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BEFORE THE
CALIFORNIA GAMBLING CONTROL COMMISSION

In the Matter of the Application for a Finding
of Suitability, Tribal Key Employee
Regarding:

GARY STEVE KIRBY

Respondent.

BGC Case No. BGC-HQ2017-00019SL
CGCC Case No. CGCC-2017-0921-17E

DECISION AND ORDER

Hearing Date: April 25, 2018
Time: 10:00 a.m.

9 This matter was heard by the California Gambling Control Commission (Commission)
10 pursuant to Business and Professions Code sections 19870 and 19871 and Title 4, California
11 Code of Regulations (CCR) section 12060, in Sacramento, California, on April 25, 2018.

12 Michelle Laird (Laird), Deputy Attorney General, State of California, represented
13 complainant Stephanie Shimazu, Director of the Bureau of Gambling Control (Bureau),
14 Department of Justice, State of California.

15 Gary Steve Kirby (Respondent) represented himself at the hearing.

16 During the evidentiary hearing, Presiding Officer Jason Pope took official notice of the
17 Notice of Hearing and attachments, the signed Notice of Defense, and the Conclusion of
18 Prehearing conference letter.

19 During the evidentiary hearing, Presiding Officer Jason Pope accepted into evidence the
20 following exhibits offered by the Bureau:

21 1) Statement of Reasons; Statement to Respondent; copies of excerpts from the California
22 Business and Professions Code and California Code of Regulations; March 21, 2018, Declaration
23 of Service by Overnight Courier, Bates Nos.001-018;

24 2) September 8, 2017, Commission correspondence Re: Notification of Scheduled
25 Commission Meeting, Bates Nos. 019-022;

26 3) September 25, 2017, Commission correspondence Re: Referral of Initial Application
27 for Tribal Key Finding of Suitability to an Evidentiary Hearing, Bates Nos. 023-025;

- 1 4) December 19, 2017, Commission correspondence Re: Notice of Hearing, with
2 attachments, Bates Nos. 026-042;
- 3 5) Notice of Defense signed October 3, 2017, Bates Nos. 043-045;
- 4 6) March 6, 2018, Commission correspondence Re: Conclusion of Prehearing Conference,
5 Bates Nos. 046-051;
- 6 7) Bureau of Gambling Control Background Investigation Report dated June 16, 2017,
7 Bates Nos. 052-062;
- 8 8) January 26, 2016 correspondence from Melissa Avent to Respondent requesting
9 additional information and/or documentation, Bates Nos. 063-065;
- 10 9) February 8, 2017 correspondence from Melissa Avent to Respondent requesting
11 additional information and/or documentation, Bates Nos. 066-068;
- 12 10) Respondent's Application for Finding of Suitability Tribal Key Employee received
13 May 22, 2017, Bates Nos. 069-071;
- 14 11) Respondent's Application for Finding of Suitability Tribal Key Employee received
15 October 28, 2015, Bates Nos. 072-074;
- 16 12) Supplemental Background Investigation Information Tribal Key Employee signed
17 September 22, 2015, Bates Nos. 075-082;
- 18 13) Tribal Gaming Authority Eligibility Determination dated October 8, 2015, Bates Nos.
19 083-087;
- 20 14) Gary Kirby National Guard/ U.S. Army Reserve Service Records, Bates Nos. 088-
21 095;
- 22 15) Selected court filings dated September 1, 2009 and December 8, 2009, filed in the
23 United States Bankruptcy Court, Northern District of California, Santa Rosa Division, Bates Nos.
24 096-108;
- 25 16) Sonoma County Sheriff's Office Arrest Report for September 25, 1982 incident, Bates
26 Nos. 109-118;
- 27 17) Sonoma County Superior Court records and Criminal Docket, Case No. MCR-188657
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1 (date of offense March 31, 1992; date of conviction May 5, 1992), Bates Nos. 119-122;

2 18) Sonoma County Superior Court Criminal Docket and Courtroom Minutes, Case No.
3 SCR-20477 (date of offense October 16, 1992; date of conviction June 15, 1993), Bates Nos. 123-
4 130;

5 19) Department of Justice Criminal History Report dated October 9, 2017, Bates Nos.
6 131-135.

