

**BEFORE THE
DEPARTMENT OF RESOURCES, RECYCLING & RECOVERY
OF THE STATE OF CALIFORNIA**

IN THE MATTER OF:

Recycling Specialists, Inc – Norman An

Address: 1720 Old Bayshore Highway, San Jose, California

Type of Entity: Application Denial

File No.: IH17-007-BCR

Certificate No.: CN509548

PRECEDENTIAL DECISION No.: 23-16

**Designation of decision as precedential under Government
Code Section 11425.60**

Pursuant to Government Code Section 11425.60, the Department of Resources, Recycling and Recovery hereby designates as precedential its decision, dated July 20, 2017, in the above-referenced action.

This decision is designated precedential effective September 10, 2023,
Sacramento, California.

Dated: September 10, 2023.

As approved by Rachel Machi Wagoner on September 10, 2023,
Department of Resources, Recycling & Recovery.

1 STATE OF CALIFORNIA
2 DEPARTMENT OF RESOURCES RECYCLING AND RECOVERY
3
4

5 IN THE MATTER OF:) File No. IH17-007-BCR
6)
7 RECYCLING SPECIALISTS, INC.,)
8 CN509548;)
9 NORMAN AN,) DECISION AND ORDER
10)
11 RESPONDENT.)
12)
13)
14

15
16 I. INTRODUCTION

17
18 The Division of Recycling (“Division” or “DOR”) of the Department of Resources
19 Recycling and Recovery (“CalRecycle” or “Department”) issued a notice to Recycling
20 Specialists, Inc. (“Respondent” or “RSI”) dated April 25, 2017, denying Respondent’s
21 application for certification to operate a processing facility at 1720 Old Bayshore
22 Highway in San Jose, California.
23

24 Respondent filed a timely request for a hearing on the application denial pursuant to
25 Title 14, section 2130 of the California Code of Regulations.
26

27 A hearing was conducted on July 10, 2017, in Sacramento, California. On that date all
28 evidence and testimony in this matter was received into the record. The hearing was
29 transcribed by a court reporter.
30

31 Benjamin Grimes, Attorney, CalRecycle, appeared on behalf of the Division. Elizabeth
32 M. Pappy, Esq., appeared on behalf of Respondent.
33

34 Douglas C. Jensen, Attorney III, CalRecycle, presided over the hearing under a
35 delegation of authority from CalRecycle Director, Scott Smithline.
36

37 II. ISSUE

38
39 Whether the Division’s decision to deny Respondent’s application for certification to
40 operate a processing facility shall be sustained, modified, or reversed.
41

42 III. EVIDENTIARY MATTERS

43
44 The Division presented testimony from Jennifer Akins (“Akins”). Akins has been a
45 certification supervisor for the Division since July of 2014. As part of her job duties, she
46 reviews applications for recycling and processor certifications as well as her staff’s
47 recommendations regarding certification applications. Ms. Akins testified generally as
48

1 to the application review process and specifically as to her review of Respondent's
2 certification application.

3
4 Respondent presented testimony from Howard Misle ("Misle"), the majority owner of
5 RSI. Misle began working in the recycling business in approximately 1994, and since
6 that time has been associated with several businesses involved in various recycling
7 activities. Those businesses include American Metal & Iron, Inc. ("AMI"), American
8 Metal Group, Inc. ("AMG"), Antique and Salvage Liquidators, Inc. ("ASL"), and AMI
9 Southern California, Inc. ("AMISC"). Misle testified generally as to his business
10 experience in the recycling field, and provided specific testimony regarding an
11 approximate 2001 Division audit of AMI, a lawsuit filed by ASL and AMISC against the
12 Department, and criminal guilty pleas entered by AMG and ASL in 2012.

13
14 Respondent also presented testimony from Dora Zuniga ("Zuniga"). Zuniga is
15 employed by RSI as an office manager and her duties include completing shipping
16 reports in DORIIS¹. Ms. Zuniga testified regarding her previous experience working in
17 the recycling field, including AMI and AMG-- both owned by Misle.

18
19 Division Exhibits 3, 5 through 12, and 14 through 18, were admitted into evidence
20 without objection.

