

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

AB-7684

MORAIMA LOYA dba Vegas Room
2100 Long Beach Boulevard, Long Beach, CA 90806,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

File: 40-325336 Reg: 00048487

Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen

Appeals Board Hearing: August 16, 2001
Los Angeles, CA

ISSUED OCTOBER 15, 2001

Moraima Loya, doing business as Vegas Room (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended her license for 30 days, with 15 days thereof stayed for a two-year probationary period, for having possessed and operated a slot machine, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from violations of Penal Code §§330.1 and 330b.

Appearances on appeal include appellant Moraima Loya, appearing through her counsel, Armando Chavira, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

¹The decision of the Department, dated August 17, 2000, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer license was issued on May 6, 1997. Thereafter, the Department instituted an accusation against appellant charging her with the possession and operation of slot machines as defined in Penal Code §330b, and with having made cash payoffs, in violation of Penal Code §330.1.

An administrative hearing was held on June 29, 2000, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Arturo Montes, a police detective employed by the City of Long Beach. Montes testified that he deposited a 20-dollar bill in what appeared to him to be a gambling machine similar to machines he had seen in Las Vegas. He received 80 credits, bet the maximum of 32, pressed a start button which caused wheels, of which there were three, to turn. When the wheels stopped, the video screen showed 248 credits indicating that he had won 200 credits. After he advised the bartender he had won, a waitress paid him \$62 and cleared the machine.

The Department was unable to produce the machine at the hearing. Montes testified that the machine had been destroyed without his knowledge or authorization, contrary to established procedures of the Long Beach Police Department.

Subsequent to the hearing, the Department issued its decision which determined the machine in question was a slot machine within the meaning of the law, as a device operated by the insertion of money and caused to operate in a manner which included an element of hazard or chance.

Appellant thereafter filed a timely notice of appeal. In her appeal, appellant contends that the testimony of the police detective should have been suppressed

because of the inability of the Department to produce the device in question. Appellant also contends the Administrative Law Judge (ALJ) erred in treating detective Montes as an expert witness. Finally, appellant contends that Montes's testimony was not substantial evidence. Since all three issues involve the testimony of detective Montes, they will be addressed together.

DISCUSSION

Appellant contends, variously, that the testimony of detective Montes should have been suppressed because of the Department's inability to produce the device in question, that he lacked the qualifications of an expert, and that his testimony did not constitute substantial evidence.

Our review of the record fails to disclose any indication that appellant sought at the hearing to have the testimony of detective Montes suppressed. Appellant's counsel cross-examined Montes at length concerning his operation of the machine and his knowledge, or lack thereof, of the circumstances involving the destruction of the machine. While he moved for a dismissal of the accusation, which the Department denied, nowhere did he ask the ALJ to exclude Montes's testimony. The contention on appeal that the ALJ should have done so appears to be an afterthought, and not one this Board should entertain.

Numerous cases have held that the failure to raise an issue or assert a defense during the administrative hearing bars its consideration when raised or asserted for the first time on appeal. (Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control (1966) 65 Cal.2d 349, 377 [55 Cal.Rptr. 23]; Hooks v. California Personnel Board (1980) 111 Cal.App.3d 572, 577 [168 Cal.Rptr. 822];

Shea v. Board of Medical Examiners (1978) 81 Cal.App.3d 564,576 [146 Cal.Rptr. 653]; Reimel v. House (1968) 259 Cal.App.2d 511, 515 [66 Cal.Rptr. 434]; Harris v. Alcoholic Beverage Control Appeals Board (1961) 197 Cal.App.2d 182, 187 [17 Cal.Rptr. 167].)

The contentions that Montes lacked the credentials of an expert and that his testimony was not substantial evidence also lack merit. His testimony about the operation of the device and its award of credits on a chance basis was based upon his firsthand experience with the device's operation. The only skills required of Montes were an ability to insert money into the device and push a button to trigger its operation. The receipt of a cash payout in return for credits won simply confirms that the device comes within the scope of Penal Code §330b - by reason of chance Montes became entitled to "money, credit, allowance or thing of value or additional chance or right to use such slot machine or device." Montes's description of the device's operation and its outcome is ample evidence to support the charge of the accusation.

Appellant's counsel essentially conceded, in what appears to have been part of an unsuccessful strategy to gain a more lenient order, that the device was a gaming machine: "[I]t's hard to argue on whether or not it's a gaming machine but it appears it may be based on the investigator's testimony. To that extent [I] would submit on the machine. ... In other words, I'm not arguing it's not a violation." [RT 62, 63; see also, RT 67.]

Counsel was giving little away with his concession. As with the phone card vending machine described in People v. Pacific Gaming Technologies [2000] 82 Cal.App.4th 699, 700-701 [98 Cal.Rptr.2d 400] and found to be an unlawful gaming

device, "if it looks like a duck, walks like a duck, and sounds like a duck, it is a duck.

And so it is with this duck."

ORDER

The decision of the Department is affirmed.²

TED HUNT, CHAIRMAN
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.