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

**AB-9616**
File: 20-519848; Reg: 16083744

7-ELEVEN, INC., DEBRA L. SEVILLE, and FRANK R. SEVILLE,
dba 7-Eleven Store #2171-17814E,
32487 Yucaipa Boulevard, Yucaipa, CA 92399,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Doris Huebel

Appeals Board Hearing: July 6, 2017
San Francisco, CA

**ISSUED JULY 26, 2017**

*Appearances*: *Appellants:* Donna Hooper, of Solomon, Saltsman & Jamieson, as counsel for 7-Eleven, Inc., Debra L. Seville, and Frank R. Seville, doing business as 7-Eleven Store #2171-17814E,

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

OPINION

7-Eleven, Inc., Debra L. Seville, and Frank R. Seville, doing business as 7-Eleven Store #2171-17814E, appeal from a decision of the Department of Alcoholic Beverage Control[1] suspending their license for 15 days because their clerk sold an alcoholic beverage to a minor decoy, in violation of Business and Professions Code section 25658, subdivision (a).

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

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on August 14, 2012. There is no record of prior discipline against appellants' license.

On February 9, 2016, the Department filed an accusation against appellants charging that, on December 7, 2015, appellants' clerk, Kyle Morgan Houser (the clerk), sold an alcoholic beverage to 19-year-old Eric Matthew Zamora. Although not noted in the accusation, Zamora was working as a minor decoy in a joint operation between the Department of Alcoholic Beverage Control and the San Bernardino County Sheriff's Department at the time.

On March 1, 2016, appellants filed and served on the Department a Special Notice of Defense pursuant to Government Code section 11506, as well as a Request for Discovery pursuant to Government Code section 11507.6, demanding, inter alia, the names and addresses of all witnesses. (Exh. 1.) Appellants received the Department's response on April 7, 2016, providing the address and phone number of the Highland Station of the San Bernardino County Sheriff's Department (where the decoy volunteers as an Explorer) in lieu of his personal contact information. The Department also provided a copy of the decoy's California driver's license—with the address redacted. (*Ibid*.)

On April 14, 2016, appellants sent a meet and confer letter to the Department. (*Ibid*.) Appellants then filed a Motion to Compel Discovery on April 20, 2016, and the Department filed its opposition to the motion on May 4, 2016. The motion was denied on May 9, 2016. (*Ibid*.)

At the administrative hearing held on June 29, 2016, documentary evidence was received and testimony concerning the sale was presented by Zamora (the decoy) and

by Hayley Mammen, a Department agent. Appellants presented no witnesses.

Testimony established that on the day of the operation, Agent Mammen entered the licensed premises, followed a short time later by the decoy. The decoy went to the beverage cooler where he selected a 25-ounce can of Bud Light beer. He took the beer to the sales counter and waited in line behind two people. When it was his turn, the decoy set the beer on the counter and the clerk asked "is that it?" The decoy replied "yes." The clerk then scanned the beer and completed the sale without asking for identification or asking any age-related questions. Agent Mammen was standing in line behind the decoy during the transaction and was able to hear and see what transpired.

The decoy exited the premises, followed shortly thereafter by Agent Mammen. The two of them then re-entered the store with another agent and a San Bernardino County Sheriff's deputy. The officers identified themselves to the clerk, and a face-to-face identification of the clerk was made by the decoy. A photo was taken of the decoy and clerk together (exh. 2) and the clerk was issued a citation.

On July 5, 2016, the administrative law judge (ALJ) submitted a proposed decision, sustaining the accusation and suspending the license for a period of 15 days. On July 13, 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 20, 2016, the Department issued its Certificate of Decision, adopting the proposed decision in its entirety and imposing a 15-day suspension.

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, and (2) the Department's commenting procedure violates the APA.

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 pp. 4-6.) Appellants also contend the Department failed to comply with Government Code section 11507.6 when it provided only the address of the Highland Station[2] 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

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[2]During the administrative hearing, the decoy stated that he volunteers as an Explorer at "Highland Station" (RT at p. 16) but appellants refer to this as the "Highland Police Department" in all their documents, as does the ALJ in his Order Denying Motion to Compel (exh. 1)—leading to some potential confusion. In the decision, the ALJ correctly identifies the entity involved as the San Bernardino County Sheriff's Department Highland Station. (Findings of Fact, ¶ 10.)