21
22 Division Exhibit 4-- a 2012 criminal complaint, investigation report, and plea
23 documents--were admitted over Respondent's hearsay objection. However, for
24 purposes of this Decision and Order, consideration of Division Exhibit 4 has been
25 limited to the criminal complaint and the plea documents, both of which were
26 acknowledged and addressed by Misle in his testimony and were not disputed.

27
28 Respondent Exhibits A and B were admitted into evidence without objection.

29
30 On the day of hearing, Respondent submitted an informal hearing brief that included
31 legal arguments either not raised or not substantially addressed at hearing. The
32 Division was afforded an opportunity to respond to the brief with the limitation that any
33 response be limited to the legal issues raised in Respondent's brief. The Division filed
34 and served a responsive brief on July 13, 2017.

35
36 On July 14, 2017, Respondent filed objections to the Division's responsive brief on the
37 basis that it exceeded the scope of the Hearing Officer's instruction that any responsive
38 brief be limited to the legal arguments raised in Respondent's brief. Respondent moved
39 to strike arguments outside the scope of the Hearing Officer's instruction. The Division
40 filed a response to the objections and motion to strike on July 17, 2017.

41
42 The Division's responsive brief does repeat some arguments presented at hearing.
43 However, the repeated arguments provide context for the Division's substantive
44 response to legal arguments raised in Respondent's brief. The Division's responsive
45 brief does not raise new arguments outside the scope of the Hearing Officer's

46
47 ¹ DORIIS stands for Division of Recycling Integrated Information System. It is the program utilized by the Division
48 and its certificate-holders to record California Refund Value transactions.

1 instruction. Therefore, Respondent's objections are overruled and its motion to strike is
2 denied.

3 4 **IV. FINDINGS OF FACT**

5
6 On April 25, 2017, the Division issued a letter to Respondent indicating that its
7 application to operate as a certified processor at 1720 Old Bayshore Highway in San
8 Jose had been denied. The denial letter noted that three people responsible for
9 Respondent's proposed processing facility had previous experience in the Beverage
10 Container Recycling Program: Howard Misle, John Velasquez, and Dora Zuniga. These
11 three individuals were associated with AMI, which had been certified as both a recycling
12 center and a processor at 11665 Berryessa Road in San Jose. They were also
13 associated with AMG, another certified processor and recycler also operating out of
14 11665 Berryessa Road.

15
16 The denial letter indicated that AMI had been the subject of a 2001 Division audit
17 ("Audit") resulting in a finding of a \$1,505,505.22 liability from improper payments. The
18 letter noted that while a settlement had been reached with AMI for the overpayments,
19 AMI eventually defaulted on the agreement.

20
21 The denial letter further noted two Misle-owned corporations, AMG and ASL, had
22 pleaded guilty to multiple felonies. The letter indicated that the 2001 Division audit of
23 AMI, the subsequent default on the audit settlement, and the felony guilty pleas formed
24 the basis for the denial.

25
26 John Velasquez ("Velasquez"), identified as a responsible individual in the Division's
27 denial letter, is employed as yard manager at RSI responsible for day-to-day operations.
28 He was previously employed at AMI and AMG in a similar capacity, and was the yard
29 manager at AMI from November 1, 1999 through October 31, 2001-- the review period
30 of the Audit.

31
32 Dora Zuniga ("Zuniga"), also identified as a responsible individual in the Division's
33 denial letter, is employed by RSI as an office manager, and her duties include filling out
34 shipping reports and processor invoices, and entering information into DORIIS. Zuniga
35 was previously employed at AMG and AMI in a similar capacity to her current position.
36 During at least some of the Audit period, Zuniga was responsible for verifying California
37 Refund Value transactions at AMI. She recently obtained a Division voucher, qualifying
38 her to apply for certifications.

39
40 Misle is the majority owner of RSI, which he purchased in approximately July of 2016.
41 At the time of purchase, RSI held a recycling center certification.

42
43 Misle has extensive experience in the recycling field. He first worked in recycling
44 beginning in 1994 at his father-in-law's company, City Metals. In 1999, Misle purchased
45 his father-in-law's company, and it became AMI.

