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

AB-9741
File: 47-291519; Reg: 17085921

LA NUEVA RONDA NO.2, INC.,
dba La Nueva Ronda II
24805 Alessandro Boulevard, Suites 1, 2 & 3,
Moreno Valley, CA 92553-6100,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Doris Huebel

Appeals Board Hearing: May 2, 2019
Ontario, CA

ISSUED MAY 16, 2019

Appearances: *Appellant:* Joshua Kaplan, as counsel for La Nueva Ronda No. 2, Inc,

Respondent: Alanna Ormiston, as counsel for the Department of Alcoholic Beverage Control.

OPINION

La Nueva Ronda No.2, Inc., doing business as La Nueva Ronda II, appeals from a decision of the Department of Alcoholic Beverage Control[1] revoking its license — with the revocation stayed for a period of three years, provided no further cause for discipline arises during that time — and concurrently suspending its license for 30 days or indefinitely thereafter until appellant signs a new petition for conditional license,

[1]The decision of the Department, dated July 27, 2018, is set forth in the appendix.

because an officer/director of appellant's corporation pled guilty to a public offense involving moral turpitude, to wit: laundering monetary instruments (18 U.S.C. 1956, subdivision (a)), such conviction being grounds for suspension or revocation of the license under Business and Professions Code section 23405, subdivision (d) and 24200, subdivision (d). (Exh. 1.)

18 USC ¶ 1956, subdivision (a) provides, in pertinent part:

(a)

[¶ . . . ¶]

(2) Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States--

[¶ . . . ¶]

(B) knowing that the monetary instrument or funds involved in the transportation, transmission, or transfer represent the proceeds of some form of unlawful activity and knowing that such transportation, transmission, or transfer is designed in whole or in part--

(I) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law,

shall be sentenced to a fine of not more than $ 500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both. . . .

(3) Whoever, with the intent--

[¶ . . . ¶]

(B) to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity; or

[¶ . . . ¶]

> conducts or attempts to conduct a financial transaction involving property represented to be the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity, shall be fined under this title or imprisoned for not more than 20 years, or both.

(18 USC § 1956(a)2(B), (3)(B).)

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general eating place license was issued on September 29, 1995. There is no record of departmental discipline against the license.

On September 18, 2017, the Department instituted a single count accusation against appellant charging that appellant's officer and shareholder, Edgar De Dios Fragoso (hereinafter, Fragoso), was the subject of a plea, verdict or judgment of guilty or pled nolo contendere to a public offense involving moral turpitude.

An administrative hearing held on April 11, 2018. Documentary evidence was received and testimony concerning the violation charged was presented by Department Supervising Agent Joseph Perez, and by Eva Meneses, co-owner of the licensed premises. Appellant was not represented by legal counsel at the administrative hearing.

Testimony established that on March 6, 2015, Fragoso, an officer of appellant La Nueva Ronda No. 2, Inc., was indicted for laundering monetary instruments. The indictment alleged Fragoso used a licensed premises, ERDM Inc. (dba El Rodeo, File No. 47-410889) to conduct meetings and launder money from the sale of methamphetamine. (Exh. 2.) On August 18, 2015, Fragoso signed a guilty plea agreement to the indictment. (Exh. 3.) Fragoso, who was President, Chief Financial Officer, Director, and 25% stockholder of the appellant-corporation, agreed to cancel

the license for ERDM, Inc., for which he served as President and Secretary, as part of the plea agreement. (RT at p. 15; Exhs. 4-10.)

Eva Meneses, Secretary, Director, and stockholder of appellant-corporation testified that she is Fragoso's mother and confirmed that he was indicted and pled guilty to laundering money for drug sales. (RT at pp. 28-29.) She alleged that Fragoso's 25% share in the appellant-corporation was transferred two or three years ago, but offered no documentary evidence to support this claim.[2] Evidence was presented from the Department's records, dated February 5, 2014, showing Fragoso as President, Director, Officer and shareholder of appellant-corporation. (Exh. 4.) The administrative law judge (ALJ) found there was no evidence to support the claim that Fragoso's interest in the appellant-corporation had been transferred.

The ALJ issued her proposed decision on May 7, 2018, sustaining the accusation and recommending the license be revoked, with revocation stayed for a three-year probationary period, and concurrently suspended for 30 days or indefinitely thereafter until a new petition for conditional license is signed divesting Edgar De Dios Fragoso of any interest and control of the licensed premises.

Appellant then filed a timely appeal raising the following issues: (1) the decision is not supported by substantial evidence, and appellant should be permitted to augment the record with evidence that could not have been produced at the administrative hearing, (2) appellant was denied due process when the potential consequences of appearing in pro per were not explained, and (3) the penalty is cruel and unusual.

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[2]The Department's License Query System shows Fragoso as President, Chief Financial Officer, Director, and one of three stockholders. <Accessed: Feb. 15, 2019.>

DISCUSSION

I

Appellant contends the decision is not supported by substantial evidence and that it should be permitted to augment the record with evidence that could not have been produced at the administrative hearing. (AOB at pp. 5-12.)

This Board is bound by the factual findings in the Department's decision so long as those findings are supported by substantial evidence. The 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. An appellate body reviews for error guided by applicable standards of review.

