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

AB-9609
File: 21-477585; Reg: 16083543

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy Store #9345
717 Marsh Street, San Luis Obispo, CA 93401-3901,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley

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

ISSUED OCTOBER 3, 2017

Appearances: *Appellants:* Melissa H. Gelbart, of Solomon, Saltsman & Jamieson, as counsel for Garfield Beach CVS, LLC and Longs Drug Stores California, LLC,

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 Store #9345, appeal from a decision of the Department of Alcoholic Beverage Control[1] suspending their license for 15 days because their employee sold alcohol to an individual under the age of 21, in violation of Business and Professions Code section 25858, subdivision (a).

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

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on June 22, 2009. On January 6, 2016, the Department instituted an accusation against appellants charging that, on September 26, 2015, appellants' employee, Mr. Murphy (the clerk), sold an alcoholic beverage to Ms. Taylor, a person under the age of 21 (Taylor).

At the administrative hearing held on May 10, 2016, documentary evidence was received and testimony concerning the violation charged was presented by Department Agent Lori Kohman and by Taylor.

Testimony established that on September 26, 2015, Taylor entered the licensed premises and went to the beverage section where she selected a 1.75 liter bottle of New Amsterdam vodka and a bottle of cranberry juice. She took her selections to the checkout counter. When it was her turn, she set the bottles on the counter. The clerk rang up the purchase and completed the sale without asking for identification or asking any age-related questions. Agent Kohman observed the transaction from inside the store.

Upon exiting the premises, Taylor was approached by Agent Kohman and two other officers. They asked her how old she was and she replied that she was 24. When asked for identification, Taylor handed the officers a California driver's license belonging to a Ms. Newberry. Taylor was quizzed about the details on the ID, and her answers misstated the zip code and height contained on it. Kohman did not believe Taylor resembled the photo on the ID, and, after further questioning, Taylor admitted that she was two weeks from her 20th birthday and that she had found the Newberry license a few weeks earlier. Taylor was issued a citation.

Agent Kohman re-entered the premises with Taylor, and she identified the clerk who sold her the alcohol. The clerk remembered selling alcohol to Taylor, but said he believed she was over the age of 21. Taylor testified that she had used the Newberry ID approximately five times in the past to purchase alcohol—all from this same clerk.

The ALJ submitted a proposed decision on June 3, 2016, sustaining the accusation and suspending the license for 15 days. The Chief ALJ sent out a letter accompanying the proposed decision, stated that under General Order 2016-02 the proposed decision would be held for 14 days and the parties were invited to submit comments to the Director during this period. Appellants submitted comments objecting to the commenting procedure. The Department did not submit comments. On August 5, 2016, the Department adopted the proposed decision in full, and a Certificate of Decision was issued on September 13, 2016.

Appellants then filed a timely appeal making the following contentions: (1) the administrative law judge (ALJ) abused his discretion and applied an incorrect standard when he concluded that appellants failed to establish a defense under Business and Professions Code section 25660, and (2) the Department's commenting procedure violates the Administrative Procedures Act (APA). The Board raises a third issue on its own: (3) the ALJ erred in assessing the penalty.

DISCUSSION

I

Appellants contend the ALJ abused his discretion and applied an incorrect standard when he concluded that appellants failed to establish a defense under Business and Professions Code section 25660. (App.Op.Br. at p. 6.) They maintain

"the ALJ failed to consider the evidence from the perspective of a reasonably prudent person under the same circumstances" (*id.* at p. 7) but instead considered his own opinion and that of an ABC agent—rather than attempting "to consider how the I.D. would be perceived by a clerk." (*Ibid.*)

Appellants maintain that a defense to the charge of the accusation was established under Business and Professions Code section 25660, which provides:

> (a) Bona fide evidence of majority and identity of the person is any of the following:
>
> (1) A document issued by a federal, state, county, or municipal government, or subdivision or agency thereof, including, but not limited to, a valid motor vehicle operator's license that contains the name, date of birth, description, and picture of the person.
>
> (2) A valid passport issued by the United States or by a foreign government.
>
> (3) A valid identification card issued to a member of the Armed Forces that includes a date of birth and a picture of the person.
>
> (b) Proof that the defendant-licensee, or his or her employee or agent, demanded, was shown, and acted in reliance upon bona fide evidence in any transaction, employment, use, or permission forbidden by Section 25658, 25663, or 25665 shall be a defense to any criminal prosecution therefor or to any proceedings for the suspension or revocation of any license based thereon.

