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

AB-9615
File: 21-414959; Reg: 16083753

IRONWOOD LIQUOR STORE, INC.,
dba Ironwood Liquor
23980 Ironwood Avenue, Moreno Valley, CA 92557,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Doris Huebel

Appeals Board Hearing: September 7, 2017
San Diego, CA

ISSUED OCTOBER 2, 2017

Appearances: *Appellant:* Melissa H. Gelbart, of Solomon, Saltsman & Jamieson, as counsel for Ironwood Liquor Store, Inc.,

Respondent: Jennifer M. Casey, as counsel for Department of Alcoholic Beverage Control.

OPINION

Ironwood Liquor Store, Inc., doing business as Ironwood Liquor, appeals from a decision of the Department of Alcoholic Beverage Control[1] suspending its license for 10 days, with all 10 days conditionally stayed (contingent upon one year of discipline-free operation), because its clerk sold an alcoholic beverage to a police minor decoy, in violation of Business and Professions Code section 25658, subdivision (a).

[1]The decision of the Department, dated September 21, 2016, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on October 19, 2004. On February 10, 2016, the Department filed an accusation charging that appellant's clerk, Kamel Wadie Hannah (the clerk), sold an alcoholic beverage to 18-year-old David Matthew Davis on July 17, 2015. Although not noted in the accusation, Davis was working as a minor decoy for the Moreno Valley Police Department (MVPD)[2] at the time.

On March 1, 2016, appellant filed and served on the Department a Special Notice of Defense pursuant to Government Code section 11506, as well as a Request for Discovery pursuant to Government Code section 11507.6, demanding, inter alia, the names and addresses of all witnesses. (Exh. 1.) The Department responded on April 4, 2016, providing the address and phone number of the MVPD in lieu of the decoy's personal contact information. The Department also provided a copy of the decoy's ID—with the address redacted. (*Ibid*.)

On April 18, 2016, appellant sent a meet and confer letter to the Department. (*Ibid*.) Appellant then filed a Motion to Compel Discovery on April 22, 2016, and the Department filed its opposition to the motion on April 26, 2016. The motion was denied on May 9, 2016. (*Ibid*.)

An administrative hearing was held on June 28, 2016. Documentary evidence was received, and testimony concerning the sale was presented at the hearing by Davis (the decoy) and by MVPD Deputy Deirdre Ritter.

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[2] MVPD is referred to variously as the Moreno Valley Police Department, the Moreno Valley Division of the Riverside Police Department, and the Moreno Valley Station. They contract with the Riverside County Sheriff's Department for services. (http://www.riversidesheriff.org/stations/moval.asp - accessed August 9, 2017.)

Testimony established that on July 17, 2015, Deputy Ritter entered the licensed premises followed shortly thereafter by the decoy. The decoy went to the cooler where he selected a three-pack of 25-ounce cans of Bud Light beer. He took the beer to the sales counter and stood in line. When it was his turn, the decoy set the beer down. The clerk asked for his identification and the decoy handed him his California identification card which had a vertical orientation. The ID card contained his true date of birth—showing him to be 18 years of age—and a red stripe indicating "AGE 21 IN 2018." (Exh. 3.) The clerk looked at the ID for a few seconds then completed the sale without asking any age-related questions. Deputy Ritter observed the transaction from inside the store. The decoy later made a face-to-face identification of the clerk, accompanied by Deputy Chavez, and the clerk was issued a citation.

On July 5, 2016, the administrative law judge (ALJ) submitted a proposed decision, sustaining the accusation and suspending the license for a period of 10 days, with all 10 days conditionally stayed. On July 13, 2016, following the submission of the proposed decision, the Department's Administrative Hearing Office sent a letter from its Chief ALJ to both appellant 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.

Appellant submitted its 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 September 21, 2016, the Department issued its Certificate of Decision, adopting the proposed decision in its entirety.

Appellant then filed a timely appeal contending: (1) the ALJ abused her discretion by denying appellant's motion to compel disclosure of the decoy's contact information, and (2) the Department's commenting procedure violates the APA.