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

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

[28 Cal.Rptr.74].)

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 Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113]; Harris, *supra*, at 114.)

The evidence presented at the hearing — to establish that Fragoso was an officer and shareholder of the appellant-corporation — was received under seal because it contained confidential information. (Exh. 4.) Appellant contends that since this exhibit is not permitted to be public information and cannot be reproduced as part of the administrative record, its contents cannot be relied upon to support the findings in the decision. Accordingly, appellant maintains the findings by the ALJ that Fragoso was an officer and shareholder of the appellant-corporation are not supported by substantial evidence.

The ALJ found, in relevant part:

> 4. Riverside District Office Supervising Agent Joseph Perez, Jr., appeared and testified at the hearing. Supervising Agent Perez reviewed the department base file for the Licensed Premises prior to the hearing. The Department base file contains the most recent ABC-243 Corporate Questionnaire, dated February 5, 2014, which lists Edgar De Dios Fragoso as the President/Director of La Nueva Ronda No. 2 Inc., and holding 25 percent of outstanding shares of stock of the Licensed Premises since July 1, 2013. . . .

(Findings of Fact, ¶ 4.) Exhibit 4 was received under seal as evidence as follows:

> MR. NGUYEN: Your honor, I have another exhibit I'd like marked next in order for identification, it's a certified document, certification stamp from the Department's Riverside District Office, the second page is entitled "Corporate Questionnaire," and is commonly known as an ABC 243. And it bears - - I will note for the record, your Honor - - Section 15, where it notes "Officers" and "Directors." It lists as president and director, Edgar De Dios Fragoso, and the address . . .
>
> And also, in Section 16, where it lists all stock certificates, Edgar De Dios Fragoso is listed at the bottom under "Certificate No. 7," and holding 25 percent of outstanding shares of stock. And in Section1 of this document, the name of the corporation is La Nueva Ronda No. 2, Inc.

(RT at pp. 14-15.) Appellant did not object.

Appellant filed a declaration in support of its request to augment the record with two documents: (1) minutes from its annual shareholders meeting showing that Fragoso gifted his shares to Eva Meneses and showing Eva Meneses as President (Declaration, Exh. A, dated August 23, 2015, stamped received by the Department on October 20, 2017); and (2) with a Corporate Questionnaire showing Eva Meneses as President, and indicating that Fragoso's shares were cancelled as of September 28, 2017 (Declaration, Exh. B, dated September 28, 2017, stamped received by the Department on October 4, 2017).

In the Declaration, appellant declares:

> 4. I could not produce these and submit them at the ABC hearing in this matter because I did not completely understand the process and procedures to do so because I am not totally fluent in English, because I have no legal training, because I was not advised by anyone that these Exhibits are [*sic*] stamped as received by the ABC would not be produced by the ABC as part of the file in this case and because I reasonably assumed that the Department would show the Administrative Law Judge all of the relevant documents in this case.

(Declaration, at p. 2.)

The Department opposes the request to augment the record on the basis that the additional evidence is outside the administrative record and because appellant

failed to explain why the evidence could not have been offered at the administrative hearing. (RRB at p. 3.) Business & Professions Code section 23083, subdivision (a) states, in relevant part:

> (a) The board shall determine the appeal upon the record of the department and upon any briefs which may be filed by the parties. . . . The board shall not receive any evidence other than that contained in the record of the proceedings of the department.

(Cal. Bus. & Prof. Code, § 23083(a).) The documents appellant wishes to bring before the Board are clearly outside of the administrative record.

Business and Professions Code section 23084, subdivision (e) instructs that one of the questions the Board may consider is:

> e) Whether there is relevant evidence, which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before the department.

(Cal. Bus. & Prof. Code, § 23084(e).) Appellant argues that the material in its Declaration should have been received into evidence at the administrative hearing, but was not because Ms. Meneses was "legally incompetent to represent Appellant's interest . . ." (AOB at p. 10.) Counsel for appellant submitted the material to the Department prior to the adoption of the proposed decision, in his comments to the Director, and, therefore, he maintains these materials "are indeed part of the certified record herein." (*Ibid*.) No authority is offered, and we know of none, for the position that the submission of material, in the form of attachments to the comments submitted to the Director, makes that material part of the record.

We agree with the Department that appellant's brief fails to demonstrate that the additional evidence could not have been produced at the hearing. Appellant relies on a lack of fluency in English as an excuse, yet a court-certified interpreter was present at

the hearing with her, and her declaration is written in English. The fact that appellant represented herself, without the benefit of legal counsel — as discussed in section II, below — does not excuse appellant from the consequences of that self-representation, nor does it permit augmentation of the record with material which was readily available at the time of the administrative hearing but which was not offered in evidence. An individual who chooses to represent themselves, as the Board has said many times, is held to the same standards and treated no differently than any other party.

Finally, it should be noted that the documents being offered for augmentation of the record were both stamped "received" by the Department in October of 2017. The accusation in this matter was filed on September 18, 2017, and Fragoso signed his guilty plea on August 18, 2015. In other words, the documents in question were sent to the Department a month after the accusation had been filed, and two years after Fragoso signed his plea agreement, attempting to remove him from the license after disciplinary charges had been filed. Accordingly, these documents are outside the record.

