ISSUED MAY 7, 1998

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

JUNG SOOK SHIN & MOO HYUN SHIN dba Larry's Liquor 9039 E. Adams Huntington Beach, CA 92646, Appellants/Licensees, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	AB-6838 File: 21-173205 Reg: 96036448 Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria Date and Place of the Appeals Board Hearing: January 7, 1998 Los Angeles, CA

Jung Sook Shin and Moo Hyun Shin, doing business as Larry's Liquor (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their off-sale general license for 25 days with 10 days stayed, for not labeling a display of videos containing harmful matter with a sign stating "adults only," and for displaying such videos in a manner making them visible and accessible to minors, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code §24200, subdivision (a), and Penal Code §§313 and 313.1, subdivision (e).

[1]The decision of the Department dated March 13, 1997, is set forth in the appendix.

Appearances on appeal include appellants Jung Sook Shin and Moo Hyun Shin, appearing through their counsel, Anthony A. DeCorso, Angela E. Oh, and Evan Scheffel; and the Department of Alcoholic Beverage Control, appearing through its counsel, David B. Wainstein.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on July 5, 1985. Thereafter, the Department instituted an accusation concerning videos containing harmful matter and alleged the failure to post the required signs, as well as in an amended accusation, alleging that such videos were visible and accessible to children.

An administrative hearing was held on February 6, 1997, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which suspended appellants' license. Appellants thereafter filed a timely notice of appeal.

In their appeal, appellants raise the following issues: (1) there was substantial conformity to Penal Code §313.1, subdivision (e)'s requirement, by posting a sign excluding persons under the age of 18 years, (2) Penal Code §313 is not a proper ground upon which to suspend appellant's license, notwithstanding the provisions of the California Constitutions's public welfare and morals provisions and Business and Professions Code §24200, subdivision (a).

DISCUSSION

I

Appellant contends that there was substantial conformity to Penal Code §313.1, subdivision (e)'s requirement, by posting a sign excluding persons under the age of 18 years.

Penal Code §313.1, subdivision (e), states 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...."

Appellants posted a sign which read: "You must be 18 years old to purchase or to look at these magazines...." Exhibits 1B and 1F show a free-standing rack with three sections. The top and bottom sections contain magazines of the adult variety. The center section contains some video recordings. The sign posted by appellants was attached to the lower portion of the top section just above the videos. Another sign placed under the posted sign, stated: "This is not a library please do not read magazines."

We conclude that there was no substantial compliance with the Penal Code section. The code states that a sign entitled "adults only" must be affixed to the designated area. The words "adults only" is in quotes in the code section. It therefore appears that the legislature meant that those particular words should appear. Also, we observe from the record that the sign posted by appellants refers to magazines only. Impliedly, it could be argued that the videos were not included in appellant's prohibition, only the magazines.

II

Appellants contend that Penal Code §313 is not a proper ground upon which to suspend appellant's license, notwithstanding the California Constitution's public welfare and morals provisions and Business and Professions Code §24200, subdivision (a).

The accusation (count 2) states after a recitation of the Constitutional provision and applicable statute, that "On or about February 16, 1996, [appellants] did display harmful matter, as defined in Section 313 of the California Penal Code, in an area of the licensed premises readily visible or accessible to children." Harmful matter is defined in Penal Code §313, in pertinent part, 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 to minors ... 'Matter' means any ... magazine ... video recording ... or other pictorial representation...."

The foundational issue of the present appeal concerns the question whether the Department may, in the absence of a specific statute or rule, dictate where placement of videos containing "harmful matter," as that term is defined by Penal Code §313, will be within the licensed premises.[2] The Appeals Board has not directly considered this issue in the past. The Department has from time to time

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[2]In the case of American Drug Stores, Inc. (1992) AB-6160, the Appeals Board, concerned with the Department's reaching into the internal operation of a licensed premises, stated: "... the line between the department's proper regulation to effect conformity to law, and unacceptable control of appellant's right to manage and control its own internal affairs, is extremely fine." The Appeals Board concluded certain conditions were improperly imposed.

issued decisions which attempted to control the placement and curtail visibility by minors of videos containing harmful matter, in matters where Penal Code §313.1, subdivision (e), was the foundational statute. That Penal Code section concerns placement only in a most general manner:

> "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 [referring to the jackets of the videos]. This area shall be labeled "adults only."

Based on the record in other appealed cases considering the same issues, the reading of the statute, and the committee reports, the Appeals Board has reversed the Department's decisions which improperly attempted to control of placement under subdivision (e), thereby expanding the boundaries of the statute without legislative authority: Khong (1995) AB-6472, Singh & Keith (1994) AB-6387, and Yim (1993) AB-6285.

