



Nutrition Rush
Hearing Officer Administrative Hearing
MEETING MINUTES

6-12

Southern Nevada Health District
280 South Decatur Boulevard, Las Vegas, Nevada 89107
Red Rock Conference Room
9:00 A.M. – Tuesday, March 21, 2017

SNHD STAFF PRESENT:

Larry Rogers, Environmental Health (EH) Manager
Heather Anderson-Fintak, Associate General Counsel
Al Sang, Environmental Health Specialist (EHS)
Belinda Bober, Senior EHS
Bianca Ramirez-Luna, EHS I
Carol Culbert, EH Supervisor
Heather Armantrout, Legal Intern

Heather Hanoff, Recording Secretary
Robert Urzi, EH Supervisor
Korie Northam, EHS II
Adam Eddins, EHS I
Candice Sims, Senior EHS
George Taylor, EHS II

FACILITY OWNERS/REPRESENTATIVES PRESENT:

Lionso Velazquez-Diaz, Facility Owner
Bryan Lindsey, Nutrition Rush's Bankruptcy Attorney

Brian Kuveke, Facility Assistant Manager
Laura Kuveke, Facility Executive Director

PUBLIC PRESENT:

Darcy Spears, KTNV

Ozkar Palomo, KTNV

I. CALL TO ORDER:

The Hearing Officer, Henry Melton, called the meeting to order at 9:06 a.m. The security aide asked everyone to silence their cell phones.

II. PUBLIC COMMENT:

None

III. MATTERS REQUIRING HEARING OFFICER ACTION:

Nutrition Rush (PR0104553 and PR0104820), 4510 East Charleston Boulevard, Las Vegas, NV 89102: Proposed Revocation of Permits

Opening Statements:

Heather Anderson-Fintak, SNHD Counsel, announced that the hearing is recorded and it is the Health District's responsibility to prove the case. This will be Nutrition Rush's last opportunity to present any evidence or testimony. Any further appeal is to District Court on a Petition for Judicial Review, which means the Court will only look at a transcript of this hearing and the documents that are presented today to make a decision on whether or not the Hearing Officer had substantial evidence to make his decision. Nutrition Rush's bankruptcy attorney was asked whether he would be representing Mr. Velazquez-Diaz, permit owner. He stated no; he was there only to witness the proceedings. Ms. Anderson-Fintak explained how the hearing would proceed.

Heather Anderson-Fintak asked Mr. Velazquez-Diaz if he wanted to have the full hearing on everything from December, 2016 until now or if he wanted to start with the last chance Director's Conference. If he accepts that the product was placed on hold and destroyed appropriately, then we can focus on the allegation of selling hold product behind the smoothie

bar. Belinda Bober showed Mr. Velazquez-Diaz the notices/inspection reports in the hearing book. Mr. Velazquez-Diaz stated that he is not aware of the day to day operations of the store, but he agreed to focus on the Director's Conference to present.

The following people were sworn in for testimony by Hearing Officer Melton: Belinda Bober, Candice Sims, Laura Kuveke, Lionso Velazquez-Diaz, and Brian Kuveke.

Belinda Bober's Testimony:

Belinda Bober, SNHD inspector, verified that she responded to a complaint on March 7, 2017, regarding the sale of unapproved source product, Rogue product, from the Nutrition Rush store located at 4510 East Charleston Boulevard. All products must be from an approved source to ensure the public that the products are safe to consume. Products from unapproved sources are not allowed to be used or sold. A 4-5 pound container of Rogue whey product was observed on the smoothie counter and it was more than half empty. An employee said that he was using the Rogue whey product to make his own smoothies and giving out the Rogue capsules as samples. Ms. Bober explained the accompanying photographs from March 7th and testified that hold product appeared to have been moved around and removed between February 9th and March 7th. Additional hold products were found on the shelves. The facility was closed at the end of the March 7th complaint investigation and the person in charge was given the Suspension Pending Revocation letter with a verbal explanation.

Candice Sims' Testimony:

Candice Sims, SNHD inspector, identified herself as the Nutrition Rush investigation coordinator. She confirmed that Rogue Nutrition and ProPowderz product had been placed on hold by the Health District. Ms. Sims personally found Rogue product on the shelves at the West Sahara location. She requested product invoices from ownership to trace the product back to the manufacturer but she was unable to verify an approved source for Rogue Nutrition and ProPowderz product.

The hold order was not appealed and Mr. Velazquez-Diaz emailed Ms. Sims requesting voluntary destruction of all the hold products, thereby accepting the determination that the product was from an unapproved source. Ms. Sims described the witnessed destruction of the first hold products; the same method will be used for the current hold products. Destruction is scheduled for March 28, 2017.

Laura Kuveke's Testimony:

Laura Kuveke identified herself as Mr. Velazquez-Diaz's Executive Director who controls everything with store operations, including hiring and firing employees, although Mr. Velazquez-Diaz has overall say in decisions. Mrs. Kuveke stated that the only protein powder used for smoothies is from the brand Eclipse. Rogue product used to be given out as a sample which is why there was a half empty container of it on the smoothie counter. Mrs. Kuveke stated that the Rogue product hasn't been used since it was placed on hold. It would make no sense to continue sampling a product that cannot be sold. The products in the store area were never placed in the back by the Health District so they were left on the counter. The hold product in the back had to be moved to allow access to other supplies, the modem, and the security cameras. They also needed to do an inventory of the all products for their bankruptcy case. To Mrs. Kuveke's knowledge, no hold product has been sold or removed from the property. She admitted that leaving hold product out for employee use was naïve and she didn't realize the employee was using the product until the complaint on March 7, 2017. She admitted to having inadequate control over what the employees were doing at that time.

Lionso Velazquez-Diaz's (Owner) Testimony:

Lionso Velazquez-Diaz admitted that he signed an agreement at the Director's conference that he would not sell any hold products. He knew that was his last chance and any further violations would result in a permit revocation. He said that he understood the process. Mr. Velazquez-Diaz was not aware that David did not fully explain the process and requirements to

the store employees. He was not fully aware of all the allegations so he was not prepared to provide the best evidence at this hearing. He is not at the store very often and said that they might need to be stricter with the employees.

Bryan Kuveke's (Assistant Operations Manager) Testimony:

Bryan Kuveke testified that no hold product was sold. Sampling is not the same thing as selling and sampling was not addressed in the Health District paperwork. There is also a difference between selling and using. Mr. Kuveke claims the product was used by an employee, not given out as samples. He said all the information was just presented to them today, even though they have been requesting information since the store was closed two weeks ago. Mr. Kuveke said that multiple emails were sent to Candice Sims requesting information on the case, but nobody responded to their inquiries. Neither Mr. nor Mrs. Kuveke was able to produce proof of these emails even after looking at Mrs. Kuveke's smart phone. Even though Mr. Kuveke had been to the store 1 to 3 times in the six weeks before the store was closed, he did not see the hold products behind the counter so he did not remove them. Mr. Kuveke said the employees told him that the inspectors did not take all the hold products to the back room, but he was not at the store at the time of the inspection. During Heather Anderson-Fintak's questioning, Mr. Kuveke admitted that it's not okay for employees to use hold product themselves or give it out as samples.

CLOSING STATEMENTS:

Heather Anderson-Fintak: The Southern Nevada Health District has the burden of proof in this case by preponderance of the evidence and it was met by substantial demonstrative and testimonial today. This is a case that doesn't happen very often. SNHD has over 19,000 permits in Clark County and the mass products placed on hold were unprecedented. Initially holds began on December 9, 2016. Nutrition Rush representatives voluntarily decided to destroy the product on February 7th. On February 9, 2017, additional products were placed on hold. Mr. Velazquez-Diaz is ultimately responsible as the permit holder for this establishment, but he has not exercised control over his establishment. He signed a last chance letter on February 23, 2017 because Nutrition Rush was caught not once, but twice, selling product from an unapproved source. A large container of protein powder was found next to a smoothie maker which suggests that staff were using this product in the smoothies.; Mr. Velazquez-Diaz did not provide supporting evidence. Under NRS 446.920. SNHD has the authority to place products on hold, to require proof of source, and also to order destruction and we have done so. Due to the inability to adhere to the requirement, SNHD requests revocation of these two permits that Nutrition Rush has at 4510 East Charleston Boulevard.

Lionso Velazquez-Diaz: Mr. Valezquez-Diaz argues that in the supplement business, the product is used to supplement a meal. The protein jugs come half full. Somebody did not use half of it for themselves. It is not fair to be shut down because an employee chose to be, more irresponsible, to make his own shake while he was at work of a product that shouldn't have even been touched. There's no reason to sample a product that is not being sold. The incident was not intentional. An employee did the wrong thing and was obviously caught.

PUBLIC COMMENT:

Brian Lindsey, Esq.: Mr. Lindsey, of Schwartz Flansburg, explained that he represents Nutrition Rush in a Chapter 11 bankruptcy before the United States District Bankruptcy Court for the District of Nevada. While Mr. Velazquez-Diaz may hold the license, this proceeding affects Nutrition Rush. As a Chapter 11 debtor in possession in bankruptcy, Nutrition Rush has various fiduciary duties. He admitted that the stores are disorganized, but moving forward, they will not be. They're dealing with their two main creditors by the way are the IRS and Nevada Department of Taxation. They're working with them. He thinks a permanent revocation of the license for that store would be a harsh penalty on Nutrition Rush. They are seeking another chance to work with the Health District.

EVIDENCE:

SNHD Exhibit 1: Hold Order Inspection Report and Photographs - December 9, 2016
SNHD Exhibit 2: Follow-up Hold Inspection Report and Photographs - December 22, 2016
SNHD Exhibit 3: Destruction Surveys and Photographs - February 7, 2017
SNHD Exhibit 4: Survey and Photographs - February 9, 2017
SNHD Exhibit 5: Director's Conference Letter - February 14, 2017
SNHD Exhibit 6: Director's Conference Letter - February 23, 2017 (Signature Verified by Mr. Velazquez-Diaz)
SNHD Exhibit 7: Complaint Suspension with Accompanying Photographs and Suspension Pending Revocation Letter - March 7, 2017
SNHD Exhibit 8: Letter of Appeal - March 7, 2017

DECISION:

Nutrition Rush Permits (PR0104553 and PR0104820) Are Revoked.

The permit revocations were upheld since the Health District met its burden of proof and it is ultimately the owner's responsibility to have control over his employees and facility.

IV. PUBLIC COMMENT:

None

V. ADJOURNMENT:

The hearing was adjourned by the Hearing Officer, Henry Melton, at 11:15 a.m.