

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

AB-9257

File: 20-420567 Reg: 11075673

7-ELEVEN, INC. and THE ELEVENTH DIMENSION, INC.,
dba 7-Eleven Store #2136-17372E
6780 Vineland Avenue, North Hollywood, CA 91606,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: May 2, 2013
Los Angeles

ISSUED JUNE 11, 2013

7-Eleven, Inc. and The Eleventh Dimension, Inc., doing business as 7-Eleven Store #2136-17372E (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 10 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 The Eleventh Dimension, Inc., appearing through their counsel, Ralph Barat Saltsman and Autumn M. Renshaw, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

¹The decision of the Department, dated March 16, 2012, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on April 8, 2005. On August 20, 2011, the Department filed an accusation against appellants charging that, on June 10, 2011, appellants' clerk, Rita Hernandez (the clerk), sold an alcoholic beverage to 19-year-old Daisy Vanegas. Although not noted in the accusation, Vanegas was working as a minor decoy for the Los Angeles Police Department (LAPD) at the time.

At the administrative hearing held on January 4, 2012, documentary evidence was received and testimony concerning the sale was presented by Vanegas (the decoy); and by Jeramie Schulze, Frank Benavidez, and Sergeant Stephen Moore, LAPD officers. Appellants presented no witnesses.

Testimony established that on June 10, 2011, an LAPD officer entered the licensed premises, followed a few seconds later by the decoy. The decoy selected a can of Four Loko, took it to the counter, and the clerk rang up the sale. The clerk did not ask for identification nor any age-related questions. The decoy then exited the store, and returned with the LAPD officers who explained to the clerk, in Spanish, that she had sold alcohol to a minor. One of the officers asked the decoy to identify who sold her the alcohol, and a face-to-face identification of the clerk was made. A few moments later, as a photo of the decoy and clerk was being taken, the decoy was asked again who sold her the alcohol, and a second face-to-face identification was made. Later, a citation was issued to the clerk.

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

Appellants then filed a timely appeal contending: (1) The decoy operation was

not conducted fairly, as required by rule 141(a);² 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.

DISCUSSION

I

Appellants contend that the decoy operation violated rule 141(a) because the clerk did not understand English well and the two face-to-face identifications were conducted in English.

Rule 141(a) provides:

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.

Appellants maintain that this decoy operation was not conducted in a fashion that promotes fairness, even though prior to the face-to-face identifications the clerk was informed, in Spanish, that she had sold alcohol to a minor. Even though appellants do not cite rule 141(b)(5),³ they imply that the face-to-face identification was improper.

The ALJ reached the following conclusion in the second paragraph of Conclusions of Law 5:

The Respondent's rule 141(b)(5) argument is based on the premise that Hernandez did not understand that she was being identified. Specifically,

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.

³Rule 141(b)(5) provides: "Following any completed sale, but not later than the time a citation, if any, is issued, the peace officer directing the decoy shall make a reasonable attempt to enter the licensed premises and have the minor decoy who purchased alcoholic beverages make a face to face identification of the alleged seller of the alcoholic beverages."

at some point in their dealings with Hernandez, the officers concluded that she spoke better Spanish than English. Although they spoke to her in Spanish much of the time, they spoke English when they asked Vanegas to identify the person who sold her the alcohol. Since Hernandez did not testify, there is no way to determine how much English she understood. The argument that her English was so poor that she understood next to nothing is speculation. In any event, the observable actions of the [sic] Vanegas and the officers were such that Hernandez knew or should have known that she was being identified. (Finding of Fact ¶ 8.)

In *Chun* (1999) AB-7287, the Board said "face-to-face" means that:

the decoy and the seller, in some reasonable proximity to each other, acknowledge each other's presence, by the decoy's identification, and the seller's presence such that the seller is, or reasonably ought to be, knowledgeable that he or she is being accused and pointed out as the seller.

In *Greer* (2000) AB-7403, the Board said it is not necessary that the clerk *actually* be aware that the identification is taking place. The only "acknowledgment" required is achieved by "the seller's presence such that the seller is, *or reasonably ought to be*, knowledgeable that he or she is being accused and pointed out as the seller."

[Emphasis added.]

The core objective of rule 141 is fairness to licensees when decoys are used to test their compliance with the law. (*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2003) 109 Cal.App.4th 1687, 1698 [1 Cal.Rptr.3d 339].) Rule 141(b)(5) is concerned with both identifying the seller and providing an opportunity for the seller to look at the decoy again, soon after the sale. (*Ibid.*) It does not require a direct "face off" or any overt "acknowledgment" to accomplish these purposes. There was no evidence of misidentification and the clerk had the opportunity to look at the decoy again. The opportunity is all that needs to be provided.

The ALJ found that rule 141(b)(5) was satisfied twice, once right after the decoy re-entered the store with the officers, and again when a photograph was taken of the

clerk and the decoy. We agree with the ALJ that the clerk knew or should have known that she was being identified because the situation was explained to her in Spanish prior to the face-to-face identification. We find no unfairness in asking the decoy to identify the clerk in English at that point.

II

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. Appellants assert 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 appellants 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. 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 consistent "on-point" rulings.

ORDER

The decision of the Department is affirmed.⁴

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
PETER J. RODDY, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁴This 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.