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

AB-9624
File: 23-452280; Reg: 16084211

HANGAR 24 CRAFT BREWERY, LLC,
dba Hangar 24 Craft Brewery,
1710 Sessums Drive,
Riverside, CA 92374-1909,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Doris Huebel

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

ISSUED NOVEMBER 28, 2017

Appearances: *Appellant:* Donna J. Hooper, of Solomon, Saltsman & Jamieson, as counsel for Hangar 24 Craft Brewery, LLC,

Respondent: Jonathan V. Nguyen and Joseph J. Scoleri, III, as counsel for Department of Alcoholic Beverage Control.

OPINION

Hangar 24 Craft Brewery, LLC, doing business as Hangar 24 Craft Brewery, appeals from a decision of the Department of Alcoholic Beverage Control[1] suspending its license for 25 days because its employee 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 November 21, 2016, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's small beer manufacturer license was issued on March 13, 2008. On May 25, 2016, the Department filed a two-count accusation charging that appellant's clerk, Gregg Ian Glenn (the bartender), sold or furnished an alcoholic beverage to 18-year-old Kambria Carmen Noelle Dormae[2] on January 22, 2016 (count 1); and that an unidentified male employee sold or furnished an alcoholic beverage to 18-year-old Kambria Carmen Noelle Dormae on January 22, 2016 (count 2). Although not noted in the accusation, Dormae was working as a minor decoy for the Redlands Police Department (RPD) at the time.

On June 10, 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 by providing the address and phone number of the Redlands Police Department in lieu of the decoy's personal contact information. (*Ibid*.) On August 2, 2016, appellant filed a Motion to Compel Discovery. The motion was opposed by the Department, and it was denied by the ALJ. (*Ibid*.)

At the administrative hearing held on September 7, 2016, documentary evidence was received, and testimony concerning the sale was presented by Dormae (the decoy); by RPD officers Dave Frisch and Michael Merriman; Department Agent Eric Burlingame; and appellant's assistant manager, Natalie Morton.

Testimony established that on the day of the operation, at approximately 7:45

[2]Misspelled as "Dorame" in the accusation and decision. (See RT at p.10.)

p.m., the decoy entered the licensed premises' tasting room, followed shortly thereafter by Officer Frisch. The decoy went to the bar counter, was greeted by the bartender[3] and they exchanged pleasantries. The decoy then ordered a pint of Orange Wheat beer. The bartender asked the decoy for her identification, and she handed him her California driver's license. It contained her correct date of birth—showing her to be 18 years of age—and a red stripe indicating "AGE 21 IN 2018." (Exh. 4A.) He looked at the license for a few seconds then told her the cost of the beer. As the decoy paid for the beer and received change from the bartender, another (unidentified) employee poured the beer from the tap and placed it in front of the decoy. The decoy then took the beer to the patio.

Officer Frisch observed the transaction from inside the premises at a distance of approximately 20 feet. He texted the decoy to return to the tasting room for security purposes. He also texted Detective Merriman that the decoy had been served alcohol. Merriman entered the premises with Officer Gonzales, and conferred briefly with Officer Frisch and the decoy. The decoy was asked who sold her the beer and she pointed out the bartender.

Merriman and the decoy approached the bar and Detective Merriman asked the bartender "Did you sell her the beer?" The bartender answered "yes." Merriman asked if he had asked for identification and he said that he had. Merriman asked the decoy if this was the individual who sold her the beer and she replied "this is the man who sold me the beer, but it's not the man who poured me the beer." He then asked her how old she was and she replied, "18." The decoy and bartender were standing approximately

[3]Referred to as "beertender" in parts of the record.

five feet apart at the time and looking at each other during the identification. A photo of the bartender and decoy was taken (exh. 4D), the bartender was issued a citation, and his employment at the premises was subsequently terminated. While being questioned, the bartender was asked by the officers about the identity of the person who poured the beer for the decoy, but he said that he did not know.

On September 22, 2016, the administrative law judge (ALJ) submitted a proposed decision, sustaining the accusation and suspending the license for a period of 25 days. On the same day, 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 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 November 21, 2016, the Department issued its Certificate of Decision, adopting the proposed decision in its entirety.

