

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

AB-7329a

JOSE CORONA dba El Prado Café
3144 East First Street, Los Angeles, CA 90063,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

File: 40-016951 Reg: 98042264

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: April 5, 2001
Los Angeles, CA

ISSUED JUNE 21, 2001

This is an appeal from an order of the Department, entered upon remand following a decision of the Appeals Board which reversed the penalty the Department imposed upon appellant, Jose Corona, following its finding of a violation of Business and Professions Code §25602, subdivision (a).¹

Appearances on appeal include appellant Jose Corona, appearing through his counsel, Armando Chavira, and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer license was issued on December 17, 1998. Thereafter, the Department instituted an accusation against appellant charging a violation of Business and Professions Code §25602, subdivision (a).

¹ A copy of the Department's Decision Following Appeals Board Decision, dated November 21, 2000, is set forth in the Appendix.

An administrative hearing was held on May 11, 1998, and November 5, 1998, following which the Department issued its decision sustaining the charge of the accusation, and imposing a 40-day suspension, with 15 days thereof stayed, conditioned upon a one-year period of discipline-free operation. On appeal, the Appeals Board sustained the decision of the Department on the merits, but reversed the penalty and remanded the case to the Department for reconsideration of the penalty. The record from the administrative hearing revealed that Department counsel had recommended only a 30-day suspension, and the decision did not offer a reason for the upward departure from the Department recommendation. In light of the possibility that the administrative law judge may have been mistaken as to the Department's recommendation, the Board reversed the penalty, stating:

"The Board has ... said on various occasions that it views the Department's penalty recommendations as representing the Department's best thinking at that particular time, and, where an ALJ departs upwardly from the recommendation, he or she should explain why. Judge Lo did not provide any reasons for his enlargement upon the recommendation of Department counsel.

"Our review of the record does not reveal any unusual circumstance or matter of aggravation which would not have already been known to the Department. The Department's defense on this appeal of the increased penalty, that it reflects prior discipline, is unpersuasive, since that same explanation was offered to Judge Lo with the Department's original recommendation.

"We are not in a position to know, whether Judge Lo, as appellant suggests, was simply mistaken as to the recommendation by Department counsel, or whether he simply disagreed with the recommendation. Consequently, consistent with a practice the Board has followed in the past, we think the penalty portion of the decision should be reversed and the matter remanded to the Department for reconsideration of the penalty. Given that attention has now been focused on the matter, we are confident that any departure from the Department's original penalty recommendation will not be the product of oversight or misunderstanding. If the penalty reflects a misunderstanding, we are confident the Department will correct it upon remand. If the upward departure was intended, appellant will know that by the action the Department takes."

Following the remand, the Department entered a new order, which reduced the period of suspension to 30 days, with 15 of those days stayed for a probationary period. At first blush, it would seem that this order resolved any concerns the Board may have had.

However, appellant now contends that the Department should have entertained his request to accept a Petition in Offer of Compromise in lieu of his serving the 15 days of the 30 day suspension which were not stayed. Appellant points out that his prior disciplinary history involving similar violations is sufficiently dated as to escape the prohibition in Business and Professions Code §25602.3 against the acceptance by the Department of such a petition where there has been a violation of §25602, subdivision (a), within the previous 36 months. Finally, appellant suggests that the Department has abused its discretion by declining to accept his petition, and asks that the Board clarify the Department's policy with respect to its acceptance of such petitions.

DISCUSSION

Aside from the fact that there is nothing in the record indicating what occurred between appellant and the Department with respect to appellant's assertion that the Department should accept his petition to pay a fine rather than serve a suspension, appellant's contentions suffer from two other fatal defects.

First, what is involved in this case is a 30-day suspension. Business and Professions Code §23095, which governs petitions for compromise, is limited to decisions which impose suspensions of 15 days or less. A 30-day suspension, with 15 days stayed, is hardly a suspension of 15 days or less. The fact that appellant may ultimately have to serve only a 15-day suspension does not reshape a 30-day

suspension into a 15-day suspension.

Second, §23095 merely permits the Department to entertain such a petition if, after investigation, it is satisfied that the public welfare and morals would not be impaired by permitting the licensee to operate during the period set for suspension, that payment of money will achieve the desired disciplinary purposes, and that the licensee's books and records are kept in such a manner that loss of sales which would have been incurred by the licensee had the suspension gone into effect can be determined with reasonable accuracy.

We read §23095 as affording the Department wide discretion in its consideration of such petitions. There is nothing in the record of this case that suggests there has been any abuse of that discretion.

ORDER

The decision of the Department is affirmed.²

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

² This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

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