Appellant's motion to augment the record is denied.

II

Appellant contends it was denied due process when the potential consequences of appearing in pro per were not explained, thereby denying appellant its constitutional right to competent counsel. It further contends that allowing appellant to represent itself constitued the unauthorized practice of law. (AOB at pp. 12-22.)

Appellant contends that the ALJ improperly allowed Eva Meneses,[3] a non-lawyer, to engage in the unauthorized practice of law — a misdemeanor — by allowing her to represent appellant at the administrative hearing. (Bus. & Prof. Code, §§ 6125, 6126, subd. (a).)[4] Furthermore, appellant maintains Ms. Meneses was obviously incompetent, as a matter of law, to provide such representation, and as a result appellant was deprived of adequate and competent counsel.

In criminal cases, the right to counsel is guaranteed by the sixth amendment to the U.S. Constitution which guarantees the right of a criminal defendant to appointed counsel if he or she cannot afford one, and to the effective assistance of counsel. Any right to counsel that exists in other cases in California, such as in administrative hearings, arises from the due process clause of the fourteenth amendment to the U.S. Constitution and article 1, section 7, of the California Constitution. Under the Administrative Procedure Act, respondents are informed that they may be represented by counsel at their own expense. (Gov. Code §§11505, 11509.) Appellant was given this same notice.

The right to counsel in administrative proceedings differs materially from the right to counsel in criminal proceedings. In *Walker,* the California Supreme Court affirmed the general rule that there is no constitutional right to counsel in administrative disciplinary proceedings, and noted that the right to counsel has been recognized only

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[3]Throughout the brief appellant refers to “Mereda Estrada” as the appellant, rather than Eva Meneses. There is no Mereda Estrada in this matter. We assume this is the result of a cut-and-paste from a previous brief.

[4]Section 6125 provides that "No person shall practice law in California unless the person is an active member of the State Bar." Section 6126, subdivision (a), provides that one who engages in the unauthorized practice of law is guilty of a misdemeanor.

when the litigant risks losing his or her physical liberty on losing the litigation. In administrative disciplinary proceedings, the licensee's only due process entitlement is to a fair hearing. (*Walker v State Bar* (1989) 49 Cal.3d 1107, 1116, [264 Cal.Rptr. 825].)

The ALJ did not, as appellant contends, allow Ms. Meneses to engage in the unauthorized practice of law. The Court of Appeal, in *Caressa Camille v. Department of Alcoholic Beverage Control* (2002) 99 Cal.App.4th 1094 [121 Cal.Rptr.2d 758], rejected an identical proposition to the argument raised in this matter — that a non-attorney is prohibited from representing a corporation — and found that the prohibition against non-attorney corporate representatives is applicable only to proceedings in *courts of record* and not to administrative proceedings. The court specifically found "an administrative tribunal is not a 'court of record' as defined by article VI, section 1 of the California Constitution." (*Id*. at p. 1103.) A non-attorney representative of the corporation was entirely permissible in an administrative hearing.

With regard to representation by a non-attorney, courts have uniformly found that procedural rules "must apply equally to parties represented by counsel and those who forgo attorney representation." (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 984 [884 P.2d 126].) Parties proceeding in propria persona are "entitled to the same, but no greater, consideration than other litigants and attorneys." (*Nelson v. Gaunt* (1981) 125 Cal.App.3d 623, 638 [178 Cal.Rptr. 167].)

Whether or not Ms. Meneses was incompetent to represent appellant at the hearing is not properly an issue in this appeal. The right to the effective assistance of counsel is a criminal law concept not applicable to administrative license disciplinary actions. "While due process requires the right to counsel, the right to 'effective' counsel

in civil proceedings that lack overhanging criminal penalties has yet to be recognized [citaiton]." (*White v. Board of Medical Quality Assurance* (1982) 128 Cal.App.3d 699, 707 [180 Cal.Rptr. 516].)

Appellant further contends that the ALJ violated due process by not advising appellant of the potential consequences of proceeding without legal counsel. It also assert that it did not knowingly, understandingly, or intelligently waive the presence of counsel to assist it at the hearing. The Court of Appeal in *Borrow*, addressed and rejected similar contentions:

> Reconciling the nature of the administrative proceeding with the foregoing principles and authorities, we conclude that **in a proceeding to revoke or suspend a license or other administrative action of a disciplinary nature** the licensee or respondent is entitled to have counsel of his own choosing, which burden he must bear himself, and that **he is not denied due process of law when counsel is not furnished him**, even though he is unable to afford counsel. Such a proceeding does not bear a close identity to the aims and objectives of criminal law enforcement, but has for its objective the protection of the public rather than to punish the offender. **There is no constitutional requirement, therefore, that the hearing officer or the agency advise a party that he is entitled to be represented by counsel** and that if he cannot afford counsel one will be afforded him. In proceedings under the Administrative Procedure Act there is a statutory requirement, however, that a party be advised that he is entitled to be represented by counsel chosen and employed by him. (§ 11509.) In the present case the licensee does not maintain that she was deprived of this right.
>
> Since the requirements of due process are satisfied in a proceeding under the Administrative Procedure Act, insofar as representation by counsel is concerned, if a party is advised that he is entitled to be represented by counsel employed by him and such attorney is permitted to represent him in the proceeding, **there is no requirement, in the event that the party does not choose to be represented by counsel, or does not have the funds with which to hire an attorney, that the analogies of the criminal law be followed in ascertaining whether there has been an intelligent waiver of counsel**. Accordingly, there is no requirement that the hearing officer determine whether the accused understands the nature of the charge, the elements of the offense, the pleas and defenses which may be available, or the

punishment or penalty which may be exacted. . . .

