

ISSUED JANUARY 16, 1998

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

MANUEL VARGAS)	AB-6791
dba Pancho's Cafe)	
2835 Sunset Blvd.)	File: 41-273394
Los Angeles, CA 90021,)	Reg: 93029211
Appellant/Licensee,)	
)	Department's Order
v.)	of Revocation
)	
DEPARTMENT OF ALCOHOLIC)	Date and Place of the
BEVERAGE CONTROL,)	Appeals Board Hearing
Respondent.)	August 6, 1997
)	Los Angeles, CA

Manuel Vargas, doing business as Pancho's Cafe (appellant), appeals from an order of the Department of Alcoholic Beverage Control¹ which revoked his on-sale beer and wine public premises license, for a violation of the terms of probation previously imposed for violations contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22.

Appearances on appeal include appellant Manuel Vargas, appearing through his counsel, Ralph Barat Saltsman; and the Department of Alcoholic Beverage

¹The order of the Department dated January 6, 1997, is set forth in the appendix.

Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine public premises license was issued on July 10, 1992. In October 1993, the Department of Alcoholic Beverage Control instituted an accusation alleging that in August 1993, appellant permitted employees to solicit the purchase of alcoholic beverages or other drinks for their own consumption; the solicitation of an act of prostitution; and the furnishing of an alcoholic beverage or beverages to a person who manifested obvious signs of intoxication.

Subsequently, appellant signed a form entitled Stipulation and Waiver in which he acknowledged the receipt of the accusation, agreed that disciplinary action could be taken against his license based on the accusation, and waived his right to a hearing, reconsideration, and appeal. Thereafter, on April 7, 1994 (1994 decision), the Department of Alcoholic Beverage Control issued its decision, in conformity with the Stipulation and Waiver form, that conditionally revoked appellant's license and placed appellant on three years probation.²

During the term of probation, in April 1996, the Department of Alcoholic Beverage Control filed a second accusation alleging a violation of furnishing an alcoholic beverage or beverages, in March 1996, to a patron manifesting obvious signs of intoxication. A decision was thereafter entered on November 14, 1996

²The stipulation and waiver form and the decision of the Department entered pursuant to the stipulation and waiver, are set forth in the appendix.

(1996 decision), determining that the allegations of the accusation were true, imposing a ten-day suspension, and stating that the allegations of prior discipline (presumably the 1994 decision) had not been established,³ meaning, we infer, that the Department at that 1996 hearing, did not place into evidence the 1994 decision which had placed appellant on a three-year probation.

On January 6, 1997 (1997 decision), the Department of Alcoholic Beverage Control entered its order vacating appellant's probation, and unconditionally revoking his license, pursuant to the terms of the 1994 decision which states in pertinent part that revocation is stayed provided: "That no cause for disciplinary action occur within the stayed period ... If cause for disciplinary action occurred [sic] during the stayed period, the Director of the Department of Alcoholic Beverage Control may, in his discretion, and without further hearing, vacate the stay and revoke the license."

Appellant filed a timely notice of appeal. In his appeal, appellant raises the following issues: (1) the Department of Alcoholic Beverage Control is estopped from revoking appellant's license, arguing that the 1994 decision was not established or proven true in the administrative hearing which culminated in the issuance of the 1996 decision; and (2) revocation of the license constitutes an abuse of discretion, arguing that the 1996 decision called only for a 10-day suspension.

DISCUSSION

³The November 14, 1996, decision is set forth in the appendix.

The Department argues that the Appeals Board has no jurisdiction to hear this matter, as appellant waived his right to appeal in the signed stipulation and waiver form, applicable therefore, to the 1994 decision. This appeal while a review of the terms of probation, is not based on the propriety of the entry of the 1994 decision, but on the entry of the 1997 decision, that 1997 decision being an exercise of the Department's discretion. (See footnote 6, ante.)

I

Appellant contends that the Department of Alcoholic Beverage Control is estopped from revoking appellant's license, arguing that the 1994 decision was not established or proven true in the administrative hearing which culminated in the issuance of the 1996 decision. Appellant also argues that the finding of the 1996 decision is res judicata as to the fact that the 1994 decision was not proven. In this, appellant is in error.

