

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

AB-9584

File: 21-479718; Reg: 16083547

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy #9762
2011 East La Palma Avenue, Anaheim, CA 92806-2744,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Doris Huebel

Appeals Board Hearing: May 4, 2017
Los Angeles, CA

ISSUED MAY 22, 2017

Appearances: *Appellants:* Melissa Gelbart, of Solomon, Saltsman & Jamieson,
as counsel for Garfield Beach CVS, LLC and Longs Drug Stores
California, LLC, doing business as CVS Pharmacy #9762,

Respondent: Jonathan V. Nguyen, as counsel for Department of
Alcoholic Beverage Control.

OPINION

Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing
business as CVS Pharmacy #9762, appeal from a decision of the Department of
Alcoholic Beverage Control¹ suspending their license for 10 days because their clerk
sold an alcoholic beverage to a police minor decoy, in violation of Business and

¹The decision of the Department, dated April 20, 2016, is set forth in the
appendix.

Professions Code section 25658, subdivision (a).

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on September 10, 2009. On January 7, 2016, the Department filed an accusation against appellants charging that, on August 30, 2015, appellants' clerk, Donna Victoria Deangelo (the clerk), sold an alcoholic beverage to 15-year-old Hanna C. Although not noted in the accusation, Hanna was working as a minor decoy for the Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on March 16, 2016, documentary evidence was received and testimony concerning the sale was presented by Hanna C. (the decoy) and by Department Agent Benjamin Delarosa. Appellants presented no witnesses.

Testimony established that on the day of the violation, Agent Delarosa entered the licensed premises followed a short time later by the decoy. The decoy proceeded to the cooler where she selected a 25-ounce can of Bud Light beer. (Exh. 2.) She took the beer to the sales counter and stood in line behind two other customers. When it was her turn the decoy set the beer on the counter. The clerk scanned the beer and asked for the decoy's identification. The decoy replied that she did not have any identification with her. The clerk then asked for her birth date and the decoy replied truthfully, September 12, 1999. The clerk entered something on the register's screen and completed the sale. Agent Delarosa observed the transaction then exited the store. The decoy also exited. Subsequently, the decoy and two agents re-entered the premises to make a face-to-face identification of the clerk and a photograph was taken

of them together. (Exh. 2.) The clerk was later issued a citation.

On March 16, 2016, the administrative law judge (ALJ) submitted a proposed decision, sustaining the accusation and suspending the license for a period of 10 days. On March 23, 2016, following the submission of the proposed decision, the Department's Administrative Hearing Office sent a letter from its Chief ALJ to both appellants and Department counsel inviting the submission of comments on the proposed decision. The letter inviting simultaneous submission of comments from the parties states that the proposed decision and any comments submitted will be submitted to the Director of ABC in 14 days.

On April 1, 2016, appellants submitted their comments to the Director, arguing that neither the Administrative Procedure Act (APA) nor the ABC Act authorize the Department to permit the parties in a disciplinary procedure to comment on a proposed decision, and that by requesting submission of these comments, the Department exceeded the authority granted to it by the APA.

On April 20, 2016, the Department issued its Certificate of Decision, adopting the proposed decision in its entirety.

Appellants then filed a timely appeal contending the Department's commenting procedure violates the APA.

DISCUSSION

Appellants contend that the Department's commenting procedure violates the APA because it is contrary to the intent of the legislature, is an underground regulation, and encourages illegal ex parte communications. (App.Op.Br. at p. 6.) The Department, in addition to opposing appellants' claims, maintains the Appeals Board

lacks jurisdiction to consider this issue (Dept.Br. at p. 5), and contends that voiding the comments would not change the outcome of the case (*id.* at p. 6).

Jurisdiction

This Board's scope of review is limited by the California Constitution and by statute. The Constitution provides:

Review by the board of a decision of the Department shall be limited to the questions whether the department has proceeded without or in excess of its jurisdiction, whether the department has proceeded in the manner required by law, whether the decision is supported by the findings, and whether the findings are supported by substantial evidence in the light of the whole record.

(Cal. Const. art. XX, § 22.)

Additionally, the Constitution provides that "the board shall review the decision subject to such limitations as may be imposed by the Legislature." Those limitations are articulated in section 23084 of the Business and Professions Code, captioned "Questions to be considered by the board on review":

The review by the board of a decision of the department shall be limited to the questions:

- (a) Whether the department has proceeded without, or in excess of, its jurisdiction.
- (b) Whether the department has proceeded in the manner required by law.
- (c) Whether the decision is supported by the findings.
- (d) Whether the findings are supported by substantial evidence in light of the whole record.
- (e) Whether there is relevant evidence, which, in the exercise of reasonable diligence, could not have been produced or which was

improperly excluded at the hearing before the department.

Notably, nothing in the language of either the Constitution or the Business and Professions Code limits this Board's review to the language of the decision itself. Indeed, procedural issues seem to fall squarely under the question of "whether the department has proceeded in the manner required by law." The inclusion of the word "proceeded" in that clause suggests that review of procedure is wholly within the Board's authority. Moreover, a decision obtained through defiance of the provisions of the APA, for example, reflects a failure to proceed in the manner required by law, and should be rejected on appeal as readily as a decision that lacks substantial evidence.

Fortunately, the Board need not rely solely on its own interpretation, as these provisions have been the subject of a number of cases before the California Supreme Court and courts of appeal.

The Department, in its brief, sets forth two cases, neither of which support its position that "[t]he plain language of the constitution, statutes, and supporting case law make clear that the Board is confined to reviewing the Department's decision" and may not examine the Department's policies or procedures. (Dept.Br. at p. 6, citing *Harris v. Alcoholic Bev. Control Appeals Bd.* (1963) 212 Cal.App.2d 106 [28 Cal.Rptr. 74] and *Rice v. Alcoholic Bev. Control Appeals Bd.* (1978) 79 Cal.App.3d 372 [144 Cal.Rptr. 851].) The first case, *Harris*, does indeed observe that "[t]he powers . . . conferred upon the Appeals Board are strictly limited." (*Harris, supra*, at p. 112.) *Harris*, however, turns on the meaning and limitations of the phrase "substantial evidence in light of the whole record" and makes no reference whatsoever to the Department's internal policies or procedures. (See generally *id.*) Simply put, *Harris* is irrelevant.

The second case, *Rice*, is even less helpful. While the court does outline, in passing, the Board's scope of review (*Rice, supra*, at p. 374), the scope of the Board's review was not at issue. Ultimately, the court merely rejects the Board's interpretation of a regulation; it does not hold that the Board had no authority to interpret it. (*Id.* at pp. 377-378.) As in *Harris*, the court makes no mention whatsoever of the Department's policies and procedures or whether the Board holds the authority to review them. (See generally *id.*) *Rice* is equally irrelevant.

A far more helpful case—and one inexplicably ignored by the Department—is the Supreme Court's decision in *Quintanar*. (*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Quintanar)* (2006) 40 Cal.4th 1, 15 [50 Cal.Rptr.3d 585].) In *Quintanar*, the Court reviewed and rejected internal Department procedures through which Department counsel routinely submitted secret ex parte hearing reports—including a recommended outcome—to the Department Director in his decision-making capacity. (*Quintanar, supra*, at pp. 6-7.) The Supreme Court concluded the ex parte hearing reports violated the administrative adjudication bill of rights provisions of the APA. (*Id.* at p. 8.) The court's decision turned on exactly the same scope of review constitutionally granted to the Appeals Board: "whether the Department proceeded in the manner required by law." (*Id.* at p. 7, citing Cal. Const., art. XX, § 22 and Bus. & Prof. Code, § 23090.2(b)].)

More importantly, the Supreme Court explicitly observed that the Board does indeed have jurisdiction to review procedural issues for compliance with applicable law: The Board is authorized to determine "whether the [D]epartment has proceeded in the manner required by law" (Cal. Const., art. XX, § 22, subd. (d); Bus. & Prof. Code,

§ 23084, subd. (b)); as such, it has jurisdiction to determine whether the Department has complied with statutes such as the APA. (*Quintanar, supra*, at p. 15 [overruling a pre-APA case that held Board could not examine decision makers' reasoning].)

Indeed, according to *Quintanar*, the Board may even review documents outside the record in order to ascertain compliance with applicable law. (*Id.* at p. 15, fn. 11.) With regard to the Department's categorical refusal to comply with the Board's order to produce its ex parte hearing reports for review, the Court wrote:

Notwithstanding the Department's objections, the Board had the authority to order disclosure. It was constitutionally empowered to determine whether the Department had issued its decision in compliance with all laws, including the APA. (Cal. Const., art. XX, § 22.) While it is true, as the Department notes, that the Constitution also limits the Board to consideration of the record before the Department (*ibid.*), we must harmonize these two provisions to the extent possible so that the limit imposed by one clause does not destroy the power granted by the other. (*People v. Garcia* (1999) 21 Cal.4th 1, 6 [87 Cal.Rptr.2d 114, 980 P.2d 829].) We interpret the record limit as applying to prevent parties relitigating substantive matter by submitting new evidence, but not to prevent the Board from carrying out its obligation to determine whether the Department has complied with the law.

(*Ibid.*)

Subsequent lower-court decisions describe these statements from *Quintanar* as dicta—and indeed, they are not essential to the Court's direct review of the Department's practices. (See, e.g., *Chevron Stations, Inc. v. Alcoholic Bev. Control Appeals Bd.* (2007) 149 Cal.App.4th 116, 132 [57 Cal.Rptr.3d 6]; *Rondon v. Alcoholic Bev. Control Appeals Bd.* (2007) 151 Cal.App.4th 1274, 1286 [60 Cal.Rptr.3d 295].) Nevertheless, *Quintanar's* position vis-à-vis the Board's scope of review represents a constitutional interpretation and statement of policy direct from the pen of the state's highest court. (See *United Steelworkers of America v. Bd. of Education* (1984) 162

Cal.App.3d 823, 835 [“Twenty years ago, Presiding Justice Otto M. Kaus gave some sage advice to trial judges and intermediate appellate court justices: Generally speaking, follow dicta from the California Supreme Court.”].) The *Quintanar* opinion, dicta or otherwise, ultimately shaped lower courts’ decisions. (See, e.g., *Chevron Stations, supra*, at pp. 131-132 [citing *Quintanar* for the proposition that “the Board was constitutionally empowered to determine whether the Department had issued its decision in compliance with all laws, including the APA”]; *Rondon, supra*, at pp. 1286-1287 [Board’s review of extra-record hearing reports was proper because their proffer was not intended to undermine Department’s factual findings, but rather to shed light on whether illegal decision-making procedures took place].) *Quintanar* must therefore shape this Board’s practices as well. That the Department should choose to categorically ignore *Quintanar* in its brief is, at the very least, peculiar.

The ex parte hearing reports in *Quintanar* occurred at the same phase of decision-making as the comment procedure in the present case, and implicated similar pre-decision commentary (albeit secretly and only from Department counsel). *Quintanar* therefore affirms the Board’s authority to review the Department’s comment procedure and whether it complies with applicable law including, but not limited to, the APA. In so doing, the Board has the authority to review documents establishing the Department’s comment procedure, including its General Orders.

Comment Procedure

The APA defines the term “regulation” broadly: “‘Regulation’ means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to

implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.” (Gov. Code, § 11342.600.) “[I]f it looks like a regulation, reads like a regulation, and acts like a regulation, it will be treated as a regulation whether or not the agency in question so labeled it.” (*State Water Resources Control Bd. v. Office of Admin. Law* (1993) 12 Cal.App.4th 697, 702 [16 Cal.Rptr.2d 25].)

The APA requires that all regulations be adopted through the formal rulemaking process.

No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation, as defined in Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

(Gov. Code, § 11340.5(a).) All regulations are subject to the APA rulemaking process unless expressly exempted by statute. (Gov. Code, § 11346; *Engelmann v. State Bd. of Education* (1991) 2 Cal.App.4th 47, 59 [3 Cal.Rptr.2d 264].) Compliance with the rulemaking process is mandatory; where a regulation was not properly adopted, it has no legal effect. (*Armistead v. State Personnel Bd.* (1978) 22 Cal.3d 198, 204-205 [149 Cal.Rptr. 1].)

A regulation is exempt if it “relates only to the internal management of the state agency.” (Gov. Code, § 11340.9(d).) This exception, however, is narrow. (See *Armistead, supra*; *Stoneham v. Rushen* (1982) 137 Cal.App.3d 729, 736 [188 Cal.Rptr. 130].) “Where the challenged policy goes beyond merely prioritizing or allocating internal resources and may significantly affect others outside the agency . . . such a policy goes beyond the agency’s internal management and is subject to adoption as a

regulation under the APA.” (*Center for Biological Diversity v. Dept. of Fish & Wildlife* (2015) 234 Cal.App.4th 214, 262 [183 Cal.Rptr.3d 736]; see also *Stoneham, supra*, at p. 736 [inmate classification scheme was rule of general application significantly affecting male prison population].)

In *Tidewater*, cited by both parties, the California Supreme Court outlined a two-part test:

A regulation subject to the APA thus has two principal identifying characteristics. [Citation.] First, the agency must intend its rule to apply generally, rather than in a specific case. The rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided. [Citation.] Second, the rule must “implement, interpret, or make specific the law enforced or administered by [the agency], or . . . govern [the agency’s] procedure.” (Gov. Code, §11342, subd. (g).)

(*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 571 [59 Cal.Rptr.2d 186].)

While much of the Department’s General Order merely regulates internal case management procedures, certain provisions affect the due process rights of licensees. In particular, section 3, paragraphs 5 and 6 introduce the new comment procedure, which occurs before the Department Director in her decision making capacity:

5. Upon receipt of a proposed decision from an Administrative Law Judge, AHO [the Administrative Hearing Office] shall forward a copy of the proposed decision to each of the parties, including OLS [the Office of Legal Services] and the Director via the Administrative Records Secretary. In addition, AHO shall include a notification that the parties may submit comments regarding the proposed decision for the Director’s consideration, that comments must be mailed to the Administrative Records Secretary, and that the Director will withhold any action on the matter for fourteen days from the date the proposed decision is mailed to the parties. Upon the written agreement of the parties, the Director may act on the proposed decision prior to the expiration of the fourteen-day withhold period.

6. The Administrative Records Secretary shall forward only the proposed decision and comments submitted by the parties to the Director on the 15th day after mailing of the proposed decision by AHO. Comments received after the 14th day will be forwarded immediately to the Director. Appellants' case was subject to the comment procedure outlined above.

Only appellants submitted comments on the proposed decision to the Director.

In their briefs, the parties agree that the comments did not alter the outcome of the case, but disagree on whether the outcome is relevant. (Dept.Br. at pp. 6-7; App.Cl.Br., at p. 6.)

Under the *Tidewater* test, the Department's General Order—in particular, the two paragraphs at issue here—constitutes an unenforceable underground regulation. First, the General Order itself expresses an intent that it will apply generally. It states: “Although the procedures described herein are intended to apply to all cases, this policy is not intended to provide parties with any substantive rights.” (General Order, *supra*, at § 2.) It orders general compliance with its terms, including paragraphs 5 and 6: “Effective immediately, the following protocols shall be followed with respect to matters litigated before the Administrative Hearing Office.” (*Id.* at § 3.) The general applicability is therefore obvious on the face of the General Order itself.

While the General Order's subsequent language attempts to minimize its general applicability, those statements are either manifestly misleading, or merely incorporate an element of agency discretion; they do not negate its general applicability. For example, the disclaimer that “this policy is not intended to provide parties with any substantive rights” (*ibid.*) is misleading because the General Order itself necessarily affects the parties' substantive due process hearing rights under the APA by creating a

new, non-statutory level of informal written argument before the Department Director. (See generally Gov. Code, § 11425.10 *et seq.*) Regardless, the General Order need not create substantive rights in order to constitute a regulation subject to the APA. (See Gov. Code, § 11342.600.)

Moreover, a regulation is not exempt from the rulemaking process simply because it entails an element of agency discretion. The General Order states that “[w]here deviation is necessary or warranted in particular situations, such deviation shall not be considered a violation of this policy.” (General Order, *supra*, at § 2.) This is pure discretion; there is no explanation of what these “particular situations” might be. Licensees—a class affected by the General Order—cannot control or predict whether the Department will apply the General Order to their case or instead ignore it. According to the terms of the General Order, they presumably have no substantive right to appeal the Department’s exercise of discretion. (See *ibid.* [“[T]his policy is not intended to provide parties with any substantive rights”].) Until the Department chooses to inform them otherwise, licensees must simply assume that the terms of the General Order will apply to their disciplinary proceedings and prepare accordingly. The General Order applies generally, and therefore satisfies the first half of the two-part *Tidewater* test.

Paragraphs 5 and 6—as well as other provisions within the General Order—supplement and “make specific” the Department’s post-hearing decision making procedures. (See *id.* at § 3, ¶¶ 5-6; see also Gov. Code, § 11425.10(a)(2) [“The agency shall make available to the person to which the agency action is directed a copy of the governing procedure.”].) As the General Order itself notes, it is “intended to

insure that the Department adopts the most efficient and legally compliant protocols for the review of proposed decisions.” (General Order, *supra*, at § 1.) The General Order therefore easily satisfies the second part of the *Tidewater* test.

The Court in *Tidewater* went on to outline several exceptions to the rulemaking requirements, including case-specific adjudications, private advice letters, and restatements or summaries, without commentary, of past case-specific decisions. (*Tidewater, supra*, at p. 571.) Additionally, as noted above, the legislature may enact individual statutory exceptions. The Department does not argue an exception; indeed, it does not address the matter at all. In our opinion, no exception applies.

The General Order is therefore a regulation—under the definition supplied by the Government Code and the Court in *Tidewater*—and its adoption improperly circumvented the APA rulemaking process. It is an unenforceable underground regulation.

The Department is correct, however, that this conclusion alone does not necessarily merit reversal. (See Dept.Br., at pp. 6-7; see also *Tidewater, supra*, at pp. 576-577.) As the Court observed in *Tidewater*,

If, when we agreed with an agency’s application of a controlling law, we nevertheless rejected that application simply because the agency failed to comply with the APA [rulemaking procedures], then we would undermine the legal force of the controlling law. Under such a rule, an agency could effectively repeal a controlling law simply by reiterating all its substantive provisions in improperly adopted regulations.

(*Tidewater, supra*, at p. 577.)

It is undisputed that the submission of comments pursuant to the General Order did not change the outcome of this case. (Dept.Br., at pp. 6-7; App.Cl.Br, at p. 6.)

However, in resolving due process issues surrounding the submission of secret ex parte hearing reports, the *Quintanar* Court rejected a similar contention:

The Department implies no remedy is necessary because any submission was harmless; according to the Department, the decision maker could have inferred the contents of the reports of hearing (to wit, a summary of the hearing and requested penalty) from the record. We are not persuaded. First, because the Department has refused to make copies of the reports of hearing part of the record, despite a Board order that it do so, whether their contents are as innocuous as the Department portrays them to be is impossible to determine. Second, although both sides no doubt would have liked to submit a secret unrebutted review of the hearing to the ultimate decision maker or decision maker's advisors, only one side had that chance. The APA's administrative adjudication bill of rights was designed to eliminate such one-sided occurrences. We will not countenance them here. Thus, reversal of the Department's orders is required.

(*Quintanar, supra*, at p. 17.)

If the Department's improper adoption of its General Order were the sole issue, then the Department would be correct; as in *Tidewater*, we would have no grounds for reversal. However, the issue here is also one of due process. Did the Department's comment procedure deprive appellants of any of the due process rights guaranteed by Chapter 4.5 of the APA? If it did, then according to *Quintanar*, the outcome of the case is not relevant.

The APA provides detailed guidance on permissible communications, including post-hearing communications with a decision maker. Generally,

While the proceeding is pending there shall be no communication, direct or indirect, regarding any issue in the proceeding, to the presiding officer from an employee or representative of an agency that is a party or from an interested person outside the agency, without notice and an opportunity for all parties to participate in the communication.

(Gov. Code, § 11430.10(a); see also Law Rev. Com. com, § 11430.10 (1995))

[extending applicability to agency heads or others delegated decision-making powers].) Subsequent provisions outline exceptions to this rule, none of which apply here. (See Gov. Code, §§ 11430.20, 11430.30.) Additionally, the APA sets out procedural remedies should a decision maker receive an improper ex parte communication. (Gov. Code, §§ 11430.40; 11430.50.)

The Law Revision Committee comments accompanying section 11430.10, however, allow for communications initiated by the decision maker:

While this section precludes an adversary from communicating with the presiding officer, it does not preclude the presiding officer from communicating with an adversary. . . . Thus it would not prohibit an agency head from communicating to an adversary that a particular case should be settled or dismissed. However, a presiding officer should give assistance or advice with caution, since there may be an appearance of unfairness if assistance or advice is given to some parties but not others.

(Law. Rev. Com. com., § 11430.10 (1995).) Similarly, the *Quintanar* court suggested the Department's hearing reports might be permissible if they complied with the APA:

The APA bars only advocate-decision maker ex parte contacts, not all contacts. Thus, for example, nothing in the APA precludes the ultimate decision maker from considering posthearing briefs submitted by, and served on, each side. The Department if it so chooses may continue to use the report of hearing procedure, so long as it provides licensees a copy of the report and the opportunity to respond. (Cf. § 11430.50 [contacts with presiding officer or decision maker must be public, and all parties must be afforded opportunity to respond].)

(*Quintanar, supra*, at p. 17.)

While the General Order was unquestionably adopted without regard to APA rulemaking procedures, we cannot say that the comment procedure itself, as applied in this case, violated appellants' APA due process rights. It appears that the Department tailored its comment procedure to the *Quintanar* decision—appellants submitted a posthearing brief, which was duly served on the department and included in the

administrative record. This is sufficient to satisfy the statutory requirement that all parties receive “notice and an opportunity . . . to participate in the communication.” (Gov. Code, § 11430.10.)

It is true that the present parties were not given the opportunity to respond to their adversary’s post-hearing comments. The “opportunity to respond,” however—as opposed to the opportunity “to participate in the communication”—is part of the procedural remedy when the decision maker receives an unsolicited *ex parte* communication. (See Gov. Code §§ 11430.40, 11430.50 [providing opposing party a ten-day window, following disclosure, to respond to *ex parte* communication].) In context, the *Quintanar* Court required the “opportunity to respond” if the Department continued to accept one-sided *ex parte* hearing reports from its own attorneys. If, as here, the decision maker instead simultaneously offers both parties the opportunity to submit comment, then both parties have had the opportunity to participate in the conversation, and the statutes require no further opportunity for response. (See Gov. Code, §§ 11430.10 through 11430.50.)

We agree with appellants that the Department’s General Order is an unenforceable underground regulation that was adopted in violation of APA rulemaking requirements. Nevertheless, the General Order’s comment procedure—as applied in the present case—did not impact appellants’ due process rights, and therefore does not merit reversal. We will not hesitate to reverse in the future, however, should it be proven that appellant’s due process rights were adversely affected by this comment procedure.

ORDER

The decision of the Department is affirmed.²

BAXTER RICE, CHAIRMAN
JUAN PEDRO GAFFNEY RIVERA, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

(a) ²This 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.