

ISSUED OCTOBER 24, 2000

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

CINNAMON TEAL CORP.	)	AB-7497
dba Class of 47)	
209 Palms Street	)	File: 48-000123
Balboa, CA 92661,	)	Reg: 99046140
Appellant/Licensee,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	John P. McCarthy
DEPARTMENT OF ALCOHOLIC)	
BEVERAGE CONTROL,	)	Date and Place of the
Respondent.	)	Appeals Board Hearing:
	)	August 3, 2000
	)	Los Angeles, CA

Cinnamon Teal Corp., doing business as Class of 47 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended appellant's on-sale general public premises license for 20 days and 15 days, respectively, for permitting a game of chance to be within the premises and for permitting the service of an alcoholic beverage to a patron who exhibited obvious signs of intoxication, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, and Business and

¹The decision of the Department, dated September 9, 1999, is set forth in the appendix.

Professions Code §24200, subdivisions (a) and (b), arising from violations of Business and Professions Code §25602, subdivision (a), and Penal Code §330.1.

Appearances on appeal include appellant Cinnamon Teal Corp., appearing through its representative, Dominic Restivo, Jr., and the Department of Alcoholic Beverage Control, appearing through its counsel, David Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellant's license was issued on July 28, 1977. Thereafter, the Department instituted an accusation against appellant charging, in a three count accusation, violations of permitting the operation of a slot machine within the premises, permitting the service of an alcoholic beverage to a patron exhibiting obvious signs of intoxication, and permitting a patron to remain within the premise while in an intoxicated condition.²

An administrative hearing was held on July 7, 1999, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that the allegations as to the game of chance and obvious intoxication, were proven.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the issue that the findings are not supported by substantial evidence, that is, (1) appellant was not aware the game was one of chance, and (2) the patron was not intoxicated.

²The last violation was not proven at the administrative hearing.

DISCUSSION

I

Appellant contends it did not know the game was one of chance. Penal Code §330.1, reads in pertinent part as follows:

“Every person who ... permits the operation of or permits to be placed, maintained ... any slot machine or device as hereinafter defined ... is guilty of a misdemeanor ... A slot machine ... is one that is, or may be, used or operated in such a way that, as a result of the insertion of any piece of money or coin or other object such machine or device is caused to operate or may be operated or played, mechanically, electrically, automatically or manually, and by reason of any element of hazard or chance, the user may receive or become entitled to receive anything of value or any check, slug, token or memorandum, whether of value or otherwise ...”

The Department’s decision determined “as a matter of law that the game in question, as played using the ‘U. S. Slots’ game, is not predictable by use of ordinary skill and is predominantly a game of chance.” (Determination of Issues I.)

Jim Biscailuz, a former Department investigator, testified as to observing the machine, and described the intricacies in playing the machine [RT 29-34, 44-47].

The only issue raised by appellant in its brief was: “Local patrol officers frequently walk through the [premises] (several times a week) and have in the past taken the opportunity to inspect the video machines. Following a suggestion by an officer we agreed to disconnect the golf video game from the internet [this is irrelevant]. However, no complaint or comment was ever made relative to the video game that was cited by the ABC.” In effect, appellant does not raise an issue that is relevant to whether or not there was a violation of the law. Appellant, in effect, appears to concede the presence of the machine, that it is a game of

chance, but complains that no one told appellant there was a problem. The device, as described in the testimony of the investigator appears to come within the Penal Code.

II

Appellant contends the patron was not intoxicated. The alleged violated statute states in pertinent part:

“Every person who sells, furnishes, gives ... any alcoholic beverage to any ... obviously intoxicated person is guilty of a misdemeanor.”

James Rose, a Department investigator, testified that in playing a game of pool with the intoxicated patron, Rose observed the slurred speech, watery and droopy eyes, and smelled the odor of alcohol on the patron's breath. Rose formed the opinion that the patron was intoxicated [RT 6, 8-11, 14, 17, 26]. Then-investigator Biscailuz also testified as to his opinion as to the intoxication of the patron [RT 37].

Appellant argues that “The person in question was a local patron who was waiting for a taxi. The patron has been in many times and the employees of the Class of '47 did not notice anything out of the ordinary relative to his behavior.”

Appellant did not call any of its employees as witnesses, so the record is devoid of testimony that could possibly shed greater insight into the matter. In effect, appellant's argument as to the employees not seeing signs of intoxication, has no factual basis in the record.

While the violations are clearly shown, it appears from a full reading of the record that the Department did not consider the good faith efforts of the licensee

sufficiently in regards to the penalty.

ORDER

The decision of the Department is affirmed, and remanded to the Department to reconsider a reduction of the penalty.³

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
E. LYNN BROWN, 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.