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

AB-9593
File: 21-479373; Reg: 15083187

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy #9579
4570 Atlantic Avenue, Long Beach, CA 90807-1513,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Doris Huebel

Appeals Board Hearing: May 4, 2017
Los Angeles, CA

ISSUED MAY 19, 2017

Appearances: *Appellants:* Melissa Gelbart, of Solomon, Saltsman & Jamieson, as counsel for Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as CVS Pharmacy #9579,

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

OPINION

Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as CVS Pharmacy #9579, appeal from a decision of the Department of Alcoholic Beverage Control[1] suspending their license for 25 days because their clerk sold an alcoholic beverage to a police minor decoy, in violation of Business and

[1]The decision of the Department, dated May 20, 2016, is set forth in the appendix.

Professions Code section 25658, subdivision (a).

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on September 2, 2009. On October 23, 2015, the Department filed an accusation against appellants charging that, on March 15, 2015, appellants' clerk, Jesse James Warriner (the clerk), sold an alcoholic beverage to 18-year-old Edward Moises Christian Tobar-Kletke. Although not noted in the accusation, Tobar-Kletke was working as a minor decoy for the Long Beach Police Department at the time.

On November 30, 2015, appellants filed and served a Request for Discovery on the Department pursuant to Government Code section 11507.6 demanding, inter alia, the names and addresses of all witnesses. (Exh. 1.) Appellants received the Department's response on December 14, 2015, providing the address and phone number of the Long Beach Police Department in lieu of decoy's personal contact information. The Department also provided a copy of the decoy's California driver's license—with the address redacted. (*Ibid*.)

On December 22, 2015, appellants sent a meet and confer letter to the Department. (*Ibid*.) Appellants then filed a Motion to Compel Discovery on December 29, 2015, and the Department filed its opposition to the motion on the same day. The motion was denied on January 8, 2016. (*Ibid*.)

The first day of administrative hearings was held on January 26, 2016. The Department asked that an accusation be entered into evidence showing that a sale to a minor occurred "on or about March 14, 2015." (*Ibid*.) Appellants objected on the ground that this version of the accusation had not been shown to them prior to the hearing, and that the date of the violation differed from the one served on them—

showing a violation on March 15, 2015. (RT Vol. I at p. 12.) The hearing was continued to March 15, 2015.

Appellants filed a Supplemental Request for Discovery on February 23, 2015, seeking "any and all accusations filed in the above-referenced action" as well as "all writings referring to, relating to, or concerning any accusation or the amendment or modification of any accusation pertaining to the above referenced action." (Exh. 4.) Appellants also subpoenaed Vincent Cravens—the Supervising Agent in Charge who signed the original accusation. (*Ibid*.) On February 25, 2016, the Department filed a First Amended Accusation to correct the date of the decoy operation as having occurred "on or about March 14, 2015." (*Ibid.*)

On March 7, 2016, appellants sent a letter to the Department demanding that it comply with the Supplemental Request for Discovery. On the same day, the Department responded by stating that all discovery had been produced in December, and that the First Amended Accusation had corrected any error. (Exh. 4.) Appellants sent a second demand letter on March 8, 2016, but received no response. Appellants then filed a Motion to Compel on March 9, 2016, and the Department filed its opposition on March 14, 2016. (*Ibid.*)

At the administrative hearing held on March 15, 2016, appellants' motion to compel was denied, and the subpoena on Vincent Cravens was quashed. Documentary evidence was received and testimony concerning the sale was presented by Tobar-Kletke (the decoy); by Long Beach Police Detective Satwan Johnson; and by Rolando Anguiano, a manager at the licensed premises.