Appellant then filed a timely appeal contending: (1) rule 141(b)(5)[4] was violated when the officers failed to conduct a face-to-face identification of the unidentified male employee who served the beer, (2) the administrative law judge (ALJ) erred in

[4]References to Rule 141 and its subdivisions are to section 141 of title 4 of the California Code of Regulations, and to the various subdivisions of that section.

sustaining two counts of violating section 25658(a) when only one alcoholic beverage was sold, (3) the ALJ erred in denying appellant's motion to compel disclosure of the decoy's address, and (4) the Department's commenting procedure violates the Administrative Procedures Act (APA). Issues one and two will be discussed together.

DISCUSSION

I

Appellant contends rule 141(b)(5) was violated when the officers failed to conduct a face-to-face identification of the unidentified male employee who served the beer to the decoy. Therefore, it contends, count 2 should be dismissed. (App.Op.Br. at pp. 5-8.) Appellant further contends that the ALJ erred in sustaining two counts of violating section 25658(a) when only one alcoholic beverage was sold to the decoy. (*Id.* at pp. 9-10.)

Rule 141 imposes the following requirements on decoy operations:

> (a) A law enforcement agency may only use a person under the age of 21 years to attempt to purchase alcoholic beverages to apprehend licensees, or employees or agents of licensees who sell alcoholic beverages to minors (persons under the age of 21) and to reduce sales of alcoholic beverages to minors in a fashion that promotes fairness.
>
> (b) The following minimum standards 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.
>
> (1) At the time of the operation, the decoy shall be less than 20 years of age;
>
> (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;
>
> (3) A decoy shall either carry his or her own identification showing the decoy's correct date of birth or shall carry no identification; a decoy who carries identification shall present it upon request to any seller of

alcoholic beverages;

(4) A decoy shall answer truthfully any questions about his or her age;

(5) Following any completed sale, but not later than the time a citation, if any, is issued, the peace officer directing the decoy shall make a reasonable attempt to enter the licensed premises and have the minor decoy who purchased alcoholic beverages make a face to face identification of the alleged seller of the alcoholic beverages.

(c) Failure to comply with this rule shall be a defense to any action brought pursuant to Business and Professions Code Section 25658.

(4 Cal. Code Regs., §141.)

This rule provides an affirmative defense. The burden is, therefore, on appellant to show non-compliance. (*Chevron Stations, Inc.* (2015) AB-9445; *7-Eleven, Inc./Lo* (2006) AB-8384.) As appellant correctly points out, the rule requires "strict adherence." (See *Acapulco Restaurants, Inc.* (1998) 67 Cal.App.4th 575, 581 [79 Cal.Rptr.2d 126].)

It is uncontested that no face-to-face identification was made of the employee who poured the beer at issue in count 2. That count states in relevant part:

> On or about January 22, 2016, respondent-licensee's agent or employee, **an unidentified male**, at said premises, sold, furnished, gave or caused to be sold, furnished or given, an alcoholic beverage, to-wit: beer, to Kambria Carmen Noelle Dorame [*sic*], a person under the age of 21 years, in violation of Business and Professions Code Section 25658(a).

(Accusation, Count 2, emphasis added.) The Department nevertheless maintains that there was compliance with rule 141(b)(5), because the officers had the minor decoy identify someone else—i.e., the bartender who took the order and collected the money for the beer. (Dept.Br. at p. 6.) The Department contends "[r]ule 141(b)(5) does not require the minor decoy to identify a server or someone who poured the alcoholic beverage." (*Ibid.*) We disagree. The face-to-face identification of one individual simply cannot be extrapolated to cover an additional employee and negate the requirement

that they be identified when, as here, the actions of that employee result in an additional count of violating section 25658(a).

The Department contends the "peace officer directing the minor decoy need only make a reasonable attempt to enter the licensed premises and have the minor decoy make a face to face identification of the alleged seller." (*Ibid.)* And, it alleges, the officers fulfilled this requirement when they asked the bartender for the identity of the person who poured the beer. (*Id.* at p. 7.) The Department's position is that the "rule does not require that face to face identification take place, only a reasonable attempt be made." (*Ibid*.) The fact that the officers were unable to identify the "unidentified male" is inconsequential, it contends, so long as they made an attempt. We find this to be an absurd interpretation of rule 141(b)(5).

