

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

AB-7613

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

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

File: 20-341794 Reg: 99047395

Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen

Appeals Board Hearing: March 1, 2001
Los Angeles, CA

ISSUED JUNE 19, 2001

Magdy William Mikhail and Violet Kamal Mikhail, doing business as Grove Market (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 45 days for appellant's agent selling an alcoholic beverage while their license was suspended, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code §23300.

Appearances on appeal include appellants Magdy William Mikhail and Violet Kamal Mikhail, appearing through their counsel, Michael B. Levin, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

¹The decision of the Department, dated March 16, 2000, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 31, 1998.

Thereafter, the Department instituted an accusation against appellants charging that, on July 22, 1999, Anna Jimenez, an agent for appellants, sold an alcoholic beverage, (malt liquor) to Tyrone Blackman, while appellants' license was under suspension as a result of a previous violation.

An administrative hearing was held on January 13, 2000, at which time documentary evidence was received, and testimony was presented concerning the circumstances of the unlawful sale by John Corby, an investigator for the Department; Tyrone Blackman, the customer involved in the transaction at issue; co-appellant Magdy Mikhail; and Anna Jimenez, appellants' alleged agent in the transaction.

The testimony revealed that, on the date in question, Mikhail was feeling ill and suddenly needed to rush to the bathroom. Jimenez, who was a baby-sitter for appellants' young children, happened to be in the store to buy a phone card. Mikhail told Jimenez to keep the customers waiting and that he would be right back. He then rushed to the bathroom, returning after about seven minutes.

While Mikhail was gone, Jimenez stood behind the counter by the cash register. The ALJ described Jimenez as "small in stature and voice, and speaks little English besides." (Finding 10.) She had no experience as a clerk, did not know how to work the cash register, and did not know that the alcoholic beverage license was suspended. Mikhail did not give her any instructions other than to keep the customers waiting until he got back.

Blackman, who had been a customer in the store previously, came into the store,

got two beers from the cooler, and took them to the counter. He testified that he did not know the alcoholic beverage license was under suspension. Blackman ignored Jimenez's attempt to get him to wait for Mikhail's return. He was in a hurry and told her the amount he said he was always charged for the beer. He gave Jimenez the money, and told her to give him a bag, which Jimenez found behind the counter and gave to him. Blackman put the beer in the bag and left the store. Jimenez, who did not know how to open the cash register, placed the money Blackman had given her next to the cash register. Blackman was detained outside the store by a passing police officer. Mikhail knew nothing of the transaction until he returned from the bathroom and the police officer brought Blackman back inside the store to identify who had sold him the beer.

Subsequent to the hearing, the Department issued its decision which determined that Jimenez, although not appellants' employee, was clothed with ostensible authority to act as appellants' agent, and that she sold and delivered the alcoholic beverages as appellants' agent.

Appellants thereafter filed a timely appeal in which they contend that the findings are not supported by substantial evidence in light of the record as a whole.

DISCUSSION

A person may be either an actual or an ostensible agent. (Civ. Code §2298.) An ostensible agent is created "when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him." (Civ. Code §2300; see also 2 Witkin, Summary of California Law (9th ed. 1987), §§40, 93-95, and 125.)

The ALJ found Jimenez had been "clothed with ostensible authority," because "when an individual is standing behind the counter at a premises and is (or appears to be) selling alcoholic beverages, that individual is considered to be an agent of the licensee" (Finding 12.) This statement is not an accurate statement of the requirements for ostensible agency. Even if it were, however, the evidence does not support the premise that Jimenez appeared to Blackman to have authority to sell beer for Mikhail.

Although Jimenez was standing behind the counter when Blackman brought the two beers to the counter, she told Blackman she did not know the price of the beer and tried to get Blackman to wait until Mikhail returned. Blackman said he was in a hurry and told Jimenez that "Mike" (Mikhail) always charged him a dollar. He gave her a dollar bill and said "Give me a bag." Jimenez gave him a bag she found behind the counter and took the dollar, either from Blackman's hand or from the counter where he placed it, and Blackman left the store, having put the beer in the bag himself. [RT 49, 53-55.] Jimenez did not ring up the sale, tell Blackman the price, open the cash register, put the money in the register, or make change; in other words, she did not present herself as Mikhail's clerk and she did not engage in the ordinary actions of a clerk.

