ISSUED AUGUST 26, 1997

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

RANVIR SINGH dba The Grog Shop Liquor & Deli 2296 Santa Rosa Avenue Santa Rosa, CA 95407, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6738 File: 21-290280 Reg: 96035435 Administrative Law Judge at the Dept. Hearing: Michael B. Dorais Date and Place of the Appeals Board Hearing: June 4, 1997 Sacramento, CA

Ranvir Singh, doing business as The Grog Shop Liquor & Deli (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which ordered his off-sale general license suspended for 25 days, with enforcement of 10 days thereof stayed for a probationary period of three years, for having displayed videotapes and box containers depicting harmful matter in an area not segregated from that of the general public, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, and Business and Professions Code

[1] The decision of the Department dated September 19, 1996, is set forth in the appendix.

§24200, subdivision (a), arising from a violation of Penal Code §313.1, subdivision (e).

Appearances on appeal include appellant Ranvir Singh, appearing through his counsel, Paul A. Neuer; and the Department of Alcoholic Beverage Control, appearing through its counsel, Nicholas R. Loehr.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on December 24, 1993. Thereafter, the Department instituted an accusation alleging that appellant violated Penal Code §313.1, subdivision (e), by displaying videotapes and box containers depicting explicit sexual conduct, including sexual intercourse, oral copulation and masturbation, in an area of the premises not segregated from that of the general public.

An administrative hearing was held on August 6, 1996, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the discovery and seizure by Department representatives of a number of videotapes and box containers from shelves located beneath one of the sales counters of appellant's store. Following the hearing, the Department adopted the proposed decision of the Administrative Law Judge (ALJ) which found that appellant violated Penal Code §313.1, subdivision (e). The decision included specific findings that the recordings were inside soft multicolored cardboard boxes which depicted the title of the recording, and explicit sexual activity with a graphic display of men's and women's genitalia in a manner which met the standard of "harmful matter" (Finding III-3); and

the area where the recordings were displayed was not labeled "Adults Only" (Finding III-4). Thereafter, appellant filed a timely notice of appeal.

Appellant raises the following issues: (1) Findings of Fact II and III are not supported by substantial evidence in light of the whole record in that there was insufficient evidence that the recordings and the box containers were "harmful matter" within the meaning of Penal Code §313.1, subdivision (e), as defined in Penal Code §313, subdivision (a); and (2) Determination of Issues I, II, III and IV, to the extent they rely on Findings of Fact II and III are not supported by substantial evidence in light of the whole record.

DISCUSSION

This case involves what is essentially a single issue. That issue is whether or not the evidence established that the videotape recordings and the boxes containing them constituted harmful matter within the meaning of Penal Code §313.1, subdivision (e). To properly analyze that question, we first focus on the statute's specific requirements.

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

"Any person who sells or rents video recordings of harmful matter[2] shall create

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[2] "Harmful matter" is defined in Penal Code §313, subdivision (a) 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

> 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 statute, as we read it, requires a licensee who wishes to sell or rent such materials to do two things. (1) he or she must "create an area ... for the placement" thereof; and (2) the area must be labeled "adults only." In this case, there is no dispute that the area where the recordings were placed was not labeled "adults only."

The ALJ determined that appellant violated §313.1, subdivision (e), by permitting materials (carton containers) which advertised video recordings of harmful matter to be in an area of the licensed premises accessible to and viewable by minors. (See Determination of Issues I.) This determination was based upon specific findings that box containers, with recordings inside, were displayed in an area of the premises within view of, and accessible to, any customer, including minors (Finding III-1); the recordings were inside soft multicolored cardboard boxes which depicted the title of the recording, and explicit sexual activity which met the standard of "harmful matter" (Finding III-3); and the area where the recordings were displayed was not labeled "Adults Only" (Finding III-4).

