

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

AB-9784

File: 21-565001; Reg: 18087007

WALID ABDULRAHMAN,
dba Fiesta Latina Market
14643 Road 192
Porterville, CA 93257,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Alberto Roldan

Appeals Board Hearing: December 5, 2019
Sacramento, CA

ISSUED DECEMBER 17, 2019

Appearances: *Appellant:* Dean R. Lueders, of ACTlegally, as counsel for Walid Abdulrahman,

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

OPINION

Walid Abdulrahman, doing business as Fiesta Latina Market, appeals from a decision of the Department of Alcoholic Beverage Control¹ suspending his license for 45 days because he permitted the operation of illegal gambling devices, in violation of Penal Code sections 330, subdivision (b), 330.1, and 330.4.

¹The decision of the Department, dated December 4, 2018, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on January 6, 2016. There are two prior instances of discipline against the license, one of which is for the same violations alleged in the instant case. (Findings of Fact, ¶ 2.)

On May 30, 2018, the Department instituted a four-count accusation against appellant charging that, on three separate occasions, he permitted the operation of illegal gambling devices, in violation of Penal Code sections 330, subdivision (b), 330.1, and 330.4.

At the administrative hearing held on September 11, 2018, documentary evidence was received and testimony concerning the violation charged was presented by Department Agents Alda Medina and Bryan Ansay. Appellant presented no witnesses.

Testimony established that Agent Medina visited the premises on three separate occasions — December 20, 2017, December 22, 2017, and January 25, 2018. On each of the visits, she went into the premises in plain clothes during regular business hours, and was able to enter an adjacent business in the same structure as the licensed premises where she observed illegal gambling devices. She played the machines on each of her visits. When she won she was told to print out a ticket and then to go to appellant's premises to get paid. Each time she was paid by someone at the licensed premises.

The administrative law judge (ALJ) issued his proposed decision on October 8, 2018, sustaining the accusation and recommending a 45-day suspension. The Department adopted the proposed decision in its entirety on December 3, 2018, and issued its Certificate of Decision on December 4, 2018.

Appellant then filed a timely appeal arguing there is no evidence that he owned, leased, occupied, managed, or controlled the area containing the machines.

DISCUSSION

Appellant contends there is no evidence that he owned, leased, occupied, managed, or controlled the area containing the machines. (AOB at pp. 3-4.) In essence, appellant is arguing that the decision is not supported by substantial evidence.

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, 112 [28 Cal.Rptr.74].)

Therefore, the Appeals Board examines the issue of substantial evidence in light of the whole record to determine 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.)

Counts 1, 2, and 3 of the accusation allege that the appellant:

[P]ermitted the storage, placement, operation or keeping of an illegal slot machine or gambling device, to-wit: bill operated video machine, in a place, room, space, or building owned, leased, occupied, managed, and controlled by respondent-licensee in violation of Penal Code sections 330b, 330.1 and 330.4.

Count 4 of the accusation alleges that the appellant:

[P]ermitted the operation of a slot machine and as a result of the operation thereof by Agent Medina, he became entitled to or did receive a thing of value, to-wit: \$50.00, in violation of Penal Code section 330.1.

(Exh. D-1.)

Penal Code section 330b provides in relevant part:

It is unlawful for any person to manufacture, repair, own, store, possess, sell, rent, lease, let on shares, lend or give away, transport, or expose for sale or lease, or to offer to repair, sell, rent, lease, let on shares, lend or give away, or permit the operation, placement, maintenance, or keeping of, in any place, room, space, or building owned, leased, or occupied, managed, or controlled by that person, any slot machine or device, as defined in this section.

It is unlawful for any person to make or to permit the making of an agreement with another person regarding any slot machine or device, by which the user of the slot machine or device, as a result of the element of

hazard or chance or other unpredictable outcome, may become entitled to receive money, credit, allowance, or other thing of value or additional chance or right to use the slot machine or device, or to receive any check, slug, token, or memorandum entitling the holder to receive money, credit, allowance, or other thing of value.

