ISSUED JUNE 30, 1997

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

TIFFANY SUNNAN PAK dba Hi Ho Liquor Market 14914 Pacific Avenue Baldwin Park, CA 91705, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6741 File: 21-282859 Reg: 96035913 Administrative Law Judge at the Dept. Hearing: John A. Willd Date and Place of the Appeals Board Hearing: May 7, 1997 Los Angeles, CA

Tiffany Sunnan Pak, doing business as Hi Ho Liquor Market (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended her off-sale general license for 20 days with 10 days stayed for a probationary period of one year, for appellant allowing the sale of videos which contained "harmful matter" which were not labeled for "adults only" as required by law, 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, subdivisions (a) and (b), and Penal Code §313.1, subdivision (e).

[1]The decision of the Department dated October 24, 1996, is set forth in the appendix.

Appearances on appeal include appellant Tiffany Sunnan Pak, appearing through her counsel, Ralph Barat Saltsman; 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 August 23, 1993. Thereafter, the Department instituted an accusation alleging that videos were offered for sale in a manner contrary to the Penal Code. The accusation stated as follows:

"On or about January 11, 1996, respondent-licensee did, by and through licensee, Tiffany Sunnan Pak, sell or rent video recordings of harmful matter in an area of the licensed premises which was not labeled "adults only," in violation of Section 313.1 (e) of the California Penal Code."

An administrative hearing was held on August 26, 1996, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the videos, the area in which they were placed and the absence of signs which are required by law. Evidence showed that the videos, with the video jackets removed, had been placed in an area behind the sales counter to which apparently only appellant's personnel had access [RT 20, 21, 44, 51].

The videos were numbered so that if a customer selected a particular video jacket, the jacket so numbered could be matched to the video which had a corresponding number. The matching process was done for the Department's investigators by appellant's clerk upon the investigators seizing certain jackets [RT 8-10, 37, 44, 53].

The area in which the video jackets were placed was on shelving running the length of an aisle, with five tiers. The tiers were made of glass except for the bottom tier. The glass shelving was made of individual pieces, with each piece about three feet in length. The jackets were placed on all five tiers of one section (the approximately three-foot glass piece). Stacks of soft drinks were placed on the opposite side of the aisle facing the jackets [exhibit 1-A & RT 30].

The video jackets were placed on a separate glass shelf with adult magazines on one side (on a magazine style rack) and a display of cookies on the other side (not separated other than being on a separate glass shelf [RT 8 & exhibits 1-A, 1-B, & 1-C]. One video jacket was lying on a display of "Chips Ahoy" cookies, and another video jacket (on another tier) was lying behind the "Teenage Mutant Ninja Turtle" cookies [exhibits 1-B & 1-C].[2] The Administrative Law Judge (ALJ) found that the jackets displayed graphic scenes of explicit sexual conduct, as well as many depictions of adult genitalia [exhibits 1- D & 1-E, & Finding III, second paragraph].

Signs stating "adults only," according to appellant's clerk, had been placed on the area of the video jackets that day, but on checking either after or while the Department's investigators were present, the sign or signs were apparently lying on the top shelf [RT 44-45, 48]. Department investigator Eric Froeschner testified that he saw no signs [RT 9]. The Department investigators did not seize the pieces of

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[2]The two lone video jackets did not create a violation in our view, as the statute states: "The failure to place a video recording or advertisement, regardless of its content, in this area, shall not constitute an infraction ...."

paper (easily observed in exhibits 1A, 1E, and 1F) which were on the shelves of the video jacket display [RT 22, 24-25]. However, the ALJ "assumed" and found from the evidence, that the signs had been placed as testified to by appellant's clerk, and that at least one sign was lying on the top shelf [Finding III, seventh paragraph].

Subsequent to the hearing, the Department issued its decision which determined that appellant violated the law and suspended her license. Appellant thereafter filed a timely notice of appeal.

In her appeal, appellant raises the issue that the findings were not supported by substantial evidence, arguing that the video jackets were not advertisements of the contents of the videos, the videos which were offered for sale were not proven to contain harmful matter, and the videos and the videos jackets were placed (separately) in segregated areas with the video jacket area having a "adults only"sign as required by law.

DISCUSSION

Appellant contends that the findings were not supported by substantial evidence, arguing that the video jackets were not advertisements of the contents of the videos, the videos which were offered for sale were not proven to contain harmful matter, and the videos and the videos jackets were placed (separately) in segregated areas with the video jacket area having a sign as required by law.

Penal Code §313.1, subdivision (e), states:

"(e) 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 term "harmful matter" is defined by Penal Code §313 as:

"(a) 'Harmful matter' means 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."

A. Concerning the argument of whether the video jackets were advertisements, the ALJ's Finding III infers that the explicit video jackets were an advertisement of the videos, which were offered for sale. The video jackets were not by themselves of sufficient saleable value, considering the marked price. The videos, without the jackets depicting what may be expected to be viewed from the jacketless videos, would not be easily saleable. The videos needed the video jackets to make the enticement for a sale.[3]

With testimony that the video jackets and videos could be matched, and were numbered for that purposes, the video jackets and videos essentially became a completed product for sale [RT 8-10, 37, 44, 53]. Hence, the video jackets were an advertisement for the videos which could be easily matched, and which were stored across the aisle from the video jackets. Counsel for appellant conceded during oral argument that the video jackets were advertisements.

B. Concerning the argument that the videos were not proven to contain harmful matter, the video jackets depict open views of male and female genitalia,

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[3]Webster's Third New International Dictionary defines the word "advertisement" to mean "a calling attention to or making known ... a calling to public attention ...."

oral contact with such genitalia, scenes of mutual masturbation, as well as views of genitalia during sexual intercourse [exhibits 1-D and 1-E]. We view the graphic depictions as being harmful to minors and coming within the definition of "harmful matter."

We consider that appellant's procedure of being able to match the video jackets with a corresponding numbered video, to enable, realistically, the sale [RT 8-10, 37, 44, 49, 53], was a sufficient factor for the ALJ to reasonably find that the videos themselves contained harmful matter.

C. Concerning the argument that the videos were segregated and properly signed, there is no issue that the area needed to be segregated. The videos were in a separate area behind the sales counter. The video jackets were in another separate area between other commodities for sale. The investigator's opinion that the area needed to be "by itself" is not part of a lawful requirement as such interpretation is outside a reading of the statute [RT 26]. All the statute says is "create an area within ... [the] business establishment for the placement of video recordings of harmful matter ...."[4] This appellant did, in fact, by maintaining two such areas.

We consider that the statute, when written, did not have sellers of alcoholic beverages as its prime focus, but more probably, businesses engaged primarily in

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[4]Webster's Third New International Dictionary defines the word "area" as "a definitely bounded part or section of a building set aside for a specific use or purpose;" the word "bounded" as used in the above definition: "to set limits or bounds to, establish the bounds, to confine within limits;" and the word "create" as "to bring into existence."

the sale or rental of adult videos. 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 videos as a sideline, as in the present case, 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 being accessible to the general public and to minors.[5]

As to the placement of the required signs, the ALJ found that one sign had been written and was found on the top shelf.

The record shows that there was no sign posted on the videos, although one was certainly required. While simply looking at the videos would not show the contents, the videos and their jackets together became one unit for sale, which

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[5]If the legislative intent was to make a strong statement in condemnation of the improper placement of such videos, the penalty of "not to exceed $100.00" and designating the offense as a mere infraction, certainly does not lend itself to that concern. Contrary to Penal Code §313.1, subdivision (e), with its "$100.00 maximum penalty," a $2,000.00 fine or county jail time is mandated for a violation of §313.1 (all subdivisions except our subdivision (e)).

The Senate Committee on Public Safety recognized the applicability of the wording of the statute, as the committee's memorandum dated May 15, 1989, states: "It 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."

proved that the videos did contain harmful material and therefore should have had a sign.

The video jackets were an advertisement of what was available and should have had a sign. The argument is that the sign was lying on the top shelf. The statute says that the area must be "labeled 'adults only'." While the ALJ found that the sign was there, it was not seen by the investigators, and by logical inference, could not be seen by minors. It is the duty of appellant to put up the sign (which the ALJ found he did), but insure that the sign be in place at all times in such a manner as to be seen, as envisioned by the statute. The clerks' counter was across from the video jacket area, and the clerks' duty was to see that the area was properly labeled at all times [RT 8-9].

CONCLUSION

The decision of the Department is affirmed.[6]

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

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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.