ISSUED JUNE 25, 1998

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

NICANDRO LUNA dba Poncho Villa 213 and 215 West Heuneme Road Oxnard, CA 93030, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7062 File: 47-274386 Reg: 97041868 Administrative Law Judge at the Dept. Hearing: None Date and Place of the Appeals Board Hearing: May 6, 1998 Los Angeles, CA

Nicandro Luna, doing business as Poncho Villa (appellant), appeals from a decision of the Department of Alcoholic Beverage Control which ordered his license revoked, with revocation stayed for 90 days, subject to a 45-day actual suspension, and indefinitely thereafter, and, in addition, obligated appellant during the period of the stay to transfer the license to a person or persons acceptable to the Department outside the Oxnard and Port Hueneme area, for his employees having engaged in conduct contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from violations of Business and Professions Code §25602, subdivision (a) (sale of an alcoholic beverage to a person manifesting obvious signs of intoxication) and Health and Safety Code §§11351 and 11550 (possession or purchase for sale of designated controlled substance, and use, and being under the

influence of a controlled substance).

Appearances on appeal include appellant Nicandro Luna, appearing through his counsel, Ralph Barat Saltsman, and the Department of Alcoholic Beverage Control, appearing through its counsel, David B. Wainstein.

FACTS AND PROCEDURAL HISTORY

On February 5, 1998, appellant signed a stipulation and waiver form in which he acknowledged receipt of an accusation and various form documents, and consented to the imposition of certain penalties. The Department issued its decision in conformity with the terms of the stipulation and waiver on March 19, 1998.

Appellant filed a notice of appeal on March 31, 1998, and now asserts that when he signed the stipulation and waIver, he did not understand what he was signing. Appellant states that he speaks Spanish "nearly exclusively," and was not represented by an attorney or assisted by an interpreter when he signed the stipulation and waiver while in the district office. At oral argument, the parties agreed to submit opposing declarations regarding the issue of whether appellant Luna was informed of the content of the stipulation and waiver before he signed. Thereafter, the Board was to determine whether it wished to hear additional argument. Appellant has not disclosed what, if any, defense he intends to assert on the merits.

The accusation in this case was filed on November 24, 1997. It charged that on February 28, 1997, an employee, Jose Galvez, while within the premises, possessed cocaine for sale (count 1), and was under the influence of cocaine (count 2), and that on that same date, another employee, Anna Mosica, sold or furnished alcoholic beverages (beer) to two persons who were obviously intoxicated (counts 3 and 4). The accusation charged another sale by Mosica to an obviously intoxicated patron on March

22, 1997 (count 5). The accusation was served on appellant on November 25, 1997, along with a letter from the District Administrator of the Department stating that, upon appellant's execution of the enclosed stipulation and waiver form, the Department would revoke his license.[1]

DISCUSSION

Appellant contends that the stipulation and waiver which he executed, allegedly without the benefit of legal representation or the assistance of an interpreter, is without force or effect because his lack of proficiency in the English language prevented him from knowing the implications of what he signed. As appellant stated in his brief:

> "It is Appellant's contention that unless the Stipulation and Waiver is understood by the licensee at the time of the signing, then the Stipulation and Waiver can have no effect whatsoever. This is not an argument concerning the level of understanding, rather it is an argument which centers upon the inability of the licensee to understand the English language and the fact that the Stipulation and Waiver was signed at the District Office of the Department of Alcoholic Beverage Control with no interpretation from English to Spanish of the language of the Stipulation and Waiver and with no time given to the licensee to seek assistance concerning the words of the Stipulation and Waiver." (App.Br., p. 3.)

Appellant further asserts that "it does not appear as if there were any negotiations at all in this instance ... with the licensee not having access to language assistance." (Ibid.)

We find appellant's arguments unconvincing for a number of reasons

Although appellant claims that the stipulation and waiver which he signed was

---

[1] The record includes appellant's license application; the accusation filed against him on November 24, 1997; the initially-proposed stipulation and waiver, and cover letter, which accompanied the accusation; the notice of defense executed on appellant's behalf by attorney Joseph O'Neill; the notice of hearing on accusation, set for March 17, 18, and 19, 1997; the executed copy of the stipulation and waiver; and the decision. Copies of the stipulation and waiver and decision are set forth in the Appendix.

not translated to him by anyone, he admits that he and Joseph O'Neill, his former attorney, reviewed all of the documents sent to him by the Department before February 5, 1998. He says that these documents did not include the stipulation and waiver that he eventually signed. While that may be true, it is not dispositive.