The purpose of rule 141 is to make decoy operations fair to licensees:

> We conclude that while the identification of the seller is of obvious importance, Regulations section 141, subdivision (b)(5), was primarily designed to deal with a different issue. **The core rationale for the creation of binding sections concerning the conduct of buy operations was to allow such buys in a manner fair to sellers**. Regulations section 141, subdivision (b)(1-3), requires that the decoy reasonably appear to be underage and act in a manner consistent with that appearance. Regulations section 141, subdivision (b)(5), ensures--admittedly not as artfully as it might--that the seller will be given the opportunity, soon after the sale, to come "face-to-face" with the decoy. For reasons left to the sound discretion of the peace officer alone, or in conjunction with the business owner, Regulations section 141, subdivision (b)(5), does not require the identification be done on the premises where the sale occurred.

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (*7-Eleven/Keller*) (2003) 109 Cal.App.4th 1687, 1698 [1 Cal.Rptr.3d 339], emphasis added.) As the Court explained in a recent case:

> Rule 141 provides specific guidance regarding how to preserve fairness in

> minor decoy operations. Subdivision (b) of Rule 141 implements the goal of fairness by imposing five specific requirements for every minor decoy operation. Decoys must be under the age of 20; have the appearance of a person under 21; carry their own actual identification and present that identification upon request; truthfully answer any questions about their ages; and make face-to-face identifications of the persons who sold the alcoholic beverages. (Rule 141, subd. (b)(1)–(5).) Fairness under Rule 141 is assured by a set of five expressly defined safeguards, **all of which must be fulfilled during a minor decoy operation**. [Citation.]

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd*. (*Garfield Beach*) (2017) 7 Cal.App.5th 628, 638 [213 Cal.Rptr.3d 130], citing *Acapulco, supra* at p. 580, emphasis added.)

In the rule 141(b)(5) case cited—*Acapulco*—the Department intentionally did not have the decoy make a face-to-face identification of the bartender because a police officer had been sitting only a few feet away during the transaction and had observed the sale of alcohol to the decoy. Therefore, it was the Department's position that no face-to-face identification was required—maintaining that it was an exercise of its right to interpret a rule governing its enforcement obligations. The Department argued and the Appeals Board agreed in that case[5] that a face-to-face identification was only necessary in situations where there might be a possibility of mis-identifying the seller. However, the Court of Appeal disagreed and reversed both the Department and the Board, saying:

> We reject the Department's contention that its refusal to apply rule 141, subdivisions (b)(5) and (c) is no more than an exercise of its right to "interpret" a rule governing its enforcement obligations. To ignore a rule and the defense that arises from law enforcement's failure to comply with that rule is not a matter of "interpretation." **What the Department has done is to unilaterally decide that rule 141, subdivision (b)(5) applies in some situations but not others, a decision that exceeds the**

[5] *Acapulco Restaurants* (1998) AB-6895.

> **Department's power**. By its refusal to apply rule 141, subdivision (b)(5) when a police officer is present at the time of the sale, the Department has crossed the line separating the interpretation of a word or phrase on one side to the legislation of a different rule on the other, thereby substituting its judgment for that of the rulemaking authority. It might as well have said that rule 141, subdivision (b)(5) applies on Mondays but not Thursdays. The Board offers no authority for its right to do this and we know of none.

(*Ibid.*, emphasis added.) In other words, the Court held that there must be strict compliance with each of the five requirements of rule 141, including the requirement of subdivision (b) that there be a face-to-face identification of the person who has provided alcohol to the minor decoy. Here, as in *Acapulco*, the Department has unilaterally decided that rule 141(b)(5) can be ignored in some situations and applied in others—a clear violation of the Court's holding.

Rule 141(b)(5) cannot be read so narrowly that it only encompasses the person who collects the money simply because wording of the rule states that there be a face-to-face identification of the "seller" of the alcohol. The word "seller" must be interpreted to include a person pouring the beer, and who, for some reason, is not the one collecting the money. Any other interpretation would lead to absurd results.

