

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

**AB-8070**

File: 21-357533 Reg: 02053544

THE VONS COMPANIES, INC., dba Vons  
11861 Valley View Street, Garden Grove, CA 92845,  
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,  
Respondent

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

Appeals Board Hearing: December 2, 2003  
Los Angeles, CA

**ISSUED JANUARY 21, 2004**

The Vons Companies, Inc., doing business as Vons (appellant), appeals from a decision of the Department of Alcoholic Beverage Control<sup>1</sup> which suspended its license for 15 days for its clerk selling an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 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, Roxanne B. Paige.

**FACTS AND PROCEDURAL HISTORY**

Appellant's off-sale general license was issued on November 1, 1999. On August 12, 2002, the Department filed an accusation against appellant charging that, on December 7, 2001, appellant's clerk, Jennifer Dietrich (the clerk), sold an alcoholic

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<sup>1</sup>The decision of the Department, dated December 5, 2002, is set forth in the appendix.

beverage to 18-year-old Rebecca Lyons. Although not noted in the accusation, Lyons was working as a minor decoy for the Garden Grove Police Department at the time.

At the administrative hearing held on November 5, 2002, documentary evidence was received, and testimony concerning the sale was presented by Lyons (the decoy) and by John Reynolds, a Garden Grove police officer.

The testimony established that the decoy entered the premises after the officer, who directed her to the beer cooler. When the decoy picked out a six-pack of Coors beer, the officer stood 10 feet behind her. The decoy walked to the check-out area, and the officer walked to a magazine rack next to the entrance to the check-out aisle, where he remained while the decoy purchased the beer. The clerk requested the decoy's identification, and she gave the clerk her valid California driver's license. The clerk looked at the license for several seconds, handed it back to the decoy, and completed the sale.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged had been proven, and no defense had been established.

Appellant filed a timely appeal raising the following issues: Rules 141(a)<sup>2</sup> and 141(b)(2) were violated.

## DISCUSSION

Rule 141(a) provides that a decoy operation must be conducted in a fashion that promotes fairness. Rule 141(b)(2) requires that the decoy's appearance must be that "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

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<sup>2</sup>References 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.

offense." Appellant contends that these rules were both violated because the combined appearance of decoy Lyons and officer Reynolds presented the general appearance of a couple over the age of 21.

Appellant refers this Board to two of the Board's earlier decisions, *7-Eleven, Inc.* (2001) AB-7740, and *Hurtado* (2000) AB-7246. In both these appeals, the Board expressed concern over the effect that a second person participating in the operation might have on a clerk's perception of the apparent age of the decoy. In *7-Eleven*, the second person participating was another decoy; in *Hurtado*, it was an undercover police officer.

Appellant also criticizes the ALJ's failure to address in the decision the effect on the decoy's appearance caused by the presence of officer Reynolds.

Appellant did not raise this issue of "combined appearance" at the hearing. The Board is entitled to consider it waived. (See 9 Witkin, Cal. Procedure (4<sup>th</sup> ed. 1997) Appeal, §394, p. 444.) Appellant raised an issue regarding rule 141(b)(2), but argued only that the decoy enhanced her appearance by wearing boots that increased her height by one inch and by wearing a ring. The ALJ rejected this argument in

Conclusion of Law 6:

Respondent argued that the decoy attempted to enhance her apparent age by wearing boots that elevated her height by an inch and by wearing a single ring. That argument is rejected. The decoy, even at 5 feet 5 inches tall and wearing a ring, if she did wear a ring, appears well under 21 years of age. (Findings of Fact, ¶ 13.)

The ALJ did not address the effect of officer Reynold's presence because it was not raised at the hearing; the evidence did not establish that officer Reynolds "accompanied" the decoy in such a way that he and the decoy would appear to be "a couple"; there was no evidence in the record of Reynolds' age or appearance; and the

clerk did not testify, so even if all the elements of appellant's argument had been established, the effect this would have had on the clerk's perception would be mere speculation.

Appellant also argues that rule 141(a) was violated because the decoy did not bring to the hearing the driver's license she had shown the clerk. Therefore, appellant asserts, there is no "verifiable proof" of the identification the decoy showed to the clerk.

The decoy testified that she did not have the license at the hearing because she could not find it. A black-and-white photocopy was available, and the decoy testified that it was an accurate copy of the driver's license she showed to the clerk. This photocopy was admitted as exhibit 6, over appellant's objection that it was a poor copy, and one could not tell from it what the decoy looked like in her picture on the license. The ALJ admitted the photocopy, "not for what she looks like but for all the information contained on the document."

Appellant's argument has no merit. Rule 141(a) cannot be violated by a failure to present certain evidence *at the hearing*; the presence or lack of evidence at the hearing cannot have any effect on the fairness of the decoy operation that was conducted months before. In any case, there was sufficient proof of the identification used. The decoy testified that she showed the clerk her true, valid California driver's license; she identified the photocopy as an accurate depiction of her California driver's license; and the clerk told the officer that the birthdate on the license was August 1983, accurately reflecting the true birthdate of August 7, 1983, shown on the license. No further proof was necessary.

ORDER

The decision of the Department is affirmed.<sup>3</sup>

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

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<sup>3</sup>This final order 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 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 section 23090 et seq.