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

AB-9583
File: 20-395693 Reg: 15082443

7-ELEVEN, INC., RITU GUPTA, and AMIT GUPTA,
dba 7-Eleven Store #2237-13916C
5630 East Ashlan Avenue, Fresno, CA 93727,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Alberto Roldan

Appeals Board Hearing: March 2, 2017
Los Angeles, CA

Deliberated May 4, 2017
Los Angeles, CA

ISSUED JUNE 8, 2017

Appearances: *Appellants:* Melissa H. Gelbart and Saranya Kalai, of Solomon Saltsman & Jamieson, as counsel for appellants 7-Eleven, Inc., Ritu Gupta, and Amit Gupta, doing business as 7-Eleven Store #2237-13916C.
Respondent: Jacob L. Rambo and John P. Newton as counsel for the Department of Alcoholic Beverage Control.

OPINION

7-Eleven, Inc., Ritu Gupta, and Amit Gupta, doing business as 7-Eleven Store #2237-13916C (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] suspending their license for 10 days, all conditionally stayed, because their clerk sold an alcoholic beverage to a Department minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

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

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on January 14, 2003. On May 13, 2015, the Department filed an accusation against appellants charging that, on March 18, 2015, appellants' clerk, Dalvir Kaur (the clerk), sold an alcoholic beverage to 18-year-old Maribell Garcia. Although not noted in the accusation, Garcia was working as a minor decoy for the Department of Alcoholic Beverage Control at the time.

On June 4, 2015, appellants filed and served on the Department a Request for Discovery pursuant to Government Code section 11507.6 demanding the names and addresses of all witnesses. On July 7, 2015, the Department responded by providing the address of its Fresno District Office in lieu of the decoy's home address. On July 13, 2015, appellants sent a letter to the Department demanding it furnish the decoy's contact information by July 17, 2015. On July 16, 2015, the Department responded that the contact information for the District Office was sufficient.

On July 22, 2015, appellants filed a Motion to Compel Discovery. On August 5, 2015, the Department responded and opposed the motion.

On August 7, 2015, the ALJ denied appellants' motion, arguing that the statute requires only an "address" and not necessarily a home address, and further, that this Board's decision in *Mauri Restaurant Group* (1999) AB-7276 was on point and mandated denial of the motion.

The administrative hearing proceeded on March 2, 2016. Documentary evidence was received and testimony concerning the sale was presented by Garcia (the decoy) and by Department Agent Monica Molthen. Appellants presented no witnesses.

Testimony established that on the date of the operation, the decoy entered the licensed premises alone after being driven to the location by two Department agents.

The agents remained in their vehicle and monitored the decoy as she went to the back wall of the licensed premises and selected a wrapped three-pack of Bud Light beer. The licensed premises were well lit and had large glass windows that allowed the agents to watch the decoy and her interactions with the clerk during the transaction.

There were other patrons in the store when the decoy arrived. When she approached the counter with the three-pack she had selected, the other patrons were finishing with their transactions and in the process of departing. When it was her turn, the decoy set the three-pack on the counter in front of the clerk. There were no customers behind her. The clerk, Dalvir Kaur, scanned the three-pack and asked to see the decoy's identification. The decoy produced her California driver's license and handed it to the clerk, who looked at it before handing it back to the decoy. The decoy was not asked her age during the transaction.

The license the decoy produced was a standard portrait license issued to persons under the age of 21 in the state of California. The license was not in a wallet or sleeve when it was produced. Under the decoy's date of birth was a red, highlighted band that stated "Age 21 in 2017." The decoy paid for the three-pack with a $20 bill. The decoy was given change for the purchase and the three-pack by the clerk. The decoy exited the licensed premises and returned to the agents waiting for her in their vehicle. She reported what had occurred to the agents. What she reported was consistent with what they observed.

Agents Molthen and Kohman entered the licensed premises with the decoy trailing behind them. They contacted the clerk, identified themselves, and explained the violation. Agent Molthen recognized Kaur as the clerk who sold the beer to the decoy. The clerk acknowledged the sale and indicated it was a mistake. The decoy was

standing behind the agents during the above exchange. One of the agents asked the decoy to identify the person who sold her the alcohol. The decoy pointed out Kaur and said that she sold her the beer. The decoy and Kaur were approximately eight to ten feet apart, facing each other at the time of the identification. A photograph of the two was then taken. At the hearing, the decoy testified that Kaur was the person in the photograph with her and that this was the person who sold her the three-pack of beer.

The Department's decision determined that the violation charged was proved and no defense was established. The ALJ rejected appellants' affirmative defenses, including a defense raised under rule 141(b)(2). The ALJ found, however, that mitigation was warranted based on appellants' period of discipline-free operation, and assigned a reduced penalty of 10 days' suspension, with the suspension conditionally stayed in its entirety provided no cause for disciplinary action arise in the following year.

On March 21, 2016, following the submission of the proposed decision, the Department's Administrative Hearing Office sent a letter to appellants and to Department counsel offering both parties the opportunity to comment on the proposed decision. That letter stated:

> Administrative Records Secretary and Concerned Parties:
>
> Enclosed is the Proposed Decision resulting from the hearing before Department of Alcoholic Beverage Control, Administrative Hearing Office in the above entitled matter.
>
> All concerned parties and their attorneys of record are being sent a copy of this Proposed Decision. All concerned parties and attorneys of record are hereby informed that you may submit comments regarding this Proposed Decision to the Director for consideration prior to any action being taken by the Director. Comments to the Director regarding this Proposed Decision shall be mailed to the Administrative Records Secretary. Additional comments submitted for review by the Director, if any, must also be submitted to all parties and their attorneys. For the convenience of all concerned, a list of those parties and their addresses is attached.

> Pursuant to General Order 2016-02, the Administrative Records Secretary will hold this Proposed Decision until 14 days after the date of this letter. After that the Administrative Records Secretary will submit this Proposed Decision along with any comments received from concerned parties to the Director for consideration.

(Letter from John W. Lewis, Chief Admin. Law Judge, Dept. of Alcoholic Bev. Control, Mar. 21, 2016 [hereinafter "Comment Letter"].) As suggested in the final paragraph, the Comment Letter reflected a comment procedure adopted by the Department pursuant to its General Order 2016-02. (Dept. of Alcoholic Bev. Control, "GO-Ex Parte and Decision Review," Gen. Order 2016-02, at § 3, ¶¶ 5-6 (eff. Mar. 1, 2016) [hereinafter "General Order"].)

Eleven days later, on April 1, 2016, appellants, through their attorney, submitted a document entitled "Comments to the Director re Proposed Decision" to the Department as instructed. (See generally Comments to the Director re Proposed Decision [hereinafter "Appellants' comment"].) In it, appellants argued that the Department had no authority to request comments on a proposed decision; that the Department's comment procedure outlined in the General Order violated California's Administrative Procedure Act (APA); and that the comment procedure constituted a regulation and was not properly adopted as such pursuant the APA.

Fifteen days later, on April 5, 2016—one day past the deadline provided in the Comment Letter—counsel for the Department submitted a letter to then-Director Timothy Gorsuch requesting that a portion of the proposed decision pertaining to appellants' rule 141(b)(2) defense be adopted as precedent. (See Letter from John P. Newton, Attorney, Dept. of Alcoholic Bev. Control, to Timothy Gorsuch, Director, Dept. of Alcoholic Bev. Control, Apr. 5, 2016 [hereinafter "Department's comment"].)

Both parties forwarded a copy of their respective comments to the opposing party, as instructed in the Comment Letter.

It is not clear whether the Department Director actually reviewed the parties' comments, or to what extent they influenced the Director's decision making. Regardless, the proposed decision was approved without changes and certified on April 21, 2016.

Appellants then filed this appeal contending (1) the Department exceeded its authority by permitting the parties to comment on a proposed decision; (2) the ALJ abused his discretion by denying appellants' motion to compel release of the minor decoy's address; and (3) the Department failed to proceed in the manner required by law by applying an improper standard to appellants' rule 141(b)(2) defense.

In response, the Department contends this Board lacks jurisdiction to review Department procedures, including those outlined in the Comment Letter and General Order. We will first resolve the jurisdictional issue before moving on to appellants' substantive arguments.

DISCUSSION

I

The Department asserts the Appeals Board has no jurisdiction to review its comment procedure. (Dept.Br., at pp. 3-5.) It argues the Appeals Board may only review the decision itself, and not the procedures that led to that decision. (*Ibid.*) It contends "[t]he plain language of the constitution, statues, and supporting case law make clear that the Board is confined to reviewing the Department's decision." (*Id.* at p. 3.) The Department then paraphrases the California Constitution:

> The Board's power is limited to reviewing whether the Department has proceeded outside of its jurisdiction, in a manner proscribed by law, *the*

> *decision* is supported by the findings, and whether the findings are supported by substantial evidence in light of the record as a whole.

(Dept.Br., at pp. 3-4, emphasis in original.) The Department interprets the phrase it italicized—*the decision*—as a wholesale restriction on the Board's scope of review. In other words, according to the Department, the Board may *only* review the words of the decision itself, and has no authority to review the procedures through which the decision was made.

The Department further contends this Board may not review or even examine the Department's General Order because the document is not part of the administrative record. (*Id.* at p. 5.) It accuses the appellant of improperly introducing new evidence on appeal by attaching the Department's General Order to its opening brief. (App.Br., at p. 10.)

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." (*Id.*) 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." (See Cal. Const., art. XX, § 22.) The inclusion of the word "proceeded" in that clause suggests that review of *procedure* is wholly within the Board's authority. (See *id.*) 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, this 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. 4, 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 also unhelpful. 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]; see also Dept.Br.) 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 the 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 matters 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 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 the General Order.

