

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

KULJIT SINGH	)	AB-6640
dba Bhamipuri Liquor & Deli)	
5201 East Orangethorpe Avenue	)	File: 21-271451
Anaheim, CA 92807,	)	Reg: 95034150
Appellant/Licensee,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Rodolfo Echeverria
DEPARTMENT OF ALCOHOLIC)	
BEVERAGE CONTROL,	)	Date and Place of the
Respondent.	)	Appeals Board Hearing:
	)	November 6, 1996
	)	Los Angeles, CA
)	

Kuljit Singh, doing business as Bhamipuri Liquor & Deli (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended his off-sale general license for 15 days, with 5 days stayed for a one-year probationary period, for appellant's having offered for sale video recordings of harmful matter in an area of the licensed premises open to the public which was not properly labeled for adults only, being contrary to the universal and generic public welfare and morals provisions of the

¹The decision of the Department dated February 15, 1996, is set forth in the appendix.

California Constitution, article XX, §22, arising from a violation of Penal Code §313.1(e).²

Appearances on appeal include appellant Kuljit Singh, representing himself; and the Department of Alcoholic Beverage Control, appearing through its counsel, David Wainstein.

FACTS AND PROCEDURAL HISTORY

Appellant's license was issued December 2, 1992. Thereafter, the Department instituted an accusation against appellant on November 1, 1995. Appellant requested a hearing.

An administrative hearing was held on January 6, 1996, at which time oral and documentary evidence was received. At that hearing, it was determined that appellant permitted the display of harmful matter (pornographic video recordings) in an area not

² Penal Code §313.1, subdivision (e), provides, in pertinent part:

"Any person who sells or rents video recordings of harmful matter shall create an area within his or her business establishment for the placement of video recordings of harmful matter and for any material that advertises the sale or rental of these video recordings. This area shall be labeled 'adults only.' The failure to create and label the area is an infraction"

Penal Code §313, subdivision (a), defines "harmful matter" as:

"matter, taken as a whole, which to the average person, applying contemporary statewide standards, appeals to the prurient interest, and is matter which, taken as a whole, depicts or describes in a patently offensive way sexual conduct and which taken as a whole, lacks serious literary, artistic, political or scientific value for minors."

There has been no contention that the videotapes in question did not contain "harmful matter" as so defined.

created for their display and demarcated by a sign stating "Adults Only," as required by Penal Code §313.1, subdivision (e).

Subsequent to the hearing, the Department issued its decision which suspended appellant's license for 15 days, with 5 days stayed for a one-year probationary period. Appellant filed a timely notice of appeal.

In his appeal, appellant raises the following issues: (1) he has been punished twice for the same offense, having already paid a civil fine for the Penal Code violation; (2) the video recordings and their containers were, without appellant's knowledge, placed in an area where they were not usually displayed by a sales person who called while appellant was away from the premises; and (3) the penalty is excessive.

DISCUSSION

I

In a separate proceeding arising from the same incident, appellant was charged with an infraction violation of Penal Code §313.1, subdivision (e), and fined. He now contends, without citation of authority, that the penalty imposed by the Department unfairly amounts to double punishment. Appellant thus invokes the provisions of the Fifth and Fourteenth Amendments to the United States Constitution and article I, §15, of the California Constitution, commonly characterized as the "double jeopardy" provisions.

The Department contends that those constitutional provisions have no application, since what is involved in the Department's proceeding is not considered punishment. It cites Baldwin v. Department of Motor Vehicles (1995) 35 Cal.App.4th 1633 [42 Cal.Rptr.2d 422], where the contention was that "administrative revocation subsequent

to imposition of criminal punishment violates the double jeopardy clause of the Fifth Amendment to the United States Constitution." (35 Cal.App.4th, supra, at 1638.)

The court in Baldwin rejected that contention.

The Baldwin court's analysis began with its reading of United States v. Halper (1989) 490 U.S. 435 [109 S.Ct. 1892], which teaches that while the double jeopardy clause protects against multiple punishments for the same offense, the labels "criminal" and "civil" are not of prime importance. Instead, "the determination whether a given sanction constitutes punishment in the relevant sense requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve." (United States v. Halper, 490 U.S., supra, at 448. So long as the purpose of the civil sanction is remedial, and not to punish, it is not subject to the double jeopardy provisions.

In Baldwin, the court concluded that the legislation pursuant to which the Department of Motor Vehicles revoked Baldwin's operator's license for three years, following his third drunken driving offense, was not for any purpose of punishment or retribution, but instead for the protection of the general public, and thus not constitutionally defective. Other California decisions are in accord. (See Ellis v. Pierce (1991) 230 Cal.App.3d 1557, 1559 [282 Cal.Rptr. 93]; Fearn v. Zolin (1992) 9 Cal.App.4th 1756, 1762-1763 [12 Cal.Rptr. 2d 14].)

