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

AB-9248
File: 20-422425 Reg: 11075254

7-ELEVEN, INC. and NRG CONVENIENCE STORES, INC.,
dba 7-Eleven No. 2173-27060C
11666 West Olympic Boulevard, Los Angeles, CA 90064,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: February 7, 2013
Los Angeles, CA

ISSUED MARCH 11, 2013

7-Eleven, Inc. and NRG Convenience Stores, Inc., doing business as 7-Eleven No. 2173-27060C (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 12 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 7-Eleven, Inc. and NRG Convenience Stores, Inc., appearing through their counsel, Ralph Barat Saltsman and D. Andrew Quigley, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jennifer M. Casey.

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

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on April 12, 2005. On June 21, 2011, the Department filed an accusation against appellants charging that, on March 23, 2011, appellants' clerk, Sein Win (the clerk), sold an alcoholic beverage to 19-year-old Carolyn Robles. Although not noted in the accusation, Robles was working as a minor decoy for the Los Angeles Police Department at the time.

At the administrative hearing held on December 15, 2011, documentary evidence was received and testimony concerning the sale was presented by Robles (the decoy) and by Steven Harper, a Los Angeles Police police officer. Appellants presented no witnesses.

On the date of the sale, the decoy entered the premises alone, selected a six-pack of beer in bottles from the cooler, approached the sales counter, and placed the beer on it. The clerk scanned the beer and asked to see the decoy's identification. The decoy handed the clerk her California Identification Card which showed a birthdate of 10-20-91 and bore a red stripe indicating "AGE 21 in 2012." The clerk scanned the identification card twice, then proceeded with the sale.

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) is unconstitutionally vague.

DISCUSSION

I

Appellants raise a constitutional vagueness challenge to rule 141(b)(2).

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.) 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.) However, the argument appellants present – that an ALJ can never accurately assess a

[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.

decoy's apparent age at the time of sale – necessarily implicates fact as well.

Appellants did not raise a constitutional challenge to rule 141 at the administrative hearing. While they did initially launch a constitutional vagueness attack on section 24200(a) of the Business and Professions Code, (Special Notice of Defense at ¶1), they did not extend that argument to rule 141, and they did not argue it at the hearing. Ultimately, the ALJ dismissed the argument, noting that he "does not have the jurisdiction to rule on the constitutionality of a state statute." (Findings of Fact ¶IV.)

Nevertheless, the Department has submitted a reply brief acknowledging the constitutional challenge and responding in some depth. We will address the constitutional vagueness challenge despite appellants' failure to raise it at the administrative hearing, as the Department has shown it is prepared to defend on this issue.

II

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.

Rule 141(b)(2) provides that "[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." Subsection (c) adds that "[f]ailure to comply with this rule shall be a defense to any action brought pursuant to Business and Professions Code Section 25658." This Board has construed the language of rule 141(c) to means that the licensee has the burden of establishing a prima facie case that there was no compliance with the rule.

(See *Garfield Beach CVS* (2012) AB-9188 at pp. 2-3.)

The United States Supreme Court has addressed vagueness in a number of highly publicized cases. Appellants rely on one of these cases, *Smith v. Goguen* (1974) 415 U.S. 566 [94 S.Ct. 1242], as support for their assertion that rule 141(b)(2) presents an "unobtainable standard" and therefore violates due process.

It is important to note that the *Goguen* Court addressed a criminal statute that infringed on the fundamental liberties contained in the First Amendment – a circumstance very different from the present case.

Goguen addressed a Massachusetts criminal "flag misuse" statute. (See *Goguen*, *supra*, 415 U.S. 566.) The statute dictated that any individual who:

> publicly mutilates tramples upon, defaces or treats contemptuously the flag of the United States . . . whether such flag is public or private property . . . shall be punished by a fine of not less than ten nor more than one hundred dollars or by imprisonment for not more than one year, or both. . . .

(*Id.* at p. 569.)

The Court described the nature of the due-process vagueness challenge thus: "The doctrine incorporates notions of fair notice or warning. Moreover, it requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent 'arbitrary and discriminatory enforcement.'" (*Goguen*, *supra*, 415 U.S. at pp. 572-573.)

The Court ultimately held that the statute at issue was unconstitutionally vague, for both reasons. First, it failed to apprise citizens of what behavior was forbidden. As the Court noted,

> [I]t could hardly be the purpose of the Massachusetts Legislature to make criminal every informal use of the flag. The statutory language under which Goguen was charged, however, fails to draw reasonably clear lines

> between the kinds of nonceremonial treatment that are criminal and those that are not. Due process requires that all "be informed as to what the State commands or forbids, [citation], and that "men of common intelligence" not be forced to guess at the meaning of the criminal law.

(*Goguen*, *supra*, 415 U.S. at p. 574.) Second, it was sufficiently vague to permit "selective law enforcement" by officers, resulting in a denial of due process. (*Id.* at p. 575.) The Court agreed with a concurring opinion in expressing concern about "entrusting lawmaking 'to the moment-to-moment judgment of the policeman on his beat.'" (*Ibid.*) The Court observed that "Legislatures may not so abdicate their responsibilities for setting the standards of the criminal law." (*Ibid.*)

The Court did observe, however, that "[t]here are areas of human conduct where, by the nature of the problems presented, legislatures simply cannot establish standards with great precision." (*Goguen*, *supra*, 415 U.S. at p. 581.) The Court gave the example of "disorderly conduct," which requires an "on-the-spot assessment of the need to keep order." (*Ibid.*)

Later cases have clarified *Goguen*. In *Morales*, the Court treated a Chicago anti-loitering ordinance, and observed that there were two grounds for a facial challenge:

> First, the overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of *First Amendment* rights if the impermissible applications of the law are substantial when "judged in relation to the statute's plainly legitimate sweep." [Citations.] Second, even if an enactment does not reach a substantial amount of constitutionally protected conduct, it may be impermissibly vague because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests.

(*City of Chicago v. Morales* (1999) 527 U.S. 41, 52 [119 S.Ct. 1849].)

The Court found a facial challenge was appropriate under the second ground, because the "freedom to loiter for innocent purposes is part of the 'liberty' protected by

the Due Process Clause of the Fourteenth Amendment." (*Morales*, *supra*, 527 U.S. at p. 53.) The Court observed that:

> It is clear that the vagueness of this enactment makes a facial challenge appropriate. This is not an ordinance that "simply regulates business behavior and contains a scienter requirement." [Citations.] It is a criminal law that contains no *mens rea* requirement, [citations], and infringes on constitutionally protected rights. When vagueness permeates the text of such a law, it is subject to facial attack.

(*Id.* at p. 55.)

The Court went on to delineate the governing rule:

> Vagueness may invalidate *a criminal law* for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement.

(*Morales*, *supra*, 527 U.S. at p. 56, emphasis added.) The Court found the ordinance invalid for both reasons. (*Id.* at pp. 59-60, 64.)

Both *Goguen* and *Morales* addressed criminal provisions that infringed on liberty interests. The Supreme Court, in an earlier case, delineated how a vagueness analysis differs when the provision in question is not criminal and there are no liberty interests at stake. (See *Village of Hoffman Estates v. The Flipside* (1982) 455 U.S. 489 [102 S.Ct. 1186].) The *Hoffman Estates* Court addressed an Oakland ordinance regulating the sale of drug-related paraphernalia. (*Ibid.*) It observed that "perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights." (*Id.* at p. 499.)

The Court explained that a reviewing court "should examine the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct, should uphold the challenge *only if the enactment is impermissibly vague in all*

of its applications." (*Hoffman Estates*, *supra*, 455 U.S. at p. 494, emphasis added.) The Court clarified that "[a] 'facial' challenge, in this context, means a claim that the law is 'invalid *in toto* – and therefore incapable of any valid application.'" (*Id.* at p. 494, fn. 5.) The Court noted the policy reasons behind this rule: "[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." (*Ibid.*)

The Court also observed that:

> [t]he degree of vagueness that the Constitution tolerates – as well as the relative importance of fair notice and fair enforcement – depends in part on the nature of the enactment. Thus, economic regulation is subject to a less strict vagueness standard test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action. Indeed, the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process.

(*Hoffman Estates*, *supra*, 455 U.S. at pp. 498-499.) Additionally, the Court expressed "greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe." (*Ibid.*)

In sum, according to the U.S. Supreme Court, constitutional vagueness requires a showing of lack of notice of prohibited conduct or the potential for arbitrary enforcement. The specificity required of a provision is lower if it is an economic regulation, or if it imposes only civil penalties. Finally, if the provision does not affect substantial liberty interests, then the challenging party may only carry a facial challenge if it can show that the law is invalid under all circumstances.

California case law largely parallels federal case law, with several notable clarifications. In their closing brief, appellants refer this Board to a case involving a constitutionally vague probation condition, in which the California Supreme Court

articulated the vagueness rule somewhat differently:

> [T]he underpinning of a vagueness challenge is the due process concept of "fair warning." The rule of fair warning consists of "the due process concepts of preventing arbitrary law enforcement and providing adequate notice to potential offenders," [citation], protections that are "embodied in the due process clauses of the federal and California Constitutions. [Citations.] The vagueness doctrine bars enforcement of "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application."

(*In re Sheena K.* (2007) 40 Cal.4th 875, 890 [55 Cal.Rptr.3d 716].) The court went on to imply that constitutional vagueness entails *both* factors articulated in the U.S. Supreme Court's earlier opinions:

> A vague law "not only fails to provide adequate notice to those who must observe its strictures, *but also* "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

(*Ibid.*, emphasis added.)

Sheena K., however, addressed vagueness in the criminal context, with substantial potential for infringement of liberty interests. Outside the criminal context, California courts have afforded significant leeway. In a case involving municipal prohibitions on activities involving "potential or actual danger to the 'peace, health, safety, convenience, good morals, and general welfare' of the public," the court observed that:

> [a] municipality cannot reasonably be expected to isolate and specify those precise activities or conduct which are intended to be proscribed . . . . '[t]o make a statute sufficiently certain to comply with constitutional requirements [of due process of law] it is not necessary that it furnish detailed plans and specifications of the acts or conduct prohibited. [Citations.]

(*Sunset Amusement v. Board of Police Commissioners* (1972) 7 Cal.3d 64, 74 [101

Cal.Rptr. 768].) Additionally, the court referred to settled law establishing "that the Legislature need not lay down minutely defined standards, and that sufficient standards for administrative action may be found by implication from the general purposes of a statute and from the reasons which must have led to its adoption." (*Id.* at p. 73, fn. 6.)

Opinions from the state courts of appeal support a more lenient specificity standard in administrative provisions, particularly where the provision exists in the context of a larger regulatory scheme. For example, the Department of Developmental Services faced a vagueness challenge to its "fifth category" of qualifying disability, which described a "disabling condition[] found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation." (*Mason v. Office of Administrative Hearings* (2001) 89 Cal.App.4th 1119, 1122 [108 Cal.Rptr.2d 102].) The court pointed out that "the standard of definiteness instantly relevant is that applicable where the Legislature delegates responsibility to a board or agency to carry out a legislatively declared policy. Such a standard need be sufficiently definite only to provide directives of conduct for the administrative or regulatory powers." (*Id.* at p. 1127.)

The court gave significant weight to the provision's context. It concluded that, although the relevant provision was imprecise, "the statute and its implementing regulations, when considered as a whole, are sufficiently clear so as to avoid a constitutional vagueness challenge." (*Mason*, *supra*, 89 Cal.App.4th at pp. 1122-1123.) Moreover, the court found that the expertise of the professionals entrusted with interpreting the provision was relevant. "Where the language of a statute fails to provide an objective standard by which conduct can be judged, the required specificity may nonetheless be provided by the common knowledge and understanding of

members of the particular vocation or profession to which the statute applies." (*Id.* at pp. 1128-1129.)

In closing, the court noted that subjectivity alone did not necessarily establish vagueness:

> While there is some subjectivity involved in determining whether the condition is substantially similar to mental retardation and requires similar treatment, it is not enough to render the statute unconstitutionally vague, particularly when developmental disabilities are widely differing and difficult to define with precision.

(*Mason*, *supra*, 89 Cal.App.4th at p. 1130.)

In another case, the court of appeals did find a commercial statute void for vagueness. The challenge involved the Investigative Consumer Reporting Agencies Act (ICRAA) and the Consumer Credit Reporting Agencies Act (CCRAA). (*Ortiz v. Lyon Management Group, Inc.* (2007) 157 Cal.App.4th 604, 610-611 [69 Cal.Rptr.3d 66].) To summarize the facts, it was unclear whether an unlawful detainer action affected creditworthiness, and thus belonged on reports issued under the CCCRA, or personal character, which belonged on reports issued under the ICRAA. (*Id.* at pp. 612-613.) The construction and interpretation of the statutes precluded disclosure on both. (*Id.* at pp. 617-620.)

The court acknowledged that the statutes must be taken in context and constructed to preserve constitutionality:

> To determine whether a statute is unconstitutionally vague, it must be applied in a specific *context*. [Citation.] Thus, "in judging the constitutionality of [a statute] we must determine not whether [it] is vague but, rather, whether it is vague as applied to this appellant's conduct in light of the specific facts of this particular case." [Citation.] Also, the challenged statute need only be reasonably certain or specific. It "cannot be held void for uncertainty if any reasonable and practical construction can be given to its language." [Citation.] Finally, "[a]ll presumptions and intendments favor the validity of a statute. [Citation.]"

(*Ortiz*, *supra*, 157 Cal.App.4th at p. 613, emphasis in original.)

The court ultimately concluded that the inability to properly categorize unlawful detainer information was fatal, and ruled the ICRAA unconstitutionally vague. The court observed that it was faced with a statutory "platypus," falling into two mutually exclusive categories, and that it:

> was left with no rational basis to determine whether unlawful detainer information constitutes creditworthiness information subject to the CCRAA or character information subject to the ICRAA. We doubt a person of "ordinary intelligence" could do so either. Rather, credit reporting agencies and landlords "must necessarily guess at [the ICRAA's] meaning and differ as to its application. [Citation.]

(*Ortiz*, *supra*, Cal.App.4th at p. 619.) The statutory scheme "fail[ed] to provide adequate notice to persons who compile or request tenant screening reports," leaving them to simply guess, and was therefore unconstitutionally vague. (*Ibid.*) The language in *Ortiz*, unlike *Mason*, went beyond potential subjectivity and into the realm of complete uncertainty.

In sum, state law is similar to federal vagueness law, except that there is an implication that vagueness requires both a notice issue and an arbitrary enforcement issue. Additionally, greater leeway is granted to administrative provisions. A provision must be considered in its context, including the statutory or regulatory scheme accompanying it, and the specialized knowledge of individuals entrusted with interpreting or enforcing it. Finally, California courts agree that vagueness may be acceptable when the provision addresses conduct or circumstances that elude concrete definition.

In light of these rules, appellants cannot launch a facial challenge to the validity of rule 141(b)(2). Rule 141 is not a criminal provision, appellants face no criminal

penalties, and there is no constitutionally protected conduct implicated; appellants have no fundamental right to sell liquor without asking for identification. Indeed, appellants have asserted no such right. Therefore, according to precedent in *Hoffman Estates*, *supra*, appellants must show that the rule is void in all possible applications.

It is not clear whether appellants are asserting that a rule 141(b)(2) determination would be impossible in *every* case. Appellants do argue that "it is impossible for a time period to pass, and, in this instance, 9 months, according to the facts of the case, for any ALJ under any circumstances, whether it be a photograph, no photograph, descriptions, no descriptions, to make a determination that on the date of the operation, March 23, 2011, this decoy adhered to the requirements of rule 141(b)(2)." (App.Br. at p. 5.) But that argument still concludes with a reference to *this decoy* and multiple references to the specific facts before us, thus acknowledging that the determination hinges on the facts of this case alone. Appellants therefore have failed to assert, let alone prove, that rule 141(b)(2) is unconstitutionally vague in all applications. Even if they did properly allege it, we can imagine many situations where, presented with a photograph and a testifying decoy, the determination would be indisputable – if the decoy were a small child, for instance.

Even if appellants could show the rule was vague in all possible applications, additional factors must be considered. First, rule 141(b)(2), as an administrative provision addressing commercial activity, need not be as specific as the criminal statute addressed in *Goguen*, *supra*. It need only be sufficiently definite to provide directives of conduct to the administrative officers.

Moreover, apparent age, much like the developmental disabilities addressed in *Mason*, is a determination that eludes concrete definition. It would be impossible for the

Department to list factors that universally make an individual look over or under 21. Physical appearance differs significantly among minors, and traits such as hair and clothing can vary with passing fashion trends. The fact that the determination necessarily includes some subjectivity is not fatal.

Additionally, rule 141(b)(2) must be taken in its statutory context. Rule 141 in general includes concrete provisions: the decoy must be under 20, must carry legitimate identification or no identification at all, and must truthfully answer all age-related questions. An examination of the entire rule indicates that subdivision (b)(2) lacks clarity only because it is intended to enhance and expand the fairness safeguards contained in the remainder of the rule.

Finally, given the burden of proof contained in rule 141, it is unreasonable for appellants to allege there is insufficient evidence for the ALJ to assess the decoy's appearance at the time of the sale – appellants carry the burden of presenting any such evidence, if it exists. In this case, the appellants presented no testimony or other evidence regarding the decoy's appearance at the time of the sale. [RT at p. 4.] The ALJ therefore reached his conclusions based on the only evidence available – the decoy's appearance in photographs taken the day of the sale, and her appearance at the hearing. (Finding of Fact ¶¶II.B.1-4.) We cannot accept the argument that proof is impossible where no proof has been attempted.

Moreover, appellants' entire argument is patently disingenuous in light of the fact that their clerk scanned the minor decoy's identification twice and completed the sale anyway. (Findings of Fact ¶II.A.2.) We are skeptical of the argument that a clerk is entitled to rely on the appearance of a decoy where the decoy has presented valid identification clearly indicating that she is a minor.

In closing, we are vexed by appellants' constitutional challenge to their own affirmative defense. Even if we were to find 141(b)(2) unconstitutionally vague – which we decline to do – we do not have the authority to redraft the rule. We would have no choice but to strike subsection (b)(2) and eliminate the apparent age defense entirely. This would certainly grant the absolute clarity appellants seek, and would bring rule 141 more in line with the goal of section 25658 – that is, preventing sales to minors, regardless of outward appearance. We doubt, however, that appellants would welcome such an outcome.

Regardless, we find no cause for such drastic action. In light of the relevant standards and the facts presented, this Board does not find rule 141(b)(2) unconstitutionally vague.

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.