The original 1994 decision concerned solicitation of drinks, solicitation of prostitution, and service to a patron who manifested obvious signs of intoxication. The 1996 decision concerned only service to a patron who manifested obvious signs of intoxication.

The doctrine of collateral estoppel applies only if, among other requirements, the issues in the different proceedings are identical. (People v. Sims (1982) 32 Cal.3d 468, 484 [186 Cal.Rptr. 77].) Res judicata is defined as "The thing has been decided, been adjudicated." (Ballentines Law Dictionary, 1969, page 1105.) Res judicata applies only if the issues were raised or could have been raised in the

hearing. However, neither collateral estoppel nor res judicata is an applicable doctrine in the present appeal.

Appellant's confusion as to the applicability of the doctrines of collateral estoppel and res judicata, largely stem from appellant's assumption that the Department of Alcoholic Beverage Control needed to prove the 1994 decision in the 1996 decision's hearing, in order for the Department to vacate the 1994 decision's probation, and reimpose unconditional revocation.

The 1994 decision was a final and separate decision which imposed certain restrictive terms on appellant's license -- the terms of which could have been fully considered in the 1996 decision, but were not.

In any event, the terms of the 1994 decision from its inception and during the period of probation, remained in full force and effect, though essentially in limbo, pending any violation which could be considered as violative of the terms of probation. Upon such violation, the Department could have proceeded to seek a vacation of the 1994 decision's probationary terms in the 1996 decision's hearing, or, as it chose, do nothing concerning the 1994 decision and wait until the 1996 decision became final, and use that 1996 decision as a "trigger" for the Department's unilateral action to vacate probation, as it has done in the present matter.⁴

Without evidence of the 1994 decision, the Administrative Law Judge

⁴The issue as to the propriety of the Department's choice of procedure, was not sufficiently raised in this present appeal.

properly considered the 1996 decision's violation as a first-time violation and imposed a penalty, absent any aggravation by way of proof of some prior or similar violation -- for some reason mitigated below the standard penalty of 20 days.

We conclude that the Department properly considered the 1996 decision as a first-time violation, for purposes of penalty, as to that violation. There is no requirement that the Department should have proceeded in the 1996 decision's hearing with an issue of the 1994 decision's probation, an issue, we suggest, which was not pleaded or sufficiently raised in the 1996 decision's hearing.

II

Appellant contends that revocation constitutes an abuse of discretion, arguing that the 1996 decision ordered only a 10-day suspension. Appellant is questioning the discretion of the Department of Alcoholic Beverage Control to revoke the license by using the 1996 decision as the "trigger" to impose revocation in accordance with the 1994 decision's probation.

We observe that the issuance of the 1997 order (1997 decision) of revocation was an exercise of discretion, and not a ministerial act as has been argued in the past by the Department.⁵ The Department's 1994 decision's probationary terms, in pertinent part, state: "the Director of the Department of Alcoholic Beverage Control may, in his discretion ... vacate the stay and revoke the license." This should foreclose further argument on that issue of ministerial acts,

⁵Dept.'s brief, p.3; and the cases of Lee (1996) AB-6573m, and Moon (1996) AB-6546m.

as ministerial acts are non-discretionary.⁶

Returning to the present appeal, the Appeals Board's duty is to review any action of the Department to determine if the Department "has proceeded in the manner required by law" (Bus. & Prof. Code §23084), that is, among other things has adhered to the principles of due process, and substantial justice. The Board in the case of KDM, Inc. (1997) AB-6647, considered the question of the broad powers of the Department in this area of inquiry:

"Appellant contends that the condition of the stay, that 'no cause for disciplinary action occurs within the stayed period' is unreasonably broad, in that it is not limited to a violation similar in nature. It asks whether a records keeping violation, and after-hours sale, a failure to post a license, or other nominal violations, would result in the revocation of appellant's license.