Section 330.1, subdivision (a), provides:

Every person who manufactures, owns, stores, keeps, possesses, sells, rents, leases, lets on shares, lends or gives away, transports, or exposes for sale or lease, or offers to sell, rent, lease, let on shares, lend or give away or who permits the operation of or permits to be placed, maintained, used, or kept in any room, space, or building owned, leased, or occupied by him or her or under his or her management or control, any slot machine or device as hereinafter defined, and every person who makes or permits to be made with any person any agreement with reference to any slot machine or device as hereinafter defined, pursuant to which agreement the user thereof, as a result of any element of hazard or chance, may become entitled to receive anything of value or additional chance or right to use that slot machine or device, or to receive any check, slug, token, or memorandum, whether of value or otherwise, entitling the holder to receive anything of value, is guilty of a misdemeanor.

(Pen. Code, § 330.1(a).)

The prohibited machines are defined in subdivision (f) as follows:

A slot machine or device within the meaning of Sections 330.1 to 330.5, inclusive, of this code is one that is, or may be, used or operated in such a way that, as a result of the insertion of any piece of money or coin or other object the machine or device is caused to operate or may be operated or played, mechanically, electrically, automatically, or manually, and by reason of any element of hazard or chance, the user may receive or become entitled to receive anything of value or any check, slug, token, or memorandum, whether of value or otherwise, which may be given in trade, or the user may secure additional chances or rights to use such machine or device, irrespective of whether it may, apart from any element of hazard or chance, also sell, deliver, or present some merchandise, indication of weight, entertainment, or other thing of value.

(Penal Code, § 330.1(f).)

Finally, section 330.4 clarifies that the mere possession on the premises of the slot machine, as defined in section 330.1, is prohibited:

It is specifically declared that *the mere possession or control*, either as owner, lessee, agent, employee, mortgagor, or otherwise of any slot machine or device, as defined in Section 330.1 of this code, is prohibited and penalized by the provisions of Sections 330.1 to 330.5, inclusive, of this code.

It is specifically declared that every person who permits to be placed, maintained or kept in any room, space, enclosure, or building owned, leased or occupied by him, or under his management or control, *whether for use or operation or for storage, bailment, safekeeping or deposit only*, any slot machine or device, as defined in Section 330.1 of this code, is guilty of a misdemeanor and punishable as provided in Section 330.1 of this code.

(Pen. Code, § 330.4, emphasis added.) The fact that a machine is nonoperational, or even stored out of the view of patrons, is no defense. (*Ibid.*)

Appellant maintains the machines were not present in his premises, but were instead in an adjacent building over which he had no ownership or control. (AOB at p. 4.) Appellant argues that the machines were operated by third parties who rented the space from his clerk — not from him. (*Ibid.*)

The ALJ summarizes the substantial evidence supporting the accusation (and refuting appellant's argument) as follows:

12. The consoles were not being physically operated within the footprint of the Licensed Premises but the overall circumstances of their operation established by sufficient evidence that the Respondent was aware of and actively involved in their operation. Further, all three payouts occurred within the Licensed Premises so the *operation* if the consoles did occur, in part, *within* the Licensed Premises. Muthana is clearly a longstanding agent and employee of the Respondent. He was the clerk on duty during the prior discipline relating to gambling devices that the Respondent suffered arising from conduct in January 2017. The conduct that occurred during this investigation was identical to the prior conduct with the exception of the location of the consoles. (Findings of Fact ¶¶ 3-16.)

13. The Respondent developed the subterfuge of physically placing the consoles in a nearby seemingly abandoned building rather than refraining from the conduct that led to the prior discipline. This fiction was not enough to avoid culpability for these violations.

14. The Department established that the Respondent's agent and employee Muthana, was aware of and actively involved in the operation of these consoles at the Licensed Premises. The evidence established a rental agreement had been reached with the consoles' purported "owner" who was paying Muthana \$200 a month to rent space for their operation. As established by the statement by Contreras and the physical evidence recovered in the Licensed Premises office, Muthana coordinated the preservation of the vouchers and had the keys that opened their money vaults. (Findings of Fact ¶¶ 3-16.)

15. Further, Muthana was aware of the presence and nature of the consoles on the dates at issue as evidenced by his understanding of what Medina meant when she asked to cash out her winnings on all three occasions that she interacted with the consoles in the Panaderia. Muthana demonstrated his awareness of the gambling operation through his obvious awareness of the roles of Gamay and Contreras. They actively sought the assistance of Muthana in the operation of the gambling enterprise. Muthana directed gamblers like Medina to Gamay for assistance with payouts. (Findings of Fact ¶¶ 3-16.)

