

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

AB-9637

File: 21-508897 Reg: 16084452

ONE STOP MOBILE, INC.,
dba One Stop Mobile
101 19th Street, Bakersfield, CA 93301,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

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

ISSUED FEBRUARY 26, 2018

Appearances: *Appellant:* Donna J. Hooper, of Solomon Saltsman & Jamieson, as
counsel for One Stop Mobile, Inc.
Respondent: Jennifer M. Casey as counsel for the Department of
Alcoholic Beverage Control.

OPINION

One Stop Mobile, Inc. (appellant) appeals from a decision of the Department of Alcoholic Beverage Control¹ suspending its license for 10 days because its clerk sold an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on April 20, 2011. On July 11, 2016, the Department filed an accusation charging that appellant's clerk, Rickey

1. The decision of the Department, dated January 11, 2017, is set forth in the appendix.

Zukowski (the clerk), sold an alcoholic beverage to 17-year-old T.S.² on May 18, 2016. Although not noted in the accusation, T.S. was working as a minor decoy for the Bakersfield Police Department at the time.

At the administrative hearing held on October 19, 2016, documentary evidence was received and testimony concerning the sale was presented by T.S. (the decoy) and by Detective Brian West of the Bakersfield Police Department. Appellant presented no witnesses.

Testimony established that on the date of the operation, the decoy entered the licensed premises, and Detective West entered shortly thereafter. The decoy went to the back of the premises and selected a 25-ounce can of Bud Light beer from the coolers. He took the beer to the register and set it down on the counter. Detective West got in line behind him.

The clerk asked to see the decoy's identification. The decoy handed his California driver's license to the clerk, who looked at it for approximately five seconds, after which he returned it to the decoy. The decoy paid for the beer. The clerk bagged the beer and handed it and some change to the decoy. The decoy then exited.

Various officers entered the licensed premises and joined Detective West, who had moved to the side of the counter. West contacted the clerk, identified himself, and explained the violation. The decoy entered the licensed premises and joined them. West asked the decoy to identify the person who sold him the beer. The decoy pointed to the

2. Decoy T.S. was a minor on the date of the operation. His full name is therefore withheld.

clerk and said that he had. The decoy and the clerk were three to five feet apart at the time. A photo of the two of them was taken, after which the clerk was cited.

When interviewed by the officers, the clerk acknowledged selling alcohol to the decoy. He stated he had misread the date of birth on the decoy's identification since he did not have his glasses. Detective West obtained the decoy's identification and showed it to the clerk, pointing out that the decoy was born in 1998.

After the hearing, the Department issued a proposed decision determining the violation charged was proven and no defense was established.

On November 14, 2016, following submission of the proposed decision, the Department's Administrative Hearing Office sent a letter to appellant and to Department counsel offering both parties the opportunity to comment on the proposed decision. That letter stated:

Administrative Records Secretary and Concerned Parties:

Enclosed is the Proposed Decision resulting from the hearing before Department of Alcoholic Beverage Control, Administrative Hearing Office in the above entitled matter.

All concerned parties and their attorneys of record are being sent a copy of this Proposed Decision. All concerned parties and attorneys of record are hereby informed that you may submit comments regarding this Proposed Decision to the Director for consideration prior to any action being taken by the Director. Comments to the Director regarding this Proposed Decision shall be mailed to the Administrative Records Secretary. Additional comments submitted for review by the Director, if any, must also be submitted to all parties and their attorneys. For the convenience of all concerned, a list of those parties and their addresses is attached.

Pursuant to General Order 2016-02, the Administrative Records Secretary will hold this Proposed Decision until 14 days after the date of this letter. After that the Administrative Records Secretary will submit this Proposed Decision along with any comments received from concerned parties to the Director for consideration.

(Letter from John W. Lewis, Chief Admin. Law Judge, Dept. of Alcoholic Bev. Control, Nov. 14, 2016 [hereinafter "Comment Letter"].) As suggested in the final paragraph, the Comment Letter reflected a comment procedure adopted by the Department pursuant to its General Order 2016-02. (Dept. of Alcoholic Bev. Control, "GO-Ex Parte and Decision Review," Gen. Order 2016-02, at § 3, ¶¶ 5-6 (eff. Mar. 1, 2016) [hereinafter "General Order"].)

On December 5, 2016, counsel for appellant submitted "Comments to the Director re Proposed Decision," which challenged the legality of the comment procedure itself. Department counsel submitted no comments.

Appellant then filed this appeal contending the Department's comment procedure constitutes an underground regulation, violates the Administrative Procedure Act (APA), and encourages illegal ex parte communications.

DISCUSSION

Appellant contends the Department's comment procedure, implemented pursuant to its General Order 2016-02, violates the hearing and review procedures set forth in the APA, constitutes an underground regulation prohibited by the APA, and encourages illegal ex parte communications.

We recently addressed an identical argument in *7-Eleven, Inc./Gupta* (2017) AB-9583. In that case, we concluded the Department's comment procedure, as outlined in the General Order, constitutes an unenforceable underground regulation. The comment procedure was identical in this case. We therefore reach the same legal conclusion here, and refer the parties to *Gupta* for our complete reasoning. (*Id.* at pp. 12-25.)

Furthermore, we find that the sole comment, submitted by appellant, had no effect on the outcome of the case, and therefore, that the comment procedure did not materially affect appellant's due process rights. (See *id.* at pp. 26-29.)

As we have noted elsewhere, however, the Department's comment procedure creates a minefield of potential due process issues. (See *id.* at p. 29 ["The Department's decision to bypass the rulemaking process deprived it of the opportunity to review public comments that might have alerted it to potential pitfalls in the comment procedure."].) We remind the parties that "we shall remain particularly vigilant in future cases, and will not hesitate to reverse where the Department's improperly adopted comment procedure materially infringes on an appellant's due process rights." (*Ibid.*)

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.