Among the documents O'Neill and Luna would have reviewed before February 5, 1998, was the first proposed stipulation and waiver from the Department, which called for unconditional revocation. Since the stipulation and waiver form Luna ultimately signed was considerably less onerous, it is clear that Luna and/or his attorney negotiated a better deal than the Department initially offered, and it is hard to see how this could have been done without some understanding of what the stakes were. Additionally, given Luna's claimed lack of proficiency in the English language, it is fair to infer that someone, presumably O'Neill, had done the negotiating on Luna's behalf.

Appellant was put on notice by the accusation and accompanying letter that he faced possible license suspension or revocation. He was informed in the "Statement to Respondent(s)" section of the accusation of his right to retain counsel: "You may, but need not, be represented by counsel at any stage of these proceedings." Appellant apparently retained an Oxnard attorney, Joseph O'Neill, who filed a notice of defense on appellant's behalf, requesting a hearing and acknowledging receipt of, among other things, the accusation.

In the Notice of Hearing, a copy of which was served on attorney O'Neill, appellant was again reminded of his right to retain an attorney for his defense.

The letter referred to above, dated November 25, 1997, accompanied copies of a notice of defense form, a proposed stipulation and waiver, and the accusation. The

letter advised appellant that "the Department feels that, from the evidence available, a revocation of the license(s) is warranted," that appellant could admit the offense charged, and that if he did so his license would be revoked.

A notice of defense, dated December 4, 1997, was filed by attorney O'Neill. Thereafter, the stipulation and waiver was executed by appellant on February 5, 1998. There is nothing in the record disclosing when, if at all, attorney O'Neill ceased to represent appellant. Nor does the record reveal when appellant first consulted his present counsel.[2]

There are a number of assumptions we think it reasonable to make. One is that appellant was sufficiently proficient in the English language to be able to make his way through the Department's licensing process, or else was able to obtain assistance from someone who was sufficiently proficient. Another is that in his operation of the licensed business during the five-year period he has been licensed, appellant would have became familiar with the obligations imposed upon him as a licensee, and the consequences of violating of the Alcohol Beverage Control Act. Still another is that appellant, as a mature individual, knew that there are attorneys available to assist people who need legal advice, and that if he had trouble understanding something in the English language, he could ask someone to explain it to him. It may also be assumed that he would have understood that his dealings with the Department were important, in that they related to his business and his livelihood. Thus, any threat of disciplinary action which the Department might make, would be something he should

[2] The record does not disclose precisely when the attorney-client relationship between appellant and O'Neill ceased. It seems doubtful given his claimed language impairment, that Luna by himself could have bargained for a better deal with the Department.

treat seriously. The fact that he initially retained an attorney is evidence that he did take the matter seriously.

Finally, we may assume that had appellant persisted in his original attorney's request for a hearing, the possibility existed that an even harsher mode of discipline might have been imposed - that of outright revocation. By agreeing to the stipulation, it would appear that appellant salvaged the ability to recoup at least some of the value of his license.

There has been no claim that any representative of the Department made any misrepresentation to appellant. Nor has there been any claim that appellant was denied the opportunity to consult an attorney prior to or during his visit to the district office at the time he claims he executed the stipulation and waiver.

We do not know appellant's state of mind at the time he signed the stipulation and agreed to the order of revocation. Nor do we know at the time of this writing what he intends to say in the declaration he wishes to submit to the Appeals Board. The record does not indicate whether he ever requested the Department to permit him to withdraw from the stipulation.

There is language in the court's decision in Frankel v. Board of Dental Examiners (1996) 46 Cal.App. 4th 534, 552-553 [54 Cal.Rptr.2d 128], a case cited by appellant, which is particularly relevant here - albeit of no assistance to appellant. In referring to the delay in the adjudication of disciplinary accusations and problems scheduling administrative hearings which would result if a licensee were permitted to rescind a settlement agreement he had entered into, the court said:

> "This delay would be compounded if a licensee is permitted to renege on a settlement on the eve of its consideration by the Board; the executive director would then have to revive and reschedule the disciplinary process - a process

> which could take months depending upon the time required to gather and reorganize evidence and to calendar hearing dates compatible with the schedule of witnesses and counsel.
>
> "With public health and safety at stake, considerations of public policy dictate against a system which would permit a licensee to abuse the process by first agreeing to, and months later withdrawing from, a stipulated settlement in order to delay the adjudication of the administrative action and allow the licensee to continue to practice in the interim.
>
> "Moreover, permitting a licensee unilaterally to rescind a settlement agreement before the Board acts on it will have an adverse effect on the executive director's ability to pursue other disciplinary actions intended to protect public health and safety. In this era of limited resources, the time and funds spent rescheduling and prosecuting a disciplinary action where the parties' settlement has not been rejected by the Board necessarily will reduce the resources available to prosecute accusations against other licensees for failure to conform to acceptable standards and will delay the imposition of discipline upon those licensees, thereby exposing the public to danger."

