

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

AB-9960

File: 20-576463; Reg: 22092169

LA FIESTA MARKET, INC.,
dba La Fiesta Market
307 South Madera Avenue
Kerman, CA 93630-1410,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Alberto Roldan

Appeals Board Hearing: May 19, 2023
Telephonic

ISSUED MAY 22, 2023

Appearances: *Appellant:* Bruce Leichty, as counsel for La Fiesta Market, Inc.,

 Respondent: Sean Klein, as counsel for the Department of
 Alcoholic Beverage Control.

OPINION

La Fiesta Market, Inc., doing business as La Fiesta Market (appellant), appeals from a decision of the Department of Alcoholic Beverage Control (Department)¹ revoking its license because it permitted four sales of alcohol to minors, in violation of

¹ The decision of the Department, dated December 27, 2022, is set forth in the appendix.

Business and Professions Code section 25658, subdivision (a)² and because it failed to reactivate, transfer or obtain an extension of its type-20 off-sale beer and wine license, within one year of the date of the surrender of such license, as required by California Code of Regulations, Title 4, Division 1, section 65, subsection (d) (rule 65).

FACTS AND PROCEDURAL HISTORY

A type-20 off-sale beer and wine license (20-576463) was issued to appellant on February 21, 2017. Subsequently, appellant applied to upgrade its license to a type-21 off-sale general license. As part of that application process, it submitted a License Application Request (LAR), dated November 29, 2017 (exh. D-8), indicating its intent to surrender the active type-20 license upon the issuance of the upgrade. A type-21 license (21-585986) was issued to appellant on January 29, 2018. (*Ibid.*) There were three instances of prior departmental discipline against the type-21 license for four sales of alcohol to minors, in violation section 25658(a).³ As a result, the type-21 license was revoked. (Decision at pp. 1-2; Exh. D-1.)

On May 6, 2022, the Department filed a two-count accusation against appellant, seeking to revoke its type-20 license because of the sales of alcohol to minors while holding a type-21 license, and because of its failure to reactivate, transfer or obtain an extension of its type-20 license in accordance with rule 65. The accusation was amended on July 21, 2022 to correct the date the type-20 license was surrendered.

Prior to the administrative hearing, appellant sought discovery on the underlying disciplinary matters and submitted a Motion to Compel. A pre-trial conference was held

² All statutory references are to the Business and Professions Code unless otherwise indicated.

³ One instance of discipline contained two counts.

on September 27, 2022, whereby Administrative Law Judge (ALJ) Ainley issued an Order, dated October 1, 2022, ordering the production of various documents by the Department, and ruling that: “the three prior matters listed in the accusation are final and, pursuant to the doctrine of *res judicata*, could not be relitigated.” (Exh. D-1.) Appellant filed a motion to vacate the order, but the motion was denied. (Exh. D-7.)

At the administrative hearing held on October 13, 2022, documentary evidence was received and testimony concerning the accusation was presented by Department Agent Alba Medina; Staff Services Manager I (formerly licensing representative) Stella Reyes; and Supervising Agent Jason Montgomery. Law clerk Michel Shaddix, as well as licensee and corporate officer of La Fiesta Market, Inc., Fadi Abboud, testified on appellant’s behalf.

Testimony established that after successfully applying for a type-21 off-sale general license, appellant was disciplined in three instances for selling alcohol to minors. The first, in September of 2019, was resolved by stipulation and waiver, and the payment of a fine. (Exh. D-2.) The second, in June of 2021, initially resulted in a default decision. The default was vacated and an offer in compromise was reached, along with the payment of a fine. (Exh. D-3.) The third instance, in October of 2021, was similarly resolved by stipulation and waiver, and the type-21 license was revoked. (Exh. D-4.)

Following the hearing on the instant accusation, ALJ Roldan issued a proposed decision on November 15, 2022, sustaining both counts of the accusation and recommending that the type-20 license be revoked, with the revocation stayed for a period of six months to permit the transfer of the license to another premises. The

Department adopted the proposed decision in its entirety on December 23, 2022, and a certificate of decision was issued four days later.

Appellant then filed a timely appeal raising the following issues: (1) the Department proceeded in excess of its jurisdiction when it sought and ordered the revocation of appellant's license on a cause of action claiming rule 65(a) surrender, (2) the decision adopted by the department is not supported by substantial evidence, and (3) the findings of prior prohibited sales to minors are not supported by substantial evidence, and such findings could only be found by denying appellant the process it was due. Issues one and two will be discussed together.

DISCUSSION

I

RULE 65:

SURRENDER & SUBSTANTIAL EVIDENCE

Appellant contends the Department proceeded in excess of its jurisdiction when it sought and ordered the revocation of appellant's license on a cause of action claiming rule 65(a) surrender. (AOB at p. 10.) Rule 65 provides:

Surrender of License on Closing of Business

(a) Every licensee who surrenders, abandons or quits his licensed premises, or who closes his licensed business for a period exceeding 15 consecutive calendar days, shall, within 15 days after closing, surrendering, quitting, or abandoning his licensed premises, surrender his license or licenses to the department. The department may seize the license certificate or certificates of any licensee who fails to comply with the surrender provisions of this rule, and may proceed to revoke his license or licenses.

