

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

**AB-9261**

File: 21-479420 Reg: 11074696

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,  
dba CVS Pharmacy 9493  
12315 Venice Boulevard, Los Angeles, CA 90066-3801,  
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,  
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley

Appeals Board Hearing: June 6, 2013  
Los Angeles, CA

**ISSUED JULY 24, 2013**

Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as CVS Pharmacy 9493 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control<sup>1</sup> which suspended their license for 15 days for their 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 appellants Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, appearing through their counsel, Ralph Barat Saltzman, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jennifer M. Casey.

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<sup>1</sup>The decision of the Department, dated April 18, 2012, is set forth in the appendix.

## FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on September 2, 2009. On April 4, 2011, the Department filed an accusation against appellants charging that, on July 27, 2010, appellants' clerk, Jasmine Lozano (the clerk), sold an alcoholic beverage to 18-year-old Reynaldo Martinez. Although not noted in the accusation, Martinez was working as a minor decoy for the Los Angeles Police Department (LAPD) at the time.

An administrative hearing was held on October 4, 2011 and February 7, 2012. At the second day of hearing, documentary evidence was received and testimony concerning the sale was presented by Martinez (the decoy); and by Don Nguyen and David Dalzell, LAPD officers.

Testimony established that on July 27, 2010, an LAPD officer entered the licensed premises, followed a moment later by the decoy who went to the alcoholic beverage cooler and selected a 24-oz. can of Bud Light beer. The decoy took the beer to the register, where the clerk scanned it and completed the sale without asking for identification and without asking any age-related questions. The decoy exited the premises, then re-entered with two LAPD officers to make a face-to-face identification of the clerk who sold the alcohol to him. The clerk was subsequently cited.

The Department's decision determined that the violation charged was proved and no defense was established.

Appellants then filed an appeal contending: (1) The decoy did not display the appearance required by rule 141(b)(2);<sup>2</sup> and (2) rule 141(b)(2) violates the due process clauses of the California and United States Constitutions and their prohibition of vague and over broad regulations.

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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.

## DISCUSSION

## I

Appellants contend that the decoy did not display the appearance required by rule 141(b)(2), which dictates: “[t]he 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.”

Rule 141(a) provides:

(a) 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 (persons under the age of 21) and to reduce sales of alcoholic beverages to minors *in a fashion that promotes fairness*. [Emphasis added.]

Appellants maintain that the facts in this case indicate unfairness in that “the Department’s use of a male decoy with an overly large stature is outrageous and wholly inappropriate.” (App.Br. at p. 1.) At the administrative hearing, counsel for appellants also argued that the decoy looked “tough” and similar in age to the clerk. [RT 113.]

The administrative law judge (ALJ) made the following findings about the decoy’s appearance (Findings of Fact ¶¶ 5 and 11):

Martinez appeared and testified at the hearing. On July 27, 2010, he was 5’9” tall and weighed approximately 200 pounds. He wore a DKNY t-shirt, black jeans, and black tennis shoes with purple laces. He was not wearing any jewelry other than a beaded bracelet. His hair was cut short and he did not have any visible facial hair. (Exhibits 4-6.) At the hearing his appearance was the same.

[¶ . . . ¶]

Martinez was not muscular or well-built; nonetheless, he was fairly large based on his weight. His face, however, was youthful. In the photos he has a serious expression (Exhibits 4-6) which made him appear slightly

older. [fn. omitted.] Based on his overall appearance, i.e., his physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and his appearance and conduct in front of Lozano at the Licensed Premises on July 27, 2010, Martinez displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Lozano.

The ALJ goes on to say in Conclusions of Law ¶ 5:

The Respondents argued that the decoy operation at the Licensed Premises failed to comply with rule 141(b)(2) [fn. omitted] and, therefore, the accusation should be dismissed pursuant to rule 141(c). Specifically, the Respondents argued that Martinez's size and demeanor, coupled with his training, gave him the appearance of a person over the age of 21. This argument is rejected. As set forth above, Martinez had the appearance generally expected of a person under the age of 21. (Findings of Fact ¶ 11.)

This Board has repeatedly declined to substitute its judgment for that of the ALJ on this question of fact. Minors come in all shapes and sizes, and we are reluctant to suggest, without more, that minor decoys of large stature automatically violate the rule, or that a serious demeanor necessarily makes one appear older.

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 testifies, and making the determination whether the decoy's appearance met the requirement of rule 141 that he 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.

We are not in a position to second-guess the trier of fact, especially where all we have to go on is a partisan appeal that the decoy lacked the appearance required by the rule, and an equally partisan response that he did not.

II

Appellant contends that rule 141(b)(2) violates both federal and state constitutional due process requirements by presenting a standard that is impossible for

the ALJ to meet. Appellant asserts that the ALJ cannot determine compliance with rule 141(b)(2) without having observed the decoy at the time of the sale. (App.Br. at p. 7.) This issue was not raised at the administrative hearing.

As an initial matter, this Board has jurisdiction to hear constitutional challenges to administrative regulations issued by the Department, including rule 141, as part of its authority to determine whether the Department has proceeded according to law. (Bus. & Prof. Code §23804(b).) Constitutional issues, however, should only be decided on appeal when it is absolutely necessary to do so. (*People v. Marsh* (1984) 36 Cal.3d 134, 144 [202 Cal.Rptr. 92].)

It is settled law that the failure to raise an issue or assert a defense at the administrative hearing level bars its consideration when raised or asserted for the first time on appeal. (*Hooks v. California Personnel Board* (1980) 111 Cal.App.3d 572, 577 [168 Cal.Rptr. 822]; *Shea v. Board of Medical Examiners* (1978) 81 Cal.App.3d 564, 576 [146 Cal.Rptr. 653]; *Reimel v. House* (1968) 259 Cal.App.2d 511, 515 [66 Cal.Rptr. 434]; *Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control* (1966) 65 Cal.2d 349, 377 [55 Cal.Rptr. 23]; *Harris v. Alcoholic Beverage Control Appeals Board* (197 Cal.App.2d 1182, 187 [17 Cal.Rptr. 167].)

This extends to constitutional issues, as “[i]t is the general rule applicable in civil cases that a constitutional question must be raised at the earliest opportunity or it will be considered as waived.” (*Jenner v. City Council of Covina* (1958) 164 Cal.App.2d 490, 498 [331 P.2d 176].)

It is true that an exception exists for pure questions of law. (See, e.g., *In re P.C.* (2006) 137 Cal.App.4th 279, 287 [40 Cal.Rptr.3d 17].) However, the argument

appellant presents in this matter – that an ALJ can never accurately assess a decoy’s apparent age at the time of sale – is primarily a question of fact. Since appellant did not raise this issue at the administrative hearing, this Board is entitled to consider it waived. (See 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, §400, p. 458.)

Even though the issue was waived in this matter, we would refer appellant to a full discussion of the Board’s position on challenges to the constitutionality of rule 141(b)(2), which can be found by reading both *7-Eleven Inc.* (2013) AB-9248 and *Garfield Beach* (2013) AB-9258. These opinions make clear our unanimous view that (1) the argument is devoid of merit; and (2) continued, repeated assertion of the same contention justifies the imposition of sanctions upon counsel apparently intent on flouting the Board’s rulings.

#### ORDER

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

BAXTER RICE, CHAIRMAN  
FRED HIESTAND, MEMBER  
PETER J. RODDY, 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.