The Appeals Board in those cases, viewed the wording and penalties involved in Penal Code §313.1, subdivision (e), as only of marginal significance as compared to the whole scheme as set forth in a full reading of §313.1. The Senate Committee on Public Safety's report gives little support to control over placement by subdivision (e), as a portion of the report states:

> "It [subdivision (e)] will punish video retailers for not creating a section labeled 'adults only' ... Our bill does not create liability for the failure to place all harmful matter videos in the section. There is a substantial difference between liability for what is placed in the section and whether a section is created."

One of the problems which the Appeals Board feels has thwarted the Department's attempt to control placement and, thereby, visibility by minors, of the videos (which video jackets ofttimes depicting graphic scenes of sexual conduct and genital handling), is the apparent intent of the Legislature in enacting §313.1.[3] The Board viewed that the statute (§313.1, subdivision (e)), when written, did not have sellers of alcoholic beverages as its prime focus. More probably, businesses engaged primarily in the sale or rental of videos were the focus. In such a business, the creation of an "area" labeled "adults only" would, in effect, result in a de facto segregation of the videos containing harmful matter from the others. But the resulting segregation is a separation from those videos not containing harmful matter, not necessarily a segregation from that area accessible to the general public. This resulting separation, if any, is a by-product of compliance with the statute, not its direct object. Where a business offers videos as a sideline, as in the present appeal, the confinement of the videos to an "area" created within the store may not result in a de facto separation from other areas of the store, thereby remaining accessible to the general public and to minors. While the Board finds this result offensive, we have found that such internally determined placement by a

[3]The Legislature apparently did not intend to make a strong statement in condemnation of the "inappropriate" placement (and allowing minor visibility) of videos containing "harmful matter," as the penalty for a violation of subdivision (e) is a fine "not to exceed $100," and the violation designated as a mere infraction.

Contrary to the obvious weakness of subdivision (e)'s small fine, a violation of the remainder of §313.1 mandates a $2,000 fine, or county jail time, or both.

licensee is not unlawful and does not constitute a violation within the jurisdiction of the Department's power.

We also note that the position of the Department in this present appeal is somewhat undermined by its own pronouncements in its LEAD program (a program of education conducted by the Department for its licensees and their employees as to the various pitfalls of the Alcoholic Beverage Control Act), which states:

> "If licensees sell or rent videos of harmful matter, they must create an 'adults only' area within their licensed premises for the placement of the videos and label it, 'Adults Only.'" Ideally, the adults only area should be a separate room. If that is not possible, the adults only display should be physically separated from the non-harmful matter display -- the further the better. Licensees should construct the adults only display so that it is clearly distinct from the non-harmful matter display." (The LEAD materials cite Penal Code §§313 and 313.1.) (Emphasis added.)

With those historical and foundational comments, we pass to the main point of the present appeal, that is, the persistent, and laudatory, attempt by the Department to protect the public welfare and morals of minors from viewing such debasing and unfit materials.

It appears the theory of the Department's course of action is based upon various sections of the State Constitution and statutes. The California Constitution, article XX, §22, states in part:

> "... The Department shall have the power, in its discretion, to deny, suspend, or revoke any specific alcoholic beverage license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals ...."

That provision of the Constitution is modified somewhat by a preceding provision which states:

> "The Department of Alcoholic Beverage Control shall have the exclusive power, except as herein provided and in accordance with the laws enacted by the Legislature ....."

The bridge between section 313 (which defines "harmful matter") and the Constitution is constructed by Business and Professions Code §24200, subdivision (a), which states that a license may be suspended or revoked:

> "When the continuance of a license would be contrary to the public welfare or morals. However, proceedings under this subdivision are not a limitation upon the department's authority to proceed under Section 22 of Article XX of the California Constitution."

The Department cites and argues that the case of Mercurio v. Department of Alcoholic Beverage Control (1956) 144 Cal.App.2d 626 [301 P.2d 474, 479], stands for the proposition that the Department is not bound by existing statutes and may use its discretion in the exercise of Constitutionally granted powers to protect the public welfare and morals, quoting the court as stating:

> "We find nothing in the law limiting the [Department's] powers of termination of a license to the precise statutory grounds. It is clear from an examination of the Constitution and of section 25750 that the [Department] has the broad power to determine what shall be 'contrary to public welfare or morals' and to prohibit a licensee from doing or permitting on his premises any such acts."