Section 25660 establishes an affirmative defense, and the burden of proof is on the party asserting it. (*Farah v. Alcoholic Bev. Control Appeals Bd.* (1958) 159 Cal.App.2d 335, 338-339 [324 P.2d 98] ["The defense [under section 25660] is affirmative and the burden is therefore upon the licensee to show that he is entitled to the benefits of such a defense."].)

The law is clear that a fake or spurious identification can support a defense under this section if the apparent authenticity of the identification is such that reliance upon it

can be said to be reasonable. (See *Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (*Masani*) 118 Cal.App.4th 1429, 1445 [13 Cal.Rptr.3d 826].) ["The licensee should not be penalized for accepting a credible fake that has been reasonably examined for authenticity and compared with the person depicted."]; see also *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 189 [67 Cal.Rptr. 735] ["the licensee who makes a diligent inspection of the documentary evidence of majority and identity offered by the customer at or about the time of the sale is entitled to rely upon its apparent genuineness."]; *Kirby v. Alcoholic Bev. Control Appeals Bd.* (1968) 267 Cal.App.2d 895, 897 [73 Cal.Rptr. 352] ["It is well established that reliance in good faith upon a document issued by one of the governmental entities enumerated in section 25660 constitutes a defense to a license suspension proceeding even though the document is altered, forged or otherwise spurious."].)

Reasonable reliance on a fake ID cannot be established unless the appearance of the person presenting identification indicates that he or she could be 21 years of age and the seller makes a reasonable inspection of the identification offered. *(5501 Hollywood v. Dept. of Alcoholic Bev. Control* (1957) 155 Cal.App.2d 748, 753-754 [318 P.2d 820] (*5501 Hollywood*).) Whether or not a licensee has made a reasonable inspection of an ID to determine that it is bona fide is a question of fact and this Board may not go behind that factual finding. (*Masani, supra*, at p. 1445; *5501 Hollywood, supra,* at pp. 753-754.)

The ALJ reached the following conclusions in summarizing the applicable law and the facts of this case:

5. Section 25660 provides a defense to any person who was shown and acted in reliance upon bona fide evidence of majority in permitting a minor to enter and remain in a public premises in contravention of section 25665, in making a sale forbidden by section 25658(a), or in permitting a minor to consume in an on-sale premises in contravention of section 25658(b).
The defense offered by this section is an affirmative defense. As such, the licensee has the burden of establishing all of its elements, namely, that evidence of majority and identity was demanded, shown, and acted on as prescribed.[fn.] This section applies to IDs actually issued by government agencies as well as those which purport to be.[fn.] A licensee or his or her employee is not entitled to rely upon an identification if it does not appear to be a bona fide government-issued ID or if the personal appearance of the holder of the identification demonstrates above mere suspicion that the holder is not the legal owner of the identification.[fn.] **The defense offered by section 25660 is not established if the appearance of the minor does not match the description on the identification**.[fn.]

6. In the present case, the evidence is uncontroverted that Taylor showed Murphy a California driver license belonging to Hailey Newberry in connection with previous sales of alcohol. Newberry, whose date of birth is March 18, 1991,[2] would have been 24 years old at the time. Taylor, although only 19, had the appearance of a person in her early 20s. Although Taylor's hair color did not match Newberry's, it was clear that she had colored her hair. The differences in height (5'6" versus 5'7") and eye color (blue versus green) are minor.