(*Borror v. Department of Investment* (1971) 15 Cal.App.3d 531, 539-544 [92 Cal. Rptr. 525], emphasis added.) This case is no different. As the language quoted above indicates, the requirements of due process and section 11509 of the Administrative Procedure Act were satisfied once the licensee was advised of its right to be represented by counsel. The record establishes that appellant was so advised. Accordingly, we find no error.

III

Appellant contends that the penalty is disproportionate to the offense, citing the California Constitution's provisions proscribing cruel and unusual punishment. (AOB at pp. 24-25.) However, the concept of cruel and unusual punishment is the province of criminal law, and the term has no application in administrative proceedings.

This Board may examine the issue of excessive penalty if it is raised by an appellant (*Joseph's of Cal. v. Alcoholic Bev. Control Appeals Bd.* (1971) 19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183]), but will not disturb the Department's penalty order in the absence of an abuse of discretion. (*Martin v. Alcoholic Bev. Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) If the penalty imposed is reasonable, the Board must uphold it even if another penalty would be equally, or even more, reasonable. "If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within its discretion." (*Harris v. Alcoholic Bev. Control Appeals Bd.* (1965) 62 Cal.2d 589, 594 [43 Cal.Rptr. 633].)

Rule 144 provides that "[d]eviation from [the Penalty Guidelines] is appropriate

where the Department *in its sole discretion* determines that the facts of the particular case warrant such deviation — such as where facts in aggravation or mitigation exist." (Cal. Code Regs., tit. 4, § 144, emphasis added.)

Moreover, the Penalty Policy Guidelines further address the discretion necessarily involved in an ALJ's recognition of aggravating or mitigating evidence:

> **Penalty Policy Guidelines:**
>
> The California Constitution authorizes the Department, in its discretion[,] to suspend or revoke any license to sell alcoholic beverages if it shall determine for good cause that the continuance of such license would be contrary to the public welfare or morals. The Department may use a range of progressive and proportional penalties. This range will typically extend from Letters of Warning to Revocation. These guidelines contain a schedule of penalties that the Department usually imposes for the first offense of the law listed (except as otherwise indicated). These guidelines are not intended to be an exhaustive, comprehensive or complete list of all bases upon which disciplinary action may be taken against a license or licensee; nor are these guidelines intended to preclude, prevent, or impede the seeking, recommendation, or imposition of discipline greater than or less than those listed herein, in the proper exercise of the Department's discretion.

The ALJ devotes several paragraphs to a discussion of the penalty, noting that the standard penalty for conviction of a crime involving moral turpitude is automatic revocation. The ALJ, however, determined that outright revocation was too harsh a penalty in this matter — in light of appellant's long period of licensure without discipline. Accordingly, a three-year stayed revocation and a 30-day suspension was imposed — with the possibility of indefinite suspension until a new petition for conditional license is signed divesting Fragoso of any interest and control in the licensed premises.

The Board may not disturb a penalty order unless it is so clearly excessive that any reasonable person would find it to be an abuse of discretion in light of all the circumstances. The penalty here is within the bounds of the Department's discretion,

and has been mitigated from the standard penalty of revocation. We believe it is reasonable.

Appellant's disagreement with the penalty imposed does not mean the Department abused its discretion, nor that the penalty is cruel and unusual. This Board's review of a penalty looks only to see whether it can be considered reasonable, and, if it is reasonable, the Board's inquiry ends there. The penalty imposed here complies with the guidelines of rule 144 and is entirely reasonable. Accordingly, we find no error.

ORDER

The decision of the Department is affirmed.[5]

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

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[5]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.

APPENDIX

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

IN THE MATTER OF THE ACCUSATION AGAINST:

LA NUEVA RONDA NO. 2, INC.
LA NUEVA RONDA II
24805 ALESSANDRO BLVD, STE 1, 2 & 3
MORENO VALLEY, CA 92553-6100

ON-SALE GENERAL - LICENSE

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

RIVERSIDE DISTRICT OFFICE

File: 47-291519

Reg: 17085921

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 July 3, 2018. 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. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005, or mail your written appeal to the Alcoholic Beverage Control Appeals Board, 1325 J Street, Suite 1560, Sacramento, CA 95814.

On or after September 6, 2018, a representative of the Department will contact you to arrange to pick-up the license certificate.

Sacramento, California

Dated: July 27, 2018

Matthew D. Botting
General Counsel

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

IN THE MATTER OF THE ACCUSATION AGAINST:

La Nueva Ronda No. 2, Inc. Dba: La Nueva Ronda II 24805 Alessandro Boulevard, Suites 1, 2 & 3 Moreno Valley, California 92553-6100 Respondent	}	File: 47-291519 Reg.: 17085921 License Type: 47 Word Count: 7,149 Reporter: Shelby Maaske Kennedy Court Reporters Spanish Interpreter: Diana Illarraza
On-Sale General Eating Place License	}	**PROPOSED DECISION**

Administrative Law Judge D. Huebel, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Riverside, California, on April 11, 2018.

