

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

AB-8119a

File: 20-341794 Reg: 98045343

MAGDY MIKHAIL and VIOLET MIKHAIL dba Grove Market
3153 North Garey Avenue, Pomona, CA 91767,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: None

Appeals Board Hearing: December 2, 2004
Los Angeles, CA

ISSUED FEBRUARY 10, 2005

This is the second appeal in this matter. Magdy Mikhail and Violet Mikhail, doing business as Grove Market (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which again ordered their license revoked, following an Appeals Board decision which reversed the Department's original order of revocation. The Department's original order of revocation was purportedly based upon good cause arising from a subsequent sale to minor violation occurring during the conditionally stayed period of the original order of revocation, but was found by the Appeals Board to lack record support.

Appearances on appeal include appellants Magdy Mikhail and Violet Mikhail, appearing through their counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

¹The decision of the Department, dated July 16, 2004, is set forth in the appendix.

PROCEDURAL HISTORY

The original order in this matter was entered as a default order in registration 98045343 (#98045343) following appellants' failure to appear at a scheduled hearing. The order, dated May 27, 1999, was based upon an accusation charging sale to minor violations on October 16, 1998, and November 13, 1998, and called for revocation of appellants' off-sale beer and wine license. The order was stayed for a period of two years, conditioned as follows:

If cause for disciplinary action occurs during the stayed period, the Director of the Department may, in his discretion and without further notice, vacate this stay order and reimpose the order of revocation or take such other action as the Director deems just and reasonable in his discretion, and should no determination be made, at the end of the two year period of stay, said stay shall become permanent.

No appeal was taken from that decision.

On April 3, 2003, the Department entered the following order:

The above mentioned licensee(s) not having complied with the terms of the Department's Decision dated May 27, 1999, and good cause appearing therefor, it is hereby ordered that the stay be vacated and the revocation be reimposed, beginning upon service of notice.

Appellants appealed from that order, contending it was invalid because it did not reveal any basis for the reimposition of the revocation.

In a decision filed May 25, 2004, the Appeals Board reversed that order of the Department. The Board explained why it believed the order was defective, stating:

The Department argues that the revocation was reimposed because of a sale-to-minor violation occurring on May 26, 2001. The Department filed an accusation with registration number 01051984 (#01051984) alleging the sale-to-minor violation and held a hearing at which appellants were represented by counsel. The Department issued a decision in #01051984 on May 9, 2002, finding that the violation occurred as charged. The order revoked the license, but stayed the revocation for two years conditional upon appellants serving a 60-day

suspension and no cause for discipline arising during the period of the stay.² Appellants filed a timely appeal and the Appeals Board issued a decision affirming the action of the Department on February 6, 2003. (*Mikhail* (2003) AB-7965.)

Although appellants are correct that nothing in the order or the record shows any reason for vacating the stay, the Board may take official notice of its own decisions. (Gov. Code, § 11515; Evid. Code, § 451.) Officially noticing the Board's decision in AB-7965 would provide the Board with the information that this disciplinary action was subsequent to the Department's decision in #98045343. It would probably be a safe assumption that the violations which occurred in 2001, resulting in the Department's decision in #01051984 and the Appeals Board's decision in AB-7965, were the "good cause" for reimposing the stayed revocation.

However, it is the Department that must determine in the first instance what constitutes good cause; the Board can only review that determination, after it is made, for abuse of discretion. If the Board were to make the assumption in this case that the disciplinary action it approved in AB-7965 constituted the good cause necessary for the Department to reimpose the stayed penalty, that would seem to be usurping the role of Department and overstepping the bounds of the Board's jurisdiction.

The Board must determine whether the penalty was properly reimposed; the Department has not provided the information necessary for the Board to review the Department's action. The state of the record now compels a reversal of the Department's order because there is no basis in the order or the record to support the Department's finding of good cause for reimposition. The matter must be remanded to the Department for further findings or some other indication of the "good cause" that formed the basis for reimposition of the stayed revocation ordered in #98045343.

Following remand to the Department, the Department issued a new decision and order, this time reciting in the decision the proceedings in #01051984 discussed by the Board in its earlier decision, and stated:

The cause for discipline established in Registration Number 01051984 constitutes good cause for vacating the stay in Registration Number 98045343 and reimposing the revocation ordered in Registration Number 98045343.

²The accusation also charged that, on May 17, 2001, appellants possessed on the premises alcoholic beverages other than those authorized to be sold under their license. For the unauthorized beverages violation, a 10-day suspension, all stayed for a probationary period of one year, was ordered to run concurrently with the first year of the stay ordered for the other violation.

Appellants now contend that the Department violated appellants' due process rights when its Acting Chief Counsel signed and certified the Department's decision, conflating the roles of advocate and decision maker; and the decision is not supported by substantial evidence. In addition, appellants have moved to augment the record to include certain documents.

DISCUSSION

Unlike the cases upon which appellants rely,³ this case does not arise following an exercise by the Department of its powers under Business and Professions Code section 11517, subdivision (c). In each of those cases, the proposed decision was adverse to the Department, dismissing the accusation. The issue, as seen by the Board, was that the Department violated due process by failing to separate its advocacy function from its adjudicatory function and made ex parte communications prohibited by the Administrative Procedure Act.

This case is very different. It does not involve Business and Professions Code section 11517, subdivision (c). Nor does it involve any ex parte communication.⁴ It involves nothing more than an explanation by the Department of the basis for the order the Board found deficient.

The Board said, in its original decision in this case:

Although appellants are correct that nothing in the order or the record shows any reason for vacating the stay, the Board may take official notice of its own decisions. (Gov. Code, § 11515; Evid. Code, § 451.) Officially noticing the

³ *Quintanar* (2004) AB-8099; *Kim* (2004)AB-8148; and *KV Mart* (2004) AB-8121. A writ of review has been granted in each of these cases, and they are presently pending in the Second District Court of Appeal.

⁴ The Department, in its brief, has denied that there was any ex parte communication of the type involved in the *Quintanar* group of cases. We do not read appellants' Motion to Augment Record as asserting there was one.

Board's decision in AB-7965 would provide the Board with the information that this disciplinary action was subsequent to the Department's decision in #98045343. It would probably be a safe assumption that the violations which occurred in 2001, resulting in the Department's decision in #01051984 and the Appeals Board's decision in AB-7965, were the "good cause" for reimposing the stayed revocation.

By the same token, the Department may also take official notice of its own decisions, and appears to have done so in this case. Its order references both #98045343 and #1051984, confirming the Board's assumption made in its original decision.

It would seem that the Department did only what the Board implicitly suggested it do - spell out in its decision the "good cause" authority under which it was acting. We do not see how this recitation by the Department of existing decisions, to explain a decision already made, conflates the roles of advocate and decision maker.

Appellants do not dispute the fact that the event which gave rise to the disciplinary order in #1051984 - the triggering event for enforcement of the order in #98045343 - occurred during the stayed period. They argue, however, that something more should be required to support an order of revocation where the triggering event was, as in this case, on the last day of the stayed period.

The Department argues that the nexus for a reimposition of a stayed order is present, in that both cases involved sales to minors (described by the Department as "juveniles"), one as young as 15, none older than 17.

While it may seem unfortunate for the licensees that the triggering event occurred on the last day of the stay, it is worth noting that the net result is that there were three sales to minors within a 36-month period, enough to support an order of revocation under Business and Professions Code section 25658.1.

ORDER

The decision of the Department is affirmed.⁵

TED HUNT, CHAIRMAN
KAREN GETMAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁵ 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.