7 During the evidentiary hearing, Presiding Officer Jason Pope accepted into evidence the
8 following exhibits offered by Respondent:

9 A) Letter of Reference by James Hackwood;

10 B) Letter of Reference by Deborah Steele;

11 C) Letter of Reference by Lisa Winkler;

12 D) Letter of Reference by Thomas Romero;

13 E) Letter of Reference by Dustin Hamilton;

14 F) Letter of Reference by Stephanie Miranda.

15 FINDINGS OF FACT

16 1. Respondent is a Dual Rate Dealer at Graton Resort and Casino (Graton), a key
17 employee position that requires him to submit a Finding of Suitability application to the
18 Commission pursuant to the Tribal-State Gaming Compact between the State of California and
19 the Federated Indians of the Graton Rancheria.

20 2. On or about October 28, 2015, the Bureau received Respondent's Application for
21 Finding of Suitability Tribal Key Employee and a Tribal Key Employee Supplemental
22 Background Investigation form (collectively, Application).

23 3. On the Application, Respondent stated under penalty of perjury that he served in the
24 National Guard from 1983 to 1988 and received an honorable discharge.

25 4. Respondent disclosed four criminal incidents on his Application: (1) a 1983 trespassing
26 charge that was dismissed; (2) a 1990 drunk in public incident resulting in no charges; (3) a 1992
27 conviction for battery; and (4) a 1992 conviction for violating a restraining order resulting in 3
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1 years of probation.

2 5. In the course of conducting a background investigation on Respondent's Application,
3 the Bureau found that Respondent's criminal history was not completely consistent with the
4 information Respondent disclosed on his Application. Respondent had five misdemeanor
5 convictions on his record for battery, assault, inflicting corporal injury on a spouse/cohabitant,
6 and two convictions for violating a court order to prevent harassment.

7 6. The Bureau's background investigation revealed that on November 1, 1982,
8 Respondent was convicted of violating Penal Code section 242, battery. Respondent was
9 sentenced to 9 days in jail.

10 7. On May 5, 1992, Respondent was convicted of violating Penal Code section 240,
11 assault, a misdemeanor. Respondent was sentenced to 12 months of probation, and ordered to
12 take a 10 day anger management class. The Bureau was unable to obtain a copy of the arrest
13 report or court transcripts due to the age of the case. Respondent incorrectly disclosed this on his
14 Application as a battery.

15 8. On August 8, 1993, Respondent was convicted of violating Penal Code section
16 273.5(a), inflicting corporal injury on spouse, a misdemeanor, and two counts of Penal Code
17 273.6 (a), violating a court order to prevent harassment, a misdemeanor. Respondent was
18 sentenced to three years of probation, ordered to complete counseling, 80 hours of volunteer
19 work, and to pay a fine and restitution. The Bureau was unable to obtain a copy of the arrest
20 report or court transcripts due to the age of the case.

21 9. Respondent's Report of Separation and Record of Service from the Army National
22 Guard of California indicated that he received an "under honorable conditions" discharge due to
23 unsatisfactory participation in 1993 following six years of total service.

24 10. On January 26, 2016, the Bureau requested a written statement from Respondent
25 regarding the circumstances leading to his November 1, 1982 battery conviction, May 5, 1992
26 assault conviction, and August 6, 1993 conviction for inflicting corporal injury on a
27 spouse/cohabitant and the reasons that he failed to disclose the 1992 conviction.
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1 11. On February 24, 2016, Respondent answered the Bureau's inquiry. Respondent wrote
2 that he did not have any recollection of the events on November 1, 1982 or May 5, 1995
3 (incorrectly referring to the May 5, 1992 conviction). Respondent stated that on August 6, 1993,
4 he was with his then estranged wife discussing reconciliation, but did not provide any further
5 details about the incident.

6 12. On February 8, 2017, the Bureau requested that Respondent provide a more detailed
7 explanation of the circumstances surrounding his August 6, 1993 conviction for violating a court
8 order and his discharge from the United States Army.

