ISSUED APRIL 30, 1997

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

JANTILAL N. PATEL dba John's Liquor Mart 3701 Marysville Boulevard Sacramento, CA 95838, Licensee/Appellant, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6743m File: 21-296107 Reg: 96037678 Stipulation and Waiver Motion to Dismiss Appeal Date and Place of the Appeals Board Hearing: March 5, 1997 San Francisco, CA

Jantilal N. Patel, dba John's Liquor Mart (appellant), appeals from an order of the Department, entered pursuant to a stipulation and waiver executed by appellant, suspending his off-sale general license for 30 days, with the suspension of 10 days thereof stayed for a probationary period of one year, for his employee having possessed cocaine for distribution and sale, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Health and Safety Code §11351.5.[1]

[1] The decision of the Department, dated October 23, 1996, is included in the appendix hereto.

Appearances on appeal include Jantilal N. Patel, appearing through his counsel, Richard F. Antoine; and the Department of Alcoholic Beverage Control, appearing through its counsel, Kenton P. Byers.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on July 5, 1994. Thereafter, on October 4, 1996, the Department instituted an accusation alleging that appellant's employee, Eddie Lee Sparks, possessed cocaine for sale, in violation of Health and Safety Code §11351.5. On October 16, 1996, appellant executed a stipulation and waiver document tendered by the Department in which he acknowledged receipt of the accusation, stipulated that disciplinary action might be taken on the accusation based upon facts in the investigative reports on file with the Department, waived all rights to a hearing, reconsideration and appeal, and permitted the Department to enter an order suspending appellant's license for the period specified. Appellant now appeals from the entry of that order.

Appellant now contends that his constitutional rights were violated, asserting that he was coerced into executing the stipulation and waiver, a document he would not have executed if he had understood the significance of the language it contained. Appellant has filed a declaration[2] in which he recites his birth in Kenya, Africa and his move to India, followed by a move to London, England, where he resided for over 30 years. Despite his long residency in an English-speaking

[2] This declaration is cited herein as "App.Decl., ¶_."

country, appellant states English is not his "main" language, and that he has trouble understanding English technical terms and language (App.Decl., ¶2).

Appellant's declaration recites that he went to the office of Gerald Forsman (District Administrator for the Department) in response to a letter advising him that the matter could be settled.[3] When they met, appellant alleges, he was told that "if I fought the action with an attorney it would cost a lot of money and that it would be good for me if I signed the stipulation" (App.Decl., ¶4). Appellant states that he did not understand that by signing the stipulation the language in the accusation would mean he could be "found guilty ... of having sold or permitted the sale of cocaine," and that he was not told by Forsman that this could happen (App.Decl., ¶6). Appellant denies ever possessing or selling cocaine or knowing that his employee ever did so (App.Decl., ¶6). He asserts that he only signed the stipulation because he was told that, if he did, "the action would go away and my store would be closed for only 20 days." Appellant states he was not told that, if he signed the stipulation, "I would likely lose my license should any additional accusation be filed against me," or that he could not be disciplined if he did not know his employee had sold or was selling cocaine (App.Decl. ¶¶7, 8).

[3] Appellant acknowledges having met with Mr. Forsman once before in connection with a citation (App.Decl., ¶4).

The Department has moved to dismiss the appeal, contending that appellant waived the right to appeal when he executed the stipulation and waiver. In support of its motion, the Department has submitted the declaration of Gerald Forsman.[4]

The Forsman declaration recites the background circumstances which led to the filing of the accusation against appellant (Fors.Decl., ¶2), and summarizes two meetings which he held with appellant and appellant's wife, and, at the second meeting, a man identified only as "Howard" (Fors.Decl., ¶¶5,7,8). At the initial meeting, which took place sometime between September 23 and October 4, 1996, appellant was advised of the accusation process and suggested penalty "in layman's terms," and, in accordance with Mr. Forsman's practice, his right to counsel, discovery, hearing and appeal, as well as the stipulation and waiver process. Appellant was told if he had any doubt whether to select the stipulation and waiver alternative, it would not be accepted by the Department, and appellant was told at the end of the meeting that he should take additional time to consider his alternatives. Mr. Forsman states that at no time during this meeting did appellant appear to have any difficulty understanding the conversation or speaking the English language.

The accusation was filed on October 4, 1996, and served on appellant. The accusation includes a statement to the licensee advising him of, among other things, his right to retain counsel and to a hearing, if he so chose.

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[4] This declaration is cited herein as "Fors.Decl., ¶_."