"Appellant's contention does not bear directly on the penalty itself. Instead, it seeks some sort of prediction from the Appeals Board as to what kind of future violation would trigger a lifting of the stay order. The Board is not in a position to make such a prediction. Nor is the Board able to say that the Department's unwillingness to specify in advance a category of violation sufficient to induce it to seek a revocation of the stay is an abuse of discretion.

"Although the Department's brief did not address this issue, it is the Department's standard practice to frame an order staying revocation broadly, and not to attempt to characterize the kind of future violation which would warrant a lifting of the stay order. A requirement would unduly tie the Department's hands. The better course is for the Board to review such action consistent with an abuse of discretion standard when and if the situation arises."

⁶"An act which does not involve the exercise of judgment ... nothing of discretion ... without regard to or exercise of his own judgment ... An Act in the performance of duty defined and prescribed by law with such precision and certainty as to leave nothing to the exercise of discretion or judgment." (Citations omitted.) (Ballentine's Law Dictionary, 1969, p. 803. See also Webster's Third New International Dictionary, 1986, p. 1439.)

In the present appeal, the Department in 1994 stayed the revocation of appellant's license. Where revocation is stayed for some probationary period, essentially, the Department has determined that the ultimate penalty of revocation was not at that time, reasonable, thus allowing appellant to continue to exercise the privileges of the license. However, the Department retained the power to revoke the license under its probationary terms, if a future violation occurred, all designed, hopefully, to obtain the desired result of conformity to law.

In those occasions where a violation has occurred subsequent to the Department's stayed revocation decision, the Department has many options to enforce conformity to law short of revocation. It may extend the terms of probation for an additional period to impress upon the licensee that revocation is a clear danger to continuation of the license; impose new terms to the existing probation, which could address circumstances found in the new violation which circumstances were not known or considered at the time of the original imposition of the probation, or both. The Department chose to revoke the license. It is not for the Board to advise the Department which option the Department should chose, but to consider the choice made in relationship to the rule of abuse of discretion.

The 1997 decision of the Department to revoke the license was predicated on the terms of probation in the 1994 decision, which state in pertinent part:

"That no cause for disciplinary action occur within the stayed period ... If cause for disciplinary action occurred [sic] during the stayed period, the Director of the Department of Alcoholic Beverage Control may, in his discretion and without further hearing, vacate the stay and revoke the license."

We view the wording of the decision as extremely broad in its scope giving to the Department wide latitude in assessing any future course of action which may arise from some future violation, as was present in KDM, Inc., *supra*.

We note that the practice of granting or revoking probation, is a useful tool in the criminal law (Penal Code §§1203, et seq). While criminal law has many facets not applicable in administrative law, many of the objectives, such as the discretionary nature of allowing probation, and emphasizing conformity to law in future conduct, have parallels. It has been stated that probation is an act of clemency and may be withdrawn if the privileges are abused. (In re Bine (1957) 47 Cal.2d 814 [306 P.2d 445].) Also, revocation of probation is justified even though the circumstances of a new act of unlawful conduct would not justify a conviction. (People v. Calais (1974) 37 Cal.App.3d 898 [112 Cal.Rptr. 685].)

The Department by the exercise of its discretion to revoke the license under authority of the 1994 decision, in effect, has concluded that continuation of the license would be contrary to the public welfare or morals. This means that the Department considers that either the licensee is unfit, or the premises is not eligible, any longer to hold a license -- that is, continuation of the license would be "harmful or undesirable," per Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal.3d 85, 99 [84 Cal.Rptr. 1113], for the common community good. A review of the record does not disclose evidence that location of the premises was a factor in revoking the license. Therefore, consideration as to the vacation of probation should rise or fall on a question of appellant's fitness to

continue to hold the license.

Concerning the concept of public welfare or morals, the court in Boreta, supra, stated the following:

“It seems apparent that the ‘public welfare’ is not a single, platonic archetypal idea, as it were, but a construct of political philosophy embracing a wide range of goals including the enhancement of majority interest in safety, health, education, the economy, and the political process, to name a few. In order intelligently to conclude that a course of conduct is ‘contrary to the public welfare its effects must be canvassed, considered and evaluated as being harmful or undesirable....”