A search of the internet reveals that the City of Highland contracts for their law enforcement services through the San Bernardino County Sheriff's Department. (http://cms.sbcounty.gov/sheriff/PatrolStations/Highland.aspx, accessed May 24, 2017.)

> 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. 5), while the Department maintains it is only required to furnish *an* address—not a residential address. (Dept.Br. at p. 4.)

In his Order Denying Motion to Compel, the ALJ stated:

> The Administrative Law Judge finds that the Home address of the minor decoy volunteer is not required to be produced pursuant to Government Code section 11507.6. Further, the Appeals Board decision in *In re Mauri Restaurant Group*[fn.] is directly on point and the Respondents have failed to provide any superceding authority or facts to distinguish the present matter from the decision in *In re Mauri Restaurant Group*.

(Exh. 1: Order Denying Motion to Compel, at p. 2.)

This Board has addressed a number of cases raising this identical issue. In *7-Eleven, Inc./Joe* (2016) AB-9544[3] we recently held that the decoy's personal address is protected under section 832.7 of the Penal Code. (*Id.* at pp. 6-10.) We follow our *Joe* decision here—referring the parties to that case for an in-depth discussion—and concur with the ALJ that our holding in *Mauri* is on point:

> We think any requirement that a decoy's home address be disclosed must be conditioned upon a showing that the address itself has a material connection to the issues, and not simply as a means of contacting the decoy.

(*In re Mauri Restaurant Group* (1999) AB-7276 at p. 8.)

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

As in past cases, 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. 6, 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. 6.) 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. 6, 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. 7.) 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 harassment from a licensee attempting to dissuade the decoy from testifying. (*Ibid*.) We agree that the privacy and safety of the decoy are legitimately being protected by the Department's current procedures

In the instant case, the only evidence in the record that appellants attempted to reach the decoy at the Highland Station are appellants' statements:

> To Respondents knowledge, Mr. Zamora is not an employee of the Highland Police Department, and thus, it is unreasonable and even impractical, if not impossible, to contact Mr. Zamora at the address and/or phone number for the Highland Police Department. In fact, this office attempted to contact Mr. Zamora at the telephone number provided and were advised that the police department does not have anyone in the system under the name Eric Matthew Zamora working for them.

(Exh. 1: Memorandum of Points and Authorities in Support of Respondents' Motion to Compel, at p. 11; also see App.Op.Br. at p. 3.)

In the *Joe* case, the Board laid out its position on establishing whether the decoy had actually been unreachable at the address provided by the Department:

> We note, however, that in order to comply with section 11507.6, the Department must supply *an address at which the decoy may actually be reached*. In this case, the Department provided the address of its District Office, and we have no cause to believe that the District Office did not forward appellants' communications to the decoy.
>
> Appellants claim, however, that in two unrelated cases, they were given the address of the law enforcement agency responsible for the decoy operation, rather than the decoy's personal address. In both cases, the law enforcement agency indicated via telephone that it was either unwilling or unable to put appellants in contact with the decoy.
>
> In order to comply with the statute, the Department must supply "the names and addresses of witnesses." While the Penal Code protects the personal contact information of certain peace officers, it does not permit the Department to supply a sham address; *the decoy must actually be reachable at the address provided*. If a licensee establishes that it attempted to reach a decoy at the address provided by the Department, and the law enforcement agency at that address indicated it could not or would not forward the licensee's communication to the decoy, then the Department is in violation of the statute until it supplies a valid address, and the licensee may seek recourse through a motion to compel. (See Gov. Code, § 11507.7.) In short, the unique protections afforded peace officers may not be used to sidestep a licensee's due process rights.

(*Joe, supra* at p. 11, emphasis added.)

In footnote six of that decision, the Board was quite specific in its instruction on

how to establish that the decoy had actually been unreachable at the address provided:

> The burden of proving the Department's failure to comply with section 11507.6 falls with the licensee demanding the decoy's address. (See Gov. Code, § 11507.7(a) [a party's motion to compel "shall state facts showing the respondent party failed or refused to comply with Section 11507.6"].) *We suggest licensees facing discipline under section 25658(a) attempt to contact the decoy in writing, and preserve both the original communication and any response indicating a law enforcement agency's unwillingness or inability to contact the decoy. This would be sufficient to show that the decoy was indeed unreachable at the address provided.*

(*Id. a*t fn. 6, emphasis added.)

