

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

AB-9259

File: 21-477739 Reg: 11074679

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy Store 1825
5040 Laguna Boulevard, Elk Grove, CA 95758,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

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 1825 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ 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 Autumn M. Renshaw, and the Department of Alcoholic Beverage Control, appearing through its counsel, Heather Hoganson.

¹The 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 December 30, 2011, the Department filed an accusation against appellants charging that, on July 8, 2010, appellants' clerk sold an alcoholic beverage to 19-year-old Carter Nelson. Although not noted in the accusation, Nelson was working as a minor decoy for the Elk Grove Police Department at the time.

At the administrative hearing held on February 15, 2012, documentary evidence was received and testimony concerning the sale was presented by Nelson (the decoy), and by Brian George and Chris Reese, Elk Grove police officers. Appellants presented no witnesses.

Testimony established that on the day of the decoy operation, appellants' clerk sold a six-pack of Budweiser beer to the decoy. Before making the sale, the clerk asked to see the decoy's identification. The decoy handed the clerk his California driver's license, who took it and looked at it for "one or two seconds." The decoy's identification showed his date of birth, 04/16/91, 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)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

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.

and state due process requirements by presenting a standard that is impossible for the ALJ to meet.

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 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 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.