Testimony established that on the day of the operation, the decoy entered the premises, followed shortly thereafter by Detective Johnson. The decoy proceeded to the coolers where he selected a 12-pack of Bud Light beer. He took the beer to the

sales counter and stood in line behind two people. When it was his turn, the decoy set the beer on the counter. The clerk scanned the beer and asked the decoy for his identification. The decoy handed the clerk his California driver's license, which had a vertical orientation, and which contained his correct date of birth—showing him to be 18 years of age—and a red stripe indicating "AGE 21 IN 2017." (Exh. 5.) The clerk looked at the license for about five seconds then handed it back to the decoy. The clerk then completed the sale without asking any age-related questions. Detective Johnson observed the transaction from inside the premises. Following the sale, a face-to-face identification of the clerk was made, and a photo of the clerk and decoy was taken. (Exh. 6.) The clerk's employment was subsequently terminated.

On April 4, 2016, the administrative law judge (ALJ) submitted a proposed decision, sustaining the accusation and suspending the license for a period of 25 days. On April 14, 2016, following the submission of the proposed decision, the Department's Administrative Hearing Office sent a letter from its Chief ALJ to both appellants and Department counsel inviting the submission of comments on the proposed decision. The letter inviting simultaneous submission of comments from the parties states that the proposed decision and any comments submitted will be submitted to the Director of ABC in 14 days.

On April 29, 2016, appellants submitted their comments to the Director, arguing that neither the Administrative Procedure Act (APA) nor the ABC Act authorize the Department to permit the parties in a disciplinary procedure to comment on a proposed decision, and that by requesting submission of these comments, the Department exceeded the authority granted to it by the APA. The Department did not submit comments.

On May 20, 2016, the Department issued its Certificate of Decision, adopting the

proposed decision in its entirety.

Appellants then filed a timely appeal contending: (1) the ALJ abused his discretion by denying appellants' motion to compel disclosure of the decoy's personal contact information; (2) the Department's commenting procedure violates the APA; and (3) the ALJ erred in denying appellants' motion to compel discovery regarding discrepancies in the accusation, and improperly denied appellants' subpoena of the individual who signed the original accusation.

DISCUSSION

I

Appellants contend that the ALJ abused his discretion by denying appellants' motion to compel disclosure of the decoy's personal contact information. (App.Op.Br. at p. 8.) Appellants also contend the Department failed to comply with Government Code section 11507.6 when it provided only the address of the Long Beach Police Department, when it was in possession of the decoy's home address. (*Ibid.*)

Government Code section 11507.6 provides in pertinent part:

> After initiation of a proceeding in which a respondent or other party is entitled to a hearing on the merits, a party, upon written request made to another party, prior to the hearing and within 30 days after service by the agency of the initial pleading or within 15 days after the service of an additional pleading, is entitled to (1) obtain the names and addresses of witnesses to the extent known to the other party . . .

(Gov. Code, § 11507.6.) Appellants favor a plain-language interpretation of this provision that would require the Department to provide the decoy's home address "to the extent known" by the Department (App.Op.Br. at p. 9), while the Department maintains it is only required to furnish *an* address—not a residential address. (Dept.Br. at pp. 5-6.)

This Board has addressed a number of cases raising this identical issue. In

7-Eleven, Inc./Joe (2016) AB-9544[2] we 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, and refer the parties to that case for an in-depth discussion.

The Department maintains, and we agree, that disclosing the decoy's home address would violate his right to privacy. "Individuals have a legally protected privacy interest in their home addresses." (Dept.Br. at p. 7, citing *County of Los Angeles v. Los Angeles County Employee Relations Com.* (2013) 56 Cal.4th 905, 927 [157 Cal.Rptr.3d 481].) As the Department points out, appellants "have failed to show why the decoy's home address is essential to the fair resolution of their case." (Dept.Br. at p. 7.) When a person's privacy rights are implicated, the party seeking discovery must show that there is a "compelling need" for this information, and demonstrate that the information is both "directly relevant" and "essential to the fair resolution" of the matter. (Dept.Br. at p. 7, citing *Alch v. Superior Court* (2008) 165 Cal.App.4th 1412, 1423-1425 [82 Cal.Rptr.3rd 470].) Appellants have not established any compelling need for the information, nor have they demonstrated that the decoy's private information is both directly relevant and essential to the fair resolution of the matter.