9 13. On March 8, 2017, Respondent responded to the Bureau's inquiry in two separate
10 letters.¹ The letter states that in 1993, Respondent's ex-wife told him that she wanted to reconcile.
11 Respondent's ex-wife picked him up on a Friday and they spent the weekend together.
12 Respondent knew that there was a restraining order in place, but he thought it was OK to hang out
13 with his ex-wife since she picked him up. Respondent did not provide any further details about
14 the incident.

15 14. Respondent's March 8 letter states that he did not fulfil his duties in the National
16 Guard due to immaturity and not thinking about the impact it could have on his life. Respondent
17 did not provide any specific information regarding the circumstances leading to his discharge.

18 15. On or about June 16, 2017, the Bureau issued its Tribal Key Employee Background
19 Investigation Report in which it recommended that Respondent's Application be approved.

20 16. At its September 21, 2017 meeting, the Commission voted to refer the consideration of
21 Respondent's Application to a Gambling Control Act evidentiary hearing.

22 17. On or about October 3, 2017, Respondent submitted a Notice of Defense to the
23 Commission requesting an evidentiary hearing on the consideration of his Application.

24 18. On or about December 19, 2017, the Commission sent a Notice of Hearing to
25 Respondent stating that an evidentiary hearing and prehearing conference were scheduled.

26 19. On or about January 3, 2018, the Bureau filed a Statement of Reasons with the
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28 ¹ Respondent testified that his wife wrote the letters for him and he signed them.

1 Commission. In its Statement of Reasons, the Bureau recommended that the Commission deny
2 Respondent's Application on the basis that he was convicted of crimes of moral turpitude and
3 failed to make a full and truthful disclosure to the Bureau regarding his convictions and the basis
4 of his discharge from the National Guard.

5 20. The Commission heard CGCC Case No. CGCC-2017-0921-17E on April 25, 2018.
6 The Bureau was represented throughout the hearing by Deputy Attorney General Michelle Laird.
7 Respondent represented himself at the hearing.

8 21. Respondent testified that he began using drugs at age 12. Respondent was addicted to
9 methamphetamine from 1975-1995.

10 22. Respondent stated that he did the best he could to fill out the Application with the
11 information that he could recall, but it was difficult for him to recall events that occurred during
12 the time period that he used drugs.

13 23. Respondent testified that he tried to obtain copies of his court records so that he could
14 put more accurate information on his Application, but the records were no longer available.

15 24. Respondent testified that when he wrote on the Application that he was convicted of
16 trespassing in 1983, he was actually referring to the 1982 battery² conviction. Respondent
17 testified that he was charged with trespassing, false imprisonment, and battery in relation to this
18 incident. However, the trespassing and false imprisonment charges were dismissed, and he was
19 ultimately convicted of battery.

20 25. Respondent testified that after he received documents from the Bureau, he recalled
21 more about the 1982 battery conviction. Respondent recalled that he had just turned 18 and that
22 he and his then-girlfriend were under the influence of drugs. According to the police report, the
23 charges stemmed from an incident where Respondent forced his former girlfriend into her house
24 and held her down during a dispute.

25 26. When questioned about the accuracy of the police report relating to his 1982
26 conviction, Respondent stated that he could not recall much of the incident, but the report was

27 ² Respondent used the terms "assault" and "battery" interchangeably throughout his testimony.
28 Respondent testified that he did not understand the difference between the two crimes.

1 accurate to the best of his memory.

2 27. Respondent testified that he disclosed the 1990 “drunk in public” incident on his
3 Application even though there were no charges against him. Respondent testified that when he
4 filled out the Application, he disclosed all of his encounters with law enforcement that he could
5 think of, even if they did not result in a conviction.

6 28. Respondent testified that when he disclosed a 1992 battery conviction on his
7 Application, he was actually referring to his 1992 assault conviction. Respondent testified that he
8 did not understand the difference between assault and battery. Respondent testified that he did not
9 recall the events leading up to the conviction, but he believes he hit or grabbed his ex-wife.