Someone seeing her might initially think that Jimenez had authority to make sales simply because she was standing behind the counter. However, any reasonable person would immediately know that this appearance was false as soon as that person tried to buy something from her. A reasonable person would then know that whatever authority Jimenez had was restricted and did not include authority to sell to customers.

Whatever "ostensible authority" Blackman may have perceived Jimenez as having when he first approached her disappeared when she asked Blackman to wait for Mikhail's return and did not know the price of the beer or how to work the cash register.

A third party may not rely on the doctrine of ostensible authority where the third party is on notice that the agent's authority is restricted. (Civ. Code §2318; Turner v. Citizens Nat. Bank (1962) 206 Cal.App.2d 193 [23 Cal.Rptr. 698].) Since Blackman acted knowing that Jimenez was not Mikhail's salesclerk and that her authority was restricted, he would not be able to rely on the doctrine in any action against appellant, and there is no basis for the Department to assert the doctrine under these circumstances.

This Board has considered the question of whether someone was an ostensible agent in several other appeals. Two of these, Shin (1994) AB-6320 and Guzman (1992) AB-6123, bear some resemblance to the present appeal.

In the matter of Shin, the Appeals Board found an ostensible agency where a licensee's daughter, while visiting the premises, was told by the father/licensee not to sell anything, but to watch out for thieves while the father was busy with another patron. While at the counter near her father, the daughter sold an alcoholic beverage to a minor and accepted payment for the beverage, having access to the cash register.

In Guzman, the licensee asked his sister to "watch the store" while he went to the bathroom, which was off the premises. While he was gone, his sister sold beer to a minor after checking, but misreading, the minor's identification.

The alleged agents in Shin and Guzman not only appeared initially to have the authority to make sales of alcoholic beverages, *they confirmed that apparent authority*

by actually selling alcoholic beverages, doing all the usual things that an authorized clerk would do. At no time did they try to convince the customers to wait for the licensees to return, or say they did not know the prices of the items or how to work the cash registers. Neither Shin nor Guzman are persuasive on the question of ostensible agency here, since the facts in both are clearly distinguishable from those in the present appeal.

The ALJ also "concluded that there was a sale and delivery pursuant to an order placed for the purchase of such alcoholic beverages within the meaning of Section 23025." This conclusion, however, is not supported by substantial evidence, since there is nothing in the record indicating that there was "an order placed for the purchase of such alcoholic beverages" within the meaning of §23025 or any other section.

Counsel for the Department stated, in his closing argument, "A sale took place. It reasonably came down to Ms. Jimenez conceding to a transaction as opposed to her ringing up a sale in the normal course." [RT 69-70.] We disagree with counsel's assertion that a sale took place here. As counsel acknowledged, Jimenez did not voluntarily agree that Blackman could take the beer and just leave the money; she was compelled to acquiesce. As the ALJ so aptly stated: "[Blackman] forced the issue on a reluctant Jimenez; [and] overrode her will by immediately demanding a bag for the beer and handing her the money and left the store with the beer" (Finding 13.) These descriptions by Department counsel and the ALJ do not support, and, in fact, virtually preclude, a finding that the transaction occurring here constituted a sale.

The evidence shows that Blackman understood the situation, and Jimenez's limitations, very well and took advantage of them. He left the store with two beers,

having left *one dollar* to pay for them. Although he told Jimenez that Mikhail always charged him that, Blackman testified at the hearing that the beer actually cost much more: "The beer is like \$2, \$4" [RT 19.] Blackman knew that he should have paid two to four dollars for the beer he got, yet he also knew that Mikhail wasn't there at the moment, and the young woman standing there did not know the price and would not likely be inclined, or able, to stop him if he took the beer after leaving a "token" payment of one dollar. He was naturally in a hurry to leave the premises before Mikhail returned and charged him the true price of the beer. This was not a sale; this was essentially a theft; likewise, there was no "delivery" of the beer, but a taking, without adequate consideration given.

Contrary to the Department's argument in its brief, the issue here is not whether "the Appeals Board [may] second-guess the credibility determinations of the ALJ and reach a contrary conclusion." The ALJ, as the Department says, "synthesized" the testimony of Jimenez and Blackman, and, to the extent the ALJ's findings are consistent with and supported by the evidence, we have no problem with them. Where we disagree with the ALJ and the Department is in the legal conclusions to be drawn when the law is applied to the facts that have been found. We decide a question of law here, not one of fact, and the Department's determinations of law are not binding on us.

