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

AB-9608
File: 20-214959; Reg: 16083649

7-ELEVEN, INC., JAI BAKSHI, and NEENA BAKSHI,
dba 7-Eleven Store #2171-22375
66500 8th Street, Desert Hot Springs, CA 92240,

Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Doris Huebel

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

CORRECTED OCTOBER 13, 2017†
ISSUED OCTOBER 3, 2017

Appearances: *Appellants:* Melissa H. Gelbart, of Solomon, Saltsman & Jamieson, as counsel for 7-Eleven, Inc., Jai Bakshi, and Neena Bakshi,

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

OPINION

7-Eleven, Inc., Jai Bakshi, and Neena Bakshi, doing business as 7-Eleven Store #2171-22375, appeal from a decision of the Department of Alcoholic Beverage Control[1] suspending their license for 10 days, with all 10 days conditionally stayed (contingent

†This decision was corrected on October 13, 2017 to address a typographical error in the date of issuance.

[1]The decision of the Department, dated September 13, 2016, is set forth in the appendix.

upon one year of discipline-free operation) because their clerk sold an alcoholic beverage to a Department minor decoy, in violation of Business and Professions Code section 25658, subdivision (a).

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 6, 1988, and the premises has operated without discipline since that date.

On January 28, 2016, the Department filed an accusation against appellants charging that, on August 24, 2015, appellants' clerk, Josh Kane Weigel (the clerk), sold an alcoholic beverage to 18-year-old Kishan Pathak. Although not noted in the accusation, Pathak was working as a minor decoy for the Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on May 26, 2016, documentary evidence was received and testimony concerning the sale was presented by Pathak (the decoy) and by Department Agent Souk Thao.

Testimony established that on August 24, 2015, Agent Thao entered the licensed premises followed shortly thereafter by the decoy. The decoy went to the cooler and selected a 25-ounce can of Bud Light beer. He took the beer to the sales counter and waited to be called by one of the two clerks. When it was his turn, he was called over by the clerk on the right and he set the beer on the counter. The clerk asked for his identification, and the decoy handed him his California drivers license which had a vertical orientation and contained a red stripe indicating “AGE 21 IN 2017.” (Exh. 4.) The clerk swiped the ID on the register and a red screen popped up stating “Not Valid.” However, the clerk then completed the sale without asking any age-related questions. Agent Thao observed the transaction from inside the store. Later, a

face-to-face identification of the clerk was made, a photo was taken of the clerk and decoy together (exh. 2), and the clerk was cited.

On June 6, 2016, the administrative law judge (ALJ) submitted a proposed decision, sustaining the accusation and suspending the license for a period of 10 days, with all 10 days conditionally stayed. On June 10, 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.

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 September 13, 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 improperly excluded relevant evidence, and (2) the Department's commenting procedure violates the Administrative Procedures Act (APA).

DISCUSSION

I

Appellants contend that the ALJ improperly excluded relevant evidence, then erroneously rejected appellants' defense based on the lack of such evidence.

(App.Op.Br. at pp. 5-8.) Specifically, appellants maintain the "court erred by sustaining the objection to the question regarding Pathak's experience in the ROTC." (*Id.* at p.6.) They contend they were then prejudiced because "the ALJ then used that lack of evidence to reject Appellants[']argument that the decoy had the general appearance of a person over 21 years of age." (*Id.* at p. 8.)

The scope of the Appeals Board's review is limited by the California Constitution, statute, and case law. In reviewing the Department's decision, the Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the factual findings and legal conclusions. The Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing. (Cal. Const., art. XX, §§ 22; Bus. & Prof. Code, §§ 23084, 23085; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].)

This Board is bound by the factual findings in the Department's decision if supported by substantial evidence. The standard of review is as follows:

> We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. [Citations.] We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor [an appellate] court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. [Citations.]

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

Rule 141, subdivision (b)(2),[2] provides:

> 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.

The rule provides an affirmative defense, and the burden of proof lies with appellants. (*Chevron Stations, Inc.* (2015) AB-9445; *7-Eleven, Inc./Lo* (2006) AB-8384.)