The Appeals Board in its review believes that it must consider the decision of the Department within two contexts: (1) the Department’s responsibility under the public welfare or morals provisions of the Constitution, and (2) a pattern of misconduct by appellant as shown in the record.⁷

The violations in the 1994 decision concerned solicitation of alcoholic beverages and solicitation of prostitution -- these are usually revocation-type violations. That 1994 decision also found a violation of furnishing an alcoholic beverage to a patron manifesting obvious signs of intoxication -- usually a standard 20-day suspension.

⁷We are guided by two basic principles, the first of which states that: “If the decision is without reason under the evidence, the action of the Department constitutes an abuse of discretion and may be set aside. But where the decision is subject to a choice within reason, the Department is vested with the discretion of making the selection....” (Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (1982) 133 Cal.App.3d 814, 817 [184 Cal.Rptr. 367].) The second concept is that “Review for abuse of discretion consists of two distinct inquiries: the adequacy of the factual underpinning of the discretionary decision and the rationality of the choice.” (The Scope of Judicial Review of Decisions of California Administrative Agencies, Asimow, June 1995, Vol.42, No. 5, p. 1229.)

The 1996 decision's only violation was furnishing an alcoholic beverage to a patron manifesting obvious signs of intoxication -- resulting in a penalty less than the standard 20-day suspension.

It appears then, that the 1996 decision must, upon its own merits or in combination with the merits of the 1994 decision, be detrimental to public welfare or morals sufficient to revoke the license.

The violations in both cases, the 1994 decision and the 1996 decision, had portions which involved similar type violations (service to obvious intoxicants). However, the penalties assessed in the dissimilar portions of the 1994 decision were markedly different. This was due to the fact that the 1994 decision had two violations which apparently were the main basis for the stayed revocation order (the solicitation of beverages and prostitution).

It appears from the record that the 1994 decision's probation accomplished the end result to which it was mainly crafted by the Department -- to command appellant's attention to the fact that solicitation-type conduct would not be tolerated by the Department and, if continued, the license would be revoked. The record shows no solicitation violations since the 1994 decision, forcing the conclusion that the probationary terms and period accomplished their intended objective, and appellant, apparently, has learned an important lesson in obeying at least some of the law, and rules, that govern his license.

The duty imposed by the Constitution was for the Department to protect the public welfare or morals, within lawful and reasonable constraints. From a review

of the record as a whole, continuation of the license could not be considered contrary to the public welfare or morals. The obvious anti-social conduct by appellant (permitting prostitution and drink solicitations) was stopped by the actions of the Department in placing appellant on probation. The 1994 and 1996 violations of sales and service to persons showing symptoms of intoxication, would, separately or together, be only aggravated suspensions of generally 30- to 35-days, but rarely more, and on this record, hardly subject to conditional or unconditional revocation. We cannot say, considering Boreta, supra, that continuation of the license would be "harmful or undesirable," based on this record.

The pattern of improper conduct of a licensee is of major significance. The pattern of misconduct shows only a 1994 decision of a violation of "obvious intoxication" and a 1996 decision of a violation of "obvious intoxication," neither violation, separate or together, is upon this record, a revocation-type offense. To allow revocation under the totality of the facts of the present appeal, would do obvious violence to the spirit and intent of the concept called "public welfare or morals," and "due process of law."

CONCLUSION

We can understand and fully appreciate the Department's concern for its written injunctions which form the basis of its probationary orders -- designed to obtain conformity to lawful conduct. However, as we observed in KDM, Inc., supra, such a question of enforcement must be on a case-by-case basis, so that the Department may protect the important concept of the public welfare or morals but

does not, unwittingly, defeat the same. Blindness but to the written word of the probationary terms would create the very disrespect for lawful conduct that the Department has been empowered by the State Constitution and the Legislature to uphold and enforce, on a rational basis. Revocation in the present appeal would be irrational and unreasonable, and an abuse of the Department's discretion and therefore, contrary to the public welfare or morals.

The Order of the Department dated January 6, 1997, is reversed.⁸

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

⁸This 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.