ISSUED JULY 10, 2000

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

ADELMA PORTILLO dba Club El Sinaloense 6220 Eastern Avenue Bell Gardens, CA 90201, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7570 File: 40-306976 Reg: 96036043 Administrative Law Judge at the Dept. Hearing: None Date and Place of the Appeals Board Hearing: May 4, 2000 Los Angeles, CA

Adelma Portillo, doing business as Club El Sinaloense (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked her on-sale beer license for having failed to comply with the condition of the stay of a prior order of revocation contained in a decision of the Department dated September 5, 1996.

Appearances on appeal include appellant Adelma Portillo, appearing through her counsel, Armando H. Chavira, and the Department of Alcoholic Beverage

[1]The decision of the Department, dated January 27, 2000, is set forth in the appendix.

Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer license was issued on June 16, 1995. On September 5, 1996, the Department, pursuant to a stipulation and waiver executed by appellant, issued a decision ordering her license revoked, staying revocation for three years upon the condition, among others, that no cause for discipline occur during the stayed period.[2] Both the decision and the stipulation provided that, in the event cause for discipline occurred during the stayed period, the Director "may, in his discretion, and without further hearing, vacate the stay and revoke the license."

On December 21, 1999, in Portillo (AB-7308), the Appeals Board affirmed those portions of the Department's decision which found violations of Business and Professions Code §24200.5, subdivision (b), and Rule 143. The Department had adopted without change the proposed decision of the ALJ which, although finding additional violations which were not sustained by the Appeals Board, stated his view that the violations *in the case before him* did not warrant outright revocation, but specifically disclaimed expressing any opinion as to action the Department should take with respect to the existing probation from the 1996 decision.

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[2] The decision recited that appellant had violated Business and Professions Code §§24200.5, subdivision (b), and 25657, subdivision (b), Penal Code §303a, and Department Rules 143 and 143.3, subdivision (1)(a).

Thereafter, the Department entered the order from which the present appeal is taken.

Appellant raises the following issues: (1) whether it was an abuse of discretion to order revocation; (2) whether the language of the stipulation is in conflict with Harris v. Alcoholic Beverage Control Appeals Board (1965) 62 Cal.2d 589 [43 Cal.Rptr. 633] and article XX, §22 of the California Constitution; and (3) whether the Department's adoption of the decision in Registration No. 98043687 precluded the reimposition of the original stayed revocation. Issues 1 and 2 are sufficiently related that they can be discussed together.

DISCUSSION

I

Appellant contends that the Department abused its discretion in reimposing revocation, and that the stipulation pursuant to which it did so is in conflict with Harris v. Alcoholic Beverage Control Appeals Board, supra, and article XX, §22 of the California Constitution.

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 and revoke the license," or must the Department afford appellant a hearing to determine whether good cause exists for revocation, when appellant has violated the conditions of the stay.

Appellant does not contend that she was coerced into entering into the

stipulation. She 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. She benefitted substantially from the stipulation, since, although the penalty was revocation, the Department stayed its order for the three-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 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 she 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 envision circumstances where the Department's reimposition of a stayed penalty in reliance upon the express language of a stipulation could be unfair, oppressive, or contrary to fixed legal principles, this clearly is not such a case.

We are firmly of the view that appellant should be held to the terms of her bargain.

II

Appellant contends that the Department's adoption of the proposed decision in Registration No. 98043687[3], which ordered appellant's license revoked, but stayed revocation for a three-year probationary period, and imposed a 35-day suspension, precludes the Department from invoking the stipulation as a basis for the reimposition of revocation. Although not making specific reference to it, appellant has invoked the doctrine of collateral estoppel, i.e., by adopting a decision which declined to order reimposition of the stayed revocation, appellant

[3] This is Portillo (AB-7308), in which the Appeals Board affirmed, in large part, the decision of the Department. The question of the reimposition of the prior stayed revocation was not an issue in that appeal.

reasons, the Department is collaterally estopped from doing so in the present proceeding.

In Registration No. 98043687, the Department requested the Administrative Law Judge (ALJ) to reimpose the earlier stayed revocation, but he declined to do so stating:

> "The solicitations, particularly given the prior discipline, are serious violations. It is not felt, however, that the facts proved *in this case* should result in outright revocation. No recommendation is made as to what the Department should or should not do concerning the existing probation in Registration Number 96036043." (Emphasis in original.)

The Department adopted the proposed decision without change. The order reimposing the stayed revocation came one month later.

In People v. Sims (1982) 32 Cal.2d 468 [186 Cal.Rptr. 77], the California Supreme Court, in a thorough discussion of the application of the doctrine of collateral estoppel to administrative proceedings, held in that case that the doctrine did apply, and voided a welfare fraud prosecution initiated after the welfare recipient had been exonerated of fraud charges in an administrative proceeding. In its decision, the court spelled out what it described as a "three-pronged test," which, if met, bars relitigation of an issue decided at the previous proceeding. Resort to the first prong of that test demonstrates that appellant's contention is without merit: was the issue *necessarily decided* at the previous proceeding identical to the one sought to be relitigated.

The only issue which was decided in the earlier proceeding was that, on the record of the case before him, the ALJ did not believe he should order reimposition

of the stayed penalty. He made it clear in his proposed opinion that he was making no recommendation on whether, in light of the record in the case in which the stayed penalty was first imposed, a reimposition might be appropriate.

The Department's adoption of the proposed opinion can not be seen as having necessarily decided the reimposition issue. It did not have to address that issue, because the proposed decision had deferred any consideration of it.

The court in People v. Sims, supra, also referred to its decision in Hollywood Circle, Inc. v. Department of Alcoholic Beverage Control (1961) 55 Cal.2d 728, 732 [13 Cal.Rptr.104], which quoted from 2 Davis, Administrative Law (1958) section 18.03, page 568:

> "The key to a sound solution of problems of res judicata in administrative law is recognition that the traditional principle of res judicata as developed in the judicial system should be fully applicable to some administrative action, that the principle should not be applicable to other administrative action, and that much administrative action should be subject to a qualified or relaxed set of rules."

We think this is an area where the principle should not apply. The stipulation gave the Department the power to reconsider the stay if a further violation occurred. Such a reconsideration would include, to some extent, consideration of the records in both proceedings, not just the most recent one. In some cases, it might mean that the Department would decide that the stay may remain in effect; in others, as in this case, it could mean that the Department deemed further continuation of the stay not in the best interest of welfare and morals. These decisions go to the core of the discretion vested in the Department involving disciplinary matters. In such cases, the application of a doctrine which

limits the Department's discretion, and its power, must be carefully considered.

ORDER

The decision of the Department is affirmed.[4]

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

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[4] 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.