At the administrative hearing, counsel for appellants argued that the decoy's experience in Junior ROTC was relevant to establishing how he appeared to the clerk on the day of the decoy operation—even though he wore no uniform or other indicia of belonging to ROTC during the operation—for the purpose of establishing whether there was compliance with rule 141(b)(2). Counsel for the Department objected to this testimony at the hearing on the basis of relevance, and the ALJ sustained the objection. (See RT at pp. 52-54.) Appellants maintain the ALJ used the lack of this evidence regarding the decoy's ROTC experience to reject their argument that the decoy had the appearance of an individual over the age of 21.

Evidence Code section 210 defines relevant evidence as follows:

> "Relevant evidence" means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.

Parties are not permitted to enter any and all evidence without limitation, however. The APA provides: "The presiding officer has discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time." (Government Code, § 11513(f).)

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[2]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.

> Whether offered evidence is relevant is an issue the determination of which involves an exercise of judicial discretion by the trial court, and its conclusion in the premises will be sustained on appeal unless an abuse of discretion is shown.

(*People v. Diamond* (1970) 10 Cal.App.3d 798, 801 [89 Cal.Rptr. 126].) We agree with the Department that the exclusion of evidence regarding the decoy's ROTC experience, offered by appellants to establish a rule 141(b)(2) defense, was a proper exercise of the ALJ's discretion.

This Board has rejected similar arguments regarding "experienced decoys" many times. As we noted in *Azzam* (2001) AB-7631:

> Nothing in Rule 141(b)(2) prohibits using an experienced decoy. A decoy's experience is not, by itself, relevant to a determination of the decoy's apparent age; it is only the *observable effect* of that experience that can be considered by the trier of fact. . . . There is no justification for contending that the mere fact of the decoy's experience violates Rule 141(b)(2), without evidence that the experience actually resulted in the decoy displaying the appearance of a person 21 years old or older.

(*Id.* at p. 5, emphasis in original.) This Board has further noted that:

> An ALJ's task to evaluate the appearance of decoys is not an easy one, nor is it precise. To a large extent, application of such standards as the rule provides is, of necessity, subjective; all that can be required is reasonableness in the application. As long as the determinations of the ALJ's are reasonable and not arbitrary or capricious, we will uphold them.

(*O'Brien* (2001) AB-7751, at pp. 6-7.)

In the decision below, the ALJ made the following findings about the decoy's appearance and experience:

> 5. Decoy Pathak appeared and testified at the hearing. On August 24, 2015, he was 5'2" tall and weighed 120 pounds. He was wearing a grey t-shirt with the Fox Motor Cross brand logo on the front, blue jeans and tennis shoes,. His hair was cut short. He wore a copper bracelet on his right wrist and a black Casio watch on his left wrist. He shaved that morning and had no facial hair. (Exhibits 2, 5A and 5B.) His appearance at the hearing was the same, except he weighed 126, he did not wear the bracelet, he wore a different black watch, and the length of his hair on the sides of his head was cut shorter in length.

[¶ . . . ¶]

11. As of August 24, 2015, decoy Pathak had been involved in approximately six minor decoy operations, visiting on average 10 to 20 locations per operation. Decoy Pathak became involved in the decoy program through the Cathedral City Police Department's Explorer Program, the latter of which he joined in 2010. As a Police Explorer decoy Pathak attends weekly meetings, learns basic tactics, such as searches and how to handcuff people. In his free time he goes on patrols once monthly. He wears his Police Explorer uniform to the weekly meetings and while on patrol. He has been on two ride-alongs. Decoy Pathak was a cadet major in the Junior Reserve Officers' Training Corps (ROTC). He was in the Junior ROTC during the four years while in high school. Decoy Pathak lifts weights at the gym almost daily.

12. On August 24, 2015, decoy Pathak visited a total of 19 locations, and only two locations, including the Licensed Premises, sold alcoholic beverages to him. Decoy Pathak was more nervous on the day of the operation than during the giving of his testimony. He was nervous while testifying.

13. Decoy Pathak appeared his age at the time of the decoy operation. Based on his overall appearance, i.e., his physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and his appearance and conduct in front of clerk Weigel at the Licensed Premises on August 24, 2015, decoy Pathak displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to the clerk. Decoy Pathak appeared his true age.