Furthermore, the Department maintains that disclosure of the decoy's personal contact information is exempt from disclosure pursuant to Government Code section 6254, subdivision (f) which provides, in pertinent part, that information is exempt from disclosure if it would "endanger the safety of a witness or other person involved in the investigation." (*Id*. at p. 8.) It contends that the decoy's safety would be placed in jeopardy by disclosing his home address, and could expose him to danger or possible

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

harassment from a licensee attempting to dissuade the decoy from testifying. (*Ibid*.) We agree.

In the instant case, the record contains no evidence that appellants attempted to reach the decoy at the Long Beach Police Department. It is appellants' burden to establish a violation of section 11507.6. (See Gov. Code, § 11507.7; see also *Joe*, *supra*, at p. 11). Appellants have not met this burden, nor have they demonstrated how the denial of their motion constitutes an abuse of discretion. Moreover, we believe the privacy and safety of the decoy are legitimately being protected by the Department's current procedures.

II

Appellants contend that the Departments 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. 6.) The Department, in addition to opposing appellants' claims, maintains the Appeals Board lacks jurisdiction to consider this issue (Dept.Br. at p. 5), and contends that voiding the comments would not change the outcome of the case (*id*. at p. 6).

Jurisdiction

This Board's scope of review is limited by the California Constitution and by statute. The Constitution provides:

> Review by the board of a decision of the Department shall be limited to the questions whether the department has proceeded without or in excess of its jurisdiction, whether the department has proceeded in the manner required by law, whether the decision is supported by the findings, and whether the findings are supported by substantial evidence in the light of the whole record.

(Cal. Const. art. XX, § 22.)

Additionally, the Constitution provides that "the board shall review the decision

subject to such limitations as may be imposed by the Legislature." Those limitations are articulated in section 23084 of the Business and Professions Code, captioned "Questions to be considered by the board on review":

> The review by the board of a decision of the department shall be limited to the questions:
>
> (a) Whether the department has proceeded without, or in excess of, its jurisdiction.
>
> (b) Whether the department has proceeded in the manner required by law.
>
> (c) Whether the decision is supported by the findings.
>
> (d) Whether the findings are supported by substantial evidence in light of the whole record.
>
> (e) Whether there is relevant evidence, which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before the department.

Notably, nothing in the language of either the Constitution or the Business and Professions Code limits this Board's review to the language of the decision itself. Indeed, procedural issues seem to fall squarely under the question of "whether the department has proceeded in the manner required by law." The inclusion of the word "proceeded" in that clause suggests that review of procedure is wholly within the Board's authority. Moreover, a decision obtained through defiance of the provisions of the APA, for example, reflects a failure to proceed in the manner required by law, and should be rejected on appeal as readily as a decision that lacks substantial evidence.

Fortunately, the Board need not rely solely on its own interpretation, as these provisions have been the subject of a number of cases before the California Supreme Court and courts of appeal.

The Department, in its brief, sets forth two cases, neither of which support its position that "[t]he plain language of the constitution, statutes, and supporting case law

make clear that the Board is confined to reviewing the Department's decision" and may not examine the Department's policies or procedures. (Dept.Br. at p. 6, citing *Harris v. Alcoholic Bev. Control Appeals Bd.* (1963) 212 Cal.App.2d 106 [28 Cal.Rptr. 74] and *Rice v. Alcoholic Bev. Control Appeals Bd.* (1978) 79 Cal.App.3d 372 [144 Cal.Rptr. 851].) The first case, *Harris*, does indeed observe that "[t]he powers . . . conferred upon the Appeals Board are strictly limited." (*Harris, supra*, at p. 112.) *Harris*, however, turns on the meaning and limitations of the phrase "substantial evidence in light of the whole record" and makes no reference whatsoever to the Department's internal policies or procedures. (See generally *id*.) Simply put, *Harris* is irrelevant.