Appellant executed the stipulation on October 16, 1996, following his second meeting with Mr. Forsman. According to Mr. Forsman's declaration, the accusation process, appellant's right to discovery and right to be represented by counsel, his right to a hearing, and the stipulation and waiver process were again explained to appellant in layman's terms (Fors.Decl., ¶7). According to the Forsman declaration (at ¶8), at the conclusion of the meeting appellant agreed to accept the stipulation. At that time, appellant negotiated a specific date in November upon which the suspension would commence, so that it would be concluded before the holiday season (Fors.Decl., ¶8).[5]

DISCUSSION

Appellant contends that at the time he signed the stipulation and waiver document, he was under duress, without benefit of counsel, and without knowledge of the ramifications of such a stipulation. His counsel asserts in his brief that the underlying charges were completely defensible, claiming that the individual who was arrested was not on the premises at the time of the arrest, was not convicted of the sale of cocaine, and had no prior history with cocaine. Therefore, appellant argues, there would have been no basis for any discipline,

[5] Finally, the Forsman declaration cites conversations with a Department investigator and a police analyst who had dealings with appellant and reportedly observed no apparent difficulty with the English language on appellant's part (Fors.Decl., ¶9). We do not place any weight on these statements, since they reflect only hearsay conversations.

since there would be no showing that appellant knew or could have known of the impermissible activity.

Appellant's brief contains a number of factual assertions regarding the accusation which are unsupported by any record evidence. That there is no factual record is, of course, because it is the very purpose of the stipulation and waiver process to eliminate the need to develop such a record. In return for his agreement to accept discipline, a licensee is told in advance what that discipline will be. As a result, the Department is relieved of the need to prove its case. Since the licensee is at all times able to consult an attorney or other advisors, the notion that he may opt for the certainty of the known discipline as opposed to the risk that he or she may fair worse if a full record is created in an administrative hearing, does not, in the ordinary case, seem in any way unfair.

The stipulation and waiver form which the Department uses is a single page, barely four paragraphs long.[6] In it, a licensee acknowledges, among other things, the receipt of the accusation, which on its face, is a "Statement to Respondent(s)" which clearly alerts the licensee to certain rights, including the right to be represented by an attorney. Paragraph 3 of this form, which was the focus of appellant's counsel's attack, states that by signing, the licensee: "Waive[s] all rights to a hearing, reconsideration and appeal, and any and all other rights which

[6] A copy of the stipulation and waiver which appellant executed is included in the appendix.

may be accorded pursuant to the Alcoholic Beverage Control Act or the Administrative Procedure Act."

Appellant does not claim he was unaware of his right to consult an attorney before making his decision to accept the stipulation or request a hearing. Thus, when appellant went to the meeting with the Department's District Administrator where he agreed to the stipulation and waiver, his attendance without an attorney was the product of his own deliberate choice. According to Mr. Forsman, appellant was, in fact, accompanied by his wife at both meetings, and by an additional person at the second hearing, and there has been no claim that those two individuals also lacked an understanding of the English language

The Department contends, on the other hand, that appellant knew full well what he was doing, arguing, in essence, that appellant is suffering from "buyer's remorse."

We do not believe the record supports appellant's claims.

A. Appellant's claim of coercion.

Appellant's claim he was coerced by Mr. Forsman's remarks is simply unpersuasive. To the contrary, he was told not to execute the stipulation, and that the Department would not accept it, if he had any doubts as to what he should do. Looking only at what appellant claims he was told, Mr. Forsman's comments are no more than a straightforward statement of the alternatives available to appellant. Appellant claims that he was told that "if [he] fought the action with an attorney it

would cost a lot of money and that it would be good for [him] if [he] signed the stipulation." (App.Decl., ¶4). Appellant was free to reject this advice, and was subject to no more coercion than any other licensee confronted with two alternatives, neither of which was particularly pleasant.

Appellant also asserts (App.Decl., ¶7) that he "only signed the paper because Mr. Forsman said that if I did, the action would go away and my store would be closed for only 20 days. He did not tell me that if I signed the paper I would likely lose my license should any additional accusation be filed against me." These assertions, taken at face value, are unpersuasive.

The statement that appellant's store would be closed for 20 days was true. The possible consequences of a subsequent violation during the one-year probationary period which was part of the discipline imposed, would include the reinstatement of the remaining 10 days of the suspension, but whether or not license revocation might result is wholly speculative, and would depend on the nature and seriousness of the violation and a multitude of other considerations. Neither Mr. Forsman nor anyone else in the Department was in any position to predict what might happen in the future in connection with some possible license violation. Consequently, there would have been no reason for Mr. Forsman to make such a prediction.

Lastly, appellant claims he was never told he could not be disciplined if he did not know his employee had cocaine or was selling cocaine. However, such a statement, even if made, would not have been legally correct.