10 29. Respondent testified that on his Application he disclosed a 1992 conviction for
11 breaking a restraining order, but he was actually referring to his 1993 convictions for corporal
12 injury upon a spouse/cohabitant and violation of a court order to prevent harassment. Respondent
13 testified that he cannot recall the specifics of this incident because it was so long ago and due to
14 his prior drug use. He recalls that he was arrested, went through the court system, and served
15 probation.

16 30. Respondent testified that he checked the box for “honorable” as the type of discharge
17 he received from the National Guard because he thought it was accurate at the time based on a
18 conversation he had with his mother regarding her belief that his discharge was “upgraded.”
19 Respondent admitted that he actually received a general discharge under honorable conditions,
20 which is different than an honorable discharge.

21 31. Respondent testified that he received a general discharge under honorable conditions
22 because he quit participating because he was under the influence of drugs.

23 32. Respondent testified that one day in 1996 he quit using drugs on his own initiative
24 without any assistance. Respondent testified has not used drugs since quitting in 1996 and has not
25 been arrested or charged with a crime since he quit using drugs.

26 33. Respondent testified that he is a different person now than he was in the 1980’s and
27 early 1990’s. Respondent testified that he is a law abiding citizen who loves his job and spending
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1 time with his grandchildren.

2 34. Respondent also submitted multiple letters of reference in support of his Application:

3 a. James Hackwood is Respondent's coworker at Graton. Mr. Hackwood wrote
4 that Respondent is "a devout rule follower" at Graton and is more familiar with the Policies and
5 Procedures handbook than anyone he knows. Mr. Hackwood states that Respondent takes his job
6 seriously and wants to do the right thing at all times;

7 b. Deborah Steele wrote that she has worked with Respondent for 4.5 years and
8 Respondent is a "go by the book kind of guy" and is an asset to Graton. Ms. Steele also wrote that
9 she is the President of Sebastopol Wranglers, a local horse association, and Respondent
10 volunteers to help with association events.

11 c. Lisa Winkler, Registered Nurse, wrote that her and Respondent have been
12 friends for more than 20 years and he is honest and trustworthy;

13 d. Thomas Romero, Casino Manager at Parkwest Casino 580, wrote that when he
14 supervised Respondent at Graton, he found Respondent to be determined and his work was
15 responsible and accurate;

16 e. Dustin Hamilton is Respondent's coworker at Graton. Mr. Hamilton wrote that
17 Respondent is a "by the book guy," is trustworthy, and diligent;

18 f. Stephanie Miranda wrote that Respondent has rented a room from her for two
19 years and he is respectful, responsible, and trustworthy.

20 35. Respondent's testimony that he was unable to recall the specifics of events that
21 occurred many years ago when he was under the influence of drugs was credible. Although
22 Respondent disclosed the wrong dates and/or incorrectly identified the charges and convictions
23 against him, it appears that he disclosed each conviction to the best of his ability.

24 36. Respondent did not provide thorough explanations in his February 24, 2016 and
25 March 8, 2017 responses to the Bureau. Respondent's explanations for not recalling specific
26 dates, events, and being confused about the distinction between battery and assault, etc. are
27 understandable, but Respondent did not provide that information in his responses; had he
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1 provided more thorough responses, Respondent may have avoided having his Application
2 referred to an evidentiary hearing.

3 37. Respondent appeared to be honest and forthcoming while testifying about his criminal
4 history. Respondent did not dispute what was written in the police report or court documents and
5 never attempted to minimize, dispute, or deny the facts discovered in the course of the Bureau's
6 investigation.

7 38. None of Respondent's convictions occurred within the 10-year period immediately
8 preceding the submission of his Application.

9 39. Based on the foregoing, Respondent has met his burden of proving that he is a person
10 of good character, honesty, and integrity. As a result, Respondent is qualified to receive a finding
11 of suitability under Business and Professions Code section 19857(a).

