

STATE OF INDIANA
BEFORE THE ALCOHOL AND TOBACCO COMMISSION

IN THE MATTER OF)	
THE PERMIT OF)	
)	
EL RODEO #24, LLC)	
5636 SOUTH MUTUAL LANE)	
SUITE A)	PERMIT NO. RR49-23314
INDIANAPOLIS, IN 46239)	
)	
Applicant.)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. BACKGROUND OF THE CASE

El Rodeo #24, 5636 South Mutual Lane, Suite A, Indianapolis, Indiana 46239, permit number RR49-23314 (Applicant), is the renewal applicant for a permit to sell beer, wine, and liquor in a restaurant to be issued by the Alcohol and Tobacco Commission (Commission). The renewal application was assigned to the Alcoholic Beverage Board of Marion County (Local Board). The Local Board held a hearing on January 19, 2016, and voted 3-0 to deny this application based on the lack of high and fine reputation, stemming from ten (10) felony counts for theft of the owners, who own many restaurants. On February 2, 2016, the Commission voted to deny the application at its regularly held meeting.

Applicant filed Objections and Request for Appeal Hearing, and the matter was assigned to the Hearing Officer David Rothenberg (Hearing Officer). The matter was set for hearing on November 17, 2016, and that time, witnesses were sworn, evidence was heard, and the matter was taken under advisement. The Hearing Officer also took judicial notice of the entire contents of the file related to this cause. Having been duly advised of the facts and law

at issue, the Hearing Officer now submits these Proposed Findings of Fact and Conclusions of

Law to the Commission for its consideration.

II. EVIDENCE BEFORE THE LOCAL BOARD

- A. The following individuals testified before the Local Board in favor of the Applicant in this cause:
1. Manager for El Rodeo #24.
- B. The following evidence was introduced and admitted before the Local Board in favor of the Applicant in this cause:
1. None.
- C. The following individuals appeared before the Local Board against the Applicant in this cause:
1. None.
- D. The following evidence was introduced and admitted before the Local Board against the Applicant in this cause:
1. None.

III. EVIDENCE BEFORE THE COMMISSION

- A. The following individuals testified before the Commission in favor of the Applicant in this cause:
1. Jeff McKean, attorney for the Applicant;
 2. Gina Santana, Operations Director, El Rodeo;
 3. Francisco Salgado, Owner, El Rodeo;
 4. Jose Melendez, Owner, El Rodeo;
 5. Robert Locke, Accountant, El Rodeo; and
 6. Greg Genrich, Application Preparer, El Rodeo.
- B. The following evidence was introduced and admitted before the Commission in favor of the Applicant in this cause:
1. Plea Agreement for Francisco Salgado (49G15-1504-FD-002290) (Exhibit 1);
 2. Indiana Code 7.1-3-4-2 (Individuals disqualified for beer retailers' permit) (Exhibit 2);
 3. Forfeiture agreement (79D01-1402-PL-11) (Exhibit 3);

4. E-mail from Marion County Prosecutor Terry Curry to defense attorney Sean Hessler (Exhibit 4);
5. Copy of check in the amount of \$46,000 to the Commission for fines over violations concerning Reputation and Character (905 IAC 1-27-1) (Exhibit 5);
6. Copies of forty-six (46) Offer and Acceptance of Settlements concerning above referenced violations (Exhibit 6);
7. Indiana Online Licensing record for other El Rodeo restaurants which were approved in various local boards around the state after the convictions of the owners. (Exhibit 7);
8. List of recommended financial and accounting system changes made by to El Rodeo by their accounting firm, Custom Business & Tax Solutions, Inc. (Exhibit 8);
9. Example of daily cash reconciliation sheet adopted by El Rodeo as per recommendations made by Custom Business & Tax Solutions, Inc. (Example 9);
10. Example of agenda from El Rodeo managers' meeting, dated August 20, 2016 (Exhibit 10);
11. Spreadsheet outlining sales from 2010 through 2015 for all El Rodeo locations (Exhibit 11);
12. El Rodeo employee policies, to be reviewed and signed by employee (Exhibit 12); and
13. Petition with El Rodeo customers attesting to the good reputation and character in the community (approximately 111 signatures) (Exhibit 13).

C. The following individuals testified before the Commission against the Applicant in this cause:

1. None.

D. The following evidence was introduced and admitted before the Commission against the Applicant in this cause:

1. None.

IV. FINDINGS OF FACT

1. El Rodeo #24, 5636 South Mutual Lane, Suite A, Indianapolis, Indiana 46239, permit number RR49-23314, is the Applicant for a beer, wine, and liquor permit. (ATC File).

2. The Applicant meets the qualifications to hold a permit pursuant to Ind. Code § 7.1-3-4-2(a)(1), 7.1-3-4-2(a)(2)(B), 7.1-3-4-2(a)(3-13). (Local Board Hearing; ATC Hearing, ATC File).

3. On August 8, 2014, the Applicant was cited for Furnishing Alcohol to a Minor, of which a fine was paid on July 23, 2015. (ATC File).

4. On January 22, 2015, Francisco Salgado signed a plea agreements in Marion County under cause number 49G15-1504-FD-002290 for ten (10) counts of Theft, a D-Felony. Jose Melendez signed a similar agreement. (ATC Hearing).

5. Francisco Salgado's conviction is based on an extrapolation of actions in one location (Mooresville) and applied to all locations. (ATC Hearing).

6. Between the Plea Agreements and the Forfeiture Agreements, the Applicant and the commonly-owned businesses surrendered approximately 4.5 million dollars. (ATC Hearing).

7. On August 5, 2016, the Applicant signed forty-six (46) Offers and Acceptance of Settlements for a violation of Reputation and Character stemming from the Salgado/Melendez convictions. (ATC Hearing; ATC File).

8. Salgado and Melendez operate, through common ownership, approximately 25 locations. (ATC Hearing).

9. Presently, the owners of the LLCs are not involved in daily operations, but rather the overall management of the commonly-owned LLCs. (ATC Hearing).

10. The elected Marion County Prosecutor, thought an e-mail dated March 9, 2016, indicated that he has no objections to the Applicant retaining their alcohol permit. (ATC Hearing).

11. Six (6) other El Rodeo Permits have been approved by local boards around the state after this Local Board voted to deny this permit, under identical circumstances. (ATC Hearing).

~~12. In Marion County, the county in which the Applicant is located, the Local Board has approve three other El Rodeo permits (RR4998027, 4-0; RR49-20687, 3-1; RR49-96281, 3-1). (ATC File).~~

13. Post-conviction, accountant Locke reviewed all of the financial and auditing systems used by Applicant and made numerous recommendations all of which have been implemented by Applicant, including the purchase of a new POS system, the implantation of a managers' bonus system based on profit, and a revision to the employee guidelines concerning both alcohol and non-alcohol transactions. (ATC Hearing).

14. There have been no police runs concerning public nuisance complaints to the Applicant or any of the commonly-owned businesses. (ATC Hearing).

15. Any Finding of Fact may be considered a Conclusion of Law if the context so warrants.

V. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to Ind. Code § 7.1-1-2-2 and Ind. Code § 7.1-2-3-9.

2. The permit application was properly submitted pursuant to Ind. Code § 7.1-3-1-4.

3. The Commission is authorized to act upon proper application. *Id.*

4. The Hearing Judge may take judicial notice of the Commission file relevant to a case, including the transcript of proceedings and exhibits before the local board. 905 IAC 1-36-7(a).

5. The Hearing Judge conducted a *de novo* review of the appeal on behalf of the Commission, including a public hearing and a review of the record and documents in the

Commission file. *Ind. Code § 7.1-3-19-11(a); 905 IAC 1-36-7(a), 37-11(e)(2); see also Ind. Code § 4-21.5-3-27(d).*

6. The findings here are based exclusively upon the substantial and reliable evidence in the record of proceedings and on matters officially noticed in the proceeding. *905 IAC 1-37-11(e)(2); Ind. Code § 4-21.5-3-27(d).*

7. An individual is disqualified from holding a beer retailer's permit if they have been convicted, within ten(10) years before the date of application of an Indiana Class A, Class B, or Class C felony. *Ind. Code § 7.1-3-4-2(a)(2)(B)(ii).*

8. In determining whether to renew a permit under the standards of 905 IAC 1-27-1, the Commission may consider the esteem in which the person is held by members of his community, and such assessment of his character as may be reasonably inferred from police reports, evidence admitted in court, and other commission proceedings. *905 IAC 1-27-1.*

9. In determining whether to renew a permit, the Commission may consider whether the licensed premises has become a public nuisance, or is the scene of acts or conduct which are prohibited by the Indiana Penal Code. *905 IAC 1-27-2.*

10. The Commission shall have the power to prescribe the manner and methods by which all records relating to alcoholic beverages are kept and preserved and may inspect all records relating to alcoholic beverages. *Ind. Code § 7.1-2-3-19.*

11. The Commission may reverse a local board's action in denying an application for a permit **only** if it finds that the local board's decision was (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (b) contrary to constitutional right, power, privilege, or immunity; (c) in excess of, or contrary to, statutory jurisdiction, authority,

limitations or rights; or (d) without observation of procedure required by law, or unsupported by substantial evidence. *Ind. Code § 7.1-3-19-11.*

12. Any Conclusion of Law may be considered a Finding of Fact if the context so warrants.

VI. DETERMINATION

Under 905 IAC 1-27-1, an applicant's esteem in the community may be considered when the Commission determines whether an applicant is suitable for renewal. As stated in that rule, the Commission may consider police reports and evidence admitted in court, among other things, when evaluating the character of the applicant in order to determine his or her reputation in the community. In this case, the owners of the Applicant were convicted of ten counts of theft, a Class D Felony. As part of that conviction, they forfeited a large amount of cash. That said, a Class D Felony does not automatically disqualify an applicant from holding a beer retailer's permit.

On September 6, 2016, the Marion County Local Board heard the matter of El Rodeo #25, LLC (RR49-04563), where the vote to award/deny the permit was split 2 – 2. In that case, the local board used the same theory behind the conviction to deny the permit as they did the Applicant in this case. The full Commission heard the case on October 4, 2016, and voted unanimously to award the permit to El Rodeo #25, LLC based on the facts that a D Felony conviction did not disqualify the applicant from holding a beer retailer's permit, in addition to the fact that the premises where two sets of accounting books were found was not the same as that of the applicant in that case.

The same applies here.

~~As in that case, El Rodeo #24, LLC, should be awarded a one-year renewal, after which~~
time they are to appear in front of the local board and demonstrate that their good book-keeping standards they have adopted are being followed, through a certified audit by an independent account firm certifying that their accounting procedures are in compliance and all taxes have been paid.

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the decision of the Marion County Local Board resulting in a 3-0 vote to deny the application for the permit number RR49-23314, be reversed and the Alcohol and Tobacco Commission should approve said application. The application of El Rodeo #24, LLC, 5636 South Mutual Lane, Suite A, Indianapolis, Indiana, for the Type 209 permit, was sufficient and the permit applied for herein is APPROVED.

Approved this 21 day of February, 2017.

David Cook as amended

DAVID COOK, CHAIRMAN

David H. Coleman

DAVID COLEMAN, VICE CHAIRMAN

Dale Grubb

DALE GRUBB, COMMISSIONER

Marjorie Maginn as amended

MARJORIE MAGINN, COMMISSIONER