

ISSUED SEPTEMBER 26, 1997

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

KAP SOON and PYONG JAE CHO	)	AB-6571a
dba Lomita Liquor)	
2022 Pacific Coast Highway	)	File: 21-217867
Lomita, CA 90717,	)	Reg.: 95032048
Appellants/Licensees,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Marguerite C. Geftakys
DEPARTMENT OF ALCOHOLIC)	
BEVERAGE CONTROL,	)	Date and Place of the
Respondent.	)	Appeals Board Hearing:
	)	August 6, 1997
	)	Los Angeles, CA
)	
)	

Kap Soon and Pyong Jae Cho, doing business as Lomita Liquor (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which ordered their on-sale general license suspended for 25 days, with 10 days thereof stayed for a probationary period of one year. The Department's decision was entered following a decision of the Alcohol Beverage Control Appeals Board which had reversed the penalty portion of a previous Department decision which had found a violation by appellants of

¹ A copy of the Department's Decision Following Appeals Board Decision, dated December 26, 1996, is set forth in the appendix.

Penal Code §313.1, subdivision (e) (involving videos containing harmful matter).

Appearances on appeal include appellants Kap Soon and Pyong Jae Cho, appearing through their counsel, Ralph Barat Saltsman; and the Department of Alcoholic Beverage Control, appearing through its chief counsel, Kenton P, Byers.

FACTS AND PROCEDURAL HISTORY

This is the second appeal in this matter.

In a decision dated September 7, 1995, the Department found that appellants had violated Penal Code §313.1, subdivision (e), by failing to create a separate area labeled "adults only" for video tapes containing "harmful matter," and imposed a suspension of 35 days, with 10 days stayed. In its decision dated November 8, 1996, the Appeals Board affirmed the Department's decision, but referred the penalty and remanded the matter to the Department for reconsideration of the penalty.

On remand, the Department imposed a 25-day suspension, with 10 days stayed for a probationary period of one year, the penalty it had initially recommended at the close of the administrative hearing. Appellants now contend the Department again abused its discretion by failing to take into account mitigating factors set forth in the original decision of the Department.

DISCUSSION

The record from the prior appeal reveals that 219 adult videos were seized. They had been displayed on three shelves located approximately 30 inches from, and at

right angles to, a segregated display of adult magazines bearing an “adults only” sign. The shelves containing the videos were not so marked.

The Administrative Law Judge found the penal statute violated, but, for reasons not explained, departed from the penalty recommended by the Department (25-day suspension, with 10 days stayed). The proposed decision, which the Department adopted, imposed, instead, a 35-day suspension, with 10 days stayed.

The Appeals Board concluded the Department had abused its discretion when it ordered a suspension in excess of that recommended by Department counsel at the administrative hearing, where neither it nor the ALJ gave any explanation for the imposition of a penalty greater than originally recommended by the Department.

Appellants now challenge the Department’s imposition of the revised penalty (the penalty initially recommended at the close of the administrative hearing) as an abuse of discretion for failing to take into account mitigating factors set forth in the record. According to appellants, these include appellants’ unblemished record prior to this incident, the location of the videos adjacent to a magazine display marked by an “adults only” sign, the posting of signs immediately following the date of the violation, and the violation being a technical violation of a technical statute.

The decision on remand recites, among other things, that the Department reviewed the entire record, including the decision of the Appeals Board, but contains no explanation of the Department’s reasoning process, nor does it refer to any consideration of mitigating factors. It is this Board’s view that, in the circumstances of

this case, it was unnecessary for the Department to do so. The so-called mitigating factors were either reflected in the Department's original penalty recommendations at the close of the administrative hearing, or are not properly mitigating factors.

Appellant's previous track record (the absence of prior discipline since the time the license was issued) was set forth in the accusation, and referred to in the course of the administrative hearing. We must assume the Department was aware of it, and gave it appropriate consideration in forming its initial recommendation.

The proximity of the video shelves to the magazine display is not a proper mitigating factor. The ALJ specifically found that since the magazine display was marked by a sign and the video display was not, an inference could be drawn that the video display was available for perusal by minors. If anything, this could have been considered a matter of aggravation, although not so denominated.

It could be argued that the posting of the signs following notice of the violation reflects rehabilitation rather than mitigation. In any event, counsel's remarks accompanying the Department's initial penalty recommendation expressly took into account the posting of the signs.

We cannot agree with appellants' contention that all that was involved was a technical violation of a technical statute. It is not at all clear how the requirement that a sign be posted is to be considered technical. It can be argued that §313.1, subdivision (e), is without teeth, is an anomaly when compared to the other subdivisions of the section, or suffers from other deficiencies, but technical does not

come to mind.

Appellants correctly cite Joseph's of California v. Alcoholic Beverage Control Board (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183] in support of their contention that the Board may consider whether a penalty is excessive. The case itself, however, is of no assistance to appellants' claim that their clean record is enough to warrant less than what this Board has observed is the standard, or, at least, most frequently assessed, penalty for harmful matter violations. Joseph's of California was a case where a part-time student employee of a licensee with a 15-year history free of misconduct mistakenly gave a Department investigator a 50-cent discount on a case of wine. The Appeals Board and the court agreed a suspension was not warranted.

While there may be cases or circumstances where the Department's recitation that it has considered the entire record leaves questions unanswered, we do not think this is such a case.

CONCLUSION

The decision of the Department is affirmed.²

BEN DAVIDIAN, CHAIRMAN
RAY T. BLAIR, JR., MEMBER

² 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.

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JOHN B. TSU, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD