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

AB-9604
File: 20-483688; Reg: 16083916

7-ELEVEN, INC., NADIA KHALAF, and RAAD KHALAF,
dba 7-Eleven Store #24344
1311 Palm Avenue, Imperial Beach, CA 91932-1739,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John W. Lewis

Appeals Board Hearing: July 6, 2017
San Francisco, CA

ISSUED JULY 26, 2017

Appearances: *Appellants:* Donna J. Hooper, of Solomon, Saltsman & Jamieson, as counsel for 7-Eleven, Inc., Nadia Khalaf, and Raad Khalaf,

Respondent: John P. Newton, as counsel for Department of Alcoholic Beverage Control.

OPINION

7-Eleven, Inc., Nadia Khalaf, and Raad Khalaf, doing business as 7-Eleven Store #24344, appeal from a decision of the Department of Alcoholic Beverage Control[1] suspending their license for 10 days because their clerk sold an alcoholic beverage to a police minor decoy, in violation of Business and Professions Code section 25658, subdivision (a).

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on December 24, 2009.

[1]The decision of the Department, dated August 4, 2016, is set forth in the appendix.

There is no prior history of discipline on the license.

On March 9, 2016, the Department filed an accusation against appellants charging that, on November 13, 2015, appellants' clerk, Samer Najeeb[2] (the clerk), sold an alcoholic beverage to 17-year-old Michael D. Although not noted in the accusation, Michael was working as a minor decoy for the San Diego County Sheriff's Department at the time.

At the administrative hearing held on June 7, 2016, documentary evidence was received and testimony concerning the sale was presented by Michael D. (the decoy); by Rosa Patron, a San Diego County Sheriff's detective; by Robert Manaco, a Department of Alcoholic Beverage Control agent; and by co-licensee Raad Khalaf.

Testimony established that on the day of the incident the decoy entered the licensed premises alone, followed a short time later by Detective Patron in plain clothes. The decoy selected a six-pack of Coors Light beer in bottles and took it to the sales counter. He placed the beer on the counter and the clerk asked for his identification. The decoy handed the clerk his California driver's license, which had a portrait orientation. It contained his correct date of birth, showing him to be 17 years of age, and a red stipe indicating "AGE 21 IN 2019." (Exh. 3.) The clerk looked at the license for a few seconds then completed the sale without asking any age-related questions. Detective Patron observed the transaction from inside the store. The decoy exited the store, then re-entered with two San Diego County Sheriff deputies and an ABC agent to make a face-to-face identification of the clerk. A photo was taken of the decoy and clerk together (exh. 4.) and the clerk was subsequently cited.

On June 17, 2016, the administrative law judge (ALJ) submitted a proposed

[2]The name of the clerk is spelled Samer Nageeb in the accusation and decision, but Samir Nageep in the transcript. (RT at pp. 40, 70, 79.)

decision, sustaining the accusation and suspending the license for a period of 10 days. On June 29, 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. A corrected version of that letter was sent out on July 5, 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. The Department did not submit comments.

On August 4, 2016, the Department issued its Certificate of Decision, adopting the proposed decision in its entirety and imposing a 10-day suspension.

Appellants then filed a timely appeal contending: (1) the Department abused its discretion by allowing an audio recording of the administrative proceedings, (2) the Department's commenting procedure violates the Administrative Procedures Act (APA), and (3) the Department abused its discretion by failing to mitigate the penalty, in violation of rule 144. (Cal. Code Regs., tit. 4, §144.)

DISCUSSION

I

Appellants contend that the Department abused its discretion by allowing an audio recording to be made of the administrative proceedings in spite of their objection. (App.Op.Br. at p. 5.) Appellants also contend the Department violated the statutory

prohibition against ex parte communications by instructing the ALJ to test the audio recording equipment. (*Id.* at p. 7.)

Government Code section 11512(d) dictates reporting procedures for administrative hearings: "The proceedings at the hearing shall be reported by a stenographic reporter. However, upon the consent of all the parties, the proceedings may be reported electronically." (Gov. Code, §11512(d).) Appellants maintain the audio recording at issue here—made by the ALJ as a test of equipment and not as the official record of the proceedings—violates this statute.

