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

AB-9258
File: 21-477875 Reg: 11075191

GARFIELD BEACH CVS, LLC, and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy Store 9928
6378 Commerce Boulevard, Rohnert Park, CA 94928,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: April 4, 2013
Sacramento, CA

ISSUED MAY 20, 2013

Garfield Beach CVS, LLC, and Longs Drug Stores California, LLC, doing business as CVS Pharmacy Store 9928 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] 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 B. Saltsman and D. Andrew Quigley, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kelly Vent.

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[1]The decision of the Department, dated April 9, 2012, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on June 22, 2009. On October 25, 2011, the Department filed an accusation against appellants charging that, on April 15, 2011, appellants' clerk sold an alcoholic beverage to 19-year-old Andres Roberto Ramirez. Although not noted in the accusation, Ramirez was working as a minor decoy for law enforcement at the time.

At the administrative hearing held on January 11, 2012, documentary evidence was received and testimony concerning the sale was presented by Ramirez (the decoy). Appellants presented no witnesses.

Testimony established that on the day of the operation, the decoy entered the premises and selected a six-pack of Bud Light beer. The clerk asked Ramirez for his identification. Ramirez took his California driver's license out of his wallet and handed it to the clerk, who examined it for several seconds before handing it back to him. The clerk did not ask Ramirez any age-related questions. Ramirez's identification showed his date of birth, 09-27-91, as well as a red stripe bearing the words "AGE 21 in 2012."

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

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) unconstitutionally violates both federal and state due process requirements by presenting a standard that is impossible for the ALJ to meet.

This Board has recently faced a flood of challenges to the constitutionality of rule 141(b)(2). We have issued a number of decisions holding, in no uncertain terms, that the rule complies with both state and federal constitutional requirements. (See, e.g., *7-Eleven Inc*. (2013) AB-9248; *Circle K Stores* (2013) AB-9274.) Regardless, the same argument appears before us again and again in an endless parade of haphazard cut-and-paste briefs.

Having concluded for the umpteenth time in the past four months that rule 141(b)(2) is not void for vagueness, the Board is perplexed by counsel's continuous, identical repetition of that argument in this and other pending cases. We recognize that an argument without merit is not the same as a frivolous argument, and that the "borderline between a frivolous appeal or argument and one which simply has no merit is [itself] vague . . . ." (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650 [183 Cal. Rptr. 508].) Difficult as it may be to make this distinction, courts have nonetheless done so, holding that a "frivolous appeal" deserves dismissal and perhaps sanctions against counsel when it "indisputably has no merit – when any reasonable attorney would agree that the appeal is totally and completely without merit." (*California Teachers Assn. v. State of California* (1999) 20 Cal.4th 327, 340 [84 Cal. Rptr. 2d 425].) Recent opinions by an appellate body on the precise point of law (rendered by the same panel as those before whom the argument is again asserted) – absent new argument, authority, or distinguishing material facts favoring a different conclusion – would seem about as

clear a standard for measuring the frivolous nature of an appeal as one can imagine, and that is what we have here with the same shopworn, rejected argument presented on the unconstitutionality of rule 141(b)(2).

Perhaps counsel is of the view that no argument can ever be deemed frivolous by the Board because our decisions do not have precedential value. To be sure, while "[t]here is . . . no rule of administrative stare decisis" (*BankAmerica Corp. v. United States* (1983) 462 U.S. 122, 149 [103 S.Ct. 2266]), agency adjudications and appellate decisions therefrom produce administrative norms that, like judicial interpretations of statutes and regulations, operate as rules of general application and thus enjoy analogous stare decisis precedential value. (See *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade* (1973) 412 U.S. 800, 807-08 [93 S.Ct. 2367] [stating agency adjudicatory decisions "may serve as precedents," that there is "a presumption that those policies [announced in adjudications] will be carried out best if the settled rule is adhered to," and that the agency's "duty to explain its departure from prior norms" flows from that presumption]; *Kelly ex rel. Mich. Dept. of Natural Res. v. FERC* (1996) 96 F.3d 1482, 1489 [321 U.S.App.D.C. 34] ["It is, of course, axiomatic that an agency adjudication must either be consistent with prior adjudications or offer a reasoned basis for its departure from precedent . . . ."]; *M.M. & P. Maritime Advancement, Training, Educ. & Safety Program v. Dept. of Commerce* (2nd Cir.1984) 729 F.2d 748, 755: ["An agency is obligated to follow precedent, and if it chooses to change, it must explain why . . . ."]; William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions* (1991) 101 Yale L.J. 331, 397 [discussing the stare decisis effect of statutory interpretation precedents]; E. H. Schopler, *Annotation Comment Note: Applicability of*

