

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

AB-9280

File: 20-360026 Reg: 11074761

7-ELEVEN, INC., KEVIN YUONG, and KHIM TE,
dba 7-Eleven Store #2174-18659
4200 Long Beach Boulevard, Long Beach CA 90807,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: May 2, 2013
Los Angeles, CA

ISSUED JUNE 13, 2013

7-Eleven, Inc., Kevin Yuong, and Khim Te, doing business as 7-Eleven Store #2174-18659 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 10 days, all conditionally stayed for a period of one year, 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., Kevin Yuong, and Khim Te, appearing through their counsel, Ralph Barat Saltsman and Autumn M. Renshaw, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jennifer M. Casey.

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

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on December 20, 1999. On April 5, 2011, the Department filed an accusation against appellants charging that, on September 23, 2010, appellants' clerk, Isidoro Huesca (the clerk), sold an alcoholic beverage to 19-year-old Juan Carlos Castellanos. Although not noted in the accusation, Castellanos was working as a minor decoy for the Department at the time.

At the administrative hearing held on September 15, 2011, and March 28, 2012, documentary evidence was received and testimony concerning the sale was presented by Castellanos (the decoy) and by Vic Duong, an Alcoholic Beverage Control investigator. Appellants presented no witnesses.

On the date of the sale, the decoy entered the premises and proceeded directly to the coolers, where he selected a six-pack of Bud Light beer in cans, then approached the register and placed the beer on the counter. The decoy handed a ten-dollar bill to the clerk, who accepted it and handed the decoy some change, then bagged the beer. The clerk did not request identification, and asked no age-related questions. The decoy then exited the premises with the beer.

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

Appellant filed an appeal contending rule 141(b)(2)² violates both federal and state due process requirements, and is therefore unconstitutional

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

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. Appellant did not raise this issue 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. 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.³

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
PETER J. RODDY, 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.