16. Under the totality of these circumstances, their presence as operating gambling consoles in a building adjacent to the Licensed Premises on December 20, 2017, December 22, 2017 and January 25, 2018 was in violation of Penal Code section 330b, 330.1 and 330.4 as alleged in counts 1-3. Given that the payout on January 25, 2018 entitled Medina to receive a thing of value, to-wit: \$50, a separate violation of Penal Code section 330.1 was established in count 4. (Findings of Fact ¶¶ 1-16.)

(Conclusions of Law, ¶¶ 12-16.)

A licensee may be held liable for the actions of his agents or employees:

The licensee, if he elects to operate his business through employees must be responsible to the licensing authority for their conduct in the exercise of his license, else we would have the absurd result that liquor could be sold by employees at forbidden hours in licensed premises and the licensees would be immune to disciplinary action by the board. Such a result cannot have been contemplated by the Legislature.

(*Mantzoros v. State Bd. of Equalization* (1948) 87 Cal.App.2d 140, 144 [196 P.2d 657]

[declining to resolve whether licensees can be held criminally liable for employees' acts, but holding that they are subject to license discipline based on those acts].)

In *Laube v. Stroh*, the court noted: “A licensee has a general, affirmative duty to maintain a lawful establishment. Presumably this duty imposes upon the licensee the obligation to be diligent in anticipation of reasonably possible unlawful activity, and to instruct employees accordingly.” (*Laube v. Stroh* (1992) 2 Cal.App.4th 364, 367 [3 Cal.Rptr.2d 779].)

It is well-settled in alcoholic beverage case law that an employee's on-premises knowledge and misconduct is imputed to the licensee/employer. (See *Yu v. Alcoholic Bev. Control Appeals Bd.* (1992) 3 Cal.App.4th 286, 295 [4 Cal.Rptr.2d 280]; *Kirby v. Alcoholic Bev. Control Appeals Bd.* (1973) 33 Cal.App.3d 732, 737 [109 Cal.Rptr. 291].) Indeed, earlier in *Laube*, the court observed that the factual discussion not subject to review on appeal included:

[T]he element of the licensee’s knowledge of illegal and improper activity on his or her premises; this knowledge may be either actual knowledge or constructive knowledge imputed to the licensee from the knowledge of his or her employees.

(*Id.* at p. 367, citing *Fromberg v. Dept. of Alcoholic Bev. Control* (1959) 169 Cal.App.2d 230, 233-234 [337 P.2d 123].)

Moreover, as the court of appeals stated in *McFaddin San Diego 1130, Inc. v. Stroh*:

It is not necessary for a licensee to knowingly allow its premises to be used in a prohibited manner in order to be found to have permitted its use. . . . Further, the word "permit" implies no affirmative act. It involves no intent. It is mere passivity, *abstaining from preventative action*.

(*McFaddin San Diego 1130, Inc. v. Stroh* (1989) 208 Cal.App.3d 1384, 1389-1390 [257 Cal.Rptr. 8], internal quotations omitted, emphasis in original.) In other words, if a licensee does not know (or have reason to know) something is occurring, it may not be

found to have permitted the activity in question. However, *McFaddin* makes clear that if a licensee does know something is occurring, or should know — because it is on notice that it has happened before, than it may be found to have permitted the activity if it fails to take preventative action. (*Ibid.*)

The policy reasons for this general rule are evident. Without it, a licensee could escape discipline simply by absenting themselves from the premises and maintaining a practiced state of ignorance. It would defy reason and the mandate of the State Constitution (which authorizes the Department to suspend or revoke a license when continuation of the license would be contrary to public welfare or morals) to interpret the law in a manner that rewards licensees for distancing themselves from the operation of their premises.

We have thoroughly reviewed the entire record, and find that the decision is supported by substantial evidence. The knowledge of appellant's employee was properly imputed to appellant in this case. Furthermore, appellant was properly found to have permitted the use of gambling devices when he failed to take preventive action — despite having been placed on notice (by disciplinary action in 2017) that such activity was occurring.

ORDER

The decision of the Department is affirmed.²

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

²This 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:**

**WALID ABDULRAHMAN
FIESTA LATINA MARKET
14643 ROAD 192
PORTERVILLE, CA 93257**

OFF-SALE GENERAL - LICENSE

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

FRESNO DISTRICT OFFICE

File: 21-565001

Reg: 18087007

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 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 January 14, 2019, a representative of the Department will contact you to arrange to pick up the license certificate.

Sacramento, California

Dated: December 4, 2018

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**Alcoholic Beverage Control
Office of Legal Services**



**Matthew D. Botting
General Counsel**

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

IN THE MATTER OF THE ACCUSATION AGAINST:

Walid Abdulrahman
DBA: Fiesta Latina Market
14643 Road 192
Porterville, California 93257

Respondent

Off-Sale General License

} File: 21-565001

} Registration: 18087007

} License Type: 21

} Word Count: 12,683

} Reporter:

} Stephanie Farmer CSR #12482
} California Reporting Services

} **PROPOSED DECISION**

Administrative Law Judge Alberto Roldan, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Visalia, California, on September 11, 2018.

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

Dean R. Leuders, Attorney, represented Respondent Walid Abdulrahman (Respondent).

In a four count accusation, the Department seeks to discipline the Respondent's license on the grounds that,

1. On or about December 20, 2017, the Respondent-Licensee permitted the storage, placement, operation or keeping of an illegal slot machine or gambling device, to-wit: a bill operated video machine, in a place, room, space or building owned, leased, occupied, managed, and controlled by the Respondent-Licensee in violation of Penal Code sections 330b, 330.1 and 330.4, and
2. On or about December 22, 2017, the Respondent-Licensee permitted the storage, placement, operation or keeping of an illegal slot machine or gambling device, to-wit: a bill operated video machine, in a place, room, space or building owned, leased, occupied, managed, and controlled by the Respondent-Licensee in violation of Penal Code sections 330b, 330.1 and 330.4, and

3. On or about January 25, 2018, the Respondent-Licensee permitted the storage, placement, operation or keeping of an illegal slot machine or gambling device, to-wit: a bill operated video machine, in a place, room, space or building owned, leased, occupied, managed, and controlled by the Respondent-Licensee in violation of Penal Code sections 330b, 330.1 and 330.4, and
4. On or about January 25, 2018, the Respondent-Licensee permitted the operation of a slot machine and as a result of the operation thereof by Agent Medina, she became entitled to or did receive a thing of value, to-wit: \$50, in violation of Penal Code section 330.1¹. (Exhibit D-1)

In each of the above four counts alleged in 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). 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).

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 September 11, 2018.

FINDINGS OF FACT

1. The Department filed the accusation on May 30, 2018. (Exhibit D-1)
2. On January 6, 2016 the Department issued a type 21, off-sale general license to the Respondent for the above-described location (the Licensed Premises). The following is the record of prior Department discipline against the Respondent's license as established by official records introduced by the Department:

Violation Date	Violations	Registration Date	Registration Number	Penalty
1/13/2017	PC 330b, 330.1, 330.4	5/10/2017	17085550 (Exhibit D-3)	30 day suspension, 15 days stayed
7/29/2016	B&P 25631	8/31/2016	16084656 (Exhibit D-2)	15 day suspension, fine in lieu of suspension paid

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

3. On December 20, 2017 at about 9:50 a.m. Department Agent Alba Medina (Medina), while in plain clothes, visited the Licensed Premises during its regular business hours. The purpose of the visit was to follow up on a complaint about gambling devices associated with the Licensed Premises. Medina has been a Department agent for approximately 19 years and had received training and investigated prior cases regarding gambling devices during the course of her employment.

4. The Licensed Premises was a liquor store and convenience store contained in a single story structure with adjacent business spaces in the same structure. Two business spaces to the right of the front door of the Licensed Premises was a storefront with a sign over it that said "Panaderia La Potosina" (Panaderia). (Exhibits D-4 and D-5) The business did not seem to be in operation but Medina was able to enter through the unlocked security door and double glass doors. Upon entering, the Panaderia main room appeared vacant and was dimly lit. A partial wall divided the first room from a second room that was immediately to the right. After entering the second room, Medina noticed, along the south wall of the second room, three large, black electronic gambling style consoles with video screens that were adjacent to each other and appeared to be working. Medina also noticed a Hispanic female, later identified as Fanny Garay (Garay) interacting with the first console (console #1) which was to the left as you faced the three consoles. Medina approached the third console (console #3) which was to the right of the other two consoles and closest to the back wall. Medina inserted six dollar bills into console #3 and it registered on the screen that she had 24 credits. Given the amount of money she had inserted, each credit was worth a quarter of a dollar. (Exhibits D-5, D-6 and D-7)

5. Console #3 had bet and start buttons that Medina interacted with. The console allowed Medina to press a spin button after selecting the number of credits to bet. There were nine images that randomly spun in three columns. Medina played multiple rounds with the 24 credits she had paid for. Her credits increased or decreased depending on the outcome of the random spins. None of the rounds involved any skill or interaction with the process upon the start button being pressed. Medina had no way of influencing the outcome of play before, during or after the start button was pressed. The three columns would randomly spin simultaneously and stop on a random result. After some time of interacting with console #3 Medina decided to end her play while console #3 was showing that she had 10 credits remaining. Garay advised Medina that there was a button on the back of console #3 that was for ending the interaction with the console and getting a ticket for cashing in credits. Medina pressed the button and a ticket printed that showed credits that added up to \$4.50. Garay instructed Medina to take the ticket to the store. Medina exited the Panaderia and went immediately to the Licensed Premises.

6. Medina entered the Licensed Premises and immediately recognized Anees Muthana (Muthana) from a prior gambling device investigation at the Licensed Premises. Medina showed the ticket from console #3 to Muthana and asked to be paid out. Muthana directed Medina to Garay to handle cashing out the ticket. Garay entered the Licensed Premises during Medina's interaction with Muthana. Garay began to pay out Medina after Medina handed the ticket to Garay. Garay obtained change of a dollar bill from Muthana to pay 50 cents of the winnings to Medina. Garay completed the payment to Medina in the immediate presence of Muthana. After receiving the payout, Medina left the Licensed Premises at approximately 10 a.m.

7. Medina returned to the Licensed Premises on December 22, 2017 to follow up on the investigation. Medina went past the Licensed Premises at approximately 9:15 a.m. to the adjacent business where she had interacted with the consoles. She entered the Panaderia in the same manner as she did on December 20, 2017 and found it in the same condition. Garay was present along with a Hispanic male adult who was later identified as Victor Contreras (Contreras). Contreras and Garay were interacting with one of the consoles. Medina walked up to console #1 which was closest to the front wall. Medina then inserted four \$5 dollar cash bills into the console. Console #1 displayed 2,000 credits which was the equivalent of one penny per credit. Medina engaged in game play with the \$20 in credit she had originally inserted. Medina played multiple rounds with the 2,000 credits she had paid for. Her credits increased or decreased depending on the outcome of the random spins. None of the rounds involved any skill or interaction with the process upon the start button being pressed. Medina had no way of influencing the outcome of play before, during or after the start button was pressed. After interacting with console #1, Medina pressed the collection button on the back with 900 credits remaining. A payout ticket printed out from console #1. Medina took this ticket to the Licensed Premises, entered and approached Muthana who was standing behind the register.

8. Medina said to Muthana that she won money and that she wanted to get paid out. Muthana asked about who was in the Panaderia. Medina said that there was a man and a woman there. Muthana, using the name "Fan" directed Medina to Garay to handle the payout. Contreras came into the Licensed Premises while Medina was talking with Muthana. Muthana asked Contreras where Garay was while informing him that Medina had a winning ticket. Contreras walked over to Medina and took her payout ticket. After obtaining her ticket, Contreras told Muthana that he needed change. Muthana then handed Contreras bills from the register of the Licensed Premises. Contreras told Medina that her ticket was worth \$9 and he handed her a \$5 bill and four \$1 bills. Medina then left at approximately 9:25 a.m.

9. Medina returned to the Licensed Premises on January 25, 2018 at approximately 10:22 a.m. during its operating hours. After walking by the Licensed Premises and entering the

Panaderia through the unlocked doors, Medina observed that a total of three consoles were still in the same location. Medina also observed an unknown male in standing at the entrance to the room containing the consoles. Medina spoke with the male as she approached one of the three consoles. This console was slightly taller than the other two. It had four rows of five images and the images were identical to typical casino slot play. (Exhibit D-7) Medina inserted a \$20 bill and the console indicated that 80 credits resulted from this. Medina then inserted a \$5 bill and an additional 20 credits were awarded.

10. Medina then engaged in game play with the 100 credits she had received from the \$25 originally inserted. Medina played multiple rounds betting between 50 cents and a dollar. Her credits increased or decreased depending on the outcome of the random spins. None of the rounds involved any skill or interaction with the process upon the start button being pressed. Medina had no way of influencing the outcome of play before, during or after the start button was pressed. Medina spoke with the male about her efforts and remarked about her winnings. Medina remarked that she had won \$25. At this point, the console showed that she had a total of 200 credits which was 100 more than she had started with after inserting a total of \$25. She described that she could cash out by pressing a button on the back of the console. Medina then went to look for the button that she had used to cash out on the consoles she had previously played. After being unable to find a button to print a payout ticket, the unknown male suggested that Medina should take a picture of the screen of the console.

11. Medina took a picture of the screen with her cellular phone camera and brought it to the Licensed Premises. Medina showed the picture to Muthana who was standing behind the register. Medina explained that she could not find a button and that she had won \$50 on the console that she photographed. After Medina asked to be paid out, Muthana, using the name "Fan," directed Medina to find Garay to handle the payout. Medina told Muthana that Garay was not present. Muthana said he could not handle the payout and again directed Medina back to the Panaderia.

12. Medina returned to the Panaderia. The unknown male was there and Medina asked him if he had seen "Fan" in reference to Garay. He remarked that no one had come in since Medina left. At this time, Garay walked into the Panaderia. Medina asked Garay for her payout. Garay looked at the console Medina had played and agreed that she had won a \$50 payout. Garay asked Medina to follow her to the Licensed Premises. Medina watched Garay enter the Licensed Premises and approach Contreras. Garay then informed Contreras that Medina had won \$50. Garay then counted out \$50 in various United States currency bills and handed over \$50 to Medina.

13. Medina walked over to the beer coolers in the Licensed Premises. She selected a 25 ounce can of Natural Light beer and brought it to the counter. Muthana rang up the

purchase and gave Medina her change. Medina then left the Licensed Premises and joined the officers who were assisting in the investigation. Multiple Department agents returned to the Licensed Premises and identified themselves and that they were there investigating the consoles in the Panaderia.

14. Garay was interviewed during the investigation. She identified Contreras as her boyfriend. Garay admitted to an active role in the operation of the consoles. She described that a person named "Tony" was the owner of the consoles. Garay stated that the Licensed Premises did not get a cut of the money from the consoles but that the Licensed Premises did receive \$200 a month in rent for the use of the Panaderia. Contreras was also interviewed by the agents. He stated that he received the keys to unlock the Panaderia from Muthana and that Muthana held the printed out tickets from the consoles for "Tony" for when he came to collect the money from the consoles. Contreras described Muthana as a person who had keys to the consoles.

15. During a search of the business office in the Licensed Premises on January 25, 2018 agents found a stack of 14 payout tickets stapled together. They were similar in appearance to the ones Medina received from the consoles during her first two visits. The topmost receipt was dated January 24, 2018. (Exhibit D-8)

16. The Licensed Premises suffered prior discipline involving gambling consoles that were found operating in the Licensed Premises building in January 2017. Muthana was a clerk on duty during that investigation. (Exhibit D-3)

17. 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 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.
3. Penal Code section 330b provides, "(a) It is unlawful for any person to manufacture, repair, own, store, possess, sell, rent, lease, let on shares, lend or give away, transport, or expose for sale or lease, or to offer to repair, sell, rent, lease, let on shares, lend or give away, or permit the operation, placement, maintenance, or keeping of, in any place, room,

space, or building owned, leased, or occupied, managed, or controlled by that person, any slot machine or device, as defined in this section. It is unlawful for any person to make or to permit the making of an agreement with another person regarding any slot machine or device, by which the user of the slot machine or device, as a result of the element of hazard or chance or other unpredictable outcome, may become entitled to receive money, credit, allowance, or other thing of value or additional chance or right to use the slot machine or device, or to receive any check, slug, token, or memorandum entitling the holder to receive money, credit, allowance, or other thing of value.”

4. Penal Code section 330b further provides “(d) For purposes of this section, “slot machine or device” means a machine, apparatus, or device that is adapted, or may readily be converted, for use in a way that, as a result of the insertion of any piece of money or coin or other object, or by any other means, the machine or device is caused to operate or may be operated, and by reason of any element of hazard or chance or of other outcome of operation unpredictable by him or her, the user may receive or become entitled to receive any piece of money, credit, allowance, or thing of value, or additional chance or right to use the slot machine or device, or any check, slug, token, or memorandum, whether of value or otherwise, which may be exchanged for any money, credit, allowance, or thing of value, or which may be given in trade, irrespective of whether it may, apart from any element of hazard or chance or unpredictable outcome of operation, also sell, deliver, or present some merchandise, indication of weight, entertainment, or other thing of value.”