12 40. Respondent has met his burden of proving that he is a person whose prior activities,
13 criminal record, if any, reputation, habits, and associations do not pose a threat to the public
14 interest of this state, or to the effective regulation and control of controlled gambling, or create or
15 enhance the dangers of unsuitable, unfair, or illegal practices, methods, and activities in the
16 conduct of controlled gambling or in the carrying on of the business and financial arrangements
17 incidental thereto. As a result, Respondent is qualified to receive a finding of suitability pursuant
18 to Business and Professions Code section 19857(b).

19 41. Respondent has met his burden of proving that he is not disqualified from licensure
20 pursuant to Business and Professions Code section 19859.

21 42. All documentary and testimonial evidence submitted by the parties that is not
22 specifically addressed in this Decision and Order was considered but not used by the Commission
23 in making its determination on Respondent's Application.

24 43. The matter was submitted for Commission consideration on April 25, 2018.

25 LEGAL CONCLUSIONS

26 1. Division 1.5 of the Business and Professions Code, the provisions of which govern the
27 denial of licenses on various grounds, does not apply to licensure decisions made by the
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1 Commission under the Gambling Control Act. Business and Professions Code section 476(a).

2 2. Public trust and confidence can only be maintained by strict and comprehensive
3 regulation of all persons, locations, practices, associations, and activities related to the operation
4 of lawful gambling establishments and the manufacture and distribution of permissible gambling
5 equipment. Business and Professions Code section 19801(h).

6 3. A “finding of suitability” means a finding that a person meets the qualification criteria
7 described in subdivisions (a) and (b) of Section 19857, and that the person would not be
8 disqualified from holding a state gambling license on any of the grounds specified in Section
9 19859. Business and Professions Code section 19805(j).

10 4. The Commission has the responsibility of assuring that licenses, approvals, and
11 permits are not issued to, or held by, unqualified or disqualified persons, or by persons whose
12 operations are conducted in a manner that is inimical to the public health, safety, or welfare.
13 Business and Professions Code section 19823(a)(1).

14 5. An “unqualified person” means a person who is found to be unqualified pursuant to
15 the criteria set forth in Section 19857, and “disqualified person” means a person who is found to
16 be disqualified pursuant to the criteria set forth in Section 19859. Business and Professions Code
17 section 19823(b).

18 6. The Commission has the power to deny any application for a license, permit, or
19 approval for any cause deemed reasonable by the Commission. Business and Professions Code
20 section 19824(b).

21 7. The Commission has the power to take actions deemed to be reasonable to ensure that
22 no ineligible, unqualified, disqualified, or unsuitable persons are associated with controlled
23 gambling activities. Business and Professions Code section 19824(d).

24 8. The burden of proving his or her qualifications to receive any license from the
25 Commission is on the applicant. Business and Professions Code section 19856(a).

26 9. At an evidentiary hearing pursuant to Business and Professions Code sections 19870
27 and 19871 and CCR section 12060(b), the burden of proof rests with the applicant to prove his or
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1 her qualifications to receive any license under the Gambling Control Act. CCR section 12060(i).

2 10. No gambling license shall be issued unless, based on all of the information and
3 documents submitted, the commission is satisfied that the applicant is a person of good character,
4 honesty, and integrity. Business and Professions Code section 19857(a).

5 11. No gambling license shall be issued unless, based on all of the information and
6 documents submitted, the commission is satisfied that the applicant is a person whose prior
7 activities, criminal record, if any, reputation, habits, and associations do not pose a threat to the
8 public interest of this state, or to the effective regulation and control of controlled gambling, or
9 create or enhance the dangers of unsuitable, unfair, or illegal practices, methods, and activities in
10 the conduct of controlled gambling or in the carrying on of the business and financial
11 arrangements incidental thereto. Business and Professions Code section 19857(b).

12 12. The commission shall deny a license to any applicant who is disqualified for licensure.
13 Business and Professions Code section 19859.

14 13. Every Gaming Employee shall obtain, and thereafter maintain current, a valid tribal
15 gaming license, and except as provided in subdivision (b), shall obtain, and thereafter maintain
16 current, a State Gaming Agency determination of suitability, which license and determination
17 shall be subject to biennial renewal. Tribal State Compact between the State of California and the
18 Federated Indians of Graton Rancheria section 6.4.3(a).