The second case, *Rice*, is even less helpful. While the court does outline, in passing, the Board's scope of review (*Rice, supra*, at p. 374), the scope of the Board's review was not at issue. Ultimately, the court merely rejects the Board's interpretation of a regulation; it does not hold that the Board had no authority to interpret it. (*Id*. at pp. 377-378.) As in *Harris*, the court makes no mention whatsoever of the Department's policies and procedures or whether the Board holds the authority to review them. (See generally *id*.) *Rice* is equally irrelevant.

A far more helpful case—and one inexplicably ignored by the Department—is the Supreme Court's decision in *Quintanar*. (*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 Board could not examine decision makers' reasoning].) Indeed, according to *Quintanar*, the Board may even review documents outside the record in order to ascertain compliance with applicable law. (*Id*. at p. 15, fn. 11.) With regard to the Department's categorical refusal to comply with the Board's order to produce its ex parte hearing reports for review, the Court wrote:

> Notwithstanding the Department's objections, the Board had the authority to order disclosure. It was constitutionally empowered to determine whether the Department had issued its decision in compliance with all laws, including the APA. (Cal. Const., art. XX, § 22.) While it is true, as the Department notes, that the Constitution also limits the Board to consideration of the record before the Department (*ibid*.), we must harmonize these two provisions to the extent possible so that the limit imposed by one clause does not destroy the power granted by the other. (*People v. Garcia* (1999) 21 Cal.4th 1, 6 [87 Cal.Rptr.2d 114, 980 P.2d 829].) We interpret the record limit as applying to prevent parties relitigating substantive matter by submitting new evidence, but not to prevent the Board from carrying out its obligation to determine whether the Department has complied with the law.

(Ibid.)

Subsequent lower-court decisions describe these statements from *Quintanar* as dicta—and indeed, they are not essential to the Court's direct review of the Department's practices. (See, e.g., *Chevron Stations, Inc. v. Alcoholic Bev. Control*

Appeals Bd. (2007) 149 Cal.App.4th 116, 132 [57 Cal.Rptr.3d 6]; *Rondon v. Alcoholic Bev. Control Appeals Bd.* (2007) 151 Cal.App.4th 1274, 1286 [60 Cal.Rptr.3d 295].) Nevertheless, *Quintanar*'s position vis-à-vis the Board's scope of review represents a constitutional interpretation and statement of policy direct from the pen of the state's highest court. (See *United Steelworkers of America v. Bd. of Education* (1984) 162 Cal.App.3d 823, 835 ["Twenty years ago, Presiding Justice Otto M. Kaus gave some sage advice to trial judges and intermediate appellate court justices: Generally speaking, follow dicta from the California Supreme Court."].) The *Quintanar* opinion, dicta or otherwise, ultimately shaped lower courts' decisions. (See, e.g., *Chevron Stations, supra*, at pp. 131-132 [citing *Quintanar* for the proposition that "the Board was constitutionally empowered to determine whether the Department had issued its decision in compliance with all laws, including the APA"]; *Rondon, supra*, at pp. 1286-1287 [Board's review of extra-record hearing reports was proper because their proffer was not intended to undermine Department's factual findings, but rather to shed light on whether illegal decision-making procedures took place].) *Quintanar* must therefore shape this Board's practices as well. 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 its General Orders.

<u>Comment Procedure</u>

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 merely regulates internal case management procedures, certain provisions affect the due process rights of licensees. In particular, section 3, paragraphs 5 and 6 introduce the new comment procedure, which occurs before the Department Director in her decision making capacity:

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

6. The Administrative Records Secretary shall forward only the proposed

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

Appellants' case was subject to the comment procedure outlined above. Only appellants submitted comments on the proposed decision to the Director. In their briefs, the parties agree that the comments did not alter the outcome of the case, but disagree on whether the outcome is relevant. (Dept.Br. at pp. 6-7; App.Cl.Br., at p. 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.) 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 statement 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 an unenforceable underground regulation.

