ISSUED MARCH 27, 1998

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

CHON SUN LEE dba Crossroads Liquor 921 S. San Gabriel Blvd. San Gabriel, CA 91776, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	))))))))))))	AB-6832 File: 21-177002 Reg: 96037112 Administrative Law Judge at the Dept. Hearing: Sonny Lo Date and Place of the Appeals Board Hearing: November 5, 1997 Los Angeles, CA

Chon Sun Lee, doing business as Crossroads Liquor (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended his off-sale general license for 25 days with 10 days stayed for a two-year probationary period, for permitting the placement of videos containing harmful matter without the required "adults only" sign, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article

[1]The decision of the Department, dated March 6, 1997, is set forth in the appendix.

XX, §22, arising from a violation of Business and Professions Code §24200, subdivision (a), and Penal Code §313.1, subdivision (e).

Appearances on appeal include appellant Chon Sun Lee, appearing through his counsel, Ralph Barat Saltsman, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on October 15, 1985. Thereafter, the Department instituted an accusation against appellant charging the above enumerated statute violations.

An administrative hearing was held on January 21, 1997, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the violations. Subsequent to the hearing, the Department issued its decision which determined that the allegations of the accusation were true.

Appellant thereafter filed a timely notice of appeal. In his appeal, appellant raises the issue that the finding that Penal Code §313.1, subdivision (2), was violated was not supported by substantial evidence and the findings do not support the determination of issues.

DISCUSSION

Appellant contends the findings are not supported by substantial evidence and the determinations are not supported by the findings. Appellant's argument is that, while the advertising jackets may contain harmful matter, there was no

evidence that the recordings inside the jackets contained harmful matter, and the determinations do not conclude that the recordings contained harmful matter.

As to the latter argument, Determination of Issues III, last sentence, states the recordings contained harmful matter. Therefore, the only issue is whether the recordings were proven to contain harmful matter.

The accusation states:

> "On or about April 21, 1996, respondent-licensee(s) [appellant] did 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(3)[2] of the California Penal Code."

Penal Code §313.1, subdivision (e), states in pertinent part:

> "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.'"

A Department investigator testified that he observed videos which, on their jackets, depicted scenes of intimate sexual conduct [Exhibits 3 and 4]. The area where the videos were placed did not have a sign entitled "adults only" as required by law [RT 9-10].

Appellant, later in the investigation, stated to the investigator that the videos were for sale, and that a training program had been completed by appellant who knew that the sign was required, but had not gotten around to placing the sign [RT

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[2]The number "3" was erroneously inserted instead of (e). We determine that appellant was not prejudiced by this apparent clerical error, and appellant did not raise this error as an issue.

11, 18-19]. The record shows that following the violation, appellant pled guilty to a violation of Penal Code §313.1, subdivision (e), in the Alhambra Municipal Court for the County of Los Angeles [Exhibit 5].

The record also shows that the investigator had not viewed the contents of the videos [RT 17].

The Appeals Board has considered these same issues in Pak (1997) AB-6741, and we believe our reasoning there applies to the present appeal. In that case, the Appeals Board went into considerable detail concerning videos and their jackets and concluded that a reasonable inference could be made where there is no question that the jackets and the videos are as one. In the Pak case, we determined that the jackets were advertisement of the contents of the recordings placed inside the jackets.

CONCLUSION

We view the pleadings in this matter only marginally sufficient, but not within the clarity requirements of Government Code §11503. The intent of that statute is to insure a licensee is reasonably informed of the charges and that at the time of a hearing, is not surprised due to inadequate wording which could hide some of the issues from the untrained and unsophisticated eye.

Additionally, and more onerous, is the lack of sufficient proof of the contents of the videos, that seems, in past cases, to have become the norm. The Department's and the Appeals Board's time is spent over such issues that should never be able to be raised, with a clogging of calendars where adequate

investigation and hearing presentations could foreclose this unnecessary waste of time. We refer to the apparent standard practice of submitting photographs of the videos seized in lieu of the actual videos with their jackets, and the complete lack of testimony as to the contents of the videos. The Administrative Law Judge must in those cases, and in this case in particular, rest the entire case on an assumption, called in this case a presumption (on very thin grounds), that the videos indeed contained harmful matter. But for the evidence in the record of the admission of culpability by appellant in the Municipal Court, and the admission by appellant that he knew the videos needed the required sign, the outcome may have been different.

The decision of the Department of Alcoholic Beverage Control is affirmed.[3]

BEN DAVIDIAN, CHAIRMAN
JOHN B. TSU, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD[4]

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[3]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.

[4]Ray T. Blair, Jr., Member, did not participate in the oral argument or decision in this matter.