Jonathan Nguyen, Attorney, represented the Department of Alcoholic Beverage Control (hereinafter referred to as the Department).

Eva Meneses, corporate officer of La Nueva Ronda No. 2, Inc., represented Respondent, La Nueva Ronda No. 2, Inc. Respondent was not represented by counsel.

The Department seeks to discipline the Respondent's license on the grounds that on or about October 13, 2016 (and filed October 17, 2016), Respondent-Licensee's, officer, director or person holding 10% or more of the corporate stock, Edgar De Dios Fragoso, was the subject of a plea, verdict or judgment of guilty or pled nolo contendere to a public offense involving moral turpitude, to-wit: Laundering Monetary Instruments (18 U.S.C. 1956(a)(3)(B), 2(B)), such conviction being grounds for suspension or revocation of the license under Business and Professions Code sections 23405(d) and 24200(d).[1] (Exhibit 1.)

Oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the hearing. The matter was argued and submitted for decision on

[1] All statutory references are to the Business and Professions Code unless otherwise noted.

April 11, 2018.

FINDINGS OF FACT

1. The Department filed the accusation on September 18, 2017.

2. The Department issued a type 47, on-sale general eating place license to the Respondent for the above-described location on September 29, 1995 (the Licensed Premises).

3. There is no record of prior departmental discipline against the Respondent's license.

4. Riverside District Office Supervising Agent Joseph Perez, Jr., appeared and testified at the hearing. Supervising Agent Perez reviewed the Department base file for the Licensed Premises prior to the hearing. The Department base file contains the most recent ABC-243 Corporate Questionnaire, dated February 5, 2014, which lists Edgar De Dios Fragoso as the President/Director of La Nueva Ronda No. 2. Inc., and holding 25 percent of outstanding shares of stock of the Licensed Premises since July 1, 2013. Eva Meneses is listed on the same ABC-243 form as the Secretary/Director, holding 50 percent of outstanding shares of stock in La Nueva Ronda No. 2, Inc. since July 1, 2013. The base file also contains an ABC-208-A Individual Personal Affidavit dated February 5, 2014, which lists Edgar De Dios Fragoso as a Director, Stockholder and Officer, with the title of President, of La Nueva Ronda No. 2, Inc. Edgar De Dios Fragoso is further listed on that form as an Officer/Director/Stockholder of ERDM, Inc., with license number 47-410889, located at 8825 West Washington Boulevard, in Pico Rivera. (Exhibits 4 and 7.)

5. An ABC-243 Corporate Questionnaire relating to ERDM, Inc., located at 8825 East Washington Boulevard in Pico Rivera, with license number 47-410889, lists Edgar Fragoso as the Secretary/Director holding 25 percent of outstanding shares of stock as of March 2, 2004; and Eva Meneses as the Vice President/Director holding 25 percent of outstanding shares of stock as of March 2, 2004. (Exhibit 10.) An ABC-208-A Individual Personal Affidavit lists Edgar De Dios Fragoso as a Director, Stockholder, Officer, with the title of Secretary. That ABC-208-A form further reflects that Edgar De Dios Fragoso was arrested in the City of Industry on January 1999 on charges of domestic violence to which he pled no contest, and arrested in the City of Industry on July 2001 on charges of driving while under the influence (DUI) to which he pled no contest. (Exhibit 8.)

6. On or about August 18, 2015, Edgar De Dios Fragoso entered into a Plea Agreement, to plead guilty to an indictment felony charge of Laundering Monetary Instruments under 18 U.S.C. 1956(a)(3)(B), 2(B) in the United States District Court for the Central District

of California, bearing case number CR 15-105-GW. The Plea Agreement defined the nature of the offense, which Edgar De Dios Fragoso admitted to being true as follows:

"First, defendant knowingly conducted, or willfully caused others to conduct, a financial transaction affecting interstate commerce and involving property that was represented to be the proceeds of drug trafficking; Second, defendant knew that the property was represented to be the proceeds of drug trafficking; and Third, defendant intended to conceal or disguise the nature, source, and ownership of the proceeds believed to be the proceeds of drug trafficking." Edgar De Dios Fragoso further admitted to the facts which supported his plea of guilty to the said charges as follows:

> "From the time period of at least December 2012 through February 2015, defendant was an owner director, and general manager of ERDM Inc., doing business as El Rodeo ("El Rodeo"), which was located in Pico Rivera within the Central District of California.
>
> From April 2013 through July 2014, defendant, while operating El Rodeo, accepted, in various payments, approximately $235,000 in cash, which as defendant knew, was represented to be, or, in fact was, the proceeds of drug trafficking. After receiving the proceeds, defendant knowingly conducted, or willfully caused others to conduct, financial transactions affecting interstate commerce, involving the proceeds, with the intent to conceal or disguise the nature, source, and ownership of the proceeds.
>
> For example, on May 2, 2014, defendant, while operating El Rodeo, received $150,000 from individuals defendant believed were involved in a drug trafficking organization but who were actually confidential informants working on behalf of law enforcement ("CIs"). The CIs represented the $150,000 to defendant to be proceeds of drug trafficking and provided the proceeds to defendant to have it laundered, i.e., make it appear legitimate. Thereafter, defendant obtained a Comerica Bank cashier's check for $35,000, written to a fictitious name, with the notation "loan payment," and, on July 22, 2014, provided the check to an individual defendant believed was an associate of the CIs, as partial payment for the entire $150,000 intended for laundering."