1 The Division conducted an audit (“Audit”) on AMI for the period of November 1, 1999
2 through October 31, 2001. The Audit found that AMI failed to submit accurate shipping
3 reports and processor invoices, failed to satisfy receipting requirements, and failed to
4 report all aluminum beverage container transactions greater than 250 pounds. It found
5 overpayments to AMI exceeding 1.4 million dollars.

6
7 Misle testified that the overpayments occurred as a result of an employee theft. The
8 employee stole large amounts of copper from AMI and attempted to cover the theft by
9 manipulating AMI’s records to create fraudulent aluminum and plastic California Refund
10 Value (“CRV”) transactions. Misle testified that he filed a criminal report in connection
11 with the theft and hired a private investigator to track down the employee. Misle looked
12 into pursuing legal action against the employee, but decided it would not be worthwhile
13 because the employee could not be found.

14
15 In approximately December of 2002, AMI and the Division entered into Stipulated
16 Settlement Agreement and Final Agency Decision (“Stipulation”) in connection with the
17 Audit findings. The Stipulation required AMI to pay the Division \$1,498,705 in CRV,
18 Administrative fees, Processing Payments, interest, and any delinquent penalties
19 according to a set schedule.

20
21 In approximately 2009, AMI lost its main line of credit which led Misle to “re-establish”
22 AMI as a new Misle-owned company, AMG. AMG retained the same employees as
23 AMI and continued with the same type of business.

24
25 On September 10, 2009, two Misle-owned companies, ASL and AMISC, filed a Petition
26 for Writ of Mandate and Injunctive Relief and Complaint for Inverse Condemnation and
27 Unfair Competition (“E-Waste Lawsuit”) against the California Integrated Waste
28 Management Board². The Lawsuit alleged damages exceeding \$10 million in
29 connection with the failure to make E-waste payments.

30
31 Eventually, AMI stopped making payments to the Division as required by the Stipulation.
32 Misle testified that the State owed him money and he had therefore filed the E-Waste
33 Lawsuit. Since the State had not made E-waste payments to Misle, he would not make
34 payments to the State as required by the Stipulation.

35
36 Subsequent to ASI’s default on the Stipulation payments, on approximately November
37 8, 2010, the Division filed with the Superior Court of Sacramento an Application for
38 Entry of Judgment Pursuant to Public Resources Code Section 14591.5 (“Application”).
39 The Application resulted in Judgment and Order (“Judgment”) adjudging that the
40 Division recover against AMI the amount of \$970,632.00—the outstanding amount on
41 the Stipulation and related late penalties and interest.

42
43 In approximately April of 2011, Misle sold AMI and AMG to an entity named Schnitzer
44 Steel (“Schnitzer”). Schnitzer applied to the Division for certifications for its recycling
45 operations. The certifications were granted with the condition that Misle not be involved

46
47 ² The California Department of Resources Recycling and Recovery was established in 2010 to replace the California
48 Integrated Waste Management Board.

1 in the operation of the facilities. Zuniga stayed on with Schnitzer after the sale and
2 continued with her same work duties. Velasquez also stayed on with Schnitzer for a
3 short time in his capacity as yard manager.

4
5 On January 19, 2012, a First Amended Felony Complaint ("Complaint") was filed
6 against Misle, Velasquez, AMG, ASL, and others. Subsequently, AMG pleaded guilty to
7 false or fraudulent statement to discourage workers from claiming benefits or pursuing a
8 claim, false or fraudulent statement for purpose of reducing premium, rate or cost of
9 workers' compensation insurance, and willful failure to collect, truthfully account for and
10 pay tax. ASL pleaded guilty to false or fraudulent statement for purpose of reducing
11 premium, rate or cost of worker's compensation insurance and willful failure to collect,
12 truthfully account for and pay tax. The criminal complaint was resolved with AMG's and
13 ASL's guilty pleas, and no further actions were taken against Misle or Velasquez.

14
15 Misle testified that he caused AMG and ASL to plead guilty as a "business decision".
16 He felt that the accusations in the Complaint were meritless, but he caused the
17 companies to plead guilty to save the cost of taking the criminal matter to trial and to
18 resolve any liability for the individuals named.

19
20 In approximately September of 2012, ASL, AMISC, AMI, AMG, and the Department
21 entered into a Settlement Agreement and Release ("Settlement"). The Settlement
22 resolved a number of legal actions between the parties including the Department's
23 enforcement of the Judgment and the E-Waste Lawsuit. The Misle-owned companies
24 agreed to pay CalRecycle \$75,000.00, and the Department agreed to transfer
25 \$700,000.00 from the Electronic Waste and Recovery and Recycling Account to the
26 Beverage Container Recycling Fund. Misle testified that prior to resolution of the E-
27 Waste Lawsuit, the State paid over \$1 million to the Misle-owned companies at the
28 urging of the settlement judge.

29
30 **V. LEGAL CONCLUSIONS**

31
32 The Division is charged with enforcing the California Beverage Container Recycling and
33 Litter Reduction Act (Public Resources Code section 14500 et. seq.) ("Act") and related
34 regulations found at Title 14, California Code of Regulations, section 2000 et seq.
35 ("Regulations"). The Division is further charged with the duty of protecting the integrity
36 of the California Beverage Container Recycling Fund ("Fund"). (Pub. Res. Code
37 § 14552.)

38
39 Section 14539(a)(1) of the Act requires a processor to demonstrate to the Division's
40 satisfaction that it will operate in accordance with the Act. This burden of demonstrating
41 compliance with the Act applies to applicants for certification.³

42
43
44 ³ Absent a statute or other authority fixing a different standard, the burden of proof requires proof by a
45 preponderance of the evidence. (Evidence Code section 115.) Except as otherwise provided by law, a
46 party has the burden of proof as to each fact the existence or nonexistence of which is essential to the
47 claim for relief or defense that he is asserting. (Evid. Code § 500.) Therefore, applicants for certification
48 must meet the burden of proof by a preponderance of the evidence.

1 Section 2030(e) of the Regulations requires that, in determining whether an applicant is
2 likely to operate in accordance with the Regulations, the Division review the certification
3 history of the operator and any other responsible individuals.
4

5 Here, the certification history of RSI's majority-owner, Howard Misle, is significant. The
6 2001 Audit of ASI, a Misle-owned company, found overpayments in excess of \$1.4
7 million—the result of fraudulent aluminum and plastic CRV transactions. Misle
8 acknowledged the overpayments and entered into a legal agreement to make
9 restitution, but his company then defaulted.
10

11 Misle testified that he caused the default because the Department owed him money for
12 outstanding E-Waste payments. His businesses had filed a lawsuit against the
13 Department (E-Waste Lawsuit) for the outstanding payments and that litigation was
14 pending at the time of the default.
15

16 Ultimately, Misle's E-Waste Lawsuit and the Department's action to enforce the
17 Judgment were settled. The conditions of the Settlement and Misle's testimony that the
18 Department made substantial payments to Misle's companies during the pendency of
19 the E-Waste Lawsuit suggest that the E-Waste Lawsuit had at least some merit.
20

21 However, even if the Department owed money to Misle's businesses, that does not
22 excuse Misle's decision to default on the Stipulation. He entered into a valid and
23 binding legal agreement and then intentionally broke it. Misle's default demonstrates a
24 disregard for the law and a willingness to forego his promises.
25

26 Respondent argues that the Department is barred from relying upon the Audit or any
27 action it had to take to collect on the Judgment because it settled its claim and
28 dismissed it with prejudice. Respondent cites to a 1968 Appeals Court case in support
29 of its position:
30

31 "A judgment or order of a court of general jurisdiction cannot be attacked
32 in a collateral proceeding unless the judgment or order be void. [Citations
33 omitted] Reasonably, this rule must be applied to a dismissal of an action
34 'with prejudice', particularly when it was made and entered for a
35 consideration. [Citations omitted]"

36 *Wouldridge v. Burns* (1968) 265 Cal.App.2d 82, 85—86.
37

38 *Wouldridge* is inapposite. The Division is not attacking a judgment or order of the court
39 in a collateral proceeding. Rather, it is responding to a certification application
40 submitted by a non-party to the settlement. The settlement includes no language that
41 would preclude the Division from considering AMI's and AMG's conduct in the review of
42 a third-party application for certification.
43

44 Furthermore, interpreting the Settlement as barring the Division's ability to perform its
45 mandatory duties under the Act and Regulations is void as against public policy. The
46 Division's duties further the public policies of encouraging and promoting recycling and
47 protecting the Fund. The courts have made clear that when public policy outweighs the
48

1 interest in enforcement of a contract term, policy will prevail. (*Careveau v. Halferty*
2 (2000) 83 Cal.App.4th 126, 132.) Here, the public policy interests served by the
3 Division's thorough and mandatory review of an applicant's certification history clearly
4 outweigh a dismissal and a general release to which the applicant was not a party.
5

6 Nonetheless, the Audit and subsequent Settlement default are not the only factors that
7 weigh in favor of Respondent's application denial. Two of Misle's companies—ASL and
8 AMG-- pleaded guilty to false or fraudulent statement for purpose of reducing premium,
9 rate or cost of worker's compensation insurance and willful failure to collect, truthfully
10 account for and pay tax.
11

12 Section 14591.2 of the Act provides that the Division can revoke a certificate when a
13 responsible party is convicted of a crime of moral turpitude or fraud, any crime involving
14 dishonesty, or any crime substantially related to the qualifications, functions, or duties of
15 a certificate holder. (Pub. Res. Code § 14591.2(b)(4).) The crimes here are, by their
16 plain terms, crimes of fraud. Since such crimes may form the basis for certificate
17 revocation, it follows that they may also form the basis of application denial.
18

19 Respondent argues that for a crime to form a basis for discipline, there must be a logical
20 connection between the crime and the licensee's fitness to practice the profession.
21 (*Hughes v. Board of Architectural Exam'rs* (1998) 17 Cal.4th 763, 788.) However, the
22 Division is not disciplining Respondent, but merely denying an application for
23 certification. A certification is not a license, and it is not a vested right or interest. A
24 certification is a privilege. (Pub. Res. Code § 14541.5). Even if the Division was
25 imposing discipline on a licensee, there is a logical nexus here. Misle's companies
26 pleaded guilty to crimes of fraud. The Act specifically instructs the Division to consider
27 such crimes when reviewing applications for certification. (Pub. Res. Code §
28 14591.2(b)(4).) Respondent's argument is without merit.
29

30 Misle testified that he caused AMG and ASL to plead guilty to crimes of fraud as a
31 "business decision". He did not believe the Complaint had merit, but he pleaded guilty
32 to avoid the costs of continued litigation. However, Misle pleaded guilty with the
33 guidance of legal counsel and should have known that he was admitting that the crimes
34 occurred. His disavowal of the guilty pleas now is not credible.
35

36 The Audit, subsequent default, and guilty pleas constitute an adequate and reasonable
37 basis for denial of Respondent's certification application. However, Respondent argues
38 that stated bases for denial are merely pretext. The true reason that Respondent has
39 been denied certification is because the Division is "bitter that it had to pay Mr. Misle's
40 companies thousands and thousands of dollars as a result of the [E-Waste Lawsuit]."
41

42 However, Respondent has provided no evidence of the Division's alleged bitterness.
43 Akins was responsible for denying Respondent's application and she testified that the
44 bases for the denial were the Audit, default, and guilty pleas. There is no evidence that
45 she was personally involved in the E-Waste Lawsuit or instructed by those involved to
46 recommend denial. There is no evidence that Akins harbored any personal animus
47 against Mr. Misle or against his many companies or that she deviated in any way from
48

1 the Division's statutory duties in reviewing Respondent's application. Akins testimony
2 was, at all times, credible.

3
4 Respondent characterizes the E-Waste Lawsuit Settlement as favorable to the Misle-
5 owned companies and unfavorable to the Division. However, this conclusion is not
6 necessarily supported by the terms of the Settlement. And the mere fact that there was
7 litigation between the Misle-owned companies and the Division cannot support an
8 inference of animus. Indeed, the fact that the litigation settled and did not proceed to
9 trial and verdict suggests that the parties to the Settlement were satisfied with its terms.

10
11 Respondent points to the fact that its recycling certification was left in place at the time it
12 was purchased by Misle, while its subsequent application for a processor certification
13 was denied, as evidence of inconsistency. However, the Division is not time-barred
14 from taking a future enforcement action against Respondent's recycling certification.
15 (Pub. Res. Code § 14552(b)(2).) Even if the Division does not take any action against
16 Respondent's recycling certificate, its position is not necessarily inconsistent.⁴ The
17 legal standards for disciplinary action against a certificate holder are significantly
18 different than those the Division must apply when granting or denying an application for
19 certification. (Pub. Res. Code § 14591—14597, 14538(b)(1), 14539(b)(1); 14 Cal. Code
20 Regs. § 2030.) A certification history that warrants an application denial may not
21 necessarily warrant a certification revocation.

22
23 Respondent further argues in its brief that "CalRecycle offers no explanation as to why it
24 continues to allow RSI to operate as a Recycler when recyclers have a substantially
25 higher risk of noncompliance." As noted above, the Department is not time-barred from
26 taking a future action against RSI's recycling certification. Moreover, there is no
27 evidence to support to the notion that recyclers present a higher risk of noncompliance
28 than processors.

29
30 Respondent points to the fact that Misle was prohibited from involvement in the
31 recycling operations of Schnitzer as a condition of its certification, but Zuniga and
32 Velasquez were not, as further evidence of inconsistency on the part of the Division. It
33 is not clear why Zuniga and Velasquez were not prohibited from involvement at
34 Schnitzer, as they were both responsible parties during the period covered by the Audit.
35 However, there is no evidence suggesting that Zuniga and Velasquez were responsible
36 for AMI's default on the Stipulation. Misle, on the other hand, was directly responsible
37 for the default. Therefore, Misle's position at the time the prohibition was implemented
38 was distinct from Velasquez and Zuniga. The mere fact that the prohibition did not
39 extend to Zuniga and Velasquez is not evidence of Division inconsistency.

40
41 Respondent argues that the fact that Zuniga was granted a voucher although she was a
42 responsible party at the time of the Audit is further evidence of Division inconsistency.
43 However, Zuniga admitted that a voucher merely allows her to *apply* for certification—it
44 is not a certification approval. Obtaining a voucher does not involve any approval or
45 recommendation on the part of the Division. Rather, a voucher is provided when a

46
47 ⁴ Akins testified that she did in fact recommend that Respondent's recycling certification be revoked, but that the
48 Division decided not to act on that recommendation.

1 passing score on an examination is obtained. The fact that Zuniga secured a voucher is
2 not evidence of inconsistency on the part of the Division.

3
4 Respondent has not met its burden of demonstrating that it will comply with the Act and
5 Regulations. A certificate to operate a processing facility is a privilege, not a right.
6 (Pub. Res. Code § 14541.5.) In determining whether this privilege will be granted to an
7 applicant, the Division has broad discretion. The Audit, subsequent default, and guilty
8 pleas constitute good cause to deny Respondent's application for certification.

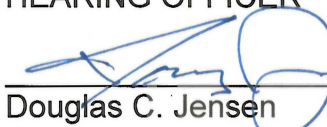
9
10 **VI. DECISION AND ORDER**

11
12 The Division's decision to deny Respondent's application for certification to run a
13 processing facility is sustained.

14
15 **IT IS SO ORDERED**

16
17
18
19
20
21 DATED: 7/20/17

HEARING OFFICER



Douglas C. Jensen
Attorney III
Department of Resources Recycling
and Recovery (CalRecycle)



DEPARTMENT OF RESOURCES RECYCLING AND RECOVERY

LEGAL OFFICE

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PROOF OF SERVICE

I, Donnet J. McFarlane, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to this action. My place of employment and business is as in the letterhead.

On July 21st, 2017, I served the attached for entitled action:

The Decision & Order in The Matter of Recycling Specialist Inc., CalRecycle Case No. IH17-007-BCR to:

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By:

- First Class Mail** - In a sealed envelope, with postage thereon fully prepaid, in the United States.
- Certified Mail** - In a sealed envelope, return receipt requested with Postage thereon fully prepaid, in the United States mail.
- Electronic Service** - Sent to the email addresses listed above.

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed at Sacramento, California, on the 21st day of July 2017.

(Signature)