7. Accordingly, the only significant difference is between Taylor's appearance and Newberry's appearance in the photo on her ID. Agent Kohman took one look at the ID and concluded that the photo was not of Taylor. In particular, she noticed that that [*sic.*] Taylor's facial features, including the shape of her face, were noticeably different than Newberry's photo. At the hearing, the undersigned compared the photo on Newberry's ID to Taylor—they did not match, which is clear from even a quick comparison of the two. As the case law cited above makes clear, a seller of alcoholic beverages is not entitled to rely upon an identification of the personal appearance of the holder of the identification demonstrates above mere suspicion that the holder is not the legal owner of the identification. Such is the case at hand and, therefore, the Respondents failed to establish a defense under section 25660.

(Conclusions of Law, ¶¶ 5-7, emphasis added.)

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[2]For privacy reasons the full name and birth date have been redacted.

Section 25660, between 1955 and 1959, required that identification be shown *immediately prior* to the purchase of alcohol. The words "immediately prior" were deleted, however, in the 1959 amendment to that section. The California Attorney General opined:

> [I]t must be concluded that by the elimination of the words "immediately prior" from section 25660 in the 1959 amendment, the time requirement for the presentation of documentary evidence has been altered. Thus the evidence of majority and identity need no longer be shown immediately prior to the alleged offense to constitute a valid defense. However, it is clear that a defense is not made out unless it is proved that the required documentary evidence was demanded, that it was shown, and that the defendant-licensee, his agent or employee, was acting in good faith in reliance upon that prior showing at the time of the alleged violation.

(36 Ops.Cal.Atty.Gen. 124, 126 (1960).)

The Attorney General's opinion is cited with approval in *Lacabanne, supra*, at page 190: "The Attorney General . . . suggested that this omission has restored the law to the situation where a licensee may rely upon a prior exhibition of the evidence of majority and identity (see *Keane v. Reilly* (1955) 130 Cal.App.2d 407 [279 P.2d 152])." As originally written, section 25660 required proof that the licensee demanded and was shown documentary proof of majority *before* furnishing any alcoholic beverage. In amending the statute in 1959 to eliminate the words "immediately prior," the legislature demonstrated a clear intent to remove the time requirement for the examination of identification by the seller. In *Keane v. Reilly, supra*, the California Court of Appeal, interpreting this language, held that the licensee was entitled to the protection of section 25660 where the licensee's bartender demanded and was shown bona fide identification by minors on prior occasions, even though no identification was presented at the time of the charged violation. The minors involved in that case had presented

bona fide identification to the bartender "some months" — and in the case of one of the minors, five or six months —prior to the date of the incident. (*Keane, supra* at page 408.)

The question before us then is whether appellants successfully raised a section 25660 defense. Put another way, is the Department's determination that appellants did *not* successfully raise the defense supported by substantial evidence? When an appellant contends that a Department decision is not supported by substantial evidence, the Appeals Board's review of the decision is limited to determining, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. (Bus. & Prof. Code § 23084; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113].) In making this determination, the Board may not exercise its independent judgment on the effect or weight of the evidence, but must resolve any evidentiary conflicts in favor of the Department's decision and accept all reasonable inferences that support the Department's findings. (*Masani*, *supra*, at p. 1437; *Lacabanne*, *supra*, at p. 185.) "Substantial evidence" is relevant evidence which reasonable minds would accept as support for a conclusion. (*Universal Camera Corp. v. Labor Bd.* (1951) 340 U.S. 474, 477 [71 S.Ct. 456]; *Toyota Motor Sales U.S.A., Inc. v. Superior Ct.* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].)

Based on a simple reading of the statutory defense provided in section 25660, it is apparent that, for a clerk who sells alcohol to a minor to be able to rely upon the minor's showing of proof of majority in a previous transaction, there must be sufficient evidence to establish that the clerk reasonably relied on the minor's prior showing of

proof of majority. Without testimony from the clerk, or some other evidence to establish that reasonable reliance existed on those previous occasions, there was no basis for the ALJ to determine whether or not said reliance was reasonable, or, indeed, whether the clerk actually relied on having seen the fake ID on previous occasions.