(b) Upon the voluntary request by any licensee, on such form as the department may prescribe, the department may cancel his license or licenses.

(c) A surrendered license may be reinstated upon request made at least 10 days prior to the date of reinstatement upon certification by the licensee that there has been no change of ownership of the licensed business, and that the premises possess the same qualifications required for the original issuance of the license.

(d) Any license voluntarily surrendered under paragraph (a) of this rule shall be revoked if it is not transferred to another person or for use at another premises, or redelivered and the licensed activity resumed, within one year from the date of such surrender. There shall be no extension of such surrender period except when the department finds good cause exists where:

(1) an application is pending for transfer of the surrendered license; or

(2) litigation other than that involving disciplinary action by the department is pending; or

(3) the premises for which the license had been issued and for which the license is sought to be redelivered were destroyed due to circumstances beyond the control of the licensee by fire, flood, or other natural catastrophe, or as part of an urban renewal program, and the licensee makes an affirmative showing of good faith efforts that he is attempting to obtain reconstruction of such destroyed premises; or

(4) the Director in his judgment finds a case of undue hardship exists which would warrant an extension.

(Cal. Code Regs., tit. 4, § 65 (rule 65).)

Rule 65 was promulgated under the authority of section 25750(a), which grants exclusive jurisdiction over alcoholic beverage licenses to the Department, and grants the Department the authority to promulgate rules to carry out its various functions and duties:

The department shall make and prescribe those reasonable rules as may be necessary or proper to carry out the purposes and intent of Section 22 of Article XX of the California Constitution and to enable it to exercise the powers and perform the duties conferred upon it by that section or by this division, not inconsistent with any statute of this state, including

particularly this division and Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.

(Bus. and Prof. Code § 25750(a).) Article XX, section 22 of the California Constitution states, in pertinent part:

The Department of Alcoholic Beverage Control shall have the exclusive power, except as herein provided and in accordance with laws enacted by the Legislature, to license the manufacture, importation and sale of alcoholic beverages in this State, and to collect license fees or occupation taxes on account thereof. The department shall have the power, in its discretion, to deny, suspend or revoke any specific alcoholic beverages license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals, or that a person seeking or holding a license has violated any law prohibiting conduct involving moral turpitude. It shall be unlawful for any person other than a licensee of said department to manufacture, import or sell alcoholic beverages in this State.

Appellant acknowledges this grant of authority to the Department in his opening brief, stating:

When the Department initiates license revocation or other discipline by way of accusation, the proceedings are governed by the California Administrative Procedures Act ("APA"). (*Rondon v. Alcoholic Beverage Control Appeals Board* (2007) 151 Cal.App.4th 1274, 60 Cal.Rptr.3d 295, 300 (referring to Bus. & Prof. Code Section 25750, and the codification of the APA at Gov. Code Sections 11340-11529).) Section 25750 in turn effectively requires that Department regulations and rules not be construed so as to be inconsistent with any statutory authority including the APA.

(AOB at p. 3.) Nevertheless, appellant challenges the Department's jurisdiction to carry out the provisions in rule 65, maintaining:

Appellant neither closed its business or quit its premises prior to receipt of the Type 21 license or took any action inconsistent with its status as a Type 20 licensee, and never signed anything consenting to a surrender of its Type 20 license or in fact surrendered that license, although [the] Department contends otherwise; and Appellant at no time before this proceeding knew that the Department asserted or would assert that Appellant could not hold Type 20 and 21 licenses simultaneously.

(*Id.* at p. 5.) Appellant maintains: “the Department lacked jurisdiction to accuse the licensee of a ‘surrender’ . . . [due to] no possession by ABC of the surrendered license . . . [and no] abandonment or surrender of the licensed premises, or a closure of the licensed business for more than 15 consecutive calendar days.” (*Id.* at pp. 10-12.) Appellant also contends the decision is not supported by substantial evidence. (*Id.* at p. 16.)

In determining whether a decision of the Department is supported by substantial evidence, this Board’s review is limited to determining, in light of the entire administrative record, whether substantial evidence exists — even if contradicted — to reasonably support the Department’s factual findings, and whether the decision is supported by those findings. (*Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113] (*Boreta*).)

“Substantial evidence” is relevant evidence which reasonable minds would accept as reasonable support for a conclusion. (*Universal Camera Corp. v. N.L.R.B.* (1951) 340 U.S. 474, 477 [71 S.Ct. 456].)

Substantial evidence, of course, is not synonymous with “any” evidence, but is evidence which is of ponderable legal significance. It must be “reasonable in nature, credible, and of solid value; it must actually be ‘substantial’ proof of the essentials which the law requires in a particular case.” [Citations.] Thus, the focus is on the quality, not the quantity of the evidence. Very little solid evidence may be “substantial,” while a lot of extremely weak evidence might be “insubstantial.”