At the beginning of the hearing, the following discussion took place:

THE COURT:

> Prior to going on the record, I did note that this hearing is being audio recorded, not as an official record in this Matter, but as a test by me of the equipment that is here. And I have been tasked with attempting to use the equipment and then to evaluate it and submit my recommendations as far as that is concerned.
>
> The official record of this hearing is, in fact, the record being kept by the court reporter, who is doing her job diligently as we sit here.

MS. ODEN:

> . . . I would just like to note for the record that Respondents would object to the testing of the electronic equipment under 11512 subsection (d).
>
> [¶ . . . ¶]
>
> As my firm in other cases has attempted to video record ABC hearings, we have been denied because the Department has – one of the reasons – because the Department has objected under 11512(d).
>
> And now I feel that we're using another means of recording regardless of either party's position and consent or objection to that.
>
> So just for the record, Respondents would note that objection.
>
> [¶ . . . ¶]

MR. NEWTON:

We have no objection to it.

I understand Respondents' counsel has been the champion of video recording on numerous occasions, and we have objected to that for various reasons not necessarily related to electronic recording as much as recording of undercover police officers and things like that or testifying – and also minors who are testifying. It was more the video.

To the extent the Department is testing out a new system that to be enacted may or may not at some point require a statute, I don't know. That's all I have.

THE COURT:

Okay. All right. I will say this: I'm aware of the firm's objections regarding the video recording of our hearings.

I will note, Ms. Oden, that first of all, this is an audio recording, not video recording.

And the reason it is being tested is because there is some type of legislation pending. It has not been approved. We're trying to anticipate what may happen and be ready for it, if and when it does, that will permit the audio recording of the ABC hearings and allow for it to be transcribed later on, the audio recording itself.

So I have been instructed to test it and test it only, and that's what I'm doing.

(RT at pp. 6-9.)

Originally, section 11512(d) mandated "phonographic"[3] recording of administrative proceedings and provided no exception for electronic recording. (See Stats. 1945, ch. 867, § 1.) In 1978, the Attorney General issued an informal opinion concluding that the legislative directive contained in section 11512, subdivision (d) meant that ordinarily, administrative hearings could *only* be reported by stenographic reporter, but that Civil Code

[3]"Phonographic reporter" referred to stenographic reporter. (See 65 Ops.Cal.Atty.Gen. 682 (Dec. 31, 1982).)

section 3513 allowed use of a tape recording device instead provided both parties waived their right to stenographic reporting. (See Cal. Atty. Gen., Indexed Letter, No. IL 77-181 (July 12, 1978).)

Following issuance of that informal opinion, the Office of Administrative Hearings (OAH) proceeded with an experimental program in which, upon waiver by the parties of their section 11512(d) "right" to stenographic reporting, hearings would be reported by electronic recording device. (65 Ops.Cal.Atty.Gen. 682, 685 (Dec. 31, 1982).) Parties, however, "were not waiving their 'right,'" and so OAH filed a complaint requesting a declaration

> (a) that the phrase "phonographic reporter" as used in section 11512, subdivision (d), means any means of reproducing speech which completely, accurately and comprehensibly reproduces that speech and (b) that OAH was not legally obligated to supply shorthand reporters to record and transcribe its APA hearings but instead could use electronic tape recorders operated by "monitors" trained in their use for that purpose.

(*Ibid*.) The superior court rejected OAH's request and held that OAH was precluded by the statute from using electronic recording devices to report hearings, regardless of waiver. (*Id.* at p. 687.)

The Attorney General promptly issued an opinion removing the possibility of parties waiving the "right" to a stenographic reporter. (See generally *id.*) Thereafter, in 1983, section 11512(d) was amended to include the present exception. (See Stats. 1983, ch. 635, § 1.) While the statute still mandates stenographic reporting, it now provides that, "upon consent of all the parties, the proceedings may be reported electronically." (Gov. Code, § 11512(d).)

There is currently a bill before the legislature (Assembly Bill 1285) which would—if enacted into law as originally proposed—authorize an audio recording to be kept as the

official record of any administrative hearing conducted by the Department of Alcoholic Beverage Control, with a transcription of that audio recording to be made in the event of an appeal. In anticipation of this possible change, the ALJ was asked to test the available audio recording equipment. This was not done as a substitute for the stenographic reporter, as prohibited by section 11512(d), and not as the official record of the administrative hearing, but merely as a test for ABC's own purposes.

Under the circumstances, we fail to see how this can be construed as an abuse of discretion. If the audio recording had been made as the official record of the hearing, in lieu of the court reporter's transcript, the consent of appellants would have been required under current law. But an audio recording made to test the equipment, and not as the official record, is not an abuse of discretion.

Appellants cite the internal management exception of Government Code section 69957 (allowing for the recording of proceedings for the purpose of monitoring the performance of subordinate judges and hearing officers in Superior Court) and maintain that section 69957 prohibits the recording at issue here. (App.Cl.Br. at pp. 2-3.) Section 69957, however, does not apply to administrative hearings conducted under the APA, and is inapplicable here.

Finally, appellants maintain that the Department violated the prohibition against ex parte communications when it instructed the ALJ to test the audio equipment. Appellants maintain the communication between the Department and ALJ is one which is prohibited by Government Code section 11430.80, subdivision (a) which provides:

> There shall be no communication, direct or indirect, while a proceeding is pending *regarding the merits of an issue in the proceeding*, between the presiding officer and the agency head or other person or body to which the power to hear or decide in the proceeding is delegated.

(Gov. Code, § 11430.80, emphasis added.)

Appellants contend: "[t]he phrase 'regarding the merits of an issue in a proceeding' must necessarily include the very manner in which the proceeding is to be conducted. This would necessarily include recording devices and the accessibility to the recording thereafter." (App.Op.Br. at p. 7.) We disagree. An instruction to test audio equipment, and make a recording which is not intended to be the official record of the administrative hearing, can in no way be construed as "regarding the merits of an issue in the proceedings," but is purely administrative—not substantive—in nature. The prohibition against ex parte communications concerns substantive issues. As *Quintanar*—cited by appellants—explains, "[a]n agency prosecutor cannot secretly communicate with the agency decision maker or the decision maker's adviser *about the substance of the case* prior to issuance of a final decision." (*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Quintanar)* (2006) 40 Cal. 4th 1, 10 [50 Cal.Rptr.3d 585], emphasis added.) It does not stand for the proposition that there can be no communication whatsoever between the Department and the ALJ about non-substantive issues such as this.

We see no basis for reversing the Department's decision as a result of this test of audio equipment.

II

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. 8.) The Department, in addition to opposing appellants' claims, maintains the Appeals Board lacks jurisdiction to consider this issue (Dept.Br. at p. 6), and contends that voiding the comments would not

change the outcome of the case (*id*. at p. 14).

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. 7, 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, supra, at* 40 Cal.4th 1, 15. 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. (*Id.*, 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.

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].) The Department argues that the commenting procedure falls within the internal management exception to the APA (Dept.Br. at p. 9), but since the procedure clearly "may significantly affect others outside the agency" (*Center for Biological Diversity, supra,* at p. 262) this argument must fail.

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 number 2016-02, issued on February 17, 2016 and entitled *Ex Parte and Decision Review* (hereinafter, 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.

(General Order # 1016-02, § 3, ¶¶ 5-6.)

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 p. 14; App.Op.Br., at p. 21.)

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. 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.

This conclusion alone, however, does not necessarily merit reversal. (See *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.)

The Department maintains the submission of comments pursuant to the General Order did not change the outcome of this case. (Dept.Br., at p. 14). However, in resolving due process issues surrounding the submission of secret ex parte hearing reports, the *Quintanar* Court rejected the Department's position:

> 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 post-hearing 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. The Board will not hesitate to reverse in the future, however, should it be proven that appellants' due process rights were adversely affected by this comment procedure.

III

Appellants contend that the Department abused its discretion by failing to mitigate the penalty, in violation of rule 144. (App.Op.Br. at p. 22.)