Appellant has focused his appeal on the contention that the evidence is insufficient to establish that the recordings or box containers constituted harmful

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> way sexual conduct and which, taken as a whole, lacks serious literary, artistic, political, or scientific value for minors."

matter within the meaning of the statute.[3] Appellant contends that evidence consisting of the covers (box containers) of the videotapes in question is insufficient "without some evidence beyond just the mere material itself." (App.Br., p.15.) The thrust of appellant's argument is that, without something additional, there is no basis for determining whether the challenged materials in fact violate contemporary community standards. Appellant acknowledges that decisions such as Paris Adult Theater I v. Slaton (1973) 413 U.S. 49 [93 S.Ct. 2628, 2634-2635] and People v. Enscat (1973) 33 Cal.App.3d 900, 913-915 [109 Cal.Rptr. 433], have held that in obscenity prosecutions, it was not error to fail to require expert affirmative evidence that the materials were obscene when the materials themselves were introduced into evidence. However, appellant argues, the term "harmful matter" is not synonymous with the term "obscene matter," since "harmful matter" is defined in reference to minors and "obscene matter" in reference to adults. Thus, even though the tapes and box containers were placed in evidence at the administrative hearing, and the containers viewed by the ALJ, it is appellant's contention that something more was required.

As we understand appellant's argument, he suggests that material which that

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[3] Although not included within appellant's statement of issues presented (see App.Br., p. 3), appellant contends that, since he was never informed by the distributor of the tapes of the "adults only" labeling requirement, the decision that he violated the statute cannot be upheld. There is no merit to this argument. Although the statute imposes such a burden on the distributor of the tapes, there is nothing in the statute that suggests that the absence of such notice may constitute a defense.

may be found by the trier of fact to be "obscene matter" simply from reviewing the material itself, without the assistance of expert evidence, may not be found to be "harmful matter" by the same test. That contention, in the abstract, may have merit. It may very well be so, with matter that does not descend to the level of obscenity, that some additional evidence may be necessary to demonstrate why it might satisfy the harmful to minors standard set out in Penal Code §313, subdivision (a). (See Ginsberg v. New York (1968) 390 U.S. 629 [88 S.Ct. 1274].) However, such is not the case here.

The ALJ made a specific determination (Determination of Issues II) that "depiction of oral copulation and other sexual acts depicted on the carton containers ... are within the legislative intent" for §313, subdivision (a). He properly rejected the argument that expert testimony was required, stating that "the depicted acts under consideration readily qualify as matter which the trier of fact can determine an average person would consider harmful to minors."

Investigator Mann's description of the various boxes introduced by Department counsel left little doubt that the materials in question were precisely what the statute intended to be placed in an area labeled "adults only."

Based upon investigator Mann's descriptions, it is apparent that, if not the recordings, certainly the cartons which contained them emphasized explicit sexual activity involving male and female genitalia, coupled with titles calculated to arouse a

sexual curiosity on the part of the viewer.

In Paris Adult Theater I, supra, the Supreme Court stated that the films alleged in that case to be obscene were the best evidence of what they represented. It added, in a footnote, that jurors did not need expert testimony in obscenity cases; "indeed, the 'expert witness' practices employed in these cases have often made a mockery out of the otherwise sound concept of expert testimony." (Paris Adult Theater I , supra, 413 U.S. at 56 [93 S.Ct. at 2634].)

Here, the ALJ as trier of the facts determined that the statutory standard had been met, and the evidence amply supports his determination. Consequently, given the ALJ's determination that the carton containers contained harmful matter, and the complete and undisputed absence of any "adults only" label or sign, the decision should be affirmed.

Although appellant has made no attack on the language of the accusation, this Board experienced some concern over possible misdirection of the charges in the accusation. Rather than charging the violation the absence of "adults only" labeling of the "area" created, the accusation charged that the video tapes and box containers containing the harmful matter were on display in an area "not segregated from that of the general public," in violation of the Penal Code provision.[4] Department counsel also

[4] Appellant did not challenge the accusation as failing to state a cause of action, and there is ample indication in the record that the absence of the "adults only" label or sign was a material element of the alleged violation. (See RT 29-30.)

placed the greatest emphasis at the administrative hearing on the fact that the tapes were in a non-segregated area in plain view of the public [RT 199-201].

This Board over the years has had reason to review cases concerning harmful matter in videos.[5] We have concluded after our reading of the accusation, the pertinent statute and the entire record, that it would be useful to again set forth our understanding of the statute, especially in view of the holdings in the Khong and Pak cases cited in the footnote. The Board's comments in those two cases addressed variances between the language of the statute and the language of the accusations upon which the Department's decisions were based.

In Khong (1995) AB-6472, the accusation charged that harmful materials were displayed "in an area not segregated from that of the general public." The Board's decision, although affirming the Department, referred to the Department investigator's "misconception" of the law concerning the placement of the objectionable material, as well as the ALJ's "false concept of what constitutes a violation under the statute," and pointed out that the material was "within a definite area and not dispersed within the premises." Pak was similar in nature, and the Board expressed its concerns once again.

While we may not pass upon the constitutionality of a statute [California Constitution, article 3, §3.5], we know of no impediment to our voicing our

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[5] Pak (1997) AB-6741; Fasheh (1996) AB-6576; Cho (1996) AB-6571; Khong (1995) AB-6472; Singh and Keith (1994) AB-6387.

interpretation of it. Ordinarily, it is inferred that each word, clause, or section of a statute was inserted by the framers for some useful purpose, with their interpretation seeking the sense and relationship of each word to each other word. (Pugh v. Sacramento (1981) 19 Cal.App.3d 485 [174 Cal.Rptr.119]; Miller v. Dunn (1887) 72 Cal. 589 [14 P. 27].) Each clause must be read as it relates to every other clause on the same subject. (H.D. Wallace & Assoc.,Inc. v. Department of Alcoholic Beverage Control (1969) 271 Cal.App.2d 589 [76 Cal.Rptr. 749]; Bakkenson v. Superior Court of Los Angeles County (1925) 197 Cal. 504 [241 P. 874].) Language of each clause must be read in context, with a view to the nature and purpose of the enactment, and interpretation must promote rather than defeat the object of the enactment. (Mutual Life Ins. Co. v. City of Los Angeles (1990) 50 Cal.3d 402 [267 Cal.Rptr. 589]; Massachusetts Mutual Life Ins. v. City and County of San Francisco (1982) 129 Cal.App.3d 876, 880 [1881 Cal.Rptr. 370].

The legislative history of subdivision (e) teaches that its purpose was to limit minors' access to adult films. Although accomplishment of that purpose and the language of the statute would require video retailers to create a section labeled "adults only," the statute does not provide a penalty for not placing videos in that section.[6]

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[6] Penal Code §313.1, subdivision (e), is a very peculiar statute. Except for subdivision (e), which is the focus of this appeal, the statute concerns distribution of harmful matter, as defined in Penal Code §313, subdivision (a). Thus, if appellant had rented or sold one of the videos to a minor, he could be punished by a fine of as much as $2,000 or sentenced to as long as one year in jail. In

It is apparent to us that the statute's subdivision (e), when written, did not have sellers of alcoholic beverages as its prime focus, but, more probably, focused businesses engaged primarily in the sale or rental of videotapes. In such a business, the creation of an "area" labeled "adults only" would, in effect, result in a de facto segregation of the tapes containing harmful matter. But the resulting segregation is a separation from those recordings not containing harmful matter, not necessarily a segregation from that area accessible to the general public. The resulting separation, if any, is a by-product of compliance with the statute, not its direct object. Where the business offers videotapes as a sideline, as in the present case, the confinement of the tapes to an "area" created within the store may not result in a de facto separation from other areas of the store.[7]

We are aware of no court ruling holding that the statute requires videotapes containing harmful matter be placed in an area segregated from that accessible to the general public, such as by curtains or doors. Nor do we read the language of the statute as requiring that result. It is our understanding that in its LEAD materials, which are advisory only, the Department recommends that such materials be

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contrast, a violation of §313.1, subdivision (e), exposes a violator to a fine of only $100.

[7] It may be noted that, at least in investigator Mann's opinion, the placement of the tapes in the shelves in question did result in their being segregated from the general public [RT 30].

segregated from areas accessible to minors. While we agree that such materials should be segregated, we are compelled to observe that the LEAD materials do not have the force of law.

CONCLUSION

Although we continue to have concerns about the lack of focus in the accusations instituted by the Department wherein violations of Penal Code §313.1, subdivision (e), are alleged, we are unable to find any indication that, in this case, appellant was unable to comprehend the charge and defend against it, and are of the view that the record supports the Department's decision. The decision of the Department is, therefore, affirmed.[8]

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

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[8] 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 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.