(*Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647] (*Toyota*).)

As we have noted many times, our standard of review is as follows:

We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department’s findings of fact. [Citations.]

We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor [an appellate] court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. [Citations.] The function of an appellate board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court.

(Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826] (Masani).)

When findings are attacked as being unsupported by the evidence, the power of this Board begins and ends with an inquiry as to whether there is substantial evidence, contradicted or uncontradicted, which will support the findings. When two or more competing inferences of equal persuasion can be reasonably deduced from the facts, the Board is without power to substitute its deductions for those of the Department — all conflicts in the evidence must be resolved in favor of the Department's decision.

(Kirby v. Alcoholic Bev. Control Appeals Bd. (1972) 25 Cal.App.3d 331, 335 [101 Cal.Rptr. 815]; Harris v. Alcoholic Beverage Control Appeals Board (1963) 212 Cal.App.2d 106, 112 [28 Cal.Rptr.74] (Harris).)

Therefore, the issue of substantial evidence when raised by an appellant, leads to an examination by the Appeals Board to determine, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. The Appeals Board cannot disregard or overturn a finding of fact by the Department merely because a contrary finding would be equally or more reasonable. (Cal. Const. Art. XX, § 22; Bus. & Prof. Code § 23084; *Boreta, supra*; *Harris, supra*, at p. 114.)

The ALJ made the following findings of fact as the basis of appellant having surrendered its license:

4. One of the documents received by the Department in furtherance of the type 21 application was a License Action Request (LAR) dated November 29, 2017. **This LAR indicated the intent of the Respondent to surrender the active type 20 license upon issuance of License Number 21-585986**, which was the type 21 license being sought by the Respondent. The Licensee signature box appears to be signed with Abboud' s signature. (Exhibit D-8)

¶ . . . ¶

6. The submission of a LAR surrendering the Type 20 license would be an ordinary and intrinsic part of an application to upgrade a license, since the Respondent would not be allowed to hold two Department licenses for the same premises. In the LAR, the Respondent stated its intent to transfer the type 20 license upon issuance of the type 21 license. The LAR form stated the Respondent was still required to renew the surrendered license when the renewal was due and that the license was subject to cancellation after one year from the effective surrender date if it was not transferred or reactivated. (Exhibit D-8)

(Decision at p. 3, ¶¶ 4-6, emphasis added.)

While appellant argued at the administrative hearing, and maintains in its briefs, that the signature on the LAR is not that of Mr. Abboud, the ALJ reached the following conclusions:

6. It is undisputed that the Licensed Premises ceased meeting the requirements of section 23950,⁴ as to the type 20 license, when it ceased operating as a type 20 establishment and began operating as a type 21 establishment on January 29, 2018. The license was surrendered on January 29, 2018, by the Respondent, as explicitly expressed in the LAR that was submitted by the Respondent. **Abboud' s denial that the type 20 license was surrendered is found not credible. The signature on the LAR appears to be Abboud's.** Further, the Respondent then proceeded to operate the Licensed Premises with the sought type 21 license after the surrender date. It is simply not credible that the LAR, surrendering the type 20 license, was submitted without the Respondent's blessing and involvement, given the Respondent's actions after the surrender of the type 20 license. The Respondent communicated an intent to transfer the license in the LAR. The surrender set in motion the period in which the Respondent was required to act in order to preserve

⁴ Business and Professions Code section 23950 requires that both applicants and premises must be qualified by the Department in order to be licensed.

the license and prevent its revocation. The Respondent was made aware of this requirement through explicit language in the submitted LAR. The Department tolled acting on its authority through February 23, 2022, but the Department then communicated to Abboud, one of the corporate officers, that the license was facing revocation after that date. (Findings of Fact, ¶¶ 1-10.)

(*Id.* at p. 7, ¶ 6, emphasis added.)

It is the province of the ALJ, as trier of fact, to make determinations as to witness credibility. (*Lorimore v. State Personnel Board* (1965) 232 Cal.App.2d 183, 189 [42 Cal.Rptr. 640]; *Brice v. Dept. of Alcoholic Bev. Control* (1957) 153 Cal.App.2d 315, 323 [314 P.2d 807].) The Appeals Board will not interfere with those determinations in the absence of a clear showing of an abuse of discretion. “‘Abuse of discretion’ in the legal sense is defined as discretion exercised to an end or purpose not justified by and clearly against reason, all of the facts and circumstances being considered. [Citations.]” (*Brown v. Gordon* (1966) 240 Cal.App.2d 659, 666-667 [49 Cal.Rptr. 901].)

As noted above, the Appeals Board is not permitted to “reweigh the evidence or exercise independent judgment to overturn the Department’s factual findings to reach a contrary, although perhaps equally reasonable, result.” (*Masani, supra.*) Accordingly, we decline to do so. In addition, having examined the entire record carefully, we find no abuse of discretion in the ALJ’s findings.