II

Appellants contend that the Department exceeded its authority by allowing the parties to comment on the ALJ's proposed decision. (App.Br., at p. 7.) They argue there is no law permitting such a procedure. (*Ibid.*) They contend that Government Code section 11517 limits the actions the Department may take on a proposed decision. (*Id.* at pp. 7-8.) They point out that while section 11518.5 of the Government Code permits a party to "apply to the agency for correction of a mistake or clerical error in the decision," it does not allow for substantive comments. (*Id.* at p. 9.) Finally, appellants contend that the Department's General Order 2016-02, which outlines the comment procedure, constitutes an underground regulation. The General Order, they argue, is generally applicable and implements Department procedure, and was not adopted pursuant to APA rulemaking statutes. (*Id.* at pp. 11-14.)

In its Response Brief, the Department does not respond directly to appellants' contention that the General Order is an underground regulation. (See generally Dept.Br.) Instead, it argues only that this Board lacks jurisdiction to review the Department's procedures (see Part I, *supra*) and that voiding the comment procedure would have no effect on the outcome of the case because the Department Director adopted the proposed decision without changes. (Dept.Br., at pp. 3-6.)

Following oral argument, this Board requested additional briefing from both parties on two specific questions of law:

> Assuming the General Order 2016-02 represents a rule of general application governing the Department's procedure:
>
> 1. Does General Order 2016-02 fall under the internal management exception to the APA rulemaking process provided by section 11340.9(d) of the Government Code?
>
> 2. What other authority, if any, exempts General Order 2016-02 from the APA rulemaking process?

(Letter from Sarah M. Smith, Attorney, Alcoholic Bev. Control Appeals Bd., to Saranya Kalai and John P. Newton, Mar. 21, 2017.)

In their supplemental brief, appellants argue the comment procedure "is not subject to the internal management exception because it does not pertain to only internal affairs; rather, General Order 2016-02 both directs individuals and entities to do things not otherwise required and significantly affects the interests of licensees." (App. Resp. to Bd. Request, at p. 2.) Appellants argue that, unlike the rule addressed by the court of appeal in *Pesticide Reform*, the Department's comment procedure *does* require licensees "to do things that they are not already required to do." (App.Br. at p. 3, citing *Californians for Pesticide Reform v. Dept. of Pesticide Regulation* (2010) 184 Cal.App.4th 887, 909 [109 Cal.Rptr.3d 428].) They also direct this Board to the more recent opinion in *Center for Biological Diversity*, in which the court of appeals found that

> [a] major aim of the APA was to provide a procedure whereby people to be affected may be heard on the merits of proposed rules. [Citations.] Where the challenged policy goes beyond merely prioritizing or allocating internal resources and may significantly affect others outside the agency, a fact situation Pesticide Reform did not encounter, such a policy goes beyond the agency's internal management and is subject to adoption as a regulation under the APA.

(App. Resp. to Bd. Request, at pp. 3-4, citing *Center for Biological Diversity v. Dept. of Fish & Wildlife* (2015) 234 Cal.App.4th 214, 262 [183 Cal.Rptr.3d 736].) Appellants contend the comment procedure "creates a protocol expanding the information . . . for the Director to rely on in determining whether to adopt or reject a proposed decision" and "circumvents direct reliance on the source documents," including the administrative record. (App. Resp. to Bd. Request, at p. 6.) According to appellants, the comment procedure "allow[s] the Director to reject a proposed decision upon any information at all, without confirming that it is part of the evidentiary record, and possibly based on preexisting relationships within the Department." (*Id.* at p. 7.) Appellants therefore insist

the comment procedure has a "substantial impact on the rights of licensees" and "must be subject to the APA's rulemaking procedures." (*Id.* at pp. 7-8.)

Finally, appellants contend no other exception excuses the comment procedure from the rulemaking process, and therefore reassert their claim that the comment procedure constitutes an underground regulation. (App Resp. to Bd. Request, at pp. 8-9.)

The Department, in its supplemental brief, relies heavily on *Pesticide Reform*, which held that "[w]here, as here, the agency's rule does not require the individuals or entities affected to do anything they are not already required to do, the rule should fall within the exception for internal management." (See Dept.Supp.Br., at pp. 2-3, citing *Californians for Pesticide Reform*, *supra*, at p. 909.) It contends that "[t]he comments procedure does not require anything from parties" and "merely informs them that the Director will wait 14 days to see if anyone wishes to comment on the case." (Dept.Supp.Br., at p. 3.) According to the Department, "[p]arties are not required to comment and there is nothing preventing them from commenting after the 14-day safe harbor," with the result that "[t]he Director has merely applied a rule to herself alone." (*Ibid.*)