(Findings of Fact, ¶¶ 5-13.) Based on these findings the ALJ reached the following conclusions regarding the decoy's appearance:

6. With respect to Rule 141(b)(2), specifically, the Respondents argued decoy Pathak's five years' training and experience as an Explorer, his ROTC experience, his prior decoy experience having visited possibly 50-100 locations as a decoy prior to August 24, 2015, his daily workouts, and claimed facial hair/mustache stubble were among certain factors which made him appear to be older than 21. This argument is rejected. The Respondents presented no evidence these factors actually resulted in decoy Pathak appearing 21 or older to clerk Weigel. There was nothing about decoy Pathak's experience as an Explorer, decoy or his participation in ROTC which made him appear older than his actual age. Decoy Pathak did not have a mustache at the time of the sale or at the hearing. The minimal hair visible above his lip was mild at best, consistent with that grown by teens. Despite decoy Pathak's daily

> workouts he remained small in stature. Decoy Pathak's appearance was consistent with that of a person who was 18 years old. In other words, decoy Pathak had the appearance generally expected of a person under the age of 21. (Finding of Fact ¶ 13.)

(Conclusions of Law, ¶ 6.)

Appellants contend:

> The activities a decoy participates in influences their poise, demeanor, maturity and mannerisms. The decoy in this case participated in the Junior ROTC but counsel was prevented from exploring this evidence and how it may have influenced his demeanor. The ALJ then used the lack of this evidence as a reason to reject Appellant's [*sic.*] argument that the decoy had the general appearance of someone over the age of 21, in violation of Rule 141 subdivision (b)(2).

(App.Cl.Br. at p. 3.)

This Board has indeed held that an ALJ should not focus his or her analysis solely on a decoy's *physical* appearance and thereby give insufficient consideration to relevant *non-physical* attributes such as poise, demeanor, maturity, and mannerisms. (See, e.g., *Circle K Stores, Inc.* (2004) AB-8169; *7-Eleven, Inc./Sahni Enterprises* (2004) AB-8083; *Circle K Stores* (1999) AB-7080.) This should not, however, be interpreted to require that the ALJ provide a "laundry list" of factors he or she found inconsequential. (*Lee* (2014) AB-9359*; 7-Eleven, Inc./Patel* (2013) AB-9237; *Circle K Stores* (1999) AB-7080.) Nor should it be interpreted to require the ALJ to admit evidence he or she determines is not relevant.

In this case, the ALJ specifically acknowledged the decoy's experience in a variety of venues—including ROTC—and rejected the contention that this experience made him appear over the age of 21. (See Conclusions of Law, ¶ 6, *supra*.) The clerk did not testify, so any "observable effect" of the decoy's experience is mere conjecture, and more testimony about his participation in ROTC would not have changed the analysis. We do not believe it was error to foreclose this line inquiry by

sustaining the Department's objection at the hearing.

The ALJ made ample findings regarding the decoy's apparent age, and both his physical and non-physical appearance. This Board cannot interfere with these factual determinations in the absence of a clear showing of an abuse of discretion. No such showing was made in this case.

As this Board has said on many occasions, the ALJ is the trier of fact, and has the opportunity to observe the decoy as he testifies, and make the determination whether the decoy's appearance met the requirement of rule 141 that he possess 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.

We see no flaw in the ALJ's findings or her decision to exclude what she found to be irrelevant evidence.

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. (App.Op.Br. at p. 8.) The Department contends the commenting procedure does not violate the APA and that voiding the comments would not change the outcome of the case. (Dept.Br. at pp. 6-10.)

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. Appellants' case was subject to the comment procedure outlined above.

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

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 p. 9; App.Cl.Br., at pp. 5-6.)

Under the *Tidewater* test, the Department's General Order—in particular, the two paragraphs at issue here—constitutes an unenforceable underground regulation. First, the General Order itself expresses an intent that it will apply generally. It states: "Although the procedures described herein are intended to apply to all cases, this policy is not intended to provide parties with any substantive rights." (General Order, *supra*, at § 2.) 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 (Dept.Br., at p.), while appellants maintain that it is speculative to assert that the procedure had no effect on the outcome. (App.Cl.Br, at p. .) 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.[3]

BAXTER RICE, CHAIRMAN
PETER J. RODDY, MEMBER
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.