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

AB-9645
File: 20-214436; Reg: 16084468

7-ELEVEN, INC., LINA GHAFARI, and PIERRE A. GHAFARI,
dba 7-Eleven Store #2171-15960
4535 Riverside Drive, Chino, CA 91710,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Doris Huebel

Appeals Board Hearing: March 1, 2018
Los Angeles, CA

ISSUED MARCH 26, 2018

Appearances: *Appellants:* Donna J. Hooper, of Solomon, Saltsman & Jamieson, as counsel for 7-Eleven, Inc., Lina Ghafari, and Pierre A. Ghafari,

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

OPINION

7-Eleven, Inc., Lina Ghafari, and Pierre A. Ghafari, doing business as 7-Eleven Store #2171-15960, appeal from a decision of the Department of Alcoholic Beverage Control[1] suspending their license for 10 days (with all 10 days stayed for a period of one year, conditioned upon discipline-free operation during that time) because their clerk sold an alcoholic beverage to a police minor decoy, in violation of Business and

[1]The decision of the Department, dated March 2, 2017, is set forth in the appendix.

Professions Code section 25658, subdivision (a).

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 1, 1988. On July 14, 2016, the Department filed an accusation against appellants charging that, on April 21, 2016, appellants' clerk, Michael Hernandez (the clerk), sold an alcoholic beverage to 18-year-old Robert Madrid. Although not noted in the accusation, Madrid was working as a minor decoy for the Chino Police Department at the time.

Appellants 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. The Department responded by providing the address and phone number of the Chino Police Department in lieu of the decoy's personal contact information. Appellants were unable to contact the decoy at the Chino Police Station. Appellants then filed a Motion to Compel Discovery.

Thereafter, appellants were contacted by the Department and a conditional interview with the decoy was proposed, to be supervised by a Department attorney. Appellants agreed to the interview, which took place on December 9, 2016, during which appellants' counsel asked the decoy questions about his training and experience for approximately one hour (see Dept. Reply Br. at pp. 2-3), in addition to asking for his personal contact information. Counsel for the Department advised against providing this information and the decoy declined to provide it.

The Motion to Compel Discovery was opposed by the Department, and it was denied by the administrative law judge (ALJ), who found that the motion was moot because the Department had provided the address of the Chino Police Department and

appellants had interviewed the decoy prior to the hearing.

An administrative hearing was held on December 14, 2016. Documentary evidence was received and testimony concerning the sale was presented by Madrid (the decoy); by Toby Reveles, a Chino Police officer; and by Ryan Downs, a second decoy who accompanied Madrid on the decoy operation but did not participate in the actual sale.

Testimony established that on April 21, 2016, Officers Reveles and Gray entered the licensed premises in plainclothes, followed shortly thereafter by the two decoys. Both decoys went to the coolers and they each selected a 25-ounce can of Bud Light beer. Decoy Madrid then took both cans of beer to the register and set them down. The clerk scanned the beer and asked the decoy for his identification. The decoy handed the clerk his California ID card—showing him to be 18 years of age—which contained a red stripe indicating “AGE 21 IN 2019" and a blue stripe indicating “AGE 18 IN 2016.” (Exh. 3B.) The clerk looked at the ID and said “Man you look young.” He then completed the sale without asking the decoy any age-related questions. The second decoy stood a step behind and to the right of the decoy during the transaction, and the clerk did not ask for his identification or ask him any age-related questions. The two Chino Police officers observed the transaction from inside the store. Later, the decoy re-entered the premises to make a face-to-face identification of the clerk who sold him the beer and the clerk was issued a citation.

On December 27, 2016, the ALJ submitted a proposed decision, sustaining the accusation and suspending the license for a period of 10 days—all stayed for one year, provided no further cause for discipline arises during that time. Thereafter, on January

9, 2017, the Department's Administrative Hearing Office sent a letter from its Chief ALJ to both appellants and Department counsel, inviting the submission of comments on the proposed decision and stating that the proposed decision and any comments submitted will be submitted to the Director of ABC in 14 days.

Appellants submitted 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 January 30, 2017, the Department adopted the proposed decision in its entirety, and on March 2, 2017, the Department issued its Certificate of Decision.

Appellants then filed a timely appeal contending: (1) the ALJ erred in denying appellants' motion to compel disclosure of the decoy's personal contact information, and (2) the Department's commenting procedure violates the Administrative Procedures Act.

DISCUSSION

I

Appellants contend that the ALJ abused her discretion by denying appellants' motion to compel disclosure of the decoy's personal contact information. Appellants also contend the Department failed to comply with Government Code section 11507.6 when it provided only the address of the Chino Police Department when it was in possession of the decoy's personal contact information.

This issue has been raised and argued in innumerable cases before this Board, and the Board has consistently found that appellants are not entitled to the decoy's

personal contact information. 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.)