The Department contends that in addition to falling under the internal management exception, the comment procedure is exempt for two additional reasons. First, they argue a number of statutes and cases already authorize—or implicitly require—assorted communications between the parties and the Director in her decision making capacity. (See Dept.Supp.Br., citing *Hohreiter v. Garrison* (1947) 81 Cal.App.2d 384, 398 [184 P.2d 323] [Industrial Accident Commission may adopt facts and award recommended by factfinder without reviewing record, but if it reaches a different finding

or award it must review the evidence itself]; *Soumen v. Munro* (1963) 219 Cal.App.2d 302 [33 Cal.Rptr. 305] [Department may adopt proposed decision without reviewing record; respondent-licensee not entitled to copy of proposed decision prior to its adoption by the Department]; Gov. Code, § 11521 [creating formal process for reconsideration by the agency "on its own motion or on petition of any party"]; Gov. Code, §§ 11517(c)(1), (c)(2)(B)-(C), and (c)(2)(E) [in addition to adopting the proposed decision in its entirety, the Director may "make technical or other minor changes," "reduce or otherwise mitigate the proposed penalty," or "[r]eject the proposed decision, and decide the case upon the record"].) The Department contends that "[c]ases where adopting the proposed decision is inappropriate require an extra layer of issue-spoting [*sic*] which is not possible by simply reviewing the proposed decision"—a conundrum it contends the comment procedure will address. (Dept.Supp.Br., at p. 5.)

Second, the Department claims the comment procedure merely expands the rights of the parties, something the Department is authorized to do by statute. (*Ibid.*, citing Gov. Code, § 11425.10(b) ["The governing procedure by which an agency conducts an adjudicative proceeding may include provisions equivalent to, or more protective of the rights of the person to which the agency action is directed than, the requirements of this section."].) According to the Department, "[t]here is no requirement for a formal rule-making action to grant additional rights to parties." (Dept.Supp.Br., at p. 5.) Because the comment procedure "allows parties to bring other issues to the Director's [attention]," it is "a more expansive grant of rights" and therefore does not require rulemaking. (*Id.* at p. 6.)

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*, *supra*, at p. 262; see also

Stoneham, *supra*, at p. 736 [inmate classification scheme was rule of general application significantly affecting male prison population]; but see *Californians for Pesticide Reform*, *supra*, at p. 909 [no underground regulation where parties are not required "do anything they are not already required to do"].)

In *Tidewater*, cited by appellants, 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.Rtpr.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 takes place 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. Both appellants and the Department submitted comments on the proposed decision to the Director, although the Department's comment was filed on the 15th day. 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. 5-6; App.Cl.Br, at pp. 5-6.)

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, emphasis added.) 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, emphasis added.) 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" (*id.* at § 2) 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 its original brief, the Department does not address the question of whether its comment procedure is exempt from the APA rulemaking process. (See Dept.Br.) However, in its supplemental brief filed in response to this Board's request, it argues the internal management exception applies, as well as other exceptions derived from case law and statute. (See Dept.Supp.Br.)

As noted above, the Department relies heavily on *Pesticide Reform*. In that case, the purported underground regulation prioritized, based on highly technical scientific criteria, the Department of Pesticide Regulation's risk assessments for pesticide active ingredients. (*Californians for Pesticide Reform*, *supra*, at pp. 895-897.) The court of appeal found the prioritization process was intended to promote efficiency in the fulfillment of the agency's statutory risk-assessment duties. (*Id.* at p. 907.) The court observed that "most agencies need to make certain determinations in order to ensure the efficiency and enforcement of their statutory duty," and therefore held that where "the agency's rule does not require the individuals or entities affected to do anything they are not already required to do, the rule should fall within the exception for internal management." (*Id.* at p. 909.)

In *Center for Biological Diversity*, however, the court refined its analysis in *Pesticide Reform*.[2] In *Center for Biological Diversity*, the purported underground

2. Notably, both decisions emerged from the Third Appellate District Court of Appeal. In its supplemental brief, the Department acknowledges only *Pesticide Reform* and fails to mention or address the court's later holding in *Center for Biological Diversity*—a

regulation involved the Department of Fish and Wildlife's "Fishing in the City" program, which stocked fish in urban lakes and ponds. (*Center for Biological Diversity*, *supra*, at p. 258.) The "mitigation measures" at issue required Fish and Wildlife biologists, in accordance with specialized protocols, to determine whether urban bodies of water should be stocked with hatchery fish under the program. (*Id.* at p. 259.) The agency argued the rule fell under the internal management exception because it applied only to itself and its biologists in making stocking decisions. (*Ibid*.) It claimed that "[a]ny impact on venders [*sic*] who do not receive contracts to supply fish because a water body is not chosen for the program is incidental." (*Ibid*.)

While the court did not reject its prior holding in *Pesticide Reform*, it found that Fish and Wildlife's stocking protocol "does not merely grant the Department [of Fish and Wildlife] discretion to allocate or prioritize its own resources before performing a statutory duty. It requires the Department to perform a *new* duty." (*Id.* at p. 261, emphasis in original.) Thus, while the stocking protocol "does not require fish farmers and vendors to engage in any affirmative conduct, it will detrimentally affect them." (*Ibid.*) The court therefore refined its *Pesticide Reform* holding:

> "A major aim of the APA was to provide a procedure whereby people to be affected may be heard on the merits of proposed rules." (*Armistead*, *supra*, 22 Cal.3d at p. 204. . . .) Where the challenged policy goes beyond merely prioritizing or allocating internal resources and may significantly affect others outside the agency, a fact situation *Pesticide Reform* did not encounter, such a policy goes beyond the agency's internal management and is subject to adoption as a regulation under the APA.

(*Id.* at p. 262.)

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troubling omission, since the later decision in *Center for Biological Diversity* is less favorable to the Department's position. Appellants address both cases in their supplemental brief.

Notably, the comment procedure here affects the decision making process in an administrative disciplinary proceeding. The APA hearing process is not a fish stocking protocol or an internal prioritization of risk assessments; it is a statutorily mandated procedure designed to ensure that any effect on the licensee's rights occurs only after a fair hearing. (See, e.g., Gov. Code, § 11425.10 [entitled "Required procedures and rights of persons affected"]; see also Law Rev. Com. com., Gov. Code, § 11425.10 ["Section 11425.10 specifies the minimum due process and public interest requirements that must be satisfied in a hearing that is subject to this chapter."].) Where, as here, the new and purportedly internal procedure alters the decision making process following an APA hearing, that procedure necessarily affects the rights of parties outside the agency.

The Department contends the procedure does not *require* licensees to submit a comment; instead, it merely informs licensees that the Director will wait 14 days to see if any party wishes to comment. (Dept.Supp.Br., at p. 3.) And yet one of the parties invited to comment is the Department itself, through its prosecuting attorney. It is absurd to claim that the comment procedure has no effect on the licensee's rights when the procedure essentially creates a new stage of briefing during which the Department's own attorneys may attempt to persuade the Director. At a minimum, licensees must remain alert to any comments the Department's prosecuting attorney submits, and, in the interests of zealously defending their own position, prepare and submit comments of their own. At worst, a licensee may face different or more severe discipline *because of* comments submitted by the prosecuting attorney—and without a clear path to appeal the contents of those comments or the procedure by which the Director chose to consider them.

Because the comment procedure has the potential to substantially affect licensees' due process rights under the APA,[3] we find that the holding in *Center for Biological Diversity* is applicable. Indeed, the potential effect on licensees' rights is far greater than the simple acquisition of a stocking contract—it goes to the very heart of whether a party has been afforded a fair hearing.

Moreover, none of the additional authorities cited by the Department exempt the comment procedure from the APA rulemaking process. In *Hohreiter*, for example, the court held that under section 11517 of the Government Code, an agency may adopt a hearing officer's proposed decision without reviewing the administrative record; if, on the other hand, it chooses to reject the proposed decision, it must review the record. (*Hohreiter*, *supra*, at pp. 396-397.) The goal, according to the court, was to ensure that "the decision is made in every case by someone familiar with the proceedings and before whom an opportunity to argue the case is afforded." (*Id.* at p. 397.) At no point does *Horheiter* authorize an agency to accept comments from the parties—including its own prosecuting counsel—in deciding whether to accept or reject a proposed decision. (See generally *Hohreiter*, *supra*.) *Stoumen*, also cited by the Department, merely applied *Hohreiter* in the context of a Department decision, with the additional holding that the licensee is not entitled to receive a copy of the proposed decision before it is adopted. (*Stoumen*, *supra*, at pp. 313-314, citing *Dami v. Dept. of Alcoholic Bev. Control* (1959) 176 Cal.App.2d 144, 154 [1 Cal.Rptr. 213].) While the Department is correct that

3. In this case, the comment submitted by counsel for the Department advocated adopting the proposed decision—but also advocated adopting the holding as precedent. While the Director apparently declined to do so in this particular case, such a move would have affected not only the present appellants, but all similarly situated licensees. The comment procedure's potential effect on the rights of licensees thus goes well beyond a single disciplinary action.

the holdings in *Hohreiter* and *Stoumen* "allow for an efficient blanket adoption of a proposed decision" and may indeed be "ill-suited for any other decision-making option" (Dept.Supp.Br., at p. 4), they in no way authorize the Department to circumvent the rulemaking process in order to achieve that end.

Similarly, the provisions of law cited by the Department do not support its position. Section 11521 of the Government Code, for instance, creates a formal process for reconsideration that can be initiated by either a party or by the agency itself. The formal reconsideration process is based on the record and "such additional evidence and argument as may be permitted." (Gov. Code, § 11521(b).) Thus, the statute permits additional argument—but only as part of a formal reconsideration. (*Ibid.*) It does not authorize the informal comment procedure created here.

Likewise, section 11517 of the Government Code provides the steps an agency may take after receiving a proposed decision, and does not authorize the Director to accept party comments before deciding whether to accept or reject the proposed decision.

The Department's position appears to be that because these statutes authorize the Director, in her decision making capacity, to communicate with the parties under specific circumstances, they allow the communications described in the comment procedure without need for the rulemaking process. This is logically flawed and facially incorrect.

