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

AB-7968
File: 48-375356 Reg: 02052195

U.S. FOBIE INTERNATIONAL BUSINESS DEVELOPMENT, INC. dba New Mesa Bar
741 San Mateo Avenue, San Bruno, CA 94066,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Stewart Judson

Appeals Board Hearing: June 12, 2003
San Francisco, CA

ISSUED JULY 30, 2003

U.S. Fobie International Business Development, Inc., doing business as New Mesa Bar (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 25 days, 10 days of which were conditionally stayed for one year, for having violated a condition on its license against maintaining a mechanical amusement device on the premises, in violation of Business and Professions Code section 23804.

Appearances on appeal include appellant U.S. Fobie International Business Development, Inc., appearing through its counsel, David Butler, Jr., and the Department of Alcoholic Beverage Control, appearing through its counsel, Thomas M. Allen.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on May 31, 2001.

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[1]The decision of the Department, dated April 18, 2002, is set forth in the appendix.

Thereafter, the Department instituted an accusation against appellant charging that, on separate dates in September and October 2001, appellant permitted a mechanical amusement device to be maintained on the premises, in violation of a condition on its license.

An administrative hearing was held on March 12, 2002, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established. Appellant thereafter filed a timely notice of appeal.

In its appeal, appellant raises the following issues: (1) there is no evidence to support Findings of Fact IV and V to the effect that the machine in question is a gaming machine; (2) the machine in question is not a "mechanical amusement device;" (3) the Department is guilty of selective and discriminatory enforcement; and (4) the Department is barred by the doctrine of equitable estoppel. Issues 1 and 2 will be discussed together, as will issues 3 and 4.

DISCUSSION

I

Appellant contends that there is no evidence in the record to support Findings of Fact IV and V, which refer to the machine in question as a "gaming machine."

We agree with appellant that the decision's reference to the machine in question as a "gaming machine" implies that its use involved gambling. We also agree with appellant that there is no evidence in the record to support those findings.

Whether or not the machine in question is a gaming machine, i.e., a device for

gambling, is not really the issue in this case.[2] The issue is whether the machine is of the kind prohibited by the condition the Department found was violated.

Condition 5 provides only that "[t]here shall be no mechanical amusement devices maintained on the premises at any time." The condition says nothing about gaming or gambling. We have no doubt that a gaming machine, if that is what the machine in question truly is, can be considered an "amusement device." One of the definitions of amusement in Webster's Third New International Dictionary is "a pleasurable diversion." Gambling is a diversion, albeit with the potential to be other than pleasurable.

But the condition does not ban all amusement devices. Had it so intended, the "mechanical" qualifier would not have been necessary. We can only assume that the Department intended to narrow the scope of its ban - otherwise, it could have said something like "no coin-operated amusement device" etc.

So we have to ask: Is the machine which was seized "mechanical," or, as appellant contends, is it "electronic?" Does it matter which it is? The Administrative Law Judge (ALJ) seems to have concluded it did not matter.

The Department investigator, who seized the machine during a premises investigation, said that it was a mechanical amusement device because "[i]t operates by machinery or tools internally basically to allow it to perform its function. ... There's moving parts internally. There's an actual machine inside of that game." [RT 19.] On cross-examination, the investigator admitted that he did not know if the only moving part on the machine was a cooling fan, but insisted the machine was a mechanical

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[2] In its brief to the Appeals Board, the Department states that the ALJ's reference to "gaming machine" was simply "a descriptive term, first used by the investigator, ... not necessary to the decision ... and is not an issue in the case." (Dept. Br. at p. 6.)

amusement device "[b]ecause it is a mechanical machine and by definition I would believe would be to that of machinery or tools having the components of machinery or tools." [RT 21.] The investigator conceded that he did not know the computer makeup of the machine: "I don't know what moves and what does not move." [RT 20.] He testified that the patron, after putting money in the machine, activates it by physically touching the screen; as to how often, "It's pretty much all the time. It's an interactive game." [RT 26.]

Department counsel argued at the hearing that the machine fell within the "common dictionary definitions" of mechanical amusement and device: "The fact that it has some electronics doesn't take it out of that category. There isn't any dichotomy between electronic on the one hand and mechanical on the other."

The ALJ concluded that the machine was of the kind prohibited by the condition, reasoning as follows (Determination of Issues VIII):

> There was little evidence offered on the subject. In the rear of the confiscated device was located at least one fan that operated when money was inserted. The word "mechanical" is defined in Webster's Third New International Dictionary copyright 1993 by Merriam-Webster, Inc. as "relating to machine or tools; of or relating to manual operations - done as if by a machine; seeming to be uninfluenced by will or emotion." "Electronic" is defined as "of or relating to electronics, especially utilizing devices constructed of or working by methods or principles of electronics, as electronic circuitry, organ or clock."
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> There clearly is a difference between mechanical and electronic devices so far as the nature of the source of their operation is concerned. It is also clear that such devices, as the one seized, whether mechanical or electronic, are "uninfluenced by will or emotion."
>
> The definitional difference is insignificant, however, The intent of the condition is unambiguous. Devices such as the one found in this premises are not permitted.