The case and its holding are of little value in this review. Mercurio concerned the violation of a Department rule against female employees soliciting drinks. A careful reading shows that the Mercurio court was considering the question of the constitutionality of the Department's Rule 143. The licensee in Mercurio had argued that pursuant to Business and Professions Code §§24200.5, subdivision (b),

and 25657, the Department could not prohibit conduct not prohibited by those statutes. In that context, the court made the ruling shown above.[4]

The briefs by appellant and the Department each contain vigorous argument for their respective causes. We view the case of Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113], while factually different, does not come within the caution raised by Harris, supra, and addresses the very questions of law raised in the present appeal. The license in Boreta was an on-sale bona fide eating place license, where minors were allowed, a factor also present in the instant appeal, as the premises in the present appeal is a liquor store.

Boreta, supra, at 2 Cal.3d 96, sets forth the issues of law in that case which are similar to those in the present appeal:

> "To put it another way, the crucial question confronting us is whether the evidence of the presence of topless waitresses, without any evidence of improper conduct on their part toward the patrons or of the effect their presence had on the behavior of patrons, constitutes 'good cause' for the revocation of a license under: (1) article XX, section 22 and/or section 24200, subdivision (a), as conduct contrary to public welfare or morals ...."

The Boreta court, continued at 2 Cal.3d 99:

> "While conceding that the use of topless waitresses is not obscene, illegal, or a violation of any rule or regulation duly issued by it, the Department contends that such use is nonetheless per se contrary to public welfare and

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[4]The Harris v. Capital Growth Investors XIV (1991) 52 Cal.3d 1142, 1157, [278 Cal.Rptr. 614] case, gave cautionary counsel applicable to this present appeal, that a rule set forth in an appellate decision is based upon the facts in that particular decision. The rule from the cited case must be cautiously used within a reasonable context of the factual similarities between that cited case and the matter under a present review.

morals and constitutes in and of itself good cause for the decision to revoke the license." (Emphasis added.)

The Boreta court in its footnote 22 at 2 Cal.3d 99, opens the door to the Department's offered theory, somewhat, by stating that the Department, in addition to enforcing the Alcoholic Beverage Control Act, the Penal Code, and other statutes, including its own rules, may act on "situations contrary to the public welfare or morals in the sale or serving of alcoholic beverages regardless of legislative expressions of policy on the subject of prior department announcements." Based on the modifying phrase of "sale or serving of alcoholic beverages" the Department may find conduct violative of welfare or morals in the area of sales and service of alcoholic beverages, but outside the enumerated sales and service activities, the Department must have some basis other than its own discretion, or its private views as to what is moral or immoral, to impose control. We are not unmindful of the void apparently left between §313.1's control of perusal of the videos by minors, and the mere observation (possibly in passing) by minors, under §313.1, subdivision (e). But it is, in our view, up to the Legislature to fill this void, and not the Department without proper statute or regulation.[5]

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[5]The "Department interpretation" at issue here does not appear in any regulation promulgated under the rule making provisions of the Administrative Procedure Act (APA; Gov. Code §11340 et seq. [Gov. Code Chaps. 3.5, 4, 4.5, and 5]), even though it appears to be a "standard of general application." We note that agencies may not "issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in subdivision (g) of Section 11342, unless ... adopted as a regulation and filed with the Secretary of State pursuant to [Chapter 3.5 of the Government Code]." (Gov. Code §11340.5, subdivision (a).) In addition, no penalty may be based on such "underground regulations." (Gov.

The Boreta court, 2 Cal.3d 99-101, points out that it had difficulty accepting the Department's proposition that topless waitresses were contrary to public welfare or morals per se. The Court considered that such a declaration of authority would permit regulatory agencies to insulate themselves from effective judicial review, stating: "The courts would have no indication of the reasons supporting administrative actions and would be forced either passively to accept the pronouncements of the agency or simply to substitute their notion of the 'public welfare.'"

The Boreta court at 2 Cal.3d 100 observed that public morals, like public welfare, are "difficult to identify in a pluralistic society." The court agreed that some conduct may be immoral per se, if, in considering the "moral order, rather than the civil order, it deviates from principles dictated by right reason to be good and therefore to be followed." The court than examined the power vested by the Constitution in the Department. The court stated:

> "This requires us to observe the distinction between private morality and public morality, between the imperatives of the moral order, and the mandates of the civil order. It is therefore the public morals, not the private morals of the officials or employees of the Department, however conscientious or well-intentioned, which must be the criteria in the instant case. In other words, in resolving the issue before us, our reference must be to the morals of the people, that is, to those of the community at large, of the whole body of the people."