As part of the Plea Agreement ERDM Inc. knowingly, voluntarily, and intelligently waived, relinquished, and surrendered all rights to contest or to the judicial review of the forfeiture of the seized California Department of Alcoholic Beverage Control license number 410889 issued to ERDM, Inc. (Exhibits 2 and 3.)

7. Eva Meneses appeared and testified at the hearing. Mrs. Meneses testified that she is an officer, director and stockholder of La Nueva Ronda No. 2, Inc. Mrs. Meneses further testified that her son, Edgar De Dios Fragoso, pled guilty to the above-referenced charges

of Laundering Monetary Instruments under 18 U.S.C. 1956(a)(3)(B), 2(B) in the United States District Court for the Central District of California, bearing case number CR 15-105-GW. Mrs. Meneses acknowledged that ERDM Inc.'s Department of Alcoholic Beverage Control license was forfeited as a result of the above-referenced conviction. There is no evidence that the Licensed Premises was used in any way in Edgar De Dios Fragoso's money laundering scheme for which he was convicted.

8. Eva Meneses said that her son, Edgar De Dios Fragoso, is not part of La Nueva Ronda No. 2. Inc. Mrs. Meneses claimed Edgar De Dios Fragoso no longer holds 25 percent of the outstanding shares of stock in La Nueva Ronda No. 2, Inc. Mrs. Meneses could not recall when the claimed transfer took place and guessed that the said transfer occurred "about two or three years ago." Respondent provided no evidence of said claimed transfer in the form of a corporate record or documentation of any kind substantiating the stock transfer and title relinquishment.

9. There is no evidence that the Respondent/Corporate Licensee (of the Licensed Premises) contacted the Department or made any efforts to file the requisite documents with the Department or the Secretary of the State to have Edgar De Dios Fragoso removed and stripped of any and all title and shares from La Nueva Ronda No. 2, Inc., including, but not limited, to being removed as a director, stockholder, officer, and president.

10. Except as set forth in this decision, all other allegations in the accusation and all other contentions of the parties lack merit.

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. Section 23405(d) provides that the Department may "suspend or revoke any license of a corporation subject to the provisions of this section where conditions exist in relation to any officer, director, or person holding 10 percent or more of the corporate stock of that corporation which would constitute grounds for disciplinary action against that person if the person was a licensee."

3. Section 24200(b) provides that a licensee's violation, or causing or permitting of a violation, of any penal provision of California law prohibiting or regulating the sale of alcoholic beverages is also a basis for the suspension or revocation of the license.

4. Section 24200(d) provides that the Department may suspend or revoke a license upon the plea, verdict, or judgment of guilty, or the plea of nolo contendere to any public offense involving moral turpitude charged against the licensee.

5. Cause for suspension or revocation of the Respondent's license exists under Article XX, section 22 of the California State Constitution, and sections 24200(a) and (b) on the basis that on or about August 18, 2015[2], the Respondent-licensee's officer, director or person holding 10 percent or more of the corporate stock, namely, Edgar De Dios Fragoso, who in fact holds 25 percent of the corporate stock of La Nueva Ronda No. 2, Inc., pled guilty to Laundering Monetary Instruments (18 U.S.C. 1956(a)(3)(B), 2(B)), a public offense involving moral turpitude, in violation of Business and Professions Code sections 23405(d) and 24200(d). (Findings of Fact ¶¶ 4 through 9.)

6. Laundering Monetary Instruments (18 U.S.C. 1956(a)(3)(B) provides in part that whoever with the intent to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity, conducts or attempts to conduct a financial transaction involving property represented to be the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity, shall be shall be guilty of this offense. Subsection (7)(B)(i) further provides that the term "specified unlawful activity" means (B) with respect to a financial transaction occurring in whole or in part in the United States, an offense against a foreign nation involving (i) the manufacture, importation, sale, or distribution of a controlled substance (as such term is defined for the purposes of the Controlled Substances Act).

7. Under section 23405, any corporation holding a license is required to report in writing to the Department within 30 days any issuance or transfer of stock to any person(s) which results in that person owning 10% or more of the corporate stock. It is also required to report in writing to the Department any change of the corporate officers that is it required to have under Corporations Code section 312. In this matter, the latest corporate information the Department had about the shareholders and officers of the Licensed Premises was from 2014.

