

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

AB-8119

File: 20-341794 Reg: 98045343

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

Administrative Law Judge at the Dept. Hearing: none

Appeals Board Hearing: April 8, 2004
Los Angeles, CA

ISSUED MAY 25, 2004

Magdy William Mikhail and Violetta Kamal Mikhail, doing business as Grove Market (appellants), appeal from an order of the Department of Alcoholic Beverage Control¹ vacating the stay and reimposing the revocation ordered on May 27, 1999.

Appearances on appeal include appellants Magdy William Mikhail and Violetta Kamal 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 order of the Department, dated April 3, 2003, is set forth in the appendix, along with the Department's decision dated May 27, 1999.

FACTS AND PROCEDURAL HISTORY

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

Thereafter, the Department filed an accusation against appellants, with a registration number of 98045343 (#98045343), charging that co-appellant Magdy Mikhail sold alcoholic beverages to persons under the age of 21 on October 16, 1998, and on November 13, 1998. An administrative hearing was scheduled and a notice of hearing was duly mailed to appellants at their address of record. The matter was heard as a default pursuant to Government Code section 11520 because appellants failed to appear at the hearing.

On May 27, 1999, the Department issued its decision which determined that the charges of the accusation were proven. The order revoked the license, but conditionally stayed the revocation for a period of two years. It provided, with regard to the stay:

If cause for disciplinary action occurs during the stayed period, the Director of the Department may, in his discretion and without further hearing, 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 such 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 issued an order in #98045343 reimposing the revocation of the license ordered on May 27, 1999. The order states:

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 filed the present appeal, contending that the order is invalid because it does not reveal any basis for the reimposition of the revocation.

DISCUSSION

The record on appeal in this case, certified by the Department to be "true, correct and complete," contains copies of the Department's order dated April 3, 2003; a certificate of decision for #98045343, dated May 27, 1999; the proposed decision of the ALJ for #98045343, dated March 26, 1999, that was adopted by the Department; a notice of hearing for #98045343, dated January 28, 1999; a notice of defense for #98045343 signed by Magdy W. Mikhail, dated January 10, 1999; the accusation in #98045343 filed December 29, 1998, and dated December 14, 1999; and the exhibits from the March 18, 1999, default hearing for #98045343.

Appellants argue that nothing in the order or the record reveal any possible "good cause" for the reimposition of the stayed penalty. Without evidence of good cause, they assert, the order of revocation is void.

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

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.

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.

ORDER

The decision of the Department is reversed, and the matter is remanded to the Department for further proceedings in accordance with the foregoing decision.³

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

³This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 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 section 23090 et seq.