The Department is correct, however, that this conclusion alone does not necessarily merit reversal. (See Dept.Br., at pp. 6-7; 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. 6-7; App.Cl.Br, at p. 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, § 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—appellant submitted a posthearing brief, which was duly served on the opponent 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 believe the Department's General Order is an unenforceable underground regulation that was adopted in violation of APA rulemaking requirements. Nevertheless, the General Order's comment procedure—as applied in the present case—did not impact appellants' APA due process rights, and therefore does merit reversal.

III

Motion To Compel

Appellants contend that the ALJ erred in denying appellants' motion to compel discovery regarding a discrepancy between the accusation and amended accusation. (App.Op.Br. at p. 24.)

Appellants argue that statements, documents, and information pertaining to the discrepancy between the original accusation and the amended accusation are relevant and discoverable under Government Code section 11507.6(e). The "discrepancy" at issue is the date of the violation—shown as March 15, 2015 on the original accusation and as March 14, 2015 on the accusation given to them at the first hearing and on the First Amended Accusation later filed. Government Code section 11507.6, subdivision (e) provides for the discovery of "[a]ny other writing or thing which is relevant and which would be admissible in evidence." This APA discovery provision requires that doubts as to discoverablility should be resolved in favor or ordering disclosure. (*Rli Ins. Co. Group v. Sup. Ct.* (1996) 51 Cal.App.4th 415, 433 [59 Cal.Rptr.2d 111].)

The Department maintains that it did not offer the accusation or the amended accusation as evidence. (Dept.Br. at p. 14.) It contends an accusation is simply "a

written statement of charges that shall set forth in ordinary and concise language the acts or omissions with which the respondent is charged, to the end that the respondent will be able to prepare his or her defense. . . ." (*Ibid.*, citing Gov. Code §11503.) The Department maintains the accusation itself cannot be used to prove a violation of Business and Professions Code section 25658(a)—the charge in the accusation—and that therefore "statements, documents, and information pertaining to changes in the accusation would also not be relevant." (*Ibid.*)

At the administrative hearing, the ALJ stated:

> Prior to going on the record today, I've marked as – a packet of documents as Exhibit 3, which contains the following: A Notice of Continued Hearing on Accusation and First Amended Accusation under Alcoholic Beverage Control Act and State Constitution with attached declarations of service by mail. Unless there is an objection I'll receive Exhibits 1 and 3 for jurisdictional purposes.

(RT at pp. 6-7, emphasis added.) Appellants asked that the original accusation, showing a violation on March 15, 2015, also be included, which the ALJ allowed. Thus augmented, exhibits 1 and 3 were admitted without objection for jurisdictional purposes. (RT at p.8.) Neither the accusation nor the amended accusation were offered as evidence.

Government Code section 11507 provides that at any time before the matter is submitted for decision, an amended or supplemental accusation may be filed. The Department contends it simply fixed a typo—correcting the date of the violation from March 15 to March 14—and that this is a correction fully encompassed by the language of the accusation itself which declares the event occurred "on or about" the stated date. (RT at p. 12.) It maintains that it is unnecessary to get into *why* the typo occurred and that the correction of a simple clerical error does not rise to the level of an event requiring additional discovery on the whys and wherefores of such a correction. (*Ibid.*)

Appellants argued at the hearing on March 15, 2016, however, that this is much more than just an issue of a typo correction:

> MS. GELBART:
>
> . . . The issue here is not that there was a typo made. It's that a typo was fixed without properly amending the Accusation; therefore, we had two versions of purportedly the same document but displaying different information. It's incredibly relevant.
>
> Now, it's not the fact that there was a typo. It's that if there was a typo, when the Department fixes that typo, they had to specifically amend the Accusation and re-serve it on all parties. If that's not happening here, you know, we appear for a hearing, we have an Accusation, and the Department produces a different Accusation that wasn't amended or modified. So I think it's much greater than simply saying that there was merely a typo.