In its opening brief, appellant contends:

The Department is authorized to issue, revoke and transfer licenses according to specifications set out in the statutes. (Cal.Const., art. XX, § 22; Bus. & Prof. Code §§ 23000 et seq., 23049 et seq., 23300 et seq. and 23950 et seq.; Gov. Code § 11500 et seq.)

There is nothing in any of these provisions authorizing the Department to, in effect, seek declaratory relief regarding a surrender of license. *See, e.g.,* Cal. Bus. & Prof. Code Chapters 7 and 8, and especially Section 24200 and Section 24201, which discuss the grounds for “suspension or revocation” of a license and accusations thereon. There is no mention of

an action to determine a surrendered license in these sections and no language broad enough to admit that possibility.

(AOB at p. 13.) It then goes on to conclude that the Department lacks jurisdiction to revoke a surrendered license by operation of law, only by the physical surrender of the license, or if the licensee had abandoned or closed its business for more than fifteen days. We disagree.

When the LAR was submitted, asking to upgrade from a type-20 to a type-21 license, appellant indicated its intention to surrender the license upon receipt of the new license. Even though Mr. Abboud maintains the signature on the LAR is not his, we must accept as true the ALJ's factual finding that appellant did indeed sign this document. And, as noted in the decision, a license cannot hold both a type-20 and a type-21 license simultaneously. Therefore, the LAR set in motion the period within which appellant was required to act, in order to preserve the license and prevent its revocation. It did not act during that time frame, and the instant accusation was therefore proper — seeking to revoke the type-20 license, with the revocation stayed to allow the transfer of the license to another premises.

We find no error in the decision regarding the implementation of rule 65, and find that the decision is supported by substantial evidence.

II

PRIOR SALES OF ALCOHOL TO MINORS

Appellant contends the findings of prior prohibited sales to minors are not supported by substantial evidence, and that such findings could only be found by denying appellant the process it was due. (AOB at p. 34.)

As an initial matter, the “findings of prior prohibited sales to minors” referred to by appellant are about *closed matters*, all three of which were resolved by a stipulated agreement or offer in compromise, and the payment of a fine. In such negotiated settlements — resulting in a signed agreement to pay a fine in lieu of serving a suspension — the appellant waives all rights to a hearing, reconsideration, or appeal. Accordingly, appellant cannot now reopen those matters in an attempt to produce evidence that the sales did not take place. As noted above, prior to the administrative hearing, ALJ Ainley issued an order finding that “the three prior matters listed in the accusation are final and, pursuant to the doctrine of *res judicata*, could not be relitigated.” (Exh. D-1.)

The Board accepts appeals regarding negotiated settlements — but only for the limited purpose of reviewing for issues such as fraud, mistake, undue influence, duress, abuse of discretion, or violation of due process. The Appeals Board does not review the underlying facts in such cases. Furthermore, these three matters are long past the deadline for appeal.

A stipulation, like other contracts, may be rescinded only if it was procured through fraud, duress, undue influence, or mistake. (See *Frankel v. Bd. of Dental Examiners* (1996) 46 Cal.App.4th 534, 544 [54 Cal.Rptr.2d 128] [holding that a stipulation and waiver is governed by contract principles].) As the Board explained in *Sood* (1999) AB-7404:

It has been the Board’s position in all cases previously decided, that appellants may not, in matters where a stipulation and waiver form waives appeal, raise substantive issues on the merits of the facts of the case. However, appellants may raise the narrow issues of due process and substantial justice: has the appellant been dealt with fairly. . .

As stated by the Ninth Circuit:

[T]he general rule of law in California is that when a person with the capacity of reading and understanding an instrument signs it, he is, in the absence of fraud and imposition, bound by its contents, and is estopped from saying that its provision is contrary to his intentions or understanding.

(*Dobler v. Story* (9th Cir.1959) 268 F.2d 274, 277.)

These prior matters, once closed as stipulated agreements, are presumed to be supported by substantial evidence, and appellant waived its right to argue otherwise.

To allow closed matters to be challenged on substantial evidence grounds would undermine our position that a strong rule of policy, adopted for the benefit of the public, supports the argument that stipulation and waivers must be binding on the parties, and cannot be re-opened. “Stipulations in administrative proceedings would not serve the purpose for which they are intended if they were voidable at the option of the licensee . . .” (*Stermer v. Bd. of Dental Examiners* (2002) 95 Cal.App.4th 128, 133 [115 Cal.Rptr.2d 291].) Accordingly, we decline to reach appellant’s substantial evidence issue in regard to the prior sales of alcohol to minors. We agree with ALJ Ainley that these matters cannot be relitigated.

In addition, appellant has presented no evidence of due process violations — aside from its assertion that it should be able to present evidence to refute the accusations in the underlying completed actions, and that the ALJ should not have made findings about those prior violations without giving appellant a chance to litigate the matters which were resolved by stipulation.

Appellant contends:

The principles of *res judicata*, and not just the absence of evidence of findings of prior violations on the face of the documents presented by Department as evidence, establish that **no findings of prior violations of law in the form of prohibited sales to minors could have been or**

should have been made without Appellant having had the chance to litigate those contentions, which quite obviously Appellant was denied here.