The suspension in this case was for 15 days, with five of those days stayed. The suspension was conditioned upon there being no cause for further disciplinary action in the ensuing year. Both the suspension and the probationary period are intended to spur the licensee to comply with the law relating to the sale of alcoholic beverages, for the

overall protection of the general public. The Department's objective is not to punish, but to encourage compliance. The penalty does not rise to the level that it must be characterized as punishment.

II

Appellant contends that the video recordings were in an area of the store where they were unlikely to be seen by children, and, therefore, the failure to isolate the display and post the sign required by the Penal Code did not constitute a violation of the Penal Code. Appellant's contention is irrelevant in view of the specific requirements of the Penal Code provision, even if it was factually correct, which it is not. The Department investigator testified that, based on his inspection of the store, children could get to the display [RT 13], and, based upon one of the photos in evidence (Exhibit 1-A), it would appear that the display would be in plain view of anyone selecting items from a counter displaying a number of non-alcoholic products such as Pringles potato chips, various brands of paper products, and the like.

Where there are conflicts in the evidence, the Appeals Board is bound to resolve them in favor of the Department's decision, and must accept all reasonable inferences which support the Department's findings. (Gore v. Harris (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666]. See Kirby v. Alcoholic Beverage Control Appeals Board (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857] (substantial evidence supported both the Department's and the license-applicant's position; Kruse v. Bank of America (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 271]; and Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control (1968) 261 Cal.App.2d 181 [67 Cal.Rptr. 734, 737].

Appellant also contends that he did not intend to violate the law, and did not know the video recordings were where they were. His argument is that the videos were left exposed on an ordinarily unused shelf by a salesman who called on the premises in appellant's absence the preceding afternoon.

The Department contends that neither Penal Code §313.1, subdivision (e), nor any of the provisions of the Alcoholic Beverages Control Act, are specific-intent statutes, and the mere fact that appellant did not intend to commit the violation is no defense. Moreover, the sign above the videos did not comply with the Penal Code requirements as to what had to be stated, and this can not be blamed on any third party.³

Penal Code §313.1, subdivision (e), does not require that any intent be shown. It makes unlawful the failure to create and label the area where the offensive materials are kept. As for appellant's claimed lack of knowledge, the Administrative Law Judge (ALJ) either chose not to believe it or concluded that it did not constitute a valid defense. In either case, it would appear that the ALJ was correct.

The photographic and physical evidence is conclusive - the video recordings are only a few feet from an aisle containing snack foods and other non-alcoholic items, and there is no sign stating "adults only." The boxes containing the video recordings leave nothing to the imagination as to their content.

III

³ The Penal Code provision requires a sign stating "adults only." Appellant's sign contained the words "for adults." [Exhibit 1-A].

Appellant contends that the penalty is excessive. He argues that the fine he would have to pay pursuant to an offer in compromise would approximate \$2,500, and asserts that a fine in that amount would work an undue hardship.

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].)

There is nothing in the record which would permit the Board to determine what the amount of any fine would be as part of a compromise. Nor is there anything in the record other than appellant's unsupported assertion that either the fine or the suspension would work an undue hardship on him.

The Department contends that the penalty "can hardly be termed an excessive penalty, particularly in light of the fact that appellant will be allowed to pay an offer in compromise ..." (Brief of Department, p. 2.) Of course, the Department is in the same position as the Board in its inability to determine from this record what such a fine would be.

The Department had the following factors to consider: (1) the videos were packaged in containers that portrayed sexually explicit conduct most graphic in nature; (2) the videos were in plain view of shoppers, adult or minor, patronizing aisles containing non-alcoholic products such as potato chips and paper products; (3) the type of sign required by the Penal Code was lacking; and (4) the appellant had taken no

steps to correct the situation even though he had been in the store four hours on the day following the alleged visit by the salesman, before the investigators arrived. In mitigation, the Department also took into consideration appellant's claim that a third person was partly to blame for the display, and that there was a sign that, although not in exact compliance with the Penal Code, did at least set forth the words "For Adults." (Finding of Fact IV.)

Considering such factors, the appropriateness of the penalty must be left to the discretion of the Department. The Department having exercised its discretion reasonably, the Appeals Board will not disturb the penalty.

CONCLUSION

The decision of the Department is affirmed.⁴

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

DISSENTING OPINION FOLLOWS

⁴This 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.

JOHN TSU, DISSENTING

I respectfully dissent from the Board's ruling. In my opinion the facts of this case indicate that the Department unfairly departed from its customary practice by pursuing disciplinary proceedings in addition to criminal proceedings. While appellant's arguments may not rise to constitutional levels, the unfairness of the double sanctions in this case prevents me from agreeing with the majority decision.

JOHN TSU, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD