

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

CHOM YE KIM and DUK HYUN KIM	)	AB-7146
dba Marina Del Rey Liquor Mart)	
753 West Washington Street	)	File: 21-234251
Venice, CA 90292,	)	Reg: 97040926
Appellants/Licensees,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Ronald M. Gruen
)	
DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	April 1, 1999
	)	Los Angeles, CA
)	

Chom Ye Kim and Duk Hyun Kim, doing business as Marina del Rey Liquor Mart (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 20 days, with 10 days stayed for a one-year probationary period, for selling or renting a video recording of harmful matter, or displaying material which advertised the sale or rental of said video recording, in an area of the licensed premises which was not labeled "adults only," actions found to be 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 §313.1, subdivision (e).

¹The decision of the Department, dated May 14, 1998, is set forth in the appendix.

Appearances on appeal include appellant Chom Ye Kim and Duk Hyun Kim, appearing through their counsel, Richard Ross, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon Logan.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on August 8, 1989.

Thereafter, the Department instituted a two-count accusation against appellants charging that, on or about May 9, 1997, they displayed harmful matter, as defined in Penal Code §313, in an area of the licensed premises readily visible or accessible to children (Count 1), and, on that same date, co-licensee Chom Ye Kim sold or rented video recordings of harmful matter, or displayed material which advertised the sale or rental of said video recordings, in an area of the licensed premises which was not labeled "adults only," in violation of Penal Code §313.1, subdivision (e) (Count 2).

An administrative hearing was held on March 31, 1998, at which time documentary evidence was received, and testimony was presented by Anthony Posata, an investigator for the Department, and by David Townsend, manager of the licensed premises, concerning the discovery of and circumstances preceding and following the alleged violation.

Posata testified that he observed several videos on the top shelf of a magazine display at the back of the store [RT 7, 8, 20]. The shelf was above Posata's eye level, over six feet from the ground [RT 12, 23, 24]. On the long, narrow side, or "spine," of one video sleeve was a picture of woman wearing a

“see-through top” [RT 8,24]. When Posata walked about a foot and a half beyond the display and turned his head back to look, he saw part of the back of the video sleeve with three small pictures showing a sexually explicit scene and a “topless” woman [RT 10,12,29,35]. Of the six videos on the shelf, only one displayed any sexually explicit pictures [RT 14,29-30]. There was no sign saying “Adults only” or “No one under 21 allowed” [RT 13,32].

Townsend testified that, until about a month before Posata came in and saw the video, appellants had never stocked, displayed, or sold videotapes of any kind [RT 39]. At that time, appellants allowed a vendor to leave eight or nine videotapes on consignment [RT 40-41]. The distributor did not tell Townsend or, as far as Townsend knew, the clerk who was present that they needed to create an “adults only” section for the videos [RT 44]. Townsend instructed the clerk to put the videos “on top of the shelves out of the way” because he “didn't want anyone to see” [RT 41].

Subsequent to the hearing, the Department issued its decision which determined that Count 1 had not been proven, but Count 2 had been proven.

Appellants thereafter filed a timely notice of appeal. In their appeal, appellants argue that appellants were not apprised of the requirements of Penal Code §313.1, subdivision (e), by the distributor of the videos in question, and knowledge of the requirements of that section is a necessary prerequisite to a finding of a violation of that statute.

DISCUSSION

Appellants contend that the failure of the video distributor to inform appellants of the requirements of Penal Code §313.1 is a defense to their failure to designate an area "adults only."

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

"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, punishable by a fine not to exceed one hundred dollars(\$100). The failure to place a video recording or advertisement, regardless of its content, in this area shall not constitute an infraction. Any person who sells or distributes video recordings of harmful matter to others for resale purposes shall inform the purchaser of the requirements of this section. This subdivision shall not apply to public libraries as defined in Section 18710 of the Education Code." (Emphasis added.)

Appellants contend that the underlined portion of the statute shown above must have been intended to provide a defense to a retailer without an "adults only" section for such videos if he or she were not notified about this statute by the distributor of the videos. They base this contention on the "entire statutory scheme" of §§313 - 313.4, which provides a number of exceptions and defenses applicable to particular situations.

One of the problems with this argument is that each of the exceptions and defenses mentioned by appellants with respect to "harmful matter" is specifically stated in one of the statutes and is specifically applicable to a particular violation. Although §313.1 imposes an affirmative duty on video distributors to inform

retailers, there is no corresponding statement of a penalty for distributors who fail to do so nor of a defense for retailers who are not informed as required. Neither the Department nor this Board is empowered to rewrite the statute to include such a penalty or defense. That is the duty of the legislature.

A more basic problem with appellant's contention is the general principle that ignorance of the law does not excuse a violation of the law. While there are situations in which this is not true, such as when a specific statute creates a specific exception, this has not been shown to be one of those situations.

Penal Code §313.1, subdivision (e), penalizes solely the "failure to create and label the area" as "adults only." A violation of subdivision (e) is treated as an infraction, punishable by a fine of not more than \$100. The sale, rental, or display of harmful matter is covered in other subdivisions of §313.1, and a violation of one of these subdivisions carries a penalty of a fine of not more than \$2000, or imprisonment for not more than one year, or both the fine and imprisonment.

In the context of the facts of this case, we are concerned with the relative harshness of the penalty. Appellants did not have an area labeled "adults only" and there is no question that subdivision (e) was violated. However, this violation was in connection with one video on a shelf more than six feet high, with only the spine and a small portion of the back of the video jacket showing. We compare this with Pak (1997) AB-6741, where video jackets depicting graphic sexual acts and adult genitalia were located on shelves next to a display of "Teenage Mutant Ninja Turtle" cookies. The penalty imposed in Pak was the same as in this matter, 20

days' suspension with 10 days stayed for a probationary period of one year. The difference in the egregiousness of these violations does not appear to be reflected in any difference in penalty. Applying "standard" penalties in radically different factual situations can be seen as a failure to exercise, and an abuse of, the Department's discretion. Therefore, we will remand this matter to the Department so that it may reconsider this penalty in light of the particular facts of this case.

ORDER

The decision of the Department is affirmed and the matter is remanded to the Department for reconsideration of the penalty.²

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

²This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this order as provided by §23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code §23090 et seq.