Code §11425.50, subd. (e).) The rule making provisions of the APA help ensure that all those affected by agency actions and policies, and not just the particular parties to an action, may have notice of, and a voice in, the requirements or restrictions that may be imposed upon them.

The Boreta court then, at 2 Cal.3d 103, held that "... the action of the Department cannot be approved on the basis that topless waitresses are per se contrary to public welfare and morals ...."

The Boreta court proceeded at 2 Cal.3d 106 to state that the Department should have established "good cause" and made a case, or drawn on its own expertise and empirical data and adopted regulations. "However," the court notes, "the Department has done neither." The court observed that the Department "... has in effect called upon us [the court] to pronounce a rule in an area in which the Department itself is reluctant to adopt one."

There may be times when the conduct is so extreme that the Department could say a course of conduct is per se contrary to public welfare and morals:

> "There may be cases in which the conduct at issue is so extreme that the Department could conclude that it is per se contrary to public morals. By this we mean that it is so vile and its impact upon society is so corruptive, that it can be almost immediately repudiated as being contrary to the standards of morality generally accepted by the community after a proper balance is struck between personal freedom and social restraint."
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> (Boreta, 2 Cal.3d at 101.)

However, counsel for the Department at the time of the oral argument proceeding, conceded that the present appealed matter does not come within the "vile" and "corrupt" standard used by the Boreta court, supra.

It is our view that the Legislature has by the passage of §313.1, subdivision (e), determined that videos containing harmful matter must be in an area (apparently to be determined by the owner of the premises), with a sign stating

"adults only." This legislation in effect, mandated a largely ineffective provision designed to limit accessibility by minors to the videos, simply by means of the posting of an "adults only" sign.

CONCLUSION

The Appeals Board is keenly aware of the menace to youth that harmful matter presents, such as the videos depicted in this appeal (Exhibit 1, A through E). We, as duly appointed public servants of this State, are personally repulsed that such materials are openly displayed to minors, of all varying ages and gender, with little effort to make to control visibility by minors. However, we are constrained in our condemnation of such openly displayed materials, by our duty to ensure the laws of the State of California are administered evenly and fairly, as enacted, rather than by our personal views of morality. We would much rather join with the dissent, as its spirit is just, but its stated position is not proper under our present laws and regulations.

It is, therefore, with great reluctance, that we reverse the decision of the Department of Alcoholic Beverage Control as to its Determination of Issues III, but sustain the decision as to its Determination of Issues I, II and IV, including the sustaining of the penalty order.[6]

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[6]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.

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

DISSENT OF JOHN B. TSU

I respectfully dissent.

Our society today is inundated with literature of varying kinds which focus upon extreme sexual conduct. To the extent that such material is openly paraded before youth, it is harmful to our children who will be the pillars of our nation in the future.

While I can understand and do appreciate the concerns of my associate Board members' overly narrow view of the imprecisely, imperfectly and ambiguously worded law as that law which is now a duly a part of the State's legal fabric, there is a time when every citizen must personally examine his or her own conscience, and stand by his or her own moral code.

While it is understandable that commercial establishments need to utilize many methods to attract business, a local liquor store or market is designed for the service of, and provider of, local community needs, and not the open and tawdry display of materials deemed by society and the law, as harmful to youth.

However, the majority view in this decision may be correct, that it will take the actions of the Legislature to correct this blight on local neighborhoods. Assuming this to be correct, then the private moral boundary of conducting business should be guided by individual conscience and overall morals of the

community good. Absent that, as I view the facts of this case, then the Department should use its inherent powers to so protect the public welfare and morals. The fabric of our society, indeed every society, is held together by the growing population of youth. Destroy the youthful fabric, and society as we know it, descends into the mire of its own emptiness as youth are openly allowed to observe the blatant and graphic displays of unrestrained sexual conduct. This is not just an issue of personal or popular morals, but one of deep concern to all parents and citizens.

The Department has attempted over time to thwart the commercialism of our self and the attendant appeal to unbridled passions and desires by demanding that visibility, even placement, of such harmful material, be reasonably placed to where those adults who may desire the observation or purchase of such, may do so without restraint.

But, blindness, only to the technical variables of imprecisely worded laws, is not a defense of our system of freedom through self-control, but quite the opposite, the oppression upon the innocents who cannot understand fully the meaning of adult conduct.

I would sustain the decision of the Department.

JOHN B. TSU, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD