

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

ANNIE M. BENNETT and RONALD F. BENNETT	)	AB-7282
dba Town House)	
52 Windward Avenue	)	File: 48-023737
Venice, CA 90291,	)	Reg: 98044196
Appellants/Licensees,)	
v.	)	Administrative Law Judge
	)	at the Dept. Hearing:
	)	John P. McCarthy
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,)	
Respondent.	)	Date and Place of the
	)	Appeals Board Hearing:
	)	November 5, 1999
	)	Los Angeles, CA

Annie M. Bennett¹ and Ronald F. Bennett, doing business as Town House (to be referred to as appellant), appeal from a decision of the Department of Alcoholic Beverage Control² which suspended Ronald F. Bennett's on-sale general public premises license for 30 days with 20 days stayed, for permitting a visual reproduction which contained scenes of women being touched, caressed, or fondled on their breasts, being contrary to the universal and generic public welfare

¹Co-appellant Annie M. Bennett is deceased.

²The decision of the Department, dated November 12, 1998, is set forth in the appendix.

and morals provisions of the California Constitution, article XX, §22, and Business and Professions Code §24200, subdivision (a), arising from a violation of 4 California Code of Regulations, §143.4(2), commonly called Rule 143.4(2).

Appearances on appeal include appellant Ronald F. Bennett, appearing through his counsel, M. R. Ward, Jr., and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellant's license was issued on May 2, 1972. Thereafter, the Department instituted an accusation against him charging the referenced violation. An administrative hearing was held on September 28, 1998, at which time oral and documentary evidence was received.

On May 1, 1998, Department investigators and officers of the Los Angeles Police Department were in the premises. Appellant had available for his patrons, a money-operated, electronic video machine located on the fixed bar counter [Findings III]. During a playing of the machine in a game of strip poker, when the player's hand beat the machine's hand, a video depiction of a woman appeared. "As play continued, when the player had the best hand, the woman undressed to the point she was totally naked. She would dance and gyrate on the screen" [Finding IV]. During the dances of naked women, they appeared on the screen to touch and fondle their bare breasts [Finding V]. The machine was seized. On May 7, 1998, Department investigators played the machine in their offices and still

photos of one of the women depicted on the screen, were taken – Exhibit 3 [Findings V and VI].

Subsequent to the hearing, the Department issued its decision which determined that the violation occurred. Appellant thereafter filed a timely notice of appeal. In his appeal, appellant raised the issue that there is no substantial evidence to support the findings, arguing that testimony as to what others saw was contradictory.

DISCUSSION

The video game machine according to appellant's brief, was brought to the hearing but as someone forgot to bring the electric cord, the machine was not played. The video game is strip poker, with a depiction of a woman through digital presentation, with the woman undressing and dancing.

Kevin Ortega, a Department investigator, testified he watched the machine while the machine was at the premises, and saw a woman fondle her breasts. The machine was seized, and later played while at the Department offices. The investigators took four photos of the video presentation– of very poor quality, of one of the three women who did the “dancing.” Some of the pictures show a pose which appears, possibly, to indicate a touching of the woman's breasts by her hands, but it is impossible to tell in viewing the exhibits, if there was an actual touching. The normal indicators of a touching by the hands, an indentation of the skin of the breasts, or a portion of the breasts being moved, cannot be seen.

Investigator Hirata testified on cross examination, that he did see shadows on the woman's body, which is some indication that there was no touching, at least as to the scenes observed [RT 46].

The machine is the best evidence of a touching, but it has some drawbacks in viewing the screen due to a possible randomness of seeing the women perform. However, despite the potential for an excessive randomness as argued by the Department, there is no evidence in the record that there is such randomness as would defeat a reasonable attempt by the trier of fact to determine if the machine contains the images as alleged, and in such a series of depictions that the trier of fact could determine that there was, or not, a violation. The testimony of the investigator as to what he saw on the machine is secondarily next in order of the best evidence. The evidence of what the investigators saw at their offices, and the photos taken, is extremely poor evidence, with little significance in this matter. The record is woefully deficient as to how the machine operates, other than persons who viewed the machine and saw images which may or may not show touching and fondling. It is up to the Department to produce the best evidence, with a record which is based on sound fact and not fiction or speculation.

We do not see any complexity of requiring the trier of fact to view the best evidence available to the extent that the scenes testified to, are, or are not, shown. Any difficulty with excessive randomness would then be easily ascertained.

ORDER

The decision of the Department is reversed, and remanded to the Department for the taking of any further and proper evidence deemed appropriate, concerning

the allegations set forth in the accusation, and in accordance with the views expressed herein.³

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

³This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this order as provided by §23090.7 of said code.

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