the Department made pursuant to Government Code §11517, subdivision (c), dated March 19, 2001, is set forth in the appendix, together with the proposed decision submitted by the Administrative Law Judge.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on January 24, 1996. On April 19, 2000, the Department instituted an accusation against appellant charging the sale of an alcoholic beverage to a minor. An administrative hearing was held on August 1, 2000, following which the Department, after rejecting the proposed decision of Administrative Law Judge (ALJ) John P. McCarthy, issued its decision pursuant to Government Code §11517, subdivision (c), sustaining the charge of the accusation and ordering the suspension from which this timely appeal has been taken.

Appellant raises the following issues: (1) the decoy operation was conducted in a fashion which did not promote fairness; and (2) the decoy did not display the appearance required by Rule 141(b)(2).

DISCUSSION

I

Appellant contends that the decoy operation was conducted unfairly, because (a) it was conducted at one of the busiest times in the operation of the supermarket, and (b) the decoy used the express-lane register, the busiest lane in the store.

There is substantial testimony in the record to the effect that, when the decoy made her purchase, the store was quite busy. The clerk had started work at 4:00 p.m., and had moved to the express lane approximately 15 to 20 minutes before the sale to the decoy. She testified there was a continuous flow of customers, with as many as six in the line to the register.

The decoy and a Department investigator each testified that there were one or two customers in line ahead of the decoy. Neither was asked how many were behind her.

The decoy testified that the clerk asked for her identification, looked at it, looked at the register display, and then handed it back to her. After ringing up the sale, the clerk again asked for identification, again examined it and again looked at the register display, and then accepted payment for the beer.

The clerk testified that the register is equipped with a feature which signals when an alcoholic beverage has been scanned, and displays a date (referred to in the Department decision as a "hurdle date") on or before which the purchaser must have been born. She testified that when she scanned the beer and the register signaled the sale of an alcoholic beverage,

"I pressed clear, and I didn't look at the date or anything. Then, when I looked at her, I said 'Oh, no. I better card her,' but I couldn't remember what the exact date was so I rescanned the beer so I could see the date, and that's when I asked her for her ID. [RT 50].

...

"The first time when I scanned the beer, we didn't even go through the ID. I scanned the beer, and I pushed the clear button, which clears the date. But when I looked at her, I noticed how young she looked. When you card, you look at the date. So I rerung up the beer so that the date would show. That's when I asked her, 'Can I see your ID?' That's when she showed me the ID, and I looked at the date, and I looked at the ID." [RT 53].

The register is also equipped to scan a driver's license, but, according to the clerk, this feature is only used when cashing a check.

The clerk testified that, when she looked at the decoy, the decoy appeared to be 20 or 21. Store policy called for the clerk to request identification from anyone appearing to be 30 years of age or younger. The clerk testified that her request for the decoy's identification was made pursuant to store policy.

The clerk was experienced, trained in the sale of alcoholic beverages, but admittedly mistaken in making the sale. The store was busy in general, and the clerk

was working the only express lane open at the time of the sale.² To the ALJ, this was enough to taint the decoy operation as unfair. The Department, in rejecting his proposed decision, expressed a decidedly contrary view, stating, in Determination of Issues I:

“[Appellant] contends that the decoy operation was not conducted in a fashion to promote fairness, as required by Rule 141(a), in that it was conducted at a time when [appellant’s] store, and in particular the express-line register used by the decoy, was extremely busy. That contention is rejected. Law enforcement personnel are entitled to operate in the setting presented by the licensee, absent extraordinary circumstances. The fact that [appellant’s] store was busy, even extremely busy, does not constitute an extraordinary circumstance. There was no evidence that customers waiting in the express line were yelling at the clerk or otherwise distracting her from the customer in front of her, or that she was distracted or confused from any source. There was no evidence that the express line was being conducted in other than a normal manner. The decoy, carrying only one item, could be expected, just like any other customer, to choose the express line. The clerk had substantial experience, and was only 20 minutes into her two-hour shift at the express line. There was no showing that law enforcement personnel acted improperly or unfairly in the course of the decoy operation. There was no showing that the fairness requirement of Rule 141(a) was violated.”

The Appeals Board has shown little affection for the “rush hour” defense. (See Circle K Stores, Inc. (April 11, 2001) AB-7476). The reason is obvious. When commerce reaches the point where the desire not to inconvenience customers overrides the importance of preventing sales of alcoholic beverages to minors, the public safety and morals of the people of the State of California will be irreparably injured. Such an unacceptable result will not occur on this Board’s watch. Unless there is persuasive evidence of something associated with the timing of the decoy operation that truly prevents a seller from acting with circumspection when faced with the possibility that a prospective purchaser of alcoholic beverages is a minor, it is unlikely

² A second express lane and an additional register were closed because of an apparent shortage of personnel.

that a “rush hour” defense will prevail.

As we understand the concept of a supermarket express line, it is not so much that a clerk is expected to operate more rapidly than a clerk in any other line, but that customers purchasing a minimal number of items will not be forced to wait in line behind shoppers with full and overflowing shopping carts. As the modern supermarket grows larger, and attracts more customers, there grows correspondingly the desire on the part of management that sales be processed as rapidly as possible, in order to minimize customer inconvenience. To that end, we have seen the development of sophisticated optical scanners capable of reading pricing codes, and register features which can reduce to a minimum the effort required to confirm whether a customer is of the legal age for the purchase of alcohol or tobacco.

But even the most sophisticated device is destined to be ineffective when compromised by preventable human error, as the evidence shows was present here.

The clerk’s own testimony revealed a flawed system. She testified that, when alerted by her register that an alcoholic beverage was being purchased, she instinctively by-passed the warning by clearing the register, and, not until she then looked at the customer and saw how young she appeared did she realize she should ask for identification. Even then, armed with enough information to prevent the sale, she allowed it to happen. Was this human error? Probably so. Was it preventable? Certainly. All that was required was that the clerk follow store protocol. In this case, the clerk began on the wrong foot, when, apparently unaware even of who the customer was, she cleared her register to permit an alcoholic beverage to be sold. In such circumstances, can it be said that an otherwise routine decoy operation was conducted unfairly? We do not think so.

II

Appellant contends that the decoy failed to present the appearance required by Rule 141(b)(2). Appellant seems to suggest that, while the decoy may have displayed indicia of age consistent with the requirement of Rule 141(b)(2), she would have presented a different appearance “under the circumstances presented to the seller.” Appellant cites a high volume of patrons, an unexpected crush of customers, an extremely busy location at an extremely busy time, and the fact that the clerk was stationed in the express lane chosen by the decoy, as factors bearing on the appearance displayed by the decoy.

Appellant seems to be saying that a seller’s perception of a decoy’s appearance is controlling in determining whether there has been compliance with Rule 141(b)(2). In other words, according to appellant, if a store is busy, and a seller mistakenly believes to be older than 21 years of age a decoy who otherwise presents the appearance which could generally be expected of a person under 21 years of age, the rule has been violated.

We do not think the rule lends itself to such an interpretation. Instead, we think the rule’s focus is on the objective appearance of the decoy under the circumstances presented to the seller at the time of the sale, rather than on the subjective perception of the seller.

In this regard, appellant has made no serious attempt to persuade the Board that the decoy’s appearance, measured by the indicia of age displayed at the time of the sale, violated Rule 141(b)(2).

ORDER

The decision of the Department is affirmed.³

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

³ 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.