5. Penal Code section 330.1(a) provides that it is a misdemeanor for anyone to manufacture, own, store, keep, possess, sell, rent, lease, let on shares, lend or give away, transport, or expose for sale or lease, or offer to sell, rent, lease, let on shares, lend or give away or to permit the operation of or to permit to be placed, maintained, used, or kept in any room, space, or building owned, leased, or occupied by him or her or under his or her management or control, any slot machine or device as defined.

6. Penal Code section 330.1(a) further provides that it is a misdemeanor to make or permit to be made any agreement with reference to any slot machine or device as defined, pursuant to which agreement the user thereof, as a result of any element of hazard or chance, may become entitled to receive anything of value or additional chance or right to use that slot machine or device, or to receive any check, slug, token, or memorandum, whether of value or otherwise, entitling the holder to receive anything of value.

7. Section 330.1(f) provides that a “slot machine or device within the meaning of [s]ections 330.1 to 330.5, inclusive, of this code is one that is, or may be, used or operated in such a way that, as a result of the insertion of any piece of money or coin or other object the machine or device is caused to operate or may be operated or played,

mechanically, electrically, automatically, or manually, and by reason of any element of hazard or chance, the user may receive or become entitled to receive anything of value or any check, slug, token, or memorandum, whether of value or otherwise, which may be given in trade, or the user may secure additional chances or rights to use such machine or device, irrespective of whether it may, apart from any element of hazard or chance, also sell, deliver, or present some merchandise, indication of weight, entertainment, or other thing of value.”

8. Penal Code section 330.4 states, “It is specifically declared that the mere possession or control, either as owner, lessee, agent, employee, mortgagor, or otherwise of any slot machine or device, as defined in Section 330.1 of this code, is prohibited and penalized by the provisions of Sections 330.1 to 330.5, inclusive, of this code. It is specifically declared that every person who permits to be placed, maintained or kept in any room, space, enclosure, or building owned, leased or occupied by him, or under his management or control, whether for use or operation or for storage, bailment, safekeeping or deposit only, any slot machine or device, as defined in Section 330.1 of this code, is guilty of a misdemeanor and punishable as provided in Section 330.1 of this code. It is further declared that the provisions of this section specifically render any slot machine or device as defined in Section 330.1 of this code subject to confiscation as provided in Section 335a of this code.”

9. 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 in the four counts of the accusation:

1. On or about December 20, 2017, the Respondent-Licensee permitted the storage, placement, operation or keeping of an illegal slot machine or gambling device, to-wit: a bill operated video machine, in a place, room, space or building owned, leased, occupied, managed, and controlled by the Respondent-Licensee in violation of Penal Code sections 330b, 330.1 and 330.4, and
2. On or about December 22, 2017, the Respondent-Licensee permitted the storage, placement, operation or keeping of an illegal slot machine or gambling device, to-wit: a bill operated video machine, in a place, room, space or building owned, leased, occupied, managed, and controlled by the Respondent-Licensee in violation of Penal Code sections 330b, 330.1 and 330.4, and
3. On or about January 25, 2018, the Respondent-Licensee permitted the storage, placement, operation or keeping of an illegal slot machine or gambling device, to-wit: a bill operated video machine, in a place, room, space or building owned, leased, occupied, managed, and controlled by the Respondent-Licensee in violation of Penal Code sections 330b, 330.1 and 330.4, and

4. On or about January 25, 2018, the Respondent-Licensee permitted the operation of a slot machine and as a result of the operation thereof by Agent Medina, she became entitled to or did receive a thing of value, to-wit: \$50, in violation of Penal Code section 330.1

10. The evidence clearly established that the consoles Medina encountered on December 20, 2017, December 22, 2017 and January 25, 2018 in the Panaderia were slot machines or devices as defined in Penal Code sections 330b and 330.1(f). The consoles accepted money by providing credits that corresponded to the number of dollars inserted. The consoles operated randomly. After Medina activated the game play, the reels would spin, and additional credits were possibly awarded based on the result of matching images potentially lining up. The loss or award of credits that Medina received involved no skill or player interaction. The game play in all instances involved the player inserting money as evidenced by Medina's interactions and the corresponding payouts she received. (Findings of Fact ¶¶ 3-12)