(AOB at p. 34, emphasis added.)

The doctrine of *res judicata*⁵ bars relitigation of issues decided in prior proceedings. (*Bennett v. Rancho California Water Dist.* (2019) 35 Cal.App.5th 908, 918-919 [248 Cal.Rptr.3d 21].) Here, since the prior violations were resolved by stipulation, no hearings were held, and no argument or evidence was received. Appellant therefore argues that its due process rights were violated when findings were made by the ALJ about the prior violations, without appellant having a chance to litigate those issues.

We disagree with appellant's contention that this is a due process violation. Instead, the absence of litigation is part and parcel of the terms of the negotiated settlements which explicitly waived all rights to hearings, reconsideration, or appeals. Furthermore, "[i]n California several cases have held that a stipulated judgment bars subsequent litigation of all issues which were **or could have been raised** in the original suit." (*Tennison v. California Victim Comp. & Government Claims Bd.* (2007) 152 Cal.App.4th 1164, 1176 [62 Cal.Rptr.3d 88], emphasis added.)

The doctrine of *res judicata* rests upon the ground that the party to be affected [...] has litigated, or **had an opportunity to litigate** the same matter in a former action in a court of competent jurisdiction, and should not be permitted to litigate it again to the harassment and vexation of his opponent. Public policy and the interest of the litigants alike require that there be an end to litigation. [Citation, emphasis added, internal quotation marks omitted.]

⁵ Literally, "the thing has been decided."

(*Needelman v. DeWolf Realty Co., Inc.* (2015) 239 Cal.App.4th 750, 761 [191 Cal.Rptr.3d 673].) Appellant in this matter had the opportunity to litigate the prior sales to minor violations, but chose instead to settle the matters with negotiated settlements. Accordingly, the doctrine of *res judicata* bars further litigation. The doctrine does not give appellant a second bite at the apple to now raise defenses and present evidence because it claims it was denied this opportunity.

We find that appellant's attempt to use discovery in this matter to re-open the closed matters was therefore rightfully denied by the ALJ, and does not constitute a due process violation.

ORDER

The decision of the Department is affirmed.⁶

SUSAN A. BONILLA, CHAIR
MEGAN McGUINNESS, MEMBER
SHARLYNE PALACIO, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁶ This 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.* Service on the Board pursuant to California Rules of Court (Rule 8.25) should be directed to: 400 R Street, Ste. 320, Sacramento, CA 95811 and/or electronically to: abcboard@abcappeals.ca.gov.

APPENDIX

**BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA**

**IN THE MATTER OF THE ACCUSATION
AGAINST:**

LA FIESTA MARKET INC.
LA FIESTA MARKET
307 S. MADERA AVE.
KERMAN, CA 93630-1410

OFF-SALE BEER AND WINE - LICENSE

Respondent(s)/Licensee(s)
Under the Alcoholic Beverage Control Act

FRESNO DISTRICT OFFICE

File: 20-576463

Reg: 22092169

CERTIFICATE OF DECISION

It is hereby certified that, having reviewed the findings of fact, determination of issues, and recommendation in the attached proposed decision, the Department of Alcoholic Beverage Control adopted said proposed decision as its decision in the case on December 23, 2022. Pursuant to Government Code section 11519, this decision shall become effective 30 days after it is delivered or mailed.

Any party may petition for reconsideration of this decision. Pursuant to Government Code section 11521(a), the Department's power to order reconsideration expires 30 days after the delivery or mailing of this decision, or if an earlier effective date is stated above, upon such earlier effective date of the decision.

Any appeal of this decision must be made in accordance with Business and Professions Code sections 23080-23089. The appeal must be filed within 40 calendar days from the date of the decision, unless the decision states it is to be "effective immediately" in which case an appeal must be filed within 10 calendar days after the date of the decision. Mail your written appeal to the Alcoholic Beverage Control Appeals Board, 400 R St, Suite 320, Sacramento, CA 95811. For further information, and detailed instructions on filing an appeal with the Alcoholic Beverage Control Appeals Board, see: <https://abcab.ca.gov> or call the Alcoholic Beverage Control Appeals Board at (916) 445-4005.

Sacramento, California

Dated: December 27, 2022



Matthew D. Botting
General Counsel

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DEC 27 2022

Alcoholic Beverage Control
Office of Legal Services

**BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA**

IN THE MATTER OF THE ACCUSATION AGAINST:

La Fiesta Market Inc.
DBA: La Fiesta Market
307 S. Madera Ave.
Kerman, CA 93630-1410

Respondent,

} File: 20-576463
}
} Reg: 22092169
}
} License Type: 20
}
} Page Count: 167
}
} Reporter: Zoanne Williams-CSR#7626
} IDepo Reporters

Off-Sale Beer and Wine License

PROPOSED DECISION

Administrative Law Judge Alberto Roldan, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter in Fresno, California on October 13, 2022.

Sean Klein, Attorney, represented the Department of Alcoholic Beverage Control (Department).