The Department's denial of appellant's section 25660 defense is supported by substantial evidence. Reasonable reliance was not established, therefore the 25660 defense must fail.

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. 12.) The Department contends that voiding the comments would not change the outcome of the case (Dept.Br. at p. 12).

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. 12; App.Cl.Br., at p. 4.)

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. 12), while appellants maintain that it is speculative to assert that the procedure had no effect on the outcome. (App.Cl.Br, at p. 4.) 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.

III

Appellants argued for a mitigated penalty at the administrative hearing. The Department also recommended a mitigated penalty, based on the licensees' history of discipline-free operation. We believe the ALJ erred in his decision and address this issue here, even though the parties do not address it in their briefs.

> The power of the appeals board in reviewing license decisions of the department is '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; Bus. & Prof. Code, §§ 23084, 23085.)

(*Rice v. Alcoholic Bev. Control Appeals Bd.* (1978) 79 Cal.App.3d 372, 374 [144 Cal.Rptr. 851].) In this matter, we find the penalty portion of the decision is not supported by substantial evidence in light of the whole record.

In that part of the decision, the ALJ states:

> The Department requested that the Respondents' license be suspended for a period of 15 days. The Respondents argued that a mitigated penalty was appropriate if the accusation were sustained. There was no evidence of aggravation presented by the Department nor was there any evidence of mitigation presented by the Respondents. The penalty recommended herein complies with Rule 144.[fn.]

(Penalty, at pp. 4-5.) The ALJ's conclusions, however, do not comport with the actual statements made during the administrative hearing. First, counsel for the Department declared:

> MR. NGUYEN:
> We're asking that the accusation be sustained. And asking for a suspension of 10 days.
>
> [¶ . . . ¶]
>
> With that, your Honor, I asked that the accusation be sustained with regard to mitigation we asked for 10 days.
>
> Rule 144 allows us to ask for 15 days. We've taken into account years of licensure for this suspension.

(RT at pp. 53, 60.) Likewise, counsel for appellants argued:

> MS. GELBART:
> And I think that pursuant to 52660, [the] accusation in this case

> must be dismissed, also [I'd] like to say in case it [is] not under Rule 144, this licensee has been licensed since June 2009 without any prior record [of] discipline. It's almost seven years now. I do think the license is entitled to mitigate [the] penalty . . .

(*Id*. at p. 56.)

Both sides recognized and recommended that mitigation was appropriate in light of the length of licensure without discipline, but this was entirely overlooked by the ALJ in the decision, wherein he erroneously states: (1) that the Department asked for a 15-day suspension and (2) that no evidence of mitigation was presented by either side.

> It is well settled that in cases involving the imposition of a penalty or other disciplinary action by an administrative body, when it appears that some of the charges are not sustained by the evidence, the matter will be returned to the administrative body for redetermination in all cases in which there is a "real doubt" as to whether the same action would have been taken upon a proper assessment of the evidence. [Citations.]

(*Vollstedt v. City of Stockton* (1990) 220 Cal.App.3d 265, 277-278 [269 Cal.Rptr. 404].)

In light of this error, we remand the decision to the Department for reconsideration of the penalty. Had the ALJ correctly stated that the Department recommended a 10-day suspension, and that both sides noted the length of licensure without discipline as a reason for mitigation, there is "real doubt" he would have imposed an unmitigated penalty of 15-days' suspension.

ORDER

The decision of the Department finding a violation of Business and Professions Code § 25658(a) is affirmed. However we reverse as to the penalty and remand the case to the Department for reconsideration of the penalty in light of the contradiction

between the record and the penalty portion of the decision.[3]

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

[3]This order of remand is filed in accordance with Business and Professions Code section 23085, and does not constitute a final order within the meaning of Business and Professions Code section 23089.