19 14. Investigation and disposition of applications for a determination of suitability shall be
20 governed entirely by State law, and the State Gaming Agency shall determine whether the
21 Applicant would be found suitable for licensure in a gambling establishment subject to the State
22 Gaming Agency's jurisdiction. Tribal State Compact between the State of California and the
23 Federated Indians of Graton Rancheria section 6.5.6(d).

24 15. Respondent has met his burden of proving that he is a person of good character,
25 honesty, and integrity. As a result, Respondent is qualified to receive a finding of suitability under
26 Business and Professions Code section 19857(a).

27 16. Respondent has met his burden of proving that he is a person whose prior activities,
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1 criminal record, if any, reputation, habits, and associations do not pose a threat to the public
2 interest of this state, or to the effective regulation and control of controlled gambling, or create or
3 enhance the dangers of unsuitable, unfair, or illegal practices, methods, and activities in the
4 conduct of controlled gambling or in the carrying on of the business and financial arrangements
5 incidental thereto. As a result, Respondent is qualified to receive a finding of suitability pursuant
6 to Business and Professions Code section 19857(b).

7 17. Respondent has met his burden of proving that he is not disqualified from licensure
8 pursuant to Business and Professions Code section 19859.

9 NOTICE OF APPLICANT'S APPEAL RIGHTS

10 Respondent Gary Steve Kirby has the following appeal rights available under state law:

11 Title 4, CCR section 12064, subsections (a) and (b) provide, in part:

12 An applicant denied a license, permit, registration, or finding of suitability, or whose
13 license, permit, registration, or finding of suitability has had conditions, restrictions,
14 or limitations imposed upon it, may request reconsideration by the Commission
15 within 30 calendar days of service of the decision, or before the effective date
16 specified in the decision, whichever is later. The request shall be made in writing to
17 the Commission, copied to the Bureau, and shall state the reasons for the request,
which must be based upon either newly discovered evidence or legal authorities that
could not reasonably have been presented before the Commission's issuance of the
decision or at the hearing on the matter, or upon other good cause which the
Commission may decide, in its sole discretion, merits reconsideration.

18 Business and Professions Code section 19870, subdivision (e) provides:

19 A decision of the commission denying a license or approval, or imposing any
20 condition or restriction on the grant of a license or approval may be reviewed by
21 petition pursuant to Section 1085 of the Code of Civil Procedure. Section 1094.5 of
22 the Code of Civil Procedure shall not apply to any judicial proceeding described in
the foregoing sentence, and the court may grant the petition only if the court finds
that the action of the commission was arbitrary and capricious, or that the action
exceeded the commission's jurisdiction.

23 Title 4, CCR section 12066, subsection (c) provides:

24 A decision of the Commission denying an application or imposing conditions on license
25 shall be subject to judicial review as provided in Business and Professions Code section
26 19870, subdivision (e). Neither the right to petition for judicial review nor the time for
27 filing the petition shall be affected by failure to seek reconsideration.
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ORDER

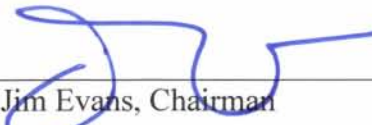
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2 1. Respondent Gary Steve Kirby's Application for a Finding of Suitability, Tribal Key
3 Employee is GRANTED.

4 2. No costs are to be awarded.

5 3. Each side to pay its own attorneys' fees.

6 This Order is effective on May 23, 2018.

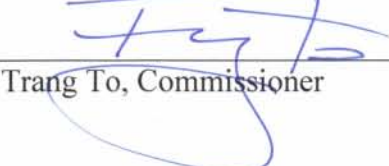
7 Dated: 5/23/18

8 Signature: 
9 Jim Evans, Chairman

10 Dated: 5/23/18

11 Signature: 
12 Paula LaBrie, Commissioner

13 Dated: 5-23-18

14 Signature: 
15 Trang To, Commissioner