Bruce Leichty, Attorney, represented the Respondent (Respondent).

The Department seeks to discipline Respondent's license in a two count Accusation on the grounds that:

Count One

On or about and between September 28, 2019, and October 15, 2021, at the above designated premises where Respondent-Licensee was operating under a type 21 Off Sale General license, to wit: license number 585986, Respondent-Licensee's agents or employees committed four violations of Business and Professions Code section 25658(a), sale of alcohol to a minor, resulting in the following sustained discipline against Respondent-Licensee:

Violation Date	Violation	Registration Date	License and Registration Numbers	Penalty
10/15/2021	B&P section 25658(a) (two counts)	11/10/2021	21-585986; 21091565	Revocation stayed to permit transfer, with an indefinite suspension pending the transfer or revocation
6/11/2021	B&P section 25658(a)	7/7/2021	21-585986; 21091301	25-day suspension
9/28/2019	B&P section 25658(a)	11/19/2019	21-585986; 19089490	15-day suspension

La Fiesta Market, Inc.
DBA: La Fiesta Market
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Count Two

On or about January 29, 2018, the Respondent surrendered to the Department its Type 20 Off-Sale Beer and Wine License for the above designated premises pursuant to California Code of Regulations, Title 4, Division 1, section 65(a) and that the Respondent subsequently failed to reactivate, transfer or obtain an extension of this license within a period of one year from the date of such surrender as required by subsection (d) of said rule.

As to Count Two, for purposes of imposition of penalty, the Department further alleged that the Respondent-Licensee has suffered the following disciplinary history at the above-designated premises address:

Violation Date	Violation	Registration Date	License and Registration Numbers	Penalty
10/15/2021	B&P section 25658(a) (two counts)	11/10/2021	21-585986; 21091565	Revocation stayed to permit transfer, with an indefinite suspension pending the transfer or revocation
6/11/2021	B&P section 25658(a)	7/7/2021	21-585986; 21091301	25-day suspension
9/28/2019	B&P section 25658(a)	11/19/2019	21-585986; 19089490	15-day suspension

(Exhibit D-1)

In both counts of the Accusation, the Department further alleged that there is cause for suspension or revocation of the license of the Respondent in accordance with section 24200 and sections 24200(a) and (b) of the Business and Professions Code. The Department further alleged that the continuance of the license of the Respondent would be contrary to public welfare and/or morals as set forth in Article XX, Section 22 of the California State Constitution and sections 24200(a) and (b) of the Business and Professions Code. (Exhibit D-1)

Oral and documentary evidence on the record was received at the hearing on October 13, 2022. The matter was argued on that date. The parties stipulated to the record remaining open for the redaction of documents that were received in evidence. The parties agreed on the redaction of documents and the redacted documents (Exhibit L-1) were received on November 2, 2022, when the record was finalized for decision.

FINDINGS OF FACT

1. The Accusation was filed on July 21, 2022.
2. The Department issued a type 20 (Off-Sale Beer and Wine) license to Respondent at the above-identified location (Licensed Premises) on February 21, 2017. The license was issued to La Fiesta Market, Inc., a corporation. The corporate officers were Bill Maida (Maida) and Fadi Abboud (Abboud). Maida served as the corporation's President and Treasurer, and Abboud served as the corporation's Vice-President and Secretary. Maida and Abboud were the only corporate officers listed for La Fiesta Market, Inc. (Exhibit L-1)
3. Subsequent to receiving the type 20 license in 2017, The Respondent sought to upgrade to a Type 21 license for the same location. In furtherance of the upgrade, the Respondent submitted an application questionnaire and supporting documentation. (Exhibit L-1) Both Maida and Abboud signed multiple attestations in the application questionnaire and supporting documents submitted. Abboud and Maita signed multiple attestations and documents in November and December 2017 that were required for the type 21 application to be completed. (Exhibit L-1)
4. One of the documents received by the Department in furtherance of the type 21 application was a License Action Request (LAR) dated November 29, 2017. This LAR indicated the intent of the Respondent to surrender the active type 20 license upon issuance of License Number 21-585986, which was the type 21 license being sought by the Respondent. The Licensee signature box appears to be signed with Abboud's signature. (Exhibit D-8)
5. Abboud testified in this matter and denied the signature on the LAR was his. Abboud's stated reason for claiming the signature was not his was the lack of three strokes through the signature. In his testimony, Abboud acknowledged several signatures as his that lacked three strokes and appeared to closely resemble the signature in the LAR. Abboud acknowledged that the signatures in Exhibit L-1 at ABC_0068, ABC_0071, ABC_0074, ABC_0075, ABC_0077, ABC_0083, ABC_0084 and ABC_0085 were his.
6. The submission of a LAR surrendering the Type 20 license would be an ordinary and intrinsic part of an application to upgrade a license, since the Respondent would not be allowed to hold two Department licenses for the same premises. In the LAR, the Respondent stated its intent to transfer the type 20 license upon issuance of the type 21 license. The LAR form stated the Respondent was still required to renew the surrendered license when the renewal was due and that the license was subject to cancellation after one year from the effective surrender date if it was not transferred or reactivated. (Exhibit D-8)
7. The Respondent was successful in its application for the type 21 license, and it was issued on January 29, 2018. (Exhibit D-8) Based on the submitted LAR, the Department designated License 20-576463 to be in surrendered status on the same date as the activation of the Respondent's type 21 license. The Respondent operated the Licensed Premises as a type 21 establishment after the issuance of the type 21 license.

