ISSUED OCTOBER 31, 2000

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

MARCELLE ABDELMASSIH dba In N Out Liquor 2114-2130 Sawtelle Boulevard, Suite 110 Los Angeles, CA 90025, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7512 File: 21-295150 Reg: 99045476 Administrative Law Judge at the Dept. Hearing: Jeffrey Fine Date and Place of the Appeals Board Hearing: August 3, 2000 Los Angeles, CA

Marcelle Abdelmassih, doing business as In N Out Liquor (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended her license for 30 days, with 15 days stayed for a probationary period of two years, for appellant maintaining in the premises a slot machine, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, and arising from a violation of Penal Code §330b, subdivision (1).

Appearances on appeal include appellant Marcelle Abdelmassih, appearing through her counsel, Joshua Kaplan, and the Department of Alcoholic Beverage Control, appearing through its counsel, John Lewis.

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[1]The decision of the Department, dated September 23, 1999, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on June 20, 1994. Thereafter, the Department instituted an accusation against appellant charging that appellant possessed and permitted the operation of a slot machine on the premises.

An administrative hearing was held on July 27, 1999, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Department investigator Eric Hirata and by appellant's clerk, John Baroudi.

Subsequent to the hearing, the Department issued its decision which determined that the violation had been established as charged.

Appellant thereafter filed a timely notice of appeal. In her appeal, appellant raises the following issues: (1) the decision is not supported by its findings and the findings are not supported by substantial evidence, and (2) the penalty is excessive.

DISCUSSION

I

Appellant contends the Department failed to sustain its burden of proof because it did not present evidence showing how the machine in question worked and did not produce the machine itself at the hearing.

Penal Code §330b, subdivision (1), provides, among other things, that it is unlawful for any person to possess or to permit to be placed in any room or building under the control of that person, a slot machine. A slot machine is defined in subdivision (2) of that section as a machine that is operated by inserting money or tokens and where the user may, by reason of hazard or chance, receive money, credit, or some other thing of value.

Inspector Hirata testified that he observed a person playing the machine, and he himself played the machine twice while it was in the premises, once losing about $10, and the other time winning 8 credits, for which the clerk gave him $2. The machine was operated by inserting money, for which he received a specified number of "credits" which he could then bet by using the "bet" button. When he pushed the "start" button, bars on the screen rotated and credits were won or lost depending on how the bars lined up when they stopped. Hirata had no control over the rotation or stopping of the bars. Hirata's description of how the game worked makes it appear that there was no opportunity to use skill to affect the outcome of the game – it was purely dependent on chance [RT 20-21].

Appellant contends that the Department was required to have an expert testify that he or she had examined the machine and determined that it was a game of chance or the video machine itself should have been brought to the hearing. The Department provided only photographs of the machine, and these were admitted into evidence (Exhibits 2, 3, 4). Appellant argues that under People v. Hitch (1974) 12 Cal.3d 641 [117 Cal.Rptr. 9], the failure to produce evidence seized should result in excluding any reference to that evidence.

Failure to retain evidence may, in certain instances, result in the exclusion of reference to that evidence. (People v. Hitch (1974) 12 Cal.3d 641 [117 Cal.Rptr. 9]; see also People v. Nation (1980) 26 Cal.3d 169 [161 Cal.Rptr. 299].) However, the cases cited involved criminal proceedings, and the rationale of those cases has never been held applicable to administrative hearings. (See Government Code §11513, subdivision (c); Woodland Hills Onion AB-4791 (June 26, 1981).)

However, there is still the question of whether the Department improperly excluded relevant evidence at the hearing.

The Board has recently considered two other cases in which video game machines were involved, but were not viewed at the administrative hearing. In those appeals the Board said that the machines were the best evidence of how the games were played, and remanded the matters to the Department so that the machines themselves could be viewed.

In Bennett (1999) AB-7282, which involved a video strip poker game, the machine did not work when plugged in at the hearing. The question in that case was whether the women depicted were touching their breasts in violation of Rule 143.4(2). The Board held that the machine should be viewed since the testimony and documentary evidence was not clear as to whether there was actual touching.

In Kuykendall (1999) AB-7216), the machine did not work at the hearing because the power cord was missing. Kuykendall involved the question of whether the video card game "11-Up" was a game of chance or a game of skill. The descriptions of the game were somewhat confusing, and the ALJ based his finding on how he "understood" the game to be played. It was clear that the ALJ was not entirely clear on how the game was played. The Appeals Board issued an order remanding the matter to the Department so that it could consider evidence that was not available at the hearing, i.e., a working video game machine.

In the present matter, appellant's clerk was told by the people who installed the game that it "operated in a manner similar to a slot machine in Las Vegas" [RT 42], and Hirata's description of how he played the game comports with that

description. The photograph of the game screen also supports it, since it shows three columns with three pictures in each column, one above another, depicting what appear to be various fruits, as are often seen on Las Vegas-style slot machines. (Exh. 4.)

On the other hand, the photograph of the game screen also shows, on the left-hand side, other information, consisting of text and pictures, that is not clearly readable. (Exh. 4.) Another picture shows the buttons below the screen, with which the game is played, consisting of "Bet" and "Start" as described by Hirata, and also buttons labeled "Double," "Take," "Big," and "Small." The significance of the text and pictures on the game screen and the additional buttons was not explained by anyone.

We believe that enough doubt is cast on how this game is played to justify the remand of this matter so that the game can be demonstrated to the ALJ. The Department is required to prove its case and it must do so using the best evidence available. In this case, the machine has not been destroyed or is otherwise unavailable. Although it is large and cumbersome, the Department was able to confiscate it and transport to the Inglewood District Office; presumably it could be transported to a hearing site. It was improper to exclude the machine from evidence, and the Department decision cannot stand.

II

Appellant contends the penalty constitutes cruel and unusual punishment. However, the constitutional provisions cited by appellant apply to criminal, not administrative, proceedings. As explained in Yapp v. State Bar (1965) 62 Cal.2d

809 [44 Cal.Rptr. 593, 597], a criminal proceeding has for its purpose the punishment of the accused, while a disciplinary proceeding is for the protection of the public.

The Appeals Board will not disturb the Department's penalty orders in the absence of an abuse of the Department's discretion. (Martin v. Alcoholic Beverage Control Appeals Board & Haley (1959) 52 Cal.2d 287 [341 P.2d 296].) However, where an appellant raises the issue of an excessive penalty, the Appeals Board will examine that issue. (Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183].)

If the machine were shown to be a gaming machine, the penalty of 15 days of actual suspension would be well within the Department's discretion. However, in light of our resolution of the evidentiary issue, above, the penalty issue is moot.

ORDER

The decision of the Department is reversed and the matter remanded to the Department for reconsideration in light of the improperly excluded evidence described in the above decision.[2]

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

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[2]This 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.