This Board may examine the issue of excessive penalty if it is raised by an appellant (*Joseph's of Cal. v. Alcoholic Bev. Control Appeals Bd.* (1971) 19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183]), but will not disturb the Department's penalty order in the absence of an abuse of discretion. (*Martin v. Alcoholic Bev. Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) If the penalty imposed is reasonable, the Board must uphold it even if another penalty would be equally, or even more, reasonable. "If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within its discretion." (*Harris v. Alcoholic Bev. Control Appeals Bd.* (1965) 62 Cal.2d 589, 594 [43 Cal.Rptr. 633].)

Rule 144 provides:

> In reaching a decision on a disciplinary action under the Alcoholic Beverage Control Act (Bus. and Prof. Code Sections 23000,et seq.), and the Administrative Procedures Act (Govt. Code Sections 11400, *et seq*.), the Department shall consider the disciplinary guidelines entitled "Penalty Guidelines" (dated 12/17/2003) which are hereby incorporated by reference. Deviation from these guidelines is appropriate where the Department **in its sole discretion** determines that the facts of the particular case warrant such a deviation - such as where facts in aggravation or mitigation exist.

(Cal. Code Regs., tit. 4, § 144, emphasis added.) Among the mitigating factors provided by the rule are the length of licensure without prior discipline, positive actions taken by the licensee to correct the problem, cooperation by the licensee in the investigation, and documented training of the licensee and employees. Aggravating factors include, *inter alia*, prior disciplinary history, licensee involvement, lack of cooperation by the licensee in the investigation, and a continuing course or pattern of conduct. (*Ibid*.)

The Penalty Policy Guidelines further address the discretion necessarily involved in

an ALJ's recognition of aggravating or mitigating evidence:

> **Penalty Policy Guidelines:**
>
> The California Constitution authorizes the Department, in its discretion[,] to suspend or revoke any license to sell alcoholic beverages if it shall determine for good cause that the continuance of such license would be contrary to the public welfare or morals. The Department may use a range of progressive and proportional penalties. This range will typically extend from Letters of Warning to Revocation. These guidelines contain a schedule of penalties that the Department usually imposes for the first offense of the law listed (except as otherwise indicated). These guidelines are not intended to be an exhaustive, comprehensive or complete list of all bases upon which disciplinary action may be taken against a license or licensee; nor are these guidelines intended to preclude, prevent, or impede the seeking, recommendation, or imposition of discipline greater than or less than those listed herein, in the proper exercise of the Department's discretion.

In his proposed decision, the ALJ devotes a separate section to the discussion of the penalty in which he explains:

> The Department recommended a 10 day suspension, acknowledging Respondents discipline free history. Respondents further point out that other remedial measures taken by Respondents should result in additional mitigation. Respondents utilized the 7-Eleven “Come of Age” training program, secret shopper program, and send employees to Department LEAD training. Co-licensee Khalaf has also had the “override” button on the stores’s register removed. All of these things are commendable. However, one look at Michael D’s license, in the portrait format (up - down) should have prevented this sale. Licenses in this format are only issued to persons under 21 years of age. It is a huge “red flag”. In any event, some mitigation is warranted. The penalty recommended here complies with Rule 144.

(Penalty Considerations, at p. 5.) Contrary to appellant’s assertion, the ALJ *did* consider evidence of mitigation—length of licensure, employee training, the licensee’s secret shopper program, and positive actions taken by the licensee—but he reached a decision that only some mitigation was appropriate. This is entirely within the discretion of the ALJ.

Appellant’s disagreement with the penalty imposed does not mean the Department abused its discretion. This Board's review of a penalty looks only to see whether it can be considered reasonable, and, if it is reasonable, the Board’s inquiry ends there. The penalty

of 10-days' suspension imposed by the Department is within the guidelines of rule 144, which provide a standard penalty of 15-days' suspension for the first violation of section 25858(a). The ALJ considered several factors in mitigation and reduced the standard penalty by 5 days accordingly. We find no error in this conclusion.

ORDER

The decision of the Department is affirmed.[4]

BAXTER RICE, CHAIRMAN
PETER J. RODDY, MEMBER
JUAN PEDRO GAFFNEY RIVERA, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[4]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.