

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

AB-9282

File: 21-434142 Reg: 11076082

RBI FOOD MART & DELI, INC., dba RBI Food Mart & Deli,
22520 Sidding Road, Bakersfield, CA 93314,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: April 4, 2013
Sacramento, CA

ISSUED MAY 20, 2013

RBI Food Mart & Deli, Inc., doing business as RBI Food Mart & Deli (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 15 days for its clerk selling an alcoholic beverage to a Department minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant RBI Food Mart & Deli, Inc., appearing through its counsel, Ralph Barat Saltsman and D. Andrew Quigley, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kelly L. Vent.

¹The decision of the Department, dated July 3, 2012, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on March 22, 2006. On November 21, 2011, the Department filed an accusation charging that appellant's clerk sold an alcoholic beverage to 19-year-old Britnie Horton on August 25, 2011. Although not noted in the accusation, Horton was working as a minor decoy for the Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on March 21, 2012, documentary evidence was received, and testimony concerning the sale was presented by Horton (the decoy). Appellant presented no witnesses.

Testimony established that on August 25, 2011, the decoy entered the licensed premises, selected a six-pack of Bud Light beer, and took it to the counter. The clerk completed the sale without asking the decoy for her identification and without asking her any age-related questions. The administrative law judge (ALJ) determined that the decoy's appearance complied with rule 141(b)(2).²

Subsequent to the hearing, the Department issued its decision which determined that the violation charged was proved and no defense was established.

Appellant filed a timely appeal contending that rule 141(b)(2) violates the due process clauses of the California and United States Constitutions.

²References 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

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. 6.) This issue was not raised at the administrative hearing.

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].) 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, a full discussion of the Board’s position on challenges to the constitutionality of rule 141(b)(2) can be found by reading both *7-Eleven Inc.* (2013) AB-9248 and *Garfield Beach* (2013) AB-9258.

ORDER

The decision of the Department is affirmed.³

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

³This 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.