ISSUED MARCH 31, 1999

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

BAHIJ SHAHLY dba Corbin Liquor 19661 Ventura Boulevard Tarzana, CA 91356, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7147 File: 21-225737 Reg: 97041569 Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen Date and Place of the Appeals Board Hearing: February 3, 1999 Los Angeles, CA

Bahij Shahly, doing business as Corbin Liquor (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended his off-sale general license for 20 days with 10 days stayed for a probationary period of one year, for permitting the placement of video recordings without the required sign as provided by law, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, and Business and Professions Code §24200, subdivision (a), arising from a violation of Penal Code §313.1, subdivision (e).

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[1]The decision of the Department, dated May 21, 1998, is set forth in the appendix.

Appearances on appeal include appellant Bahij Shahly, appearing through his counsel, Jeffrey S. Weiss, and the Department of Alcoholic Beverage Control, appearing through its counsel, David M. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on February 8, 1989. Thereafter, the Department instituted an accusation against appellant charging two counts: count 1 alleged that the display of harmful matter was readily visible or accessible to children, and count 2 alleged that the display of video recordings containing harmful matter did not have the required sign.

An administrative hearing was held on March 9, 1998, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that count 1 had not been properly established, but that count 2 was sufficiently proven.

Appellant thereafter filed a timely notice of appeal. In his appeal, appellant raises the issue that appellant substantially conformed to the requirements of the law, and that any technical violation would not be contrary to public welfare or morals.

DISCUSSION

Appellant contends that there was substantial conformity to the requirements of the law, and that any technical violation would not be contrary to public welfare or morals.

A. The Sign Requirement

The Appeals Board has considered Penal Code §313.3, subdivision (e), many times in prior decisions, and has consistently held that the absence of a sign entitled

"adults only" as required by the statute is a violation.[2] We see no valid reason to retreat from our previous position.

The magazine rack was placed in a back portion of the premises in an area where persons under 18 years would not normally need to be -- between a walk-in cooler for alcoholic beverages and a wine shelf [RT 41-42, and Exhibit 1]. The magazine rack contains the videos in question, magazines such as Hustler, Penthouse, Playboy, and other similar type magazines, along with Time, Cosmopolitan, Life, and People, and other similar type magazines [Exhibit 2-A and 2-B].

Appellant argues that there was a sign reading "no one under 21 allowed," and such sign was posted above the rack containing the videos. James Biscailuz, a Department investigator, testified that there was no sign that stated "adults only" [RT 9, 16]. Jack Shahly, the son of appellant, testified that there was a sign reading "No Person Allowed Under 21" [RT 42, 52].

The Department's decision acknowledged that there may have been the sign as argued by the son of appellant, but whether there was a sign as argued does not answer the demands of the statute, as we view the law. However, 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. (Kirby v. Alcoholic Beverage Control Appeals Board (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857] (a case where the positions of both the Department and the license-applicant were supported by substantial evidence); Kruse v. Bank of

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[2] *Khong (1995) AB-6472; Cho (1996) AB-6571; Fasheh (1996) AB-6576; Singh (1997) AB-6640; Zip In Liquor, Inc. (1997) AB-6680; Pak (1997) AB-6741 -- contains discussion of the meaning of harmful matter; Lee (1998) AB-6832; and Shin (1998) AB-6838. See also Singh (1997) AB-6738, for an analysis as to what constitutes harmful matter, and the absence of the legal requirement to keep such materials away from the general public.*

America (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 271]; Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control (1968) 261 Cal.App.2d 181 [67 Cal.Rptr. 734, 737]; and Gore v. Harris (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

In this matter, such conflicts of evidence are of no import. Appellant did not have the statute-required sign posted: "adults only." Whether the area was situated in a rear portion of the premises, not accessible to persons under 18 years, is irrelevant. The statute demands the sign. No sign in conformity to the statute was present. There was a violation.

B. Welfare or Morals

Appellant also argues as follows:

> "Appellant contends that his display of the videos for sale on a magazine rack which was not accessible to minors and which hid most the videos' covers was not against public morals, and that even if he did technically violate Penal Code Section 313.1(e), such a violation is a mere infraction, nothing more than a parking ticket, and is not contrary to public welfare or morals...."

The ability of minors to view the videos by mere glancing, is not the issue, as specific placement of the videos is not controlled by the statute, only that the videos be placed in a designated area, with the required sign.

In the Appeals Board case of Pak, supra, the Board acknowledged the weakness of the statute under consideration in that case, in a footnote, by stating:

> "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.'"

Our views in the Pak case apply equally to the present case.

Therefore, appellant's argument as to placement must fail. Appellant's argument that even if a violation occurred, such violation is only an infraction of the law (like a traffic ticket), and not contrary to public welfare or morals, also must fail.

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 address 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 present case, as the premises in the present appeal is a liquor store where minors are also allowed. The Boreta court at 2 Cal.3d 99, addressed the question as to what is public welfare (or morals), and stated:

> "It seems apparent that the 'public welfare' is not a single, platonic archetypal idea, as it were, but a construct of political philosophy embracing a wide range of goals including the enhancement of majority interest in safety, health, education, the economy, and the political process, to name but a few. In order intelligently to conclude that a course of conduct is 'contrary to the public welfare' its effects must be canvassed, considered and evaluated as being harmful or undesirable...."

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 then 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."

With the guide as stated by the Boreta court that the morals of the community are the foundation for consideration, then with that foundation, review of the effects must be considered as to the acts alleged or present, to determine if such are "harmful or undesirable." The video jackets depicted scenes of graphic male and female sexual conduct, such as, cunnilingus, oral sex (fellatio), actual acts of sexual intercourse, and the display of male and female genitals in explicit form [RT 37, and Exhibits 2-a and 2-B].

Penal Code §313 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.

Considering the definition in Penal Code §313, the videos in question, and the views of the Boreta court, the placement without the required sign appears to us to be more than a "traffic ticket" proceeding as argued by appellant, but conduct contrary to public welfare or morals.

ORDER

The decision of the Department is affirmed.[3]

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[3] *This 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

TED HUNT, CHAIRMAN
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JOHN B. TSU, MEMBER
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a writ of review of this final order in accordance with Business and Professions Code §23090 et seq.