In *7-Eleven, Inc./Joe* (2016) AB-9544[2] the Board further held that the decoy's personal address is protected under section 832.7 of the Penal Code. (*Id.* at pp. 6-10.) We once again follow our *Joe* decision here—reiterating our firm belief that the decoy's personal information must be protected—and refer the parties to that case for an in-depth discussion.

Furthermore, in this case appellants were provided an opportunity to interview the decoy prior to the administrative hearing. At that interview—in addition to questions about his training and experience—appellants asked the decoy for his address and cell phone number and he refused. That should have been the end of the inquiry. Appellants fail to explain what purpose would be served by obtaining this personal contact information when the decoy has already been interviewed.

At oral argument, counsel for appellants insinuated that conducting the interview with counsel for the Department present somehow "changed" the decoy's testimony, but offered no evidence to support this hypothesis. Appellants' attempt to paint a picture of improper influence via innuendo is unavailing. Saying "we have no way of knowing"

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

whether the Department's presence had an effect on the decoy's responses is simply not evidence of improper influence.

We believe the Motion to Compel was properly denied by the ALJ. Even though appellants continue to maintain the Chino Police Department's address was not an actual address at which they could contact the decoy, the fact remains that appellants were able to interview the decoy at length prior to the hearing—precisely what counsel for appellants has asked for in the countless cases that have raised this issue.

Finally, having had our opinion on this matter affirmed by the Court of Appeals,[3] albeit by way of an unpublished decision, we consider this issue moot until and unless we are instructed otherwise by a higher court.

II

Appellants contend that the Department's commenting procedure violates the APA because it is contrary to the intent of the legislature, is an underground regulation, and encourages illegal ex parte communications.

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

[3]On November 22, 2017, the Second District Court of Appeals filed an unpublished decision affirming the Board's decision in *7-Eleven/Holmes* (2016) AB-9554 on this issue. Since unpublished decisions cannot be cited we are not permitted to quote the decision here, nor cite it as authority.

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*, the California Supreme Court outlined a two-part test:

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

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

While much of the Department's General Order number 2016-02, issued on February 17, 2016 and entitled *Ex Parte and Decision Review* (hereinafter, General Order), merely regulates internal case management procedures, certain provisions affect the due process rights of licensees. In particular, section 3, paragraphs 5 and 6 introduce the new comment procedure, which occurs before the Department Director in his or her decision making capacity:

> ¶ 5. Upon receipt of a proposed decision from an Administrative Law Judge, AHO [the Administrative Hearing Office] shall forward a copy of the proposed decision to each of the parties, including OLS [the Office of Legal Services] and the Director via the Administrative Records Secretary. In addition, AHO shall include a notification that the parties may submit comments regarding the proposed decision for the Director's consideration, that comments must be mailed to the Administrative Records Secretary, and that the Director will withhold any action on the matter for fourteen days from the date the proposed decision is mailed to the parties. Upon the written agreement of the parties, the Director may act on the proposed decision prior to the expiration of the fourteen-day withhold period.
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> ¶ 6. The Administrative Records Secretary shall forward only the

> proposed decision and comments submitted by the parties to the Director on the 15th day after mailing of the proposed decision by AHO. Comments received after the 14th day will be forwarded immediately to the Director.

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

Only appellants 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. 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.

This conclusion alone, however, does not necessarily merit reversal. (See *Tidewater, supra*, at pp. 576-577.) As the Court observed in *Tidewater*,

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

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

The Department maintains the submission of comments pursuant to the General Order did not change the outcome of this case while appellants maintain 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 appellants of any of the due process rights guaranteed by Chapter 4.5 of the APA? If it did, then according to *Quintanar*, the outcome of the case is not relevant.

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

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

(Gov. Code, § 11430.10(a); see also Law Rev. Com. com, § 11430.10 (1995) [extending applicability to agency heads or others delegated decision-making powers].) Subsequent provisions outline exceptions to this rule, none of which apply here. (See

Gov. Code, §§ 11430.20, 11430.30.) Additionally, the APA sets out procedural remedies should a decision maker receive an improper ex parte communication. (Gov. Code, §§ 11430.40; 11430.50.)

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

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

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

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

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

While the General Order was unquestionably adopted without regard to APA rulemaking procedures, we cannot say that the comment procedure itself, as applied in this case, violated appellants' APA due process rights. It appears that the Department tailored its comment procedure to the *Quintanar* decision—appellants submitted a post-hearing brief, which was duly served on the Department and included in the administrative record. This is sufficient to satisfy the statutory requirement that all

parties receive "notice and an opportunity . . . to participate in the communication." (Gov. Code, § 11430.10.)

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

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

ORDER

The decision of the Department is affirmed.[4]

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

[4]This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code section 23090 et seq.