

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

AB-7801

File: 21-14813 Reg: 00049815

THE VONS COMPANIES, INC. dba Vons
2800 Fletcher Parkway, El Cajon, CA 92020,
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 FEBRUARY 22, 2002

The Vons Companies, Inc., doing business as Vons (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 15 days, with all 15 days stayed for a probationary period of one year, for appellant's clerk selling an alcoholic beverage to a minor decoy, 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, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

¹The decision of the Department, dated April 5, 2001, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on October 21, 1986. Thereafter, the Department instituted an accusation against appellant charging that, on July 25, 2000, appellant's clerk, Linda Lewallen ("the clerk"), sold an alcoholic beverage to 17-year-old Mindy Bergman. Bergman was acting as a decoy for the El Cajon Police Department at the time of the sale.

An administrative hearing was held on February 23, 2001, at which time documentary evidence was received and testimony was presented concerning the sale.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established.

Appellant thereafter filed a timely notice of appeal in which it raises the following issues: (1) the evidence does not support a finding that Rule 141(b)(5) was complied with; (2) there were not proper findings made regarding credibility; and (3) Rule 141(b)(2) was violated. The first two issues are related and will be discussed together.

DISCUSSION

I

Appellant contends it was error to find compliance with the face-to-face identification requirement of Rule 141(b)(5) based on the decoy's testimony, which, it alleges, was "rife with incredulity." In addition, appellant argues that the ALJ erred in failing to fully explain his basis for accepting the questionable testimony of the decoy, which, appellant asserts, is required by the case of Holohan v. Massanari (9th Cir. 2001) 246 F.3d 1195.

Appellant contends that evidence of compliance with Rule 141(b)(5) came primarily from the decoy, whose testimony lacked credibility because she could not

recall "the most rudimentary of facts surrounding the important face-to-face identification." The "rudimentary facts" upon which appellant bases its contention that the decoy lacked credibility were: the time of the decoy operation, how many check-out counters were open, how many customers were in line at the various check-out counters, whether there was another decoy on her team that night, whether she gave money to the clerk before or after being asked for her identification, where the clerk was when the decoy identified her, and whether the clerk was helping other customers when the decoy identified her. These are obviously details that have very little significance overall, and only the last two have anything to do with the face-to-face identification.

The credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. (Brice v. Department of Alcoholic Beverage Control (1957) 153 Cal.2d 315 [314 P.2d 807, 812]; Lorimore v. State Personnel Board (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640, 644].) The decoy's failure to recall the minor details noted by appellant does not persuade us that the ALJ's determination of credibility is in any way flawed.

Appellant also charges that "a gaping chasm [is exposed] in [the decoy's] testimony" by her testimony that she planned to pursue a career in law enforcement. Her desire for advancement in her career, appellant asserts, means "she had every reason to fabricate her testimony." The sheer absurdity of appellant's allegation is its own refutation.

This Board has considered and rejected, many times, the contention that Holohan v. Massanari, supra, requires of the ALJ an explanation of the reasons for accepting the decoy's testimony. Holohan dealt with the specialized area of federal Social Security Disability Insurance claims, and does not reflect the law of California.

This contention has been raised routinely by appellant's counsel, and just as routinely rejected by the Board. (See, e.g., 7-Eleven, Inc. and Huh (2001) AB-7680.) There is nothing in this case that warrants any different approach.

II

Appellant contends that the 5'6", 120-pound decoy, wearing jeans and tennis shoes, with her hair in a ponytail and only powder on her face, was shown to present an appearance of a person over the age of 21, by "[t]he overwhelming weight of the evidence." In addition, appellant argues that the decoy's experience as a police cadet and a decoy caused her to have the demeanor of someone over the age of 21.

The ALJ found that the decoy displayed the appearance that could generally be expected of a person under the age of 21 (Finding II-D). Nothing appellant has said even hints at error in his judgment, and this Board will not attempt to second-guess him simply because appellant reaches a conclusion different from that of the ALJ.

This Board has many times rejected counsel's argument that an experienced decoy displays the appearance of a person over 21. We do so again here.

ORDER

The decision of the Department is affirmed.²

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

²This 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.