The record strongly suggests that this is exactly the strategy appellant has sought to pursue.

In Borror v. Department of Investment (1971) 15 Cal.App.3d 531, 543-544 [92 Cal.Rptr. 525], the court made it clear that a licensee who chooses to proceed without counsel in an administrative proceeding will not be permitted at a later time to claim he did not understand the consequences of his actions:

> "Since the requirements of due process are satisfied in a proceeding under the Administrative Procedure Act, insofar as representation by counsel is concerned, if a party is advised that he is entitled to be represented by counsel employed by him, and such attorney is permitted to represent him in the proceeding, there is no requirement, in the event that the party does not choose to be represented by counsel, or does not have the funds with which to hire an attorney, that the analogies of the criminal law be followed in ascertaining whether there has been an intelligent waiver of counsel. Accordingly, there is no requirement that the hearing officer determine whether the accused understands the nature of the charge, the elements of the offense, the pleas and defenses which may be available, or the punishment or penalty which may be exacted. In this regard, we apprehend that as to all of the elements, other than the last mentioned, these are adequately specified under the Administrative Procedure Act in the accusation (§11503) and the notice of defense (§11506). As to the penalties involved, it is inconceivable that a licensee is not aware by virtue of the

licensing procedures of the sanctions which may be imposed for violation of his duties and obligations as such licensee."

All of this impels us to the conclusion that appellant is simply engaging in a strategy to buy time until he must transfer or surrender up his license. The filing of the notice of appeal with the Appeals Board prevents the Department from taking any action while the appeal is pending. Thus, appellant gains from his appeal, at little expense, additional operating time as well as additional time to seek out potential buyers and more favorable terms of sale.

The law is clear that a person who signs a contract without reading it, or having it read to him, is nonetheless bound by the terms of the contract, in the absence of fraud, duress or a relationship of trust and confidence. (See, e.g., Greve v. Taft Realty (1929) 101 Cal.App. 343 [281 P. 641] (commission agreement executed by corporate officers); see also, Silva v. Silva (1916) 32 Cal.App. 115 [162 P. 142 (rejecting spouse's claim that separation agreement signed by him was not binding because he did not understand its terms.)

It is difficult to see how the Department may have taken advantage of appellant.

The Department initially sought revocation, but was apparently persuaded by appellant and/or his original attorney to settle for a stayed revocation which would permit appellant a 90-day opportunity to recoup some portion of his investment by selling the license. By filing this appeal, which clearly appears to lack merit, appellant has not only enlarged that 90-day period during which he might seek a buyer, but has also delayed the implementation of the 45-day and thereafter indefinite, suspension.

Appellant has objected to the Board's consideration of the declaration of appellant's former counsel, Joseph D. O'Neill, contending that it violates the canons of

ethics and invades (breaches) the attorney-client relationship between O'Neill and appellant. Appellant's brief cites and quotes Rule 2-100 of the Rules of Professional Conduct of the State Bar. However, that rule applies to communications by an attorney directly with an adverse party when it is known that party is represented by counsel, without counsel's consent. That is not what is involved here.

In any event, it is a close question whether the simple revelation that a non-Spanish speaking attorney retained a Spanish-English language interpreter to assist him in communicating with a non-English speaking client is a breach of the attorney-client privilege. Since it could border on malpractice for an attorney not to retain an interpreter in such circumstances, one would think that an attorney, in the ordinary course, would have done so. However, all that is involved here is O'Neill's disclosure that he retained a Spanish-speaking interpreter to review the English-language documents with appellant. Since appellant himself discloses that O'Neill reviewed with him all documents from the Department dated prior to February 5, 1998, there is no need to rely on the O'Neill declaration, since O'Neill does not claim to have reviewed the document Luna signed on February 5.

It is worth noting that Luna was no stranger to the stipulation and waiver process, having executed one in 1995 in connection with an accusation charging a violation of Business and Professions Code §25602, subdivision (a) (service to an intoxicated person.

CONCLUSION

The appeal clearly lacks merit, and the Department's decision must be, and is, affirmed.[3]

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

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

Any party may, before this final decision becomes effective, apply to the appropriate 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.