

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

CIRCLE K STORES, INC.	)	AB-7338
dba Circle K Food Store)	
2097 Mentone Boulevard	)	File: 20-196091
Mentone, CA 92359,	)	Reg: 98044182
Appellant/Licensee,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Rodolfo Echeverria
)	
DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	February 3, 2000
	)	Los Angeles, CA

Circle K Stores, Inc., doing business as Circle K Food Store (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 25 days, with 10 days thereof stayed conditioned upon one year of discipline-free operation, for having maintained a coin-operated game on the premises, in violation of a condition on its license, contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code §23804.

Appearances on appeal include appellant Circle K Stores, Inc., appearing

¹The decision of the Department, dated December 31, 1998, is set forth in the appendix.

through its counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, John Lewis.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on December 5, 1988. Thereafter, the Department instituted an accusation against appellant charging that it maintained a coin-operated game on the premises, in violation of a condition on its license prohibiting coin-operated or video games on the premises.

An administrative hearing was held on November 9, 1998, at which time Department investigator Gerald Ackley testified concerning his discovery of what he described as a coin-operated game called "Sugar Loaf Toy Shop." The device in question, as pictured in Exhibit 3, a photo taken by Ackley (Exhibit 3), appears to be a large cabinet, the upper part of which is glass-enclosed, and filled with small stuffed animals and other objects which would be attractive to small children. The photo shows a claw-like feature with which the user apparently attempts to retrieve, and thereby win, one of the objects inside the glass enclosure.

Subsequent to the hearing, the Department issued its decision which sustained the charge of the accusation, and ordered the suspension from which this appeal is taken.

Appellant raises the following issues on appeal: (1) the condition is ambiguous, and, therefore void; (2) there are no findings the device was operational and accepted coins; (3) there was no substantial evidence the device was a game or was coin-operated, or that there was a nexus to licensee's sale of alcoholic beverages; and (4) the penalty was unduly harsh. Issues 1, 2 and 3 will be addressed as related issues.

DISCUSSION

I

The condition in question reads as follows: "There shall be no coin operated or video games maintained upon the premises at any time." Appellant contends that the condition is ambiguous, and does not give fair notice to the licensee. Appellant suggests that one cannot tell from the wording of the condition whether free video games, non-coin-operated video games, free mechanical games, or games operated by tokens are prohibited. Appellant also questions whether the condition would extend to the storage of a non-functioning coin-operated or video game, suggesting that was the case here.

Most of appellant's suggestions are hypothetical situations not justified by the evidence. The question is whether the device encountered by the investigator was within the proscription of the condition.

It is clearly coin-operated. The coin slots are visible in the photo. It is irrelevant whether or not it was operational on the night in question. One obvious purpose of the condition, read in light of the reason it was imposed on the license - proximity to a residence - was to make the premises less attractive to young children. The very presence of the device, filled with small toys calculated to appeal to young children, would be an attraction, at least until the prospective user found it was not operable - if, in fact, that was the case.

We do not believe the use of the word "maintain" has any likelihood of misleading anyone. The store is clearly not a repair shop, and no reasonable person would believe the Department was concerned it might become one. The obvious intent of the words "there shall be no coin-operated or video games maintained" was to tell the licensee their presence was unacceptable.

The device is clearly a game within the meaning of the condition. That it may also be a test of skill does not detract from its character as a game. Many games involve tests of skill. Ackley, whose testimony indicated some familiarity with the kind of device in question, was satisfied it was a game, and that it was coin-operated. Indeed, anyone who has ever patronized a shopping mall or video arcade has undoubtedly encountered a similar device and seen how it operates. The notion, that a licensee as sophisticated as the licensee in this case would not realize the device in question was a coin-operated game, is ludicrous.

II

Appellant contends that, because there was no evidence the device was operational and accepted coins, there could be no nexus to the sale of alcoholic beverages, citing Santa Ana Food Market, Inc. v. Alcoholic Beverage Control Appeals Board (1999) 76 Cal.App.4th 570, 575 [90 Cal.Rptr.2d 523, 527]. Appellant asserts that if the device was not operational, there would be no loitering or disturbances, since no one could use it.

We do not believe the question of whether the machine was operational is controlling. If, as appellant's counsel attempted to establish, the sign on the machine stated "Out of Order," the clear implication is that there is an "Order," reflecting the norm. Even if, at the moment, the machine is out of repair, its presence is in violation of the literal language of the condition.

As stated earlier, the upper portion of the machine is filled with toys attractive to small children. Children are likely to be attracted whether or not the machine will function. If the Department is entitled to discourage the attractiveness of the premises to children, it is entitled to exclude the machine whether operational or not.

III

Appellant contends that, since the condition was ambiguous, the penalty was too harsh. Appellant cites the Board's decision in Shehadeh (1998) AB-6869, where the Board remanded the case for reconsideration of the penalty after finding that the licensee could reasonably have believed that a condition which prohibited "fortified wines" did not extend to expensive port and sherry wines.

Shehadeh is distinguishable. There was no evidence that the licensee in the present case believed it might be permissible to have a non-operational coin-operated game on the premises.

ORDER

The decision of the Department is affirmed.²

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

² This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate district court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.