Finally, the Department contends the comment procedure is in fact an act of benevolence that "allows parties more expansive rights than the APA." (Dept.Supp.Br., at p. 5.) The Department argues that section 11425.10 authorizes that the "governing procedure by which an agency conducts an adjudicated proceeding may include

provisions equivalent to, or more protective of the rights of the person to which the agency action is directed than, the requirements of this section." (Dept.Supp.Br., at p. 5, quoting Gov. Code, § 11425.10(b).) While the Department is indeed permitted to enact more protective procedures, it must still do so through the rulemaking process unless some exception applies.[4]

We question whether the comment procedure is in fact more protective of the rights of licensees. After all, the comment procedure also affords the Department's own prosecutors the opportunity to submit comments to the Director, with no apparent restrictions on the communication except that it be noticed to the licensee. Regardless, the Department has cited no authority supporting its claim that "more protective" regulations are exempt from APA rulemaking requirements. (See generally Dept.Br.; Dept.Supp.Br.)

The comment procedure as outlined in paragraphs 5 and 6 of General Order 2016-02 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.

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4. The Law Revisions Commission comments on section 11425.10 allow for summary rulemaking in the case of "conforming regulations"—that is, rules that have no regulatory effect. (Law Rev. Com. com., Gov. Code, § 11425.10.) That exception is quite limited, however:

> [A]n agency may add to, revise or delete text published in the California Code of Regulations without complying with the rulemaking procedure specified in Article 5 of the APA *only if the change does not materially alter any requirement, right, responsibility, condition, prescription or other regulatory element* of any California Code of Regulations provision.

(Code Regs., tit. 1, § 100, emphasis added.) In this case, there is no question that there is a material alteration to post-hearing procedures affecting licensees' rights. Thus, even if the comment procedure is somehow more protective of licensees, it nevertheless was subject to the full APA rulemaking process.

The Department is correct, however, that that conclusion alone does not necessarily merit reversal. (See Dept.Br., at pp. 5-6 [inaccurately interpreting prejudice as second part of *Tidewater* test]; 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. 5-6; App.Cl.Br, at pp. 5-6.) 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, Gov. Code, § 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 Commission 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, *Quintanar* 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—both parties submitted posthearing briefs, which were duly served on the opponent and were 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 find that the Department's General Order is an unenforceable underground regulation that was adopted in violation of APA rulemaking requirements. Nevertheless,

the submission of comments by both parties pursuant to the General Order's comment procedure, as applied in the present case, did not materially undermine appellants' APA due process rights. It is undisputed that the comments did not change the outcome of the case. Moreover, appellants raise no objections to the actual content of the communications. We therefore find no grounds to reverse in this case.

We caution the Department, however, on its continued use of this comment procedure. The Department's decision to bypass the rulemaking process deprived it of the opportunity to review public comments that might have alerted it to potential pitfalls in the comment procedure. For example, may the parties raise new issues or submit new evidence in the comments? May a party object to its opponent's comments—for example, on evidentiary grounds—and if so, will the Director give due consideration to the objection, and if necessary, disregard the offending comment? What appeal rights, if any, does a licensee have based on the substance of the Department's comments?

While we decline to reverse in this case, we shall remain particularly vigilant in future cases, and will not hesitate to reverse where the Department's improperly adopted comment procedure materially infringes on an appellant's due process rights.

III

Appellants contend the Department failed to comply with section 11507.6 of the Government Code when it provided the address of its Fresno District Office, rather than the decoy's address as listed on her California driver's license, during pre-hearing discovery. (App.Br., at pp. 14-15.)

Appellants further contend the ALJ abused his discretion by denying their motion to compel disclosure of the minor decoy's address. (App.Br., at p. 15.)

Appellants argue that the reasoning employed by this Board in *Mauri Restaurant Group* is "fatally flawed." (App.Br., at p. 15, citing *Mauri Restaurant* Group (1999) AB-7276.) However, they also reject this Board's later, more detailed rulings, which concluded that minor decoys qualify as "peace officers" whose private information is protected under Penal Code section 832.7. (App.Br., at pp. 15-16; see also *7-Eleven, Inc./Joe* (2016) AB-9544 [holding that the minor decoy qualifies for peace officer protections by operation of Penal Code § 830.6(c)].)

This Board has recently addressed a number of cases raising this purely legal issue. In *7-Eleven, Inc./Joe* (2016) AB-9544, we held that the decoy's personal address is protected under section 832.7 of the Penal Code. (*Id.* at pp. 6-10.) Appellants counter the reasoning of that case by arguing that "minor decoys are never identified as peace officers in the statutory scheme that identifies the class of persons whose personnel records are made confidential." (App.Br., at p. 16.)

Oddly, appellants make no reference whatsoever to the specific provision of the Penal Code this Board referenced—namely, section 830.6(c). In *Joe*, we wrote:

> A volunteer decoy assisting with a short-term Department operation does not expressly fall under the Penal Code definition of a "peace officer." Section 830 provides a broad definition: "Any person who comes within the provisions of this chapter and who otherwise meets all standards imposed by law on a peace officer is a peace officer, and not withstanding any other provision of law, no person other than those designated in this chapter is a peace officer." (Pen. Code, § 830.) Subsequent sections provide a detailed delineation of which occupations fall under the definition, none of which reference minor decoys in particular. (See Pen Code, §§ 830.1 through 830.9.)
>
> Section 830.6(c), however, provides that "[w]henever a person is summoned to the aid of any uniformed peace officer, the summoned person is vested with the powers of a peace officer that are expressly delegated to him or her by the summoning officer or that are otherwise reasonably necessary to properly assist the officer." (Pen. Code, § 830.6(c); see also *Forro Precision, Inc. v. IBM* (9th Cir. 1982) 673 F.2d 1045, 1054 [1982 U.S. App. LEXIS 20438] [holding that under California

> law, immunity from suit arising out of execution of search warrant extends to citizen aiding officer].)
>
> The minor decoy qualifies as a peace officer under section 830.6(c). She is expressly delegated investigatory powers by a Department agent, who is indisputably a peace officer, in order to properly assist in the enforcement of the state's alcoholic beverage laws. Any personal information the Department gleaned in the course of her assistance—including, but not limited to, her home address—is explicitly protected under section 832.7 of the Penal Code. Appellants could only request disclosure of this information through the process outlined in section 1043 of the Evidence Code.

(*Joe*, *supra*, at pp. 9-10.)

Appellants argue, without support, that the absence of the specific phrase "minor decoy" from the statutory scheme is dispositive and negates the above reasoning. (See App.Br., at p. 16 ["[M]inor decoys are never identified as peace officers in the statutory scheme . . . . Nor does Penal Code § 832.6(a) identify minor decoys as reserve officers or even persons with the 'powers' of peace officers."].) It is not and it does not. The statutory scheme need not utter the magic words "minor decoy" for the decoy to be protected under the broad, duty-specific language of section 830.6(c). (See Pen. Code § 830.6(c) [applying to any person summoned to the aid of a uniformed peace officer].)

We therefore adopt our reasoning from *Joe*: the minor decoy "is expressly delegated investigatory powers by a Department agent, who is indisputably a peace officer" and therefore "[a]ny personal information the Department gleaned in the course of her assistance—including, but not limited to, her home address—is explicitly protected under section 832.7 of the Penal Code." (*Joe*, *supra*, at p. 10.) We refer appellants to that case for a more complete analysis.

IV

Appellants contend that the ALJ employed an improper—and unduly high—standard in concluding that appellants had failed to prove their rule 141(b)(2) affirmative defense. (App.Br., at pp. 16-18.) In particular, appellants take issue with the following conclusion of law:

> Specifically, the Respondents argued that [the decoy's] prior experience as a decoy and her participation in the Explorer program gave her the appearance of a person who was old enough to purchase alcohol. No evidence was offered that showed that [the decoy] carried herself in an unusually mature manner *during the transaction* that would have led one to conclude she was older than her actual age.

(Conclusions of Law, ¶ 6; see also App.Br., at p. 17 [citing above passage but altering emphasis to highlight "unusually mature manner" rather than "during the transaction"].) Appellants contend that "[t]his places a higher burden on Appellants that [*sic*] necessary under the Rule 141(b)(2) which only requires Appellants to show that the minor decoy did not have the appearance of someone under the age of 21." (App.Br., at p. 17.)

Additionally, appellants contend the ALJ failed to create "an analytical bridge between raw evidence and conclusions," which they argue is required by the California Supreme Court's holding in *Topanga Association for a Scenic Community*. (App.Br., at pp. 17-18, citing *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 510-511 [113 Cal.Rptr. 836].)

Rule 141 provides, in relevant part:

> (b) The following minimum standard shall apply to actions filed pursuant to Business and Professions Code Section 25658 in which it is alleged that a minor decoy has purchased an alcoholic beverage:
>
> [¶ . . . ¶]
>
> > (2) The decoy shall display the appearance which could generally be expected of a person under 21 years of age, under the actual

> circumstances presented to the seller of alcoholic beverages at the time of the alleged offense.

(Code Regs., tit. 4, § 141(b)(2).) The rule provides an affirmative defense, and the burden of proof lies with the party asserting it. (*Chevron Stations, Inc.* (2015) AB-9445; *7-Eleven, Inc./Lo* (2006) AB-8384.)

The ALJ made the following relevant findings of fact:

> 5. [The decoy] testified at the hearing. On March 18, 2015, she was 5'3" tall and weighed approximately 123 pounds. She wore dark blue jeans and an untucked, long sleeved, black t-shirt during the operation. She wore a small ring on her right hand but did not have any other jewelry visible. She wore her straight black hair with a part down the middle and it extended down to slightly above the elbows when her arms were at her side. Other than mascara, [the decoy] did not wear makeup or nail polish. (Exhibits D-3, D-4, & D-5)
>
> 6. Her appearance at the hearing was the same with the exception of her hair being slightly shorter but still below the shoulders and her use of nail polish at the hearing. [The decoy] had participated in at least 10 decoy operations prior to this one. [The decoy] had served as police Explorer since she was approximately 16 years old and engaged in the standard range of activities those programs offered which included exposure to basic law enforcement subjects, physical fitness training, community activities in a cadet uniform and police ride along opportunities. [The decoy] had testified at one prior hearing before her appearance and testimony in this case. Though she described herself as nervous, she appeared calm but spoke in soft voice during the hearing in this matter.

(Findings of Fact, ¶¶ 5-6.) Based on these findings, the ALJ reached the following conclusions of law:

> 5. The Respondents argued that the decoy operation at the Licensed Premises failed to comply with rules 141(a) and 141(b)(2)[fn] and, therefore, the accusation should be dismissed pursuant to rule 141(c).
>
> 6. Specifically, the Respondents argued that [the decoy's] prior experience as a decoy and her participation in the Explorer program gave her the appearance of a person who was old enough to purchase alcohol. No evidence was offered that showed that [the decoy] carried herself in an unusually mature manner *during the transaction* that would have led one to conclude she was older than her actual age. No testimony was received from the clerk who conducted the transaction that this was the case. The clerk did not testify at all in this matter. This argument is rejected—[the

> decoy] had the appearance generally expected of a person under the age of 21. (Findings of Fact ¶¶ 4-6) More importantly, [the decoy] produced a license that put [the clerk] on actual notice that she was under 21. (Finding of Fact ¶ 9) The Respondents failed to establish an affirmative defense pursuant to these assertions.

(Conclusions of Law, ¶¶ 5-6, emphasis in original.)

Appellants emphasize a single phrase within the ALJ's conclusions, "unusually mature manner," and would have this Board find that the ALJ improperly used that metric—rather than her apparent age—to hold that appellants had failed to prove their affirmative defense. (See App.Br., at p. 16, citing Conclusions of Law, ¶ 6.)

Appellants fundamentally misstate the ALJ's conclusion. They omit the emphasis the ALJ actually supplied—highlighting the phrase "during the transaction"—and substitute their own emphasis. (Compare Conclusions of Law, ¶ 6, with App.Br., at p. 16.) The rule itself dictates that the decoy's appearance must be evaluated "under the actual circumstances presented to the seller of alcoholic beverages at the time of the allege offense"—in other words, during the transaction. The ALJ did not substitute a new metric for the language of the rule, but instead emphasized that the appellants had failed to show that the decoy's appearance violated the rule *during the transaction*.

In reality, the decoy's relative maturity—as opposed to apparent age—was raised and argued by appellants, not manufactured by the ALJ. During closing argument, for example, counsel for appellants described the decoy's Explorer experience and stated, "That's certainly the kind of experience that gives someone an elevated appearance of age and maturity." (RT at p. 68.) Moments later, counsel for appellants argued the decoy "had a very tailored appearance" and that "[s]he looks mature, she sounds mature, and she is mature, as we heard from her extensive experience." (*Ibid.*) The

ALJ's reference to the decoy's relative maturity merely reflects the arguments appellants themselves raised.

Moreover, appellants ignore the final sentences of Conclusions of Law, paragraph 6, in which the ALJ concludes—with citation to his findings of fact—that "[the decoy] had the appearance generally expected of a person under the age of 21." (Conclusions of Law, ¶ 6.) This phrase, which represents the legal metric the ALJ applied to his findings of fact, is a direct quote from the rule. (See Code Regs., tit. 4, § 141(b)(2).) The ALJ's application of the rule was therefore proper.

Lastly, appellants contend that, under *Topanga*, "[t]he decision-maker must create an analytical bridge between raw evidence and conclusions when making a decision." (App.Br., at pp. 17-18, citing *Topanga*, *supra*, at pp. 510-511.) Appellants contend the ALJ instead made a boilerplate finding regarding the decoy's appearance. (*Id.* at p. 18.)

This Board has spent the last half decade repeatedly rejecting precisely the same strained interpretation of *Topanga* appellants now present. We reject it yet again in this case. As we have noted elsewhere,

> Appellants misconstrue *Topanga*. It does not hold that findings must be explained, only that findings must be made. This is made clear when one reads the entire sentence that includes the phrase on which appellant[s] rel[y]: "We further conclude that implicit in section 1094.5 is requirement that the agency which renders the challenged decision *must set forth findings* to bridge the analytic gap between the raw evidence and the ultimate decision or order.

(*Garfield Beach CVS, LLC/Longs Drug Stores Cal., LLC* (2012) AB-9255, at p. 4, citing *Topanga*, *supra*, at p. 515.) *Topanga* addressed the total absence of findings. It is of no relevance to a case such as this, where the ALJ set forth detailed findings regarding the

decoy's appearance both at the time of the sale and during the administrative hearing.

(See Findings of Fact, ¶¶ 5-6.)

ORDER

The decision of the Department is affirmed.[5]

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

5. 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.