(RT at pp. 15-16.) In short, at the first hearing, on January 26, 2016, appellants were unaware that the Department had changed the date on the accusation from March 15, 2015 to March 14, 2015—without filing an amended accusation. Once the issue arose, the ALJ granted a continuance until March 15, 2016 to allow time for appellants to prepare a defense. Thereafter, on February 25, 2016, a First Amended Accusation was filed and served on the parties, correcting the date of the violation to March 14, 2015. (Exh. 3.)

Interestingly, the original accusation showing the date of March 15, 2015 (see exh. 3) is *not* the one included as part of the record as exhibit 1. Exhibit 1 shows the date of the violation as March 14, 2015, and is identical in all other respects to the document in exhibit 3 which shows the date of the violation as March 15, 2015. Both were purportedly filed October 23, 2015, and both purport to have been signed by Supervising Agent in Charge, Vincent Cravens on September 8, 2015. It would appear that someone at the Department simply corrected the date from the 15th to the 14th rather than filing an amended accusation. We agree with appellants that this is not the

way a correction should be handled, and that the Department should take steps to ensure that typos are corrected by the filing of an amended accusation in the future. However, the First Amended Accusation cured the defect in the original accusation—however sloppily it was handled—so no reversible error arises from this circumstance.

The Department further contends that statements, documents, and information pertaining to any discrepancies between the original and amended accusations are not discoverable because they contain confidential communications between the Department attorney and its client, the Department, which are protected by the attorney-client privilege. (*Id*. At pp. 12-13; Dept.Br. at pp. 14-15.) The ALJ agreed with the Department on this point, and denied appellants' motion to compel, in part, because she believed the information was covered by the attorney-client privilege. (RT at p. 14.)

The attorney-client privilege applies to communications in the course of professional employment that are intended to be confidential. (Evid. Code, §954.) The Department established preliminary facts to support the existence of the privilege. (See *Costco Wholesale Corp. v. Sup. Ct.* (2009) 47 Cal.4th 725,733 [101 Cal.Rptr.3d 758]) and shifted the burden to appellants to establish that the communication was not confidential. The difficulty for appellants is that "a court may not order disclosure of a communication claimed to be privileged to allow a ruling on the claim of privilege." (*Ibid.*) It appears the attorney-client privilege was properly established by the Department and insufficiently refuted by appellants so that the motion to compel was properly denied on this ground.

Subpoena

Appellants contend the ALJ improperly quashed appellants' subpoena of Vincent Cravens, the Supervising Agent In Charge, thereby denying them an opportunity to question the individual who signed the original accusation. (App.Op.Br. at p. 24.)

Government Code section 11450.30, subdivision (a) provides: "A person served with a subpoena or a subpoena duces tecum may object to its terms by a motion for a protective order, including a motion to quash." Appellants maintain it was error for the ALJ to allow the Department to object on Mr. Craven's behalf. They contend that section 11450.30 only provides for objection by the person being subpoenaed. (App.Op.Br. at p. 28.)

The Department correctly asserts that Government Code section 11450.30 does not contain the word "only," and maintains that this code section is not the exclusive authority for objecting to a subpoena. Code of Civil Procedure section 1987.1 provides additional persons who can raise an objection, including a party to the action or upon the court's own motion.

The Department contends it properly objected on behalf of its agent on the ground that the information sought from him pertained to confidential communications which are protected by the attorney-client privilege. Furthermore, they contend the information sought was irrelevant to the hearing. (Dept.Br. at p. 17.) They cite Government Code section 11513, subdivision (f) which states the ALJ "has discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time." (*Id.* at p. 18.)

At the administrative hearing, the ALJ agreed with the Department and quashed the subpoena. This is squarely within the discretion afforded the ALJ by section 11513(f) and cannot be second-guessed by the Board. Appellants have not demonstrated that the quashing of the subpoena was an abuse of discretion by the ALJ.

ORDER

The decision of the Department is affirmed.[3]

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

[3]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.