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

AB-9234
File: 20-345658 Reg: 11075112

7-ELEVEN INC., DANIEL JAMES CAVAZOS, and ROSEMARIE CAVAZOS,
dba 7-Eleven Store 2233-32415
140 Beach Road, Marina, CA 93933,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Nicholas R. Loehr

Appeals Board Hearing: January 3, 2013
Sacramento, CA

Redeliberated February 7, 2013
Los Angeles, CA

ISSUED MARCH 11, 2013

7-Eleven Inc., Daniel James Cavazos, and Rosemarie Cavazos, doing business as 7-Eleven Store 2233-32415 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days, all stayed, 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 7-Eleven Inc., Daniel James Cavazos,and Rosemarie Cavazos, appearing through their counsel, Ralph Barat Saltsman and Autumn M. Renshaw, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kelly Vent.

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[1]The decision of the Department, dated January 5, 2012, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on January 1999. On May 24, 2011, the Department filed an accusation against appellants charging that, on April 30, 2011, appellants' clerk, Susan Peloso (the clerk), sold an alcoholic beverage to 18-year-old Jose Barajas. Although not noted in the accusation, Barajas was working as a minor decoy for the Department at the time.

At the administrative hearing held on October 12, 2011, documentary evidence was received and testimony concerning the sale was presented by Barajas (the decoy) and by Brandon Knott, a Department Investigator, on behalf of the Department; and by Peloso (the clerk), co-licensee Daniel Cavazos, and employee Jose Reyes on behalf of appellants.

Testimony established that the decoy entered the premises, selected a can of Budweiser beer, and approached the counter. The clerk completed the sale without checking the decoy's identification or asking how old he was. The clerk was subsequently terminated.

Both Reyes and co-licensee Cavazos were present either during or after the sale, observed the decoy, and testified as to his apparent age.

The Department's decision determined that the violation charged was proved and no defense was established. A 15-day suspension was imposed, with all days stayed.

Appellants then filed this appeal contending that rule 141(b)(2) violates both federal and state due process requirements, and is therefore unconstitutional.

DISCUSSION

Appellants contend 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.

As an initial matter, this Board has jurisdiction to hear constitutional challenges to administrative regulations issued by the Department, including rule 141,[2] 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

[2]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.

279, 287 [40 Cal Rptr.3d 17].) However, the argument appellants present – that an ALJ can never accurately assess a decoy's apparent age at the time of sale – necessarily implicates fact as well. Since appellants did not raise this issue at hearing, this Board is entitled to consider it waived. (See 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, §400, p. 458.)

Even if we chose to address it, appellants' arguments are insufficient to merit relief, or even serious consideration – they rely on repetition and insistence, rather than well-researched law and cogent analysis, for persuasion. We are not required to entertain substandard briefs:

> [A]n appellate brief "should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration." [Citation.] [¶] . . . This court is not inclined to act as counsel for . . . appellant and furnish a legal argument." [Citation.]

(*Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 546 [35 Cal.Rptr.2d 574].)

Despite the wealth of cases treating both state and federal constitutionality, appellants cite only one opinion: *Smith v. Goguen* (1974) 415 U.S. 566. That case addressed a Massachusetts penal statute, directed at ordinary citizens, which imposed constitutionally vague limitations on free speech. The Court itself observed that a "greater degree of specificity" is merited where a statute's "literal scope" infringes on First Amendment rights. (*Id.* at p. 573.) Appellants do not clarify what standard of specificity is required of an administratively imposed state regulation, directed at law enforcement, which has no effect on First Amendment or other constitutionally guaranteed rights. Appellants present no further authority to guide us.

Appellants also truncate the *Goguen* rule – and indeed, the rule of many

subsequent vagueness cases – by omitting any discussion of notice. As the Court noted, "[d]ue process requires that all 'be informed as to what the State commands or forbids,' and that 'men of common intelligence' not be forced to guess at the meaning of the criminal law." (*Goguen*, *supra*, at p. 574.) Rule 141(b)(2) is directed at law enforcement conducting decoy operations, though it is typically employed as a defense by licensees following decoy sales. Appellants have not explained how rule 141(b)(2) fails to put either law enforcement or licensees on notice of what conduct is forbidden.

We decline to draft appellants' brief on their behalf, particularly when the issue was not raised at the administrative hearing. We consider this issue waived.

ORDER

The decision of the Department is affirmed.[3]

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[3]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.