8. In determining the credibility of a witness, as provided in section 780 of the Evidence Code, the administrative law judge may consider any matter that has any tendency in reason to prove or disprove the truthfulness of the testimony at the hearing, including the manner in which the witness testifies, the extent of the capacity of the witness to perceive, to recollect, or to communicate any matter about which the witness testifies, a statement by the witness that is inconsistent with any part of the witness's testimony at the hearing, the extent of the opportunity of the witness to perceive any matter about

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[2] The Accusation reflects dates of "October 13, 2016 (and filed October 17, 2016)," however the record was not clear from where these dates came. There was no indication the Respondent was misled or otherwise prejudiced by the dates used in the Accusation.

which the witness testifies, the existence or nonexistence of any fact testified to by the witness, and the existence or nonexistence of a bias, interest, or other motive.

9. If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust. (Evidence Code, section 412.) [3]

10. Eva Meneses' contentions that: (1) Edgar De Dios Fragoso is not an officer, director, or stockholder holding any percentage shares of La Nueva Ronda No. 2, Inc., (2) Respondent filed, about two or three years ago, forms with the Department and/or Secretary of State to reflect that said claimed transfer/change, are disbelieved for the following reasons.

11. Eva Meneses could not recall material matters about which she testified, presented inconsistent, evasive testimony and exhibited a bias as an officer, director and stockholder of the La Nueva Ronda No. 2, Inc./corporate licensee subject to discipline. Mrs. Meneses testified she could not recall if the alleged transfer was made and speculated that it was transferred "about two or three years ago." She could not recall if any paperwork was filed with the Department to reflect the alleged change. When asked if she filed any paperwork with the Secretary of State her response was, "I believe so." Furthermore, Respondent produced weaker, less satisfactory evidence to prove Edgar De Dios Fragoso was removed as an officer, director and stockholder of La Nueva Ronda No. 2, Inc. It was within Respondent's power to produce stronger, more satisfactory evidence in the form of the requisite forms filed with the Department and/or Secretary of State as alleged, or a written corporate record documenting the stock transfer and title relinquishment. In balancing the credible testimony of supervising agent Perez along with the corroborating evidence against Eva Meneses' evasive, inconsistent and biased testimony, Mrs. Meneses' alleged claims, without more, are viewed with distrust and disbelieved.

12. The Department cited two cases as support that Laundering Monetary Instruments (18 U.S.C. 1956(a)(3)(B), 2(B)), is a crime involving moral turpitude. Those cases included *Rice v. Alcoholic Beverage Control Appeals Board* (1979) 89 Cal.App.3d 30, and *People v. Castro* (1985) 38 Cal. 3d 301. The Department stated that the *Castro* court defines moral turpitude as a readiness to do evil, and the *Rice* court defines moral turpitude as an act of baseness, vileness or depravity in the private or social duties which a man owes to his fellowmen, or society in general, contrary to the accepted and

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[3] Although a defendant is not under duty to produce testimony adverse to himself, if he fails to produce evidence that would naturally have been produced, he must take the risk that the trier of facts will infer that if the evidence had been produced it would have been adverse. Breland v. Traylor Engineering & Manufacturing Co. (App. 1 Dist. 1942) 52 Cal.App.2d 415, 126 P.2d 455. Where defendant, refuses to produce evidence which would overthrow case made against him if not founded on fact, presumption arises that evidence, if produced would operate to defendant's prejudice. Dahl v. Spotts (App. 1932) 128 Cal.App. 133, 16 P.2d 774.

customary rule of right and duty between man and man. The Department went on to state that the *Rice* Court provides that the conviction of certain types of crimes may establish moral turpitude as a matter of law, that moral turpitude is inherent in crimes involving fraudulent intent, intentional dishonesty for purposes of personal gain or other corrupt purpose. The Department argued that Laundering Monetary Instruments (18 U.S.C. 1956(a)(3)(B), 2(B)), is a crime of moral turpitude as a matter of law and that moral turpitude is inherent in said crime. The Department argued that Mr. Fragoso took proceeds from the sale of drugs and intentionally used El Rodeo in Pico Rivera owned by ERDM, Inc. to hide the nature and the source of this money in order to allow drug activity and drug sales to continue. This, the Department argued, is the very definition of moral turpitude, maintaining that not only is Mr. Fragoso defrauding the government by laundering money he received from a drug dealer, he did it for personal gain. This, the Department continued is the "fraudulent intent, intentional dishonesty for purposes of personal gain or other corrupt purpose" to which "the *Rice* court in this type of crime" was referring. The Department argued that "not only was Mr. Fragoso benefiting from these transactions, he was allowing a criminal enterprise of the sale of methamphetamines to continue by participating in these acts," during which he used El Rodeo in Pico Rivera owned by ERDM Inc.

13. The Department further argued that an immigration court case is persuasive authority, citing *Ian Smalley vs. John Ashcroft, Attorney General* (2004) case number 02-60231. The Department maintained that the *Smalley* case specifically dealt with 18 U.S.C. 1956(a)(3)(B), stating it to be a crime of moral turpitude because it involves an intent to defraud - to hide the source of money to be used from specified unlawful activity. The Department continued that the *Smalley* decision included argument that 18 U.S.C. 1956(a)(3)(B) is a crime of moral turpitude simply because, although not an element of the crime, the intent of concealing or disguising the nature, location, source, ownership or control of property believed to be the proceeds of specified unlawful activity shows an intent to defraud.

