ISSUED NOVEMBER 8, 1996

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

KAP SOON CHO and PYONG JAE CHO dba Lomita Liquor 2022 Pacific Coast Highway Lomita, CA 90717, Appellants/Licensees, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent,	))))))))))))	AB-6571 File: 21-217867 Reg: 95032048 Administrative Law Judge at the Dept. Hearing: Marguerite C. Geftakys Date and Place of the Appeals Board Hearing: July 1, 1996 Irvine, CA

Kap Soon Cho and Pyong Jae Cho, doing business as Lomita Liquor (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended appellants' off-sale general license for 35 days, with 10 days stayed for a probationary period of one year, for offering for sale videos of harmful matter not placed in an area labeled "adults only," being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, and in violation of subdivision (e) of Penal Code §313.1.

[1]The decision of the Department dated September 7, 1995, is set forth in the appendix.

Appearances on appeal include appellants Kap Soon Cho and Pyong Jae Cho, appearing through their counsel, Ralph B. Saltsman; and the Department of Alcoholic Beverage Control, appearing through its counsel, David B. Wainstein.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on June 6, 1988. Thereafter, the Department instituted an accusation on January 20, 1994, against appellants alleging that they offered for sale videos of harmful matter which were not placed in an area labeled "adults only" as required by Penal Code §313.1, subdivision (e).

An administrative hearing was held on July 19, 1995, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision, which suspended appellants' off-sale general license for 35 days, with 10 days stayed for a probationary period of one year. Appellants filed a timely notice of appeal.

In their appeal, appellants raise the following issues: (1) Penal Code § 313.1, subdivision (e), was not violated, and (2) the penalty constitutes an abuse of discretion as a matter of law.

DISCUSSION

I

Appellants contend that subdivision (e) of Penal Code §313.1[2] was not violated because the statute requires only that a designated area labeled “adults only” be

[2]The relevant portion of this section is set out in the appendix.

created; it is not necessary under the terms of the statute, they argue, that sexually explicit videos actually be stored there.

The record shows that appellants did have a section labeled "adults only" that contained sexually explicit magazines. The sexually explicit videos were in an area perpendicular to the "adults only" area and separated from it by a 30-inch rack of beverages. There was no other "adults only" sign besides the one in the magazine section.

The specific language of the statute requires that a designated "adults only" area for the sale of sexually explicit videos be created. However, appellants rely on the sentence in the statute that states: "The failure to place a video recording or advertisement, regardless of its content, in this area, shall not constitute an infraction." Appellants argue that they have not violated the statute because they had an "adults only" section, even though the sexually explicit videos were located elsewhere. What appellants have ignored, however, is the literal language of the statute that requires that an "adults only" area be created specifically for sexually explicit videos. The only area designated as "adults only" was clearly for magazines, since there were no videos in that area and all videos were in another area. Therefore, appellants have not complied with the terms of the statute and did commit an infraction of Penal Code §313.1 since they did not create an "adults only" area for videos.

In addition, appellants' construction of the statute, ostensibly relying on the literal language, leads to an absurd result when applied. We will not assume that the legislature intended to create a futile statute that requires creation of a specific area for

specific items but simultaneously declares that failure to place those specific items in the place created for them is of no consequence. It is a basic premise of statutory construction that the literal language of statutes is to be construed, if at all possible, in a way to avoid absurd, unreasonable, or futile results. (See 82 C.J.S. §329 and cases cited therein.)

The Department is probably correct in saying that "perusal by minors . . . .[of the sexually explicit videos] is the exact evil the statute intended to prohibit, even if it may have been unartfully drafted" [Dept. Reply Brief 3]. Keeping this purpose, and simple logic, in mind, it is clear that the statute was not intended to produce the absurd result suggested by appellants.

We find appellant's interpretation of the statute to be unsupportable. Simple logic mandates that sexually explicit videos must be in their specially designated area. Appellant has clearly violated the provisions of Penal Code 313.1.

II

Appellants contend that the penalty imposed is an abuse of discretion as a matter of law and that the matter should be remanded to the Department for reconsideration of the penalty. Appellants argue that the Department should have taken into consideration the mitigating factors of the sign over the magazines, the sign that was placed over the videos after the violation was pointed out, and appellants' history of no prior disciplinary action. In addition, appellants point out that the suspension originally recommended by the Department was 10 days less than that ultimately adopted.

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].) When reviewing the exercise of the Department's discretion in imposing a penalty, this Board must consider the entire record to determine if that discretion has been abused. This review includes the hearing proceedings, prior disciplinary actions, the Department's guidelines, prior similar cases, and the "best thinking" of the Department as shown in its recommendation to the ALJ.

The recommendation for discipline proposed by the Department at a hearing is undoubtedly based on the Department's careful analysis of the matter prior to the hearing and represents its best judgment as to an appropriate penalty under the circumstances. In the present appeal, the Department's recommendation at the conclusion of the administrative hearing was for a 25-day suspension with 10 days stayed for a 1-year probationary period. There are no guidelines for a violation of this type in the Department's procedure manual; however, of the penalties listed other than revocation or indefinite suspension, the longest usual suspension period is 30 days. Clearly, the Department did not believe that the most severe suspension was appropriate, since it recommended only a 15-day actual suspension.

The ALJ, after reciting the same factors in mitigation that had been referred to by the Department's counsel, imposed a greater penalty than the Department had recommended. The ALJ provided no analysis or explanation for the greater penalty in the proposed decision. A review of the transcript sheds no light on the ALJ's reasoning; there was nothing presented in aggravation, only in mitigation. The increase, therefore, has no obvious basis. The Department, however, adopted the ALJ's decision, including the penalty that exceeded that recommended by the Department.

A remark of the ALJ suggests that the increase in penalty over the recommended one may have been due to factors that had nothing to do with the violation itself. At the end of the hearing, one of the appellants admitted that there was no sign above the videos, but said that she thought the penalty was too severe for a first offense. The ALJ's response was: "I don't know whether Mrs. Cho has any children, but I'm wondering if she would show this kind of stuff to her children" [R.T. 40]. This remark indicates that the ALJ felt very strongly about the possibility of minors having access to sexually explicit videos and seems to be the only possible basis the ALJ had for increasing the penalty beyond the recommendation of the Department. Strong personal feelings about an activity that is not illegal, however, do not constitute "good cause" for aggravating this penalty beyond what the Department had already determined was appropriate. Imposition of this penalty, therefore, was an abuse of the Department's discretion, and did not serve the ends of substantial justice.

CONCLUSION

The decision of the Department is affirmed, the penalty is reversed, and the matter is remanded to the Department for reconsideration of the penalty.[3]

RAY T. BLAIR, JR.,CHAIRMAN
JOHN B. TSU, MEMBER
BEN DAVIDIAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[3]This final order is filed as provided by Business and Professions Code §23088, and shall become effective 30 days following the date of this filing of the final order as provided by §23090.7 of said statute for the purposes of any review pursuant to §23090 of said statute.