

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

AB-8341

File: 21-372036 Reg: 04056882

GLOBAL MANAGEMENT & DEVELOPMENT dba Cheers Liquor
12838 Foothill Boulevard, Rancho Cucamonga, CA 91739,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: August 4, 2005
Los Angeles, CA

ISSUED OCTOBER 13, 2005

Global Management & Development, doing business as Cheers Liquor (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which revoked its license for its president, director, and sole shareholder having conspired to commit a crime, having committed grand theft, and having purchased property known to be stolen, violations of Penal Code sections 182, 487, subdivision (a), and 496, subdivision (a).

Appearances on appeal include appellant Global Management & Development, appearing through its counsel, Joshua Kaplan, and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on May 23, 2002. Thereafter, the

¹The decision of the Department, dated September 9, 2004, is set forth in the appendix.

Department instituted an accusation against appellant charging that appellant conspired to commit a crime in violation of Penal Code section 182 (count 1), committed grand theft by taking money, labor or real or personal property in a value exceeding \$400, in violation of Penal Code section 487, subdivision (a) (count 2), and bought, received, withheld or concealed gasoline believing it to have been stolen, in violation of Penal Code section 496, subdivision (a).

An administrative hearing was held on July 23, 2004, at which time oral and documentary evidence was received. At that hearing, Tharwat Elmassry, appellant's president and sole shareholder, appeared without counsel and requested that the hearing be continued because of the pendency of criminal charges against him. Elmassry argued that for him to defend against the accusation, he would have to disclose his defense strategy in the criminal proceeding, to his prejudice. He claimed to be unaware that he would be expected to cross-examine witnesses or call witnesses on his own behalf, but admitted that he had "just glanced" through the notice of hearing sent to him by the Department. The administrative law judge (ALJ) denied the request, and the hearing went forward on the merits.

Bradley Johansson, Western regional manager for Systems Logistics, a national petroleum distribution company, testified that an employee, Frederick Huizar drew three loads of gasoline from a supplier to Systems Logistics, without authorization, and charged the loads to his employer. Huizar also testified, admitting that he withdrew three loads of gasoline without authorization, delivered them to appellant's location, and was paid \$2000 by appellant. Huizar said he was supplied keys to appellant's facilities

by Elmassry, and made the deliveries at a time Elmassry, by prior agreement, would not be present. Charles Yinger, a police detective for the City of Corona, testified that he conducted a videotaped interview of Huizar during which Huizar admitted taking three loads of gasoline without authorization and delivering them to Cheers Liquor. Elmassry declined to cross-examine any of the Department's witnesses, claiming his inability to do so, and further declined to testify on behalf of appellant.

Subsequent to the hearing, the Department issued its decision which determined that the Department had proved the charges of the accusation, and ordered appellant's license revoked.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) appellant was denied due process by being forced to defend itself without an attorney; (2) the decision is not supported by the findings and the findings are not supported by the evidence, and (3) the penalty is cruel and unusual punishment.

DISCUSSION

I

Appellant contends that it was denied due process when the hearing was permitted to go forward when appellant was represented only by its president, director, and sole shareholder, a non-lawyer.

Appellant acknowledges that the Fourth District Court of Appeal, in *Caressa Camille, Inc. v. Alcoholic Beverage Control Appeals Board* (2002) 99 Cal.App.4th 1094 [121 Cal.Rptr. 758], held that a corporation may be represented in administrative

proceedings by an agent who is not a licensed attorney. It attempts to distinguish that case, stating that neither that court or any other has ever upheld lay representation “when it is patently inadequate and incompetent to provide even a modicum of effective representation to the corporate licensee.” (App.Br., p. 13,)

Appellant, curiously, blames the Department’s “consent and encouragement” for Elmassry’s decision to appear in behalf of appellant. This charge is unfounded.

Instead, it appears from the record that Elmassry’s appearance at the hearing without counsel was part of an overall strategy, devised by him with or without the assistance of counsel, to protect himself and his corporation while the criminal proceeding against him and/or his corporation remained pending.

Elmassry claimed to have only “glanced” at the notice of hearing, which advised him of his right to be represented by counsel, to present any suitable evidence, and to be given full opportunity to cross-examine all witnesses testifying against him, and which informed him that any request for a continuance must be made within 10 days of any discovery of good cause. The Department opposed the request for the continuance, and it was denied.

Elmassry’s failure to fully inform himself of the contents of the notice of hearing can be blamed on no one other than himself. Asked if he had read the notice of hearing (Exhibit 1), Elmassry stated: “No. I just glanced through it.”