A licensee is vicariously responsible for the unlawful on-premises acts of his employees. Such vicarious responsibility is well settled by case law. (Morell v. Department of Alcoholic Beverage Control (1962) 204 Cal.App.2d 504 [22 Cal.Rptr. 405, 411]; Harris v. Alcoholic Beverage Control Appeals Board (1962) 197 Cal.App.2d 172 [17 Cal.Rptr. 315, 320]; and Mack v. Department of Alcoholic Beverage Control (1960) 178 Cal.App.2d 149 [2 Cal.Rptr. 629, 633].)

Appellant has not alleged any threats of retaliation if he declined to sign the stipulation, or any other threats or unfair inducements that deprived him of his free will or otherwise subjected him to unfair pressures. We therefore conclude, on the record before us, that appellant is not entitled to rescission of the stipulation and waiver on the ground that he was a victim of coercion.

B. Appellant's claim of language impairment.

Appellant contends that he did not know the consequences of his actions in executing the stipulation and waiver. He argues that he did not fully understand the significance of the pending charges, the legal effect of the waiver, and the fact that he had a complete and valid defense. Mr. Forsman, on the other hand, contends that in the two meetings he had with appellant and the persons

accompanying appellant, he observed no instances where appellant demonstrated any inability to understand what transpired.

We find it difficult to accept the notion that a businessman who has resided in an English-speaking country for over 30 years could not understand the words in the stipulation and waiver form. The form is not complicated, its use of "jargon" is minimal, and the description of the rights a licensee surrenders when executing the document are spelled out in words of ordinary usage. We find it equally difficult to accept the notion that appellant did not understand that he could consult an attorney before signing the document, or could refuse to sign the document, contest the charges of the accusation, and insist upon a hearing.[7]

Appellant relies heavily upon the decision in Isbell v. County of Sonoma (1978) 21 Cal.3d 61 [145 Cal.Rptr. 368], which involved Sonoma County's practice of requiring welfare recipients accused of receiving excessive welfare payments to execute confessions of judgment in the amount of such excess payments, upon the basis of which judgments were entered by the clerk of court. At the time the confessions of judgment were signed, the debtors were either incarcerated or became the subject of some other type of threatened enforcement action. The Supreme Court held the confession of judgment procedures used therein violated the due process clause of the 14th Amendment, because they did

[7] Appellant had operated his liquor store since 1994, and had previous dealings with the Department concerning a license violation.

not provide sufficient safeguards to ensure that the debtors had executed a voluntary, knowing and intelligent waiver or been informed of their right to be heard.

The thrust of the Court's opinion was that the applicable Civil Procedure code provisions permitted a judgment to be entered without any record evidence that the judgment debtors had ever received notice of their opportunity to be heard and had voluntarily, knowingly and intelligently waived their constitutional rights:

> "Since the relevant statutes direct the clerk to enter judgment upon the creditor's presentation of a verified confession, the crucial issue becomes whether that document itself demonstrates that the debtor has in fact made a voluntary, knowing, and intelligent waiver."

Isbell, supra, 21 Cal.3d at 68.

The "crucial issue," then, whether the document itself demonstrates a knowing waiver, must be resolved in favor of the Department. Its stipulation and waiver form contains express language communicating to the signer that he is waiving specified rights, including the right to a hearing. Coupled with the documents earlier served on the licensee, which informed him of various procedural rights and the right to counsel, it simply cannot be said that appellant's waiver was not voluntarily, knowingly and intelligently made. By contrast, the documents in the Isbell case did not even contain the word "waiver."

It is clear that if a stipulation and waiver could be avoided by a simple assertion that appellant "did not fully appreciate what it was I was signing," the

use of this procedure by the Department would be seriously impaired. The Appeals Board is well aware that the Department depends upon its stipulation and waiver procedures to administer its heavy case load. Nevertheless, where constitutional rights are truly violated in a particular case, relief would be warranted. In such cases, administrative expediency must take the back seat. But where a licensee offers no more than the unproven or incredible excuse that, because of some alleged language barrier, he or she did not understand the words on the printed page, the stipulation and waiver should not be set aside.

For the foregoing reasons, we conclude that the motion to dismiss the appeal should be granted.

CONCLUSION

The motion of the Department to dismiss the appeal is granted.[8]

BEN DAVIDIAN, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
JOHN B. TSU, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[8] This final order is filed as provided in Business and Professions Code §23088, and shall become effective 30 days following the date of this filing of the final order as provided by §23090.7 of said statute for the purposes of any review pursuant to §23090 of said statute.