

ISSUED JUNE 24, 1996

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

NADER I. & WILLIAM I. FASHEH	)	AB-6576
dba The Bottle Shop)	
2085-87 Torrance Boulevard	)	File: 21-122179
Torrance, CA 90501,	)	Reg: 95032023
Appellant/Licensee)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Frank Britt
THE DEPARTMENT OF ALCOHOLIC)	
BEVERAGE CONTROL,	)	Date and Place of the
Respondent.	)	Appeals Board Hearing:
	)	May 1, 1996
	)	Los Angeles, CA

Nader I. and William I. Fasheh, doing business as The Bottle Shop (appellants), appealed from a decision of the Department of Alcoholic Beverage Control¹ which suspended appellants' off-sale general license for 15 days, with 5 days stayed for a probationary period of one year, for offering for sale videos of harmful matter not placed in an area labeled "adults only," being contrary to the universal and generic public welfare and morals provisions of the California Constitution, Article XX, §22, and in violation of subdivision (e) of Penal Code §313.1.

¹The decision of the department dated September 21, 1995, is set forth in the appendix.

Appearances on appeal included appellant Nader I. Fasheh and William I. Fasheh, appearing through their counsel, Gregory J. Pedrick; and the Department of Alcoholic Beverage Control, appearing through its counsel, David B. Wainstein.

FACTS AND PROCEDURAL HISTORY

Appellants' license was issued April 7, 1982. Thereafter, the department instituted an accusation on February 27, 1995, against appellants alleging that they offered for sale videos of harmful matter and not labeled "adults only," as provided by Penal Code §313.1.

An administrative hearing was held on July 11, 1995, at which time oral and documentary evidence was received. Subsequent to the hearing, the department issued its decision, which suspended appellants' off-sale general license for 15 days, with 5 days stayed for a probationary period of one year.

In their appeal, appellants raised the following issues: (1) appellants did not permit the alleged occurrence, and (2) the penalty was excessive.

DISCUSSION

I

Appellants contended that they did not permit the alleged occurrence.

The rule is well settled in Alcoholic Beverage Control Act case law that the illegal acts of an employee are imputed to his or her licensee-employer. Mack v. Department of Alcoholic Beverage Control (1960) 178 Cal.App.2d 149, 2 Cal.Rptr. 629, 633; Harris v. Alcoholic Beverage Control Appeals Board (1962) 197 Cal.App.2d 172, 17 Cal.Rptr. 315, 320; Morrel v. Department of Alcoholic Beverage Control (1962) 204 Cal.App.2d 504, 22 Cal.Rptr. 405, 411; Endo v. State Board of Equalization (1956) 143 Cal.App.2d 395, 300 P.2d 366, 370-371.

Subdivision (e) of Penal Code §313.1 provides that any person who sells or rents videos of harmful matter shall create an area within his or her business for the placement of video recordings of harmful matter that shall be labelled "adults only." The term "harmful matter" is defined in subdivision (a) of Penal Code §313 to be "matter ...[that] depicts or describes in a patently offensive way sexual conduct...."

The record on appeal shows that on December 14, 1994, Department Investigator Parszik noticed a display of sexually-explicit video tapes next to a comic book stand located on appellants' premises (RT 8:1-7; 9:12-11:1). Neither the videos nor the area in which they were displayed were labeled as "adults only" (RT 11: 2-22). Jeffrey Linkous was working in the premises at that time, and told Parszik that the videos were not for rent, but were for sale only (RT 12: 4-16). Significantly, Torrance Police Officer Tanouye testified that he had been in the premises a few months prior to Parszik's visit in response to complaints that sexually-explicit videos were openly displayed in violation of an undisclosed Municipal Code provision (RT 18: 10-16) and that he could not recall any "adults only" sign displayed at that time (RT 18:20-23).

Appellants argued that the case of Laube v. Stroh (1992) 2 Cal.App.4th 364, 3 Cal.Rptr.2d 779 applied. Laube actually consisted of two cases--Laube and De Lena--both of which involved "up-scale" restaurants/bars--consolidated for decision by the Court of Appeal. The Laube portion dealt with surreptitious contraband transactions between patrons and undercover agents--a type of patron activity concerning which the licensee had no indication and therefore no actual or constructive knowledge. Appellants' case is dissimilar inasmuch as the conduct at issue is that of one of the appellants' employees, Jeffrey Linkous, not a patron, and a type of activity of which the appellants can be imputed

to have had actual, if not constructive, knowledge. Laube does not apply in the present matter.

Nor is the De Lena portion of Laube helpful to appellants' contention. The De Lena portion of the Laube case speaks to employee misconduct. The De Lena portion dealt with an off-duty employee who, on four occasions, sold contraband on the licensed premises, and the court ruled that the absence of preventative steps was not dispositive but the licensee's penalty should be based solely on the imputation to the employer of the off-duty employee's illegal acts.

II

Appellants contended that the penalty imposed is excessive and unfounded.

The appeals board will not disturb the department's penalty orders in the absence of an abuse of the department's discretion (Martin v. Alcoholic Beverage Control Appeals Board & Haley (1959) 52 Cal.2d 287, 341 P.2d 296). However, where an appellant raises the issue of an excessive penalty, the appeals board will examine that issue (Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board (1971) 19 Cal.App.3d 785, 97 Cal.Rptr. 183).

The department had the following factors to consider: (1) the violation was not an isolated incident, as Torrance Police Officer Tanouye testified that he had been in the premises a few months prior to Parszik's visit in response to complaints that sexually-explicit videos were openly displayed in violation of a Municipal Code provision, and that he could not recall any "adults only" sign displayed at that time;

(2) the videos were displayed close to a rack containing comic books of interest to children;

(3) co-appellant Nader Fasher acknowledged that the required sign was not displayed; and

(4) during the times that the videos were not properly labeled, the premises was open and

an employee was on duty. Considering such factors, any dilemma as to the appropriateness of the penalty must be left to the discretion of the department. The department having exercised its discretion reasonably, the appeals board will not disturb the penalty.

CONCLUSION

The decision of the department is affirmed.²

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

²This final order is filed as provided by Business and Professions Code §23088, and shall become effective 30 days following the date of this filing of the final order as provided by §23090.7 of said statute for the purposes of any review pursuant to §23090 of said statute.