We are not persuaded by appellant’s argument that Elmassry should have been warned about the dangers in appearing without counsel. He made an election to preserve for his criminal defense whatever elements of surprise and tactics he might

assert, gambling that his last minute request for a continuance would gain him a reprieve in the administrative proceeding.

The notice of hearing, served on appellant two months prior to the date set for the hearing, advised appellant that any postponement of the hearing was conditioned upon a showing of good cause, and that it was required to notify the Department within 10 days of the discovery of good cause, at the risk of being deprived of a postponement. Although appellant claims a request for a continuance was made to the Department's attorney, it appears that no formal request for continuance was made until the day of the hearing.

Pursuant to Government Code section 11524, the ALJ has the right to grant or deny a request for a continuance for good cause. An appellant has no absolute right to a continuance; it is granted or denied at the discretion of the ALJ and a refusal to grant a continuance will not be disturbed on appeal unless it is shown to be an abuse of discretion. (*Givens v. Department of Alcoholic Beverage Control* (1959) 176 Cal.App.2d 529, 532 [1 Cal.Rptr. 446].)

We do not believe the ALJ's ruling can be deemed an abuse of discretion. Appellant's statements to the ALJ show that he made a conscious decision to appear without counsel, and to delay seeking the continuance until all concerned had traveled to San Bernardino for the hearing.

II

Appellant argues that there is no substantial evidence in the record to support the findings. Appellant argues that there is no evidence that Elmassry knew the

gasoline was stolen or any gas delivery illegal, and that Huizar's testimony lacks any elements which tie Elmassry or any other corporate agent to any illegal activity.

"Substantial evidence" is relevant evidence which reasonable minds would accept as a reasonable support for a conclusion. (*Universal Camera Corp. v. Labor Bd.* (1951) 340 U.S. 474, 477 [95 L.Ed. 456, 71 S.Ct. 456] and *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].) When, as in the instant matter, the findings are attacked on the ground that there is a lack of substantial evidence, the Appeals Board, after considering the entire record, must determine whether there is substantial evidence, even if contradicted, to reasonably support the findings in dispute. (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925].)

Appellate review does not "resolve conflicts in the evidence, or between inferences reasonably deducible from the evidence." (*Brookhouser v. State of California* (1992) 10 Cal.App.4th 1665, 1678 [13 Cal.Rptr.2d 658].) Where there are conflicts in the evidence, the Appeals Board is bound to resolve them in favor of the Department's decision, and must accept all reasonable inferences which support the Department's findings. (*Kirby v. Alcoholic Bev. Control App. Bd.* (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857] (in which the positions of both the Department and the license-applicant were supported by substantial evidence); *Kruse v. Bank of America* (1988) 202 Cal.App.3d 38, 51 [248 Cal.Rptr. 271]; *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734]; *Gore v. Harris* (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

The claim that there is nothing in Huizar's testimony to link Elmassry or his corporation to the gasoline thefts is without merit. Huizar testified that he was provided keys to appellant's premises, instructed to make deliveries at a time Elmassry was not present, and was to be paid \$5000 for three deliveries of gasoline. Huizar made the three deliveries, the total value of which was \$35,000. Huizar was paid \$2000 by Elmassry. Huizar testified he was to receive a total of \$5000, but was prevented from receiving the balance by the initiation of criminal proceedings.

The testimony of the Department's witnesses stands unrefuted, and leaves no doubt that Elmassry committed the offenses charged in the accusation.

III

Appellant claims that the order of revocation constitutes cruel and unusual punishment.

The Appeals Board will not disturb the Department's penalty orders in the absence of an abuse of the Department's discretion. (*Martin v. Alcoholic Beverage Control Appeals Board & Haley* (1959) 52 Cal.2d 287 [341 P.2d 296].) However, where an appellant raises the issue of an excessive penalty, the Appeals Board will examine that issue. (*Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board* (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183].)

The ALJ stated, in Conclusion of Law 8, his reasons for ordering appellant's license revoked:

The dishonest behavior involved in the violations found to have occurred, indicates beyond any doubt the unfitness of Tharwat Sami Elmassry to hold a Department-issued license. Since, for all intents and purposes, Elmassry is the corporate licensee, being its sole shareholder, director and officer (Finding of Fact, ¶ 4), the sanction ordered appears necessary to adequately protect the

public from Elmassry's dishonesty.

We believe that the order of revocation was well within the discretion granted by the Legislature to the Department of the protection of public welfare and morals, and does not amount to cruel and unusual punishment by any rational standard.

ORDER

The decision of the Department is affirmed.²

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

² 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.