

ISSUED JUNE 5, 2000

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

AURELIO S. IBARRA	)	AB-7542
dba La Casa De Fernando	)	
4105 North Maine Avenue	)	File: 47-266310
Baldwin Park, CA 91706,	)	Reg: 97039035
Appellant/Licensee,	)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Rodolfo Echeverria
DEPARTMENT OF ALCOHOLIC	)	
BEVERAGE CONTROL,	)	Date and Place of the
Respondent.	)	Appeals Board Hearing:
	)	April 6, 2000
	)	Los Angeles, CA

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Aurelio S. Ibarra, doing business as La Casa De Fernando (appellant), appeals from a decision of the Department of Alcoholic Beverage Control<sup>1</sup> which revoked his license for violations of conditions set forth in a decision of the Department dated June 12, 1997.

Appearances on appeal include appellant Aurelio S. Ibarra, appearing through his counsel, Armando H. Chavira, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

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<sup>1</sup>The decision of the Department, dated December 7, 1999, is set forth in the appendix.

## FACTS AND PROCEDURAL HISTORY

In a decision entered June 12, 1997, pursuant to stipulation and waiver, the Department determined that appellant had violated Business and Professions Code §§24200.5, subdivision (b), and 25657, subdivision (b); California Penal Code §303, subdivision (a); and Department Rule §143 (4 Cal. Code Regs., §143), and ordered appellant's license revoked, with revocation stayed for a period of two years, conditioned upon an actual suspension of 10 days, and that no cause for disciplinary action occur during the period of the stay. The stipulation and decision both provided that, if cause for disciplinary action arose during the period of the stay, the Director of the Department may, "in his discretion and without further hearing, vacate the stay and revoke the license."<sup>2</sup>

In a subsequent decision, entered following a contested hearing on August 5, 1999, the Department determined that, on successive days in May 1998, appellant, through the actions of a female employee, violated Business and Professions Code §25657, subdivision (a), and Department Rule 143, and ordered appellant's license revoked, but stayed revocation upon condition that appellant serve a 20-day suspension, and upon a further condition that no cause for discipline occur during the period of the stay. Appellant did not seek review of this order.

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<sup>2</sup> The stipulation appellant executed states that disciplinary action may be taken on the accusation, that such discipline may be determined on the basis of the facts contained in the department's investigative reports (paragraph 2), and that the person executing the stipulation "waive[s] all rights to a hearing, reconsideration and appeal, and any and all other rights which may be accorded pursuant to the Alcoholic Beverage Control Act or the Administrative Procedure Act" (paragraph 3).

Thereafter, without hearing or notice, the Department entered an order reimposing the order of revocation which had been entered in 1997. The order states: "The above-mentioned licensee, not having complied with the conditions as stated in the Department's decision dated June 12, 1997, and good cause appearing therefor, it is hereby ordered that the stay be vacated and the revocation be reimposed, effective immediately." Appellant now seeks to appeal that order, contending that the Department must first make a determination that there is "good cause" for revocation and/or must hold a hearing on the question of "good cause" prior to reimposing revocation, despite the language of the stipulation and decision in the previous matter. (See footnote 2, supra.)<sup>3</sup>

#### DISCUSSION

The essential question in this appeal is whether, in accordance with the express language of the stipulation entered into by appellant, the Director of the Department may, "in his discretion and without further hearing, vacate the stay

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<sup>3</sup> A preliminary issue confronting the Board is whether appellant's appeal is timely. Since the Department's order provided that it was to become effective immediately, the last day on which an appeal might have been timely filed was December 17, 1998. The appeal was received by the Board on December 23, 1999. However, in appellant's notice of appeal, he asserts that he went to the Department on December 7, 1999, to speak to District Administrator Henry, and to appeal the order, but was advised by Henry that he could not appeal the order. Appellant further states that he was not accompanied by his attorney, M.R. Ward, Jr., whose presence elsewhere was required so that he could be with his wife, an accident victim.

The Department has moved to strike appellant's opening brief, on the ground it was not filed timely. The Appeals Board lacks the power to grant that motion. The Department has not moved to dismiss the appeal, leading us to think there may be some merit to appellant's contention that he was prevented by the District Administrator from filing his appeal in timely fashion. We will entertain the appeal.

and revoke the license,” or must the Department afford appellant a hearing to determine whether good cause exists for revocation.

Appellant does not contend that he was coerced into entering into the stipulation. He had been charged with multiple violations involving bar girl activity, including a violation of Business and Professions Code §24200.5, subdivision (b), which mandates revocation. He benefitted substantially from the stipulation, since, although the penalty was revocation, the Department stayed its order for the two-year probationary period. We can only assume there was a quid pro quo implicit in the stipulation and whatever discussions there were which led to its execution and the stay of revocation.

Having so benefitted, appellant would have the Appeals Board now put the Department to the burden of demonstrating why two violations of the conditions of the stay, involving much the same unlawful conduct as that which led to the conditional stay in the first instance, constitute good cause to support a revocation order.

We seriously doubt that there is any good reason to grant appellant the relief he seeks. If the Department must conduct what appellant has characterized as a “good cause hearing” before it may enforce the terms of a stipulation, freely bargained for and freely entered into, and from which benefits have flowed, it will have every incentive to abandon the stipulation and waiver process. This, we think, would work to the detriment of licensees who are willing to compromise with the Department, accept what may be an agreed-upon penalty, one they can live with, and save the costs and eliminate the uncertainties of litigation. These licensees, in return, accept an obligation to be especially vigilant against future

violations, which can result in a reimposition of a stayed penalty.

Appellant's reliance upon Harris v. Alcoholic Beverage Control Appeals Board (1965) 62 Cal.2d 589 [43 Cal.Rptr. 633], is misplaced. Harris simply held that the Department was bound to exercise "legal discretion, which is, in the circumstances judicial discretion," which, in turn, has been defined as "an impartial discretion, guided and controlled in its exercise by fixed legal principles." (See Harris, supra, 43 Cal.Rptr. at 636-637.) While it might be possible to envisage circumstances where the Department's reimposition of a stayed penalty in reliance upon the language of a stipulation could be unfair, or oppressive, or contrary to fixed legal principles, this does not appear to be such a case.

ORDER

The decision of the Department is affirmed.<sup>4</sup>

TED HUNT, CHAIRMAN  
RAY T. BLAIR, JR., MEMBER  
ALCOHOLIC BEVERAGE CONTROL  
APPEALS BOARD

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<sup>4</sup> 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.