DISCUSSION

I

Appellant contends that the ALJ abused her discretion by denying appellant's motion to compel disclosure of the decoy's contact information. (App.Op.Br. at pp. 4-7.) Appellant also contends the Department failed to comply with Government Code section 11507.6 when it provided only the address of the MVPD when it was in possession of the decoy's personal contact information. (*Ibid*.) At oral argument, counsel for appellant explained that it is asking for an address where the decoy can actually be reached—not necessarily a home address.

This identical issue has been raised and argued in innumerable cases before this Board. As the Board held in 1999:

> Government Code §11507.6 entitles a party to an address for a witness. The statute does not say it must be a residential address. . . . We think any requirement that a decoy's home address be disclosed must be conditioned upon a showing that the address itself has a material connection to the issues, and not simply as a means of contacting the decoy.

(*In re Mauri* (1999) AB-7276, at p. 8.) The Board's position on this issue has not changed in 18 years, yet counsel for appellant continues to raise this tired argument.

Last year, in *7-Eleven, Inc./Joe* (2016) AB-9544[3] the Board held that the decoy's personal address is protected under section 832.7 of the Penal Code. (*Id.* at pp. 6-10.) We follow our *Joe* decision here—referring the parties to that case for an in-depth discussion—and concur with the ALJ's statement in her Order Denying Appellant's Motion to Compel that our holding in *Mauri*, *supra,* is on point.

In the *Joe* case, the Board laid out its position on establishing whether the decoy had actually been unreachable at the address provided by the Department: "in order to comply with section 11507.6, the Department must supply *an address at which the decoy may actually be reached*." (*Joe, supra* at p. 11, emphasis added.) In footnote six of that decision, the Board was quite specific in its instruction on how to establish that the decoy had actually been unreachable at the address provided:

> The burden of proving the Department's failure to comply with section 11507.6 falls with the licensee demanding the decoy's address. (See Gov. Code, § 11507.7(a) [a party's motion to compel "shall state facts showing the respondent party failed or refused to comply with Section 11507.6"].) *We suggest licensees facing discipline under section 25658(a) attempt to contact the decoy in writing, and preserve both the original communication and any response indicating a law enforcement agency's unwillingness or inability to contact the decoy. This would be sufficient to show that the decoy was indeed unreachable at the address provided.*

(*Id. a*t fn. 6, emphasis added.)

Nothing in the record demonstrates <u>any</u> attempt to reach the decoy at the address provided by the Department. The Board very clearly spelled out the procedure for establishing a violation of section 11507.6—first in *Joe,* and in countless cases since

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[3]Cert. den., *7-Eleven, Inc. et al v. ABC Appeals Bd.* (July 6, 2016) 2nd App. Dist. B275900.

then—but here we are, yet again, hearing the same argument without the documentation required.

Lacking demonstrable written evidence of the law enforcement agency's refusal to cooperate, appellant has failed to meet its burden to establish a violation of section 11507.6. (See Gov. Code, § 11507.6; also see *Joe*, *supra*, at p. 11.) Furthermore, appellant has failed to demonstrate that the ALJ's denial of its Motion to Compel was an abuse of discretion.

II

Appellant contends 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. 7.) The Department contends that voiding the comments would not change the outcome of the case, and refutes appellant's other contentions. (Dept.Br. at pp. 7-10.)

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 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 his or 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.
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> 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.

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

Only appellant submitted comments on the proposed decision to the Director. In their respective 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. 7; App.Cl.Br., at pp. 6-7.)

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 therefore an underground regulation.

The Department is correct, however, that this conclusion alone does not necessarily merit reversal. (See Dept.Br., at p. 11; 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.)

The Department maintains the submission of comments pursuant to the General Order did not change the outcome of this case while appellant maintains that it is speculative to assert that the procedure had no effect on the outcome. 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.

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (*Quintanar*) (2006) 40 Cal.4th 1, 17 [50 Cal.Rptr.3d 585].)

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 appellant 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 appellant's APA due process rights. It appears that the Department tailored its comment procedure to the *Quintanar* decision—appellant 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 appellant that the Department's General Order is an 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 appellant's 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 appellant's due process rights were adversely affected by this comment procedure.

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.