8. During the period after the Respondent began operating the Licensed Premises as a type 21 establishment in 2019, the Respondent sustained multiple disciplinary actions against the type 21 license from incidents that occurred in 2019, 2020 and 2021. In each of the Department's investigations, the Respondent was operating the Licensed Premises as a type 21 establishment.

9. The below table outlines the sustained Accusations established against the Respondent, as evidenced by certified Department documents that were received in evidence (Exhibits D-2, D-3 and D-4):

Violation Date	Violation	Registration Date	License and Registration Numbers	Penalty
10/15/2021	B&P section 25658(a) (two counts)	11/10/2021	21-585986; 21091565	Revocation stayed to permit transfer, with an indefinite suspension pending the transfer or revocation
6/11/2021	B&P section 25658(a)	7/7/2021	21-585986; 21091301	25-day suspension
9/28/2019	B&P section 25658(a)	11/19/2019	21-585986; 19089490	15-day suspension

10. During the period of the surrender of the type 20 license, through February 23, 2022, the Respondent corporation did not act to transfer the type 20 license, despite its expressed intent to do so in the November 29, 2017, LAR. On February 23, 2022, Department Agent A. Medina (Medina) spoke with Abboud by telephone regarding the Respondent's intent in relation to the surrendered type 20 license. Prior to this date, the Department had taken no action with the license, despite the warning contained in the LAR. Abboud acknowledged being aware that the type 20 license was in surrendered status. Abboud stated the Respondent did not have plans regarding the license. Medina advised Abboud that he needed to request from the Department an extension to avoid the cancellation of the license. As of the submission of Medina's investigative report, the Respondent had not sought an extension or transferred the type 20 license. (Exhibit D-8) As of the hearing in this matter, the type 20 license at issue remains in surrendered status.

CONCLUSIONS OF LAW

1. Article XX, Section 22 of the California Constitution and Section 24200(a) provide that a license to sell alcoholic beverages may be suspended or revoked if continuation of the license would be contrary to public welfare or morals.

2. Business and Professions Code section 23950 requires that both applicants and premises must be qualified by the Department in order to be licensed.

3. California Code of Regulations Title 4, Rule 65¹ was enacted to establish rules for addressing licenses that no longer meet the qualification requirements beginning with Business and Professions Code section 23950. Rule 65 states as follows:

(a) Every licensee who surrenders, abandons or quits his licensed premises, or who closes his licensed business for a period exceeding 15 consecutive calendar days, shall, within 15 days after closing, surrendering, quitting, or abandoning his licensed premises, surrender his license or licenses to the department. The department may seize the license certificate or certificates of any licensee who fails to comply with the surrender provisions of this rule, and may proceed to revoke his license or licenses.

(b) Upon the voluntary request by any licensee, on such form as the department may prescribe, the department may cancel his license or licenses.

(c) A surrendered license may be reinstated upon request made at least 10 days prior to the date of reinstatement upon certification by the licensee that there has been no change of ownership of the licensed business, and that the premises possess the same qualifications required for the original issuance of the license.

(d) Any license voluntarily surrendered under paragraph (a) of this rule shall be revoked if it is not transferred to another person or for use at another premises, or redelivered and the licensed activity resumed, within one year from the date of such surrender. There shall be no extension of such surrender period except when the department finds good cause exists where:

(1) an application is pending for transfer of the surrendered license; or

(2) litigation other than that involving disciplinary action by the department is pending; or

(3) the premises for which the license had been issued and for which the license is sought to be redelivered were destroyed due to circumstances beyond the control of the licensee by fire, flood, or other natural catastrophe, or as part of an urban renewal program, and the licensee makes an affirmative showing of good faith efforts that he is attempting to obtain reconstruction of such destroyed premises;
or

(4) the Director in his judgment finds a case of undue hardship exists which would warrant an extension.

4. Rule 144 establishes that the presumptive penalty for a 3rd violation of Section 25658 within a 36-month period is revocation.

¹ All rules referred to herein are contained in title 4 of the California Code of Regulations unless otherwise noted.

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5. Cause for revocation of Respondents' license was established in accordance with the code and regulatory sections cited above for the violation alleged in Count 2 of the Accusation. (Findings of Fact ¶¶ 1-10) The priors alleged in Counts 1 and 2 are also established by the evidence presented by the Department in this matter.