Having determined that, as to Blackman, Jimenez was not appellants' agent, and that Jimenez did not sell the beer to Blackman, the question of whether Mikhail acted reasonably in having Jimenez watch the store when he had to run to the bathroom, is really moot. We wish to make it clear, however, that we regard Mikhail's action as clearly reasonable under the facts and circumstances that existed.

Mikhail had no one available at that moment to take over when he suddenly needed to go to the bathroom, and his need was so urgent that he didn't have time to close the store. It was both natural and reasonable under these circumstances for Mikhail to have Jimenez, whom he knew and trusted, watch over things and ask customers to wait a few minutes for his return.²

The ALJ agreed with appellants that Mikhail was in an emergency situation, but still found that Mikhail had not acted reasonably under the circumstances (Finding 14):

"However, [Mikhail] had been ill for sometime [sic] prior to the transaction, and was struggling to perform his duties. He was the only one working at the store and had no backup. A reasonable person under these circumstances would have acted with caution and circumspection, and perhaps closed the store temporarily or for the day, or perhaps would have gotten some backup help in the event of a problem.

"Mr. Mikhail did none of these things although his Co-respondent wife or an erstwhile employee may possibly have been of standby assistance. [Appellants] failed to act reasonably in anticipating problems associated with Mr. Mikhail's illness, and cannot now be heard to complain."

The Department says that Mikhail acted unreasonably because he did not "anticipat[e] problems associated with [his] illness, and cannot now be heard to complain." Its position on this issue is both unrealistic and unreasonable.³ We note

²The Department faults Mikhail because, in his urgent dash to the bathroom, he only told Jimenez to have customers wait until he returned and didn't tell her specifically not to sell alcoholic beverages. In light of the Department's agreement that "Mikhail was in an emergency situation, and had no time to give Jimenez a comprehensive set of instructions to refuse the sale of alcoholic beverages in his absence" (Finding 14), we find the Department's criticism unreasonable.

³Apparently, one of the "problems associated with . . . Mikhail's illness" that the Department believes Mikhail should have anticipated was that Blackman, or someone like him, during that seven-minute period Mikhail was in the bathroom, would rush into the store, grab two beers without noticing either of the two license suspension signs, (continued...)

that in our review of the record, we found no basis for the ALJ's statement that Mikhail was "struggling to perform his duties." While he was not feeling well, his need to go to the bathroom came on very suddenly and there is no evidence he had any prior indication that such a situation would arise so suddenly. Mikhail obviously did not think, when he went to work that day, that he was so ill that he had to close the store for the day. The Department contends that Mikhail should have closed the store when he needed to go to the bathroom, stating that "Mikhail could have avoided this situation if he chose to close the store for the six to eight minutes he was in the bathroom. But he did not so chose [sic]." (Dept. Brief at 7.) However, when Mikhail's urgent need arose, he did not "ma[k]e a conscious decision not to close the store," but simply did not have time to close the store temporarily [RT 28].

The Department states that "a reasonable person under these circumstances . . . perhaps would have gotten some backup help in the event of a problem." *That is exactly what Mikhail did*, by asking Jimenez, a person he knew and trusted, to watch the store for a few minutes when he had a problem. He needed someone immediately, and could not have waited for "his Co-respondent wife or an erstwhile employee" to come to his aid, even if they were standing by to help.⁴ Under the circumstances, Mikhail acted reasonably and with ordinary care.

³(...continued)
ignore the plea of Jimenez to wait for Mikhail's return, throw some money down, and leave with the beer. While a licensee is required to be vigilant, we think it goes too far to require a licensee to be so prescient.

⁴It appears that there are no other employees, and that Mrs. Mikhail does not work in the store, although she buys supplies and brings them to the store. [RT 37.]

We conclude that the Department's decision is not supported by substantial evidence or by the applicable law, and that the Department acted unreasonably and abused its discretion by finding appellants liable for selling while under suspension and imposing a penalty of 45 days' suspension. The required "good cause" for discipline does not exist in this matter.

ORDER

The decision of the Department is reversed.⁵

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁵This 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 order as provided by §23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code §23090 et seq.