14. The undersigned agrees with the Department's analysis and application of the *Castro* and *Rice* decisions to the matter at hand. The *Castro* court held that possession of heroin for sale involves moral turpitude because the trait involved includes the intent to corrupt others. (*Castro supra* at p. 317) The 1979 *Rice* case held that "proof of conviction of the crimes of possessing cocaine or marijuana for purposes of sale constitute moral turpitude as a matter of law within the meaning of [Cal. Const.,] Art. XX, § 22, and Bus. & Prof. Code, § 24200, justifying the imposition of administrative sanctions without a further showing of unfitness or unsuitability or its effect upon the conduct of the licensed business." (*Rice supra* at p.38, citing *Otash v. Bureau of Private Investigators*, 230 Cal.App.2d 568, 574; *H. D. Wallace & Assoc., Inc. v. Dept. of Alcoholic Bev. Control* (1969) 271 Cal.App.2d 589, 593.) The *Rice* court opined that a crime of moral turpitude is one that demonstrates "a level of ethical transgression so as to render the actor unfit or

unsuitable to serve the interests of the public in the licensed activity." (*Rice supra* at p. 37, citing *In re Rohan* (1978) 21 Cal.3d 195, 200.) In applying that standard to the case at hand, Edgar De Dios Fragoso's actions, described above, also fit this version of the definition of a crime involving moral turpitude. While the *Smalley* decision was not mandatory authority, it served as persuasive authority and its analysis was equally applicable to Mr. Fragoso's actions.

PENALTY

The Department requested that the Respondent's license be revoked citing that the standard penalty under Rule 144 for conviction of a crime involving moral turpitude is automatic revocation. The Department argued the license should be revoked because (1) there was no evidence Mr. Fragoso is not still conducting business at La Nueva Ronda No. 2, Inc., (2) given the Licensed Premises' connection to Mr. Fragoso who is willing to use a license (the ERDM Inc. license) for illicit purposes, and (3) Mr. Fragoso's conviction in the federal case and his position as an officer, director and stockholder of the Licensed Premises disqualifies him from being a licensee.

The Respondent did not recommend a penalty in the event that the accusation was sustained. During Respondent's opening argument Mrs. Meneses argued that Edgar De Dios Fragoso has not been involved with the Licensed Premises for close to four years, and Mrs. Meneses has been operating the Licensed Premises discipline free since 1995, for over 22 years.

In this matter, outright revocation of the Licensed Premises would be too harsh a penalty. While the evidence established Edgar De Dios Fragoso's moral turpitude conviction and the underlying offense involved El Rodeo of ERDM Inc., the underlying offense was not in any way connected to the day-to-day operation or management of the Licensed Premises. There was no evidence that Edgar De Dios Fragoso was still conducting business at the Licensed Premises (other than his involvement with the Licensed Premises relating to his titles and shares held in the La Nueva Ronda No. 2 Corporation, which will be addressed). The Licensed Premises has been operating since 1995, with no history of disciplinary action whatsoever. The absence of disciplinary history is expressly cited in Rule 144 as a mitigating factor. Also, as part of the above-referenced Plea Agreement, ERDM, Inc. (through its corporate officers/directors which included Ms. Meneses) relinquished its California Department of Alcoholic Beverage Control license, number 410889. In protecting public welfare and morals, the Department has a strong interest in making sure only qualified persons and/or entities hold licenses. Edgar De Dios Fragoso's conviction, Plea Agreement and the related surrender of the ERDM Inc. Department license, along with the Order below, warrants a meaningful measure of discipline.

Rule 144 provides for a penalty of revocation for conviction of a crime involving moral turpitude in violation of section 24200(d). This mandate is satisfied, however, by a stayed revocation as well as an outright revocation.

In line with the penalty guidelines of rule 144 and balancing the aggravating and mitigating factors, the penalty recommended herein complies with rule 144.[4] The penalty recommended herein will give the Respondent an opportunity to ensure Edgar De Dios Fragoso is in no way involved with the Licensed Premises and to take all preventative action necessary to insure there are no future violations occurring at its business. Respondent's failure to comply will ultimately result in the loss of its license.

ORDER

Count 1 is sustained. With respect to that count Respondent's on-sale general eating place license is hereby revoked, with the revocation stayed for a period of three years from the effective date of this decision, upon the condition that no subsequent final determination is made, after hearing or upon stipulation and waiver, that cause for disciplinary action occurred within the period of the stay. Should such a determination be made, the Director of the Department of Alcoholic Beverage Control may, in the Director's discretion and without further hearing, vacate this stay order and revoke Respondent's license, and should no such determination be made, the stay shall become permanent.

In addition, the license shall be suspended for 30 days and indefinitely thereafter until the Respondent signs a new petition for conditional license which shall add the following condition to the license: Edgar De Dios Fragoso shall neither have any interest, directly or indirectly, in the ownership, management, operation, or control of the licensed premises, nor shall he act as a manager or consultant for the licensed premises, nor shall he be employed at or have any employment relationship with the licensed premises in any capacity whatsoever.

Dated: May 7, 2018

D. Huebel
Administrative Law Judge

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

☒ Adopt

☐ Non-Adopt: _____

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By: Jacob ☆ Applewhite

Date: 7/3/18