11. The consoles, by hazard or chance, entitled users to receive credit for continued play or to receive money after cashing out. Medina encountered the random accumulation or loss of credits during game play during her investigation. On each occasion, she elected to receive a cash out rather than continue with game play. The vouchers printed from the backs of the consoles during the December 20, 2017 and December 22, 2017 dates were accepted and paid out as having the cash value indicated on their face. This cash value directly corresponded to the credits won during game play. During the January 25, 2018 incident, the payout of \$50 corresponded to the remaining credits indicated on the screen of the console as observed by Medina and confirmed by Gamay. The game play provided by these consoles was in violation of Penal Code sections 330b, 330.1 and 330.4. (Findings of Fact ¶¶ 3-12)

12. The consoles were not being physically operated within the footprint of the Licensed Premises but the overall circumstances of their operation established by sufficient evidence that the Respondent was aware of and actively involved in their operation. Further, all three payouts occurred within the Licensed Premises so the *operation* of the consoles did occur, in part, *within* the Licensed Premises. Muthana is clearly a longstanding agent and employee of the Respondent. He was the clerk on duty during the prior discipline relating to gambling devices that the Respondent suffered arising from conduct in January 2017. The conduct that occurred during this investigation was identical to the prior conduct with the exception of the location of the consoles. (Findings of Fact ¶¶ 3-16)

13. The Respondent developed the subterfuge of physically placing the consoles in a nearby seemingly abandoned building rather than refraining from the conduct that led to

the prior discipline. This fiction was not enough to avoid culpability for these violations.

14. The Department established that the Respondent's agent and employee Muthana, was aware of and actively involved in the operation of these consoles at the Licensed Premises. The evidence established a rental agreement had been reached with the consoles' purported "owner" who was paying Muthana \$200 a month to rent space for their operation. As established by the statement by Contreras and the physical evidence recovered in the Licensed Premises office, Muthana coordinated the preservation of the vouchers and had the keys that opened their money vaults. (Findings of Fact ¶¶ 3-16)

15. Further, Muthana was aware of the presence and nature of the consoles on the dates at issue as evidenced by his understanding of what Medina meant when she asked to cash out her winnings on all three occasions that she interacted with the consoles in the Panaderia. Muthana demonstrated his awareness of the gambling operation through his obvious awareness of the roles of Gamay and Contreras. They actively sought the assistance of Muthana in the operation of the gambling enterprise. Muthana directed gamblers like Medina to Gamay for assistance with payouts. (Findings of Fact ¶¶ 3-16)

16. Under the totality of these circumstances, their presence as operating gambling consoles in a building adjacent to the Licensed Premises on December 20, 2017, December 22, 2017 and January 25, 2018 was in violation of Penal Code sections 330b, 330.1 and 330.4 as alleged in counts 1-3. Given that the payout on January 25, 2018 entitled Medina to receive a thing of value, to-wit: \$50, a separate violation of Penal Code section 330.1 was established in count 4. (Findings of Fact ¶¶ 1-16)

PENALTY

The Department recommended an upward departure from the standard penalties called for in the 4 counts since the Respondent has a prior history of discipline for the same conduct. The Department sought a penalty of 45 days for all four counts.

The evidence established that count 4 involved a payout. Under rule 144, the standard recommended penalty for violations involving video gaming with payouts is a 30-day suspension with 15 days stayed for a period of two years. Counts 1-3 did not involve payouts so the presumption is a 15 day suspension. Count 4 is the payout received for the interaction that occurred in count 3.

In this matter, the Respondent had been placed on notice that it had allowed gambling on the Licensed Premises. The Respondent was warned in the charging documents that led to prior discipline that Muthana was involved. The response by the Respondent was to allow the development of a deception that let the gambling violations continue unabated. This was done through the subterfuge of locating the gambling devices two doors over in

Walid Abdulrahman
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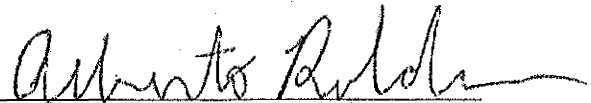
a seemingly vacant building. Despite prior warning, the Respondent allowed the pattern of unlawful conduct to continue. The Respondent has additional prior discipline in its history. All of these are significant factors in aggravation.

There appear to be no factors in mitigation applicable to these violations. Multiple factors in aggravation have been established. The penalty recommended herein complies with rule 144.

ORDER

The Respondents' off-sale general license is suspended for 45 days.

Dated: October 8, 2018



Alberto Roldan
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By: _____
Date: <u>12/3/18</u>
Date: <u>Joab H. Applequist</u>