As we read the decision, the ALJ concluded that there is a clear difference between mechanical and electronic devices so far as the nature of the source of their

operation is concerned. That, it seems to us, should have led him to the next step - was this a mechanical or was it an electronic amusement device? Instead, apparently unable or unwilling to characterize the machine in question as one or the other, he decided that the "definitional difference' could be disregarded as insignificant, because "[t]he intent of the condition is unambiguous" and "devices such as the one found in this premises are not permitted."

There is no testimony in the record of what was intended by the condition. Although we could agree with the ALJ that the language of the condition is, at least on its face, unambiguous, we do not agree that the difference between "mechanical" and "electronic" can be so easily disregarded. If the Department had intended to ban all amusement devices, it could have said so. But it did not. Instead, the condition prohibited only *mechanical* amusement devices. The condition did not refer to gaming or gambling devices, nor did it ban coin-operated amusement devices.

We think it unreasonably stretches the apparent intent of the condition to reach a device which, according to the evidence, has no moving parts other than a cooling fan, and permits the user of the device to interact electronically with the machine by touching the viewing screen. Nor do we think that the machine can reasonably be considered a mechanical device simply because coins or paper currency are required to operate it.

We think it apparent that both the investigator and the ALJ were influenced by their belief that the device could be used for gambling - the investigator read the condition as banning "mechanical gaming machines" (see RT 11), and the ALJ in two findings described it as a "gaming machine." We do not think there is enough evidence in the record one way or the other on that issue. But, even assuming that the machine

was a gambling device, its presence did not violate the license condition without substantial evidence that it was a *mechanical* amusement device, which the record lacks.[3]

II

Appellant contends that the Department is guilty of selective and discriminatory enforcement as a result of its failure to take any enforcement action against the machine in question during earlier inspections of the premises, both during appellant's ownership and that of the previous owner. Alternatively, appellant argues that the Department is equitably estopped from proceeding by its alleged failure to act.

Appellant argues that the previous owner had a pool table, a jukebox, and a machine similar to the machine in question, and, although she had the same condition on her license as appellant, no enforcement action was ever brought against her. Appellant argues that the fact that, despite earlier inspections of its premises, no enforcement enaction was taken against it until the investigator's visit on September 21, 2001, implied that it was in compliance with the Department's requirements.

We agree with the ALJ that the record is devoid of any evidence that the Department is guilty of selective or discriminatory enforcement.

At best, if its witness is to be believed, appellant has shown that the premises may have been visited on earlier occasions by Department investigators, and that, although the machine in question or one like it was present in the bar, no enforcement action was taken. This is simply not the kind of proof the law requires.

The ALJ apparently did not believe appellant's witness, concluding that there

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[3] We express no opinion as to whether the licensee violated any Penal Code provision by having the device in question on its premises.

was no evidence the Department was aware of the device in the premises prior to the time it was first seen by the Department investigator shortly prior to its seizure.

In *Balayut v. Superior Court* (1996) 12 Cal.4th 826, 832-833 [50 Cal.Rptr.2d 101], the California Supreme Court discussed the test for selective and discriminatory enforcement in this manner:

> Unequal treatment which results simply from laxity of enforcement or which reflects a non-arbitrary basis for selective enforcement of a statute does not deny equal protection and is not constitutionally prohibited discriminatory enforcement. ...
>
> In *Muggia*[4] this court explained the showing necessary to establish discriminatory prosecution: "[I]n order to establish a claim of discriminatory enforcement a defendant must demonstrate that he has been deliberately singled out for prosecution on the basis of some invidious criterion. Because the particular defendant, unlike similarly situated individuals, suffers prosecution simply as the subject of invidious discrimination, such defendant is very much the victim of the discriminatory enforcement practice. Under these circumstances, discriminatory prosecution becomes a compelling ground for the dismissal of the criminal charge, since the prosecution would not have been pursued except for the discriminatory design of the prosecuting authorities."
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> There must be discrimination and that discrimination must be intentional and unjustified and thus 'invidious' because it is unrelated to legitimate law enforcement objectives. ...

(Citations omitted.)

We also agree with the ALJ that the record facts do not warrant the application of the doctrine of equitable estoppel. That doctrine applies only where justice and right require it, and will not be invoked when the consequence of doing so would be to nullify an important government program. (See *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 493 [91 Cal.Rptr. 23]; *Chaplis v. Montgomery* (1979) 97 Cal.App.3d 249, 259 [158 Cal.Rptr. 395.) The only thing appellant has going for it is its claim that the previous licensee had a similar machine and was not targeted for enforcement. Appellant has

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[4] *Muggia v. Municipal Court* (1975) 15 Cal.3d 286 [124 Cal.Rptr. 204].

offered no evidence that "justice and right" require the Department to ignore the existence of a possible condition violation simply because the same possible violation escaped unnoticed during an earlier inspection.

ORDER

The decision of the Department is reversed for the reasons stated in part I, *supra.*[5]

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
KAREN GETMAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[5] 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.