6. It is undisputed that the Licensed Premises ceased meeting the requirements of section 23950, as to the type 20 license, when it ceased operating as a type 20 establishment and began operating as a type 21 establishment on January 29, 2018. The license was surrendered on January 29, 2018, by the Respondent, as explicitly expressed in the LAR that was submitted by the Respondent. Abboud's denial that the type 20 license was surrendered is found not credible. The signature on the LAR appears to be Abboud's. Further, the Respondent then proceeded to operate the Licensed Premises with the sought type 21 license after the surrender date. It is simply not credible that the LAR, surrendering the type 20 license, was submitted without the Respondent's blessing and involvement, given the Respondent's actions after the surrender of the type 20 license. The Respondent communicated an intent to transfer the license in the LAR. The surrender set in motion the period in which the Respondent was required to act in order to preserve the license and prevent its revocation. The Respondent was made aware of this requirement through explicit language in the submitted LAR. The Department tolled acting on its authority through February 23, 2022, but the Department then communicated to Abboud, one of the corporate officers, that the license was facing revocation after that date. (Findings of Fact ¶¶ 1-10)

7. The Department had already used its discretion pursuant to Rule 65(d) by not acting earlier than the February 23, 2022, date, even though multiple years had passed since the one-year deadline to transfer, activate or cancel had passed. The Department clearly communicated a change in approach in the conversation between Medina and Abboud when she instructed him to seek an extension and to communicate what action the Respondent was going to take regarding the surrendered license. (Findings of Fact ¶¶ 1-10) The type 20 license remained in surrendered status as of the hearing in this matter.

8. The Department has established a violation of Rule 65 as alleged in count two. The evidence received in this matter also establishes that the Respondent is not a suitable license holder pursuant to Business and Professions Code section 23950 because of the Respondent's multiple violations of section 25658 at the Licensed Premises location after it was granted a type 21 license. The most recent violation by the Respondent led to a sustained Accusation with revocation of the type 21 license as the penalty. This was because of a total of four 25658 violations in a 36-month period. (Findings of Fact ¶¶ 1-10)

9. Except as set forth in this decision, all other allegations in the accusation and all other contentions made by the parties in the pleadings or at the hearing regarding those allegations lacked merit.

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PENALTY CONSIDERATIONS

1. The Department recommended that the license be revoked with a stay of 6 months to facilitate a potential transfer of the type 20 license to a suitable licensee. The Department's evidence establishes that the Respondent is not a suitable applicant for reinstatement of the type 20 license. Rule 144 provides for a penalty up to revocation for violations of the section alleged. This mandate is satisfied, however, by a stayed revocation as well as an outright revocation.
2. As to the Rule 65 surrender, Article XX, Section 22 of the California Constitution provides that the Department has the exclusive right and power to license and regulate those who exercise the privileges of a license. Section 23950 requires that both the licensee and the premises must be qualified. Respondent is not qualified to hold a license. Because of this, the Department had no choice but to compel the revocation of the license unless it is transferred prior to the revocation, or there is demonstrated further good cause for a delay in the revocation that is communicated to the Director for him to exercise discretion based on concrete information.
3. The Department is not obligated to keep this license in surrendered status indefinitely. Under normal circumstances, the surrendered status is to last no more than one year. The Department exercised its discretion not to act on the revocation of the license for multiple years. The Department communicated a change in position on February 23, 2022, and the Respondent did not timely act to prevent the revocation mandated by Rule 65 under the circumstances described above.
4. The penalty recommended herein complies with rule 144.

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ORDER

Respondent's type 20 off-sale beer and wine license (20-576463) is hereby revoked, with the revocation stayed for 6 months from the effective date of this decision to permit the transfer of the license.

Dated: November 15, 2022



Alberto Roldan
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By: _____ 
Date: _____ 12/23/22

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

LA FIESTA MARKET, INC.,
dba La Fiesta Market
307 S. Madera Avenue
Kerman, CA 93630-1410,
Appellant/Licensee,

v.

DEPARTMENT OF ALCOHOLIC
BEVERAGE CONTROL,
Respondent.

) AB-9960
)
) File: 20-576463
) Reg: 22092169
)

**DECLARATION OF SERVICE
BY E-MAIL**

I, MARIA SEVILLA, declare that I am over the age of eighteen (18) years, and not a party to the within action; that my place of employment and business is 400 R Street, Suite 320, Sacramento, CA; that on the 22nd day of May, 2023, I served a true copy of the attached **Decision** of the Alcoholic Beverage Control Appeals Board in the above-entitled proceeding on each of the persons named below:

BY E-MAIL or ELECTRONIC TRANSMISSION: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the document(s) to be sent to the person(s) at the e-mail address(es) listed below:

BRUCE LEICHTY,
A Professional Corporation
264 Clovis Avenue
Clovis, CA 93612
leichty@sbcglobal.net

Department of ABC
Office of Legal Services
3927 Lennane Drive, Suite 100
Sacramento, CA 95834
yuri.jafarinejad@abc.ca.gov

I declare under penalty of perjury that the foregoing is true and correct.
Executed at Sacramento, California, on the 22nd day of May 2023.

Maria Sevilla

MARIA SEVILLA