Stare Decisis Doctrine to Decisions of Administrative Agencies (1961) 79 A.L.R.2d 1126, 1132 ["[A]dministrative agencies . . . act very much like courts, as regards precedents."])

If counsel disagrees with a determination by a legal forum – whether judicial or administrative – that an argument repelled by that forum has merit, an appeal or writ may be sought for review to a higher authority. Until determinations we make consistently, currently, and with the same Board members on a legal issue like this are reversed by an appellate court (or the legislature in its lawmaking power or the agency in its discretion to amend or repeal the challenged regulation), they are entitled to respect and should be followed, not flouted. Review is available there to counsel dissatisfied with our repeated rejections of their legally bereft argument that the minor decoy regulation is unconstitutionally vague; but despite numerous opportunities to do so over the past few months counsel has declined to avail itself of this option while persisting in making the identical argument in new appeals, as here.

Some jurisdictions recognize the inherent power of an administrative agency or appeals board to sanction counsel for making frivolous arguments while others expressly specify by statute the manner in which that remedy is to be exercised. (Compare, e.g., *In re Timofai Sanitation Co*. (N.J. Super.Ct.App.Div. 1991) 600 A.2d 158, 162-63 [253 N.J. Super. 495] with *Black v. Dept. of Labor & Indus.* (1996) 81 Wash. App. 722, 730-31 [915 P.2d 1170], aff'd. (1997) 131 Wash.2d 547 [933 P.2d 1025] [when provided by statute, an administrative agency may be awarded costs and attorney fees for defending a frivolous appeal.].) The two are not mutually exclusive; legislation often clarifies, for instance, the manner in which inherent judicial authority is to be applied. (See Code of Civ. Proc. § 128.5.) In this regard, California provides that

an administrative agency "may order a party, the party's attorney or other authorized representative, or both, to pay reasonable expenses, including attorney's fees, incurred by another party as a result of bad faith actions *or* tactics that are frivolous *or* solely intended to cause unnecessary delay as defined in section 128.5 of the Code of Civil Procedure," that "[t]he order, or denial of an order, is subject to judicial review in the same manner as a decision in the proceeding;" and "[t]he order is enforceable in the same manner as a money judgment or by the contempt sanction." (Gov. Code §11455.30, emphasis added.) Significantly, the offenses for which sanctions are authorized are stated in the disjunctive, which means a "frivolous" appeal or argument is itself subject to sanction regardless of whether it is made in "bad faith."

The Board's evident frustration over counsel's practice in this and other cases, a practice that shows disrespect for the law and wastes time and resources, is a clear signal to counsel they should cease and desist from doing so in the future unless *new* grounds are brought to our attention as to why our previous decisions were wrongly decided. Further, it is our intention for the reasons aforementioned to treat as "dead on arrival" the same rejected arguments on the unconstitutionality of rule 141(b)(2) until we are instructed by a Court of Appeals or the Supreme Court to the contrary, citing as authority this and other opinions we have issued discussing this matter *ad nauseam*. If this does not deter counsel from the odious practice of cutting and pasting in future appellate briefs the same bankrupt arguments we have consistently repelled on this precise issue, other steps will need to be considered.

ORDER

The decision of the Department is affirmed.[2]

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

[2]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.