In *Chun* (1999) AB-7287, at p. 5, this Board attempted to clarify what was required of a valid face-to-face identification and said:

> The phrase "face to face" means that the two, the decoy and the seller, in some reasonable proximity to each other, acknowledge each other's presence, by the decoy's identification, and the seller's presence such that the seller is, or reasonably ought to be, knowledgeable that he or she is being accused and pointed out as the seller.

This has been the Board's position in a myriad of cases on this issue in the intervening years. In compliance with *Acapulco*, the Board has ruled that each element of rule 141

must be strictly complied with. And, the Board has consistently required that "a proper face-to-face identification includes some indicia that the person being identified knows (or reasonably ought to know) that he or she is being accused and pointed out as the seller." (*Garfield Beach* (2016) AB-9571 at pp. 5-6.) This requirement must extend to the identification of each person furnishing alcohol to a minor decoy—whether they collect money or not—when that furnishing results in an additional count in the accusation of violating section 25658(a). To find otherwise would be contrary to the strict compliance dictated by *Acapulco.*

The Department contends the record establishes two violations of section 25658(a)—one by the bartender, and one by the "unidentified male" who poured the beer—while appellant maintains there was one sale of alcohol to the decoy involving two people. (App.Op.Br. at p. 6.) Appellant concedes that "separately, each actor, arguably, could be charged with a misdemeanor violation of Business and Professions Code section 25658. Certainly, the unidentified male who furnished the beer to Dormae could be charged on his own, had he been identified." (*Ibid*.) This may or may not be true, but since the person who poured the beer was not identified, this argument is moot.

The Board believes the unidentified employee who poured the beer reasonably relied on the fact that the decoy's ID had already been checked by the bartender. Therefore, this employee was not required to check for identification a second time. This mirrors the *Lacabanne* case—a case in which the doorman checked a minor's ID but the bartender did not re-check. In that case, the Court found that a server is entitled to rely on the fact that the evidence of majority has already been checked by another employee. *(Lacabanne Properties, Inc. v. Alcoholic Bev. etc. Appeals Board* (1968)

261 Cal.App.2d 181, 189 [67 Cal.Rptr. 734].) Contrary to Department counsel's assertion at oral argument that each person involved must separately check the individual's ID, we believe the employee who poured the beer was entitled to rely on the fact that identification had already been checked by the bartender.

In order to support both counts of the accusation and to strictly comply with rule 141(b)(5)—as required by *Acapulco*—we believe the officers were required to identify each of the individuals involved. Having failed to conduct a face-to-face identification of the "unidentified male," the charge in count two must be dismissed pursuant to rule 141(c): "Failure to comply with this rule shall be a defense to any action brought pursuant to Business and Professions Code Section 25658."
(4 Cal. Code Regs., § 141(c).)

The Department's contention, that only an *attempt* to make a face-to-face identification is required, not an *actual* face-to-face identification, is simply not supported by case law. As the Court in *Acapulco* admonished, the Department is not free to decide that rule 141(b)(5) requires a face-to-face identification in some situations but not others, nor may it excuse the lack of a face-to-face identification as an exercise of the Department's right to interpret a rule governing its enforcement obligations. Strict compliance with the language of rule 141(b)(5) compels an actual face-to-face identification to support each charged violation of section 25858(a) in a decoy operation.

II

Appellant contends that the ALJ abused his discretion by denying appellant's motion to compel disclosure of the decoy's contact information. (App.Op.Br. at pp. 10-18.) Appellant also contends the Department failed to comply with Government

Code section 11507.6 when it provided only the address of the Redland's Police Department when it was in possession of the decoy's personal contact information. (*Ibid*.)

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 argument.

Last year, in *7-Eleven, Inc./Joe* (2016) AB-9544[6] 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:

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

> 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 any 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 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.

III

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. 18.) The Department contends that voiding the comments would not change the outcome of the case, and refutes appellant's other contentions. (Dept.Br. at p. 16.)

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.
>
> 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.

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 *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 reversed as to count 2, and affirmed as to count 1. The decision is remanded to the Department for reconsideration of the penalty in light of the reversal of count 2.[7]

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

[7]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.