Appellants' attempt to reach the decoy by telephone in this case falls short of establishing the proof necessary to establish a violation of section 11507.6. Indeed, we believe it verges on bad faith for counsel to continue to raise this argument in appeal after appeal without producing the paper trail we have outlined as the necessary prerequisite to establishing a violation. The Board has very clearly spelled out the procedure—first in *Joe,* and in innumerable cases since then—but here we are, yet again, hearing the same argument without the documentation needed to establish a violation.

Lacking demonstrable written evidence of the law enforcement agency's refusal to cooperate, appellants have failed to meet their burden to establish a violation of section 11507.6. (See Gov. Code, § 11507.6; also see *Joe*, *supra*, at p. 11.) Furthermore, appellants have failed to demonstrate that the ALJ's denial of their Motion to Compel was an abuse of discretion.

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. 7.) The Department, in addition to opposing appellants' claims, maintains the Appeals Board lacks jurisdiction to consider this issue (Dept.Br. at p. 9), and contends that voiding the comments would not change the outcome of the case (*id*. at p. 11).

## 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. 10, 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].) 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.

## Comment Procedure

The APA defines the term "regulation" broadly: "'Regulation' means every rule,

regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure." (Gov. Code, § 11342.600.) "[I]f it looks like a regulation, reads like a regulation, and acts like a regulation, it will be treated as a regulation whether or not the agency in question so labeled it." (*State Water Resources Control Bd. v. Office of Admin. Law* (1993) 12 Cal.App.4th 697, 702 [16 Cal.Rptr.2d 25].)

The APA requires that all regulations be adopted through the formal rulemaking process.

> No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation, as defined in Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

(Gov. Code, § 11340.5(a).) All regulations are subject to the APA rulemaking process unless expressly exempted by statute. (Gov. Code, § 11346; *Engelmann v. State Bd. of Education* (1991) 2 Cal.App.4th 47, 59 [3 Cal.Rptr.2d 264].) Compliance with the rulemaking process is mandatory; where a regulation was not properly adopted, it has no legal effect. (*Armistead v. State Personnel Bd*. (1978) 22 Cal.3d 198, 204-205 [149 Cal.Rptr. 1].)

A regulation is exempt if it "relates only to the internal management of the state agency." (Gov. Code, § 11340.9(d).) This exception, however, is narrow. (See *Armistead, supra*; *Stoneham v. Rushen* (1982) 137 Cal.App.3d 729, 736 [188 Cal.Rptr. 130].) "Where the challenged policy goes beyond merely prioritizing or allocating internal resources and may significantly affect others outside the agency . . . such a

policy goes beyond the agency's internal management and is subject to adoption as a regulation under the APA." (*Center for Biological Diversity v. Dept. of Fish & Wildlife* (2015) 234 Cal.App.4th 214, 262 [183 Cal.Rptr.3d 736]; see also *Stoneham, supra*, at p. 736 [inmate classification scheme was rule of general application significantly affecting male prison population].)

In *Tidewater*, cited by both parties, the California Supreme Court outlined a two-part test:

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

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

While much of the Department's General Order number 2016-02, issued on February 17, 2016 and entitled *Ex Parte and Decision Review* (hereinafter, General Order), merely regulates internal case management procedures, certain provisions affect the due process rights of licensees. In particular, section 3, paragraphs 5 and 6 introduce a 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 15th 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. 11; App.Cl.Br., at p. 11.)

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 an unenforceable underground regulation.

The Department is correct, however, that this conclusion alone does not necessarily merit reversal. (See Dept.Br., at p. 11; 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.)

The Department maintains the submission of comments pursuant to the General Order did not change the outcome of this case (Dept.Br., at p. 11), while appellants maintain that it is speculative to assert that the procedure had no effect on the outcome. (App.Cl.Br, at p. 11.) 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.

(*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—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 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' due process rights, and therefore does not

merit reversal. The Board will not hesitate to reverse in the future, however, should it be proven that appellants' due process rights were adversely affected by this comment procedure.

ORDER

The decision of the Department is affirmed.[4]

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

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

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