

ISSUED JUNE 3, 1997

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

NUMBER ONE LIQUOR MART, INC.	)	AB-6719
dba Number One Liquor Mart	)	
1520 Aviation Boulevard	)	File: 21-298864
Redondo Beach, CA 90278,	)	Reg. 96035041
Appellant, Licensee,	)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing
	)	Sonny Lo
DEPARTMENT OF ALCOHOLIC	)	
BEVERAGE CONTROL,	)	Date and Place of the
Respondent.	)	Appeals Board Hearing
	)	April 2, 1997
	)	Los Angeles, CA
	)	

Number One Liquor Mart, Inc., doing business as Number One Liquor Mart (appellant), appeals from a decision of the Department of Alcoholic Beverage Control<sup>1</sup> which ordered appellant's off-sale general license suspended for five days, provided that it accepts, within 20 days of the effective date of the decision, a condition on its license prohibiting the sale of video tapes containing harmful matter; if the condition is not accepted, the license is to be suspended for 25 days,

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<sup>1</sup> The decision of the Department dated August 15, 1996, is set forth in the appendix.

with the suspension of 10 days thereof stayed for a probationary period of one year, for having displayed adult video tapes in an area not marked "adults only," being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Penal Code §313.1, subdivision (e).<sup>2</sup>

Appearances on appeal include appellant Number One Liquor Mart, Inc., appearing through its counsel, Richard A. Decker; and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

#### FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued in October 1994. Thereafter, the Department instituted an accusation alleging that appellant offered boxed adult video tapes for sale in an area not marked "adults only," a violation of Penal Code §313, subdivision (e). The tapes were visible to the general public, including children, with one of the tapes shelved in a manner so that the front of the box showing a man and a woman engaged in an explicit sexual act was plainly visible.

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<sup>2</sup> Section 313.1, subdivision (e), requires any person who sells or rents video tapes of "harmful matter" to create an area for their placement and label that area "adults only." "Harmful matter" is defined in Penal Code §313, subdivision (a), 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."

An administrative hearing was held on July 23, 1996, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning appellant's store display of adult video tapes and the circumstances relating to the open display of the particular tape container exhibiting the explicit sexual act.

Subsequent to the hearing, the Department issued its decision which determined that appellant had violated the penal code provision as charged in the accusation, and ordered the suspension of appellant's license as described above. Appellant thereafter filed a timely notice of appeal.

In its appeal, appellant raises a number of issues. It argues: (1) Business and Professions Code §24200, subdivision (b), does not apply; (2) insufficient evidence was presented to show that continuation of the license would be contrary to public welfare and morals; (3) the Department has failed to provide specific guidelines for licensees to comply with Penal Code §313, subdivision (a); (4) the Department has failed to warn licensees of the severity of a first-time violation of the Penal Code provision; (5) the Department has imposed strict liability; (6) the penalty imposed is an abuse of discretion; (7) the Administrative Law Judge (ALJ) "chilled" appellant's right to appeal by affording it only 20 days to consider the options offered; (8) the order is ambiguous as to its scope and duration; (9) the ALJ improperly excluded financial data relevant to the issue of penalty; (10) the probationary period grants

the Department “enormous ‘above the law’” powers; and (11) the ALJ, as an employee of the Department, is not a neutral and detached magistrate.

Certain of these issues are interrelated, and will be addressed collectively, with the specific issues being addressed identified by way of footnote. For example, issues 1,2,3 and 5 all in one aspect or another address the question whether appellant engaged in conduct that warrants license suspension.

## DISCUSSION

### I

Appellant contends that a violation of Penal Code §313.1, subdivision (e), may not be grounds for discipline under Business and Professions Code §24200, subdivision (b), since that provision only applies to alcohol-related offenses. Appellant also contends that license suspension is not warranted under the welfare and morals provision of the constitution unless the conduct (the display of the tapes) was intentional or grossly negligent.<sup>3</sup> Appellant states that since it is possible the specific tape with the objectionable material displayed on its container which was left in plain view of the general public could have been left that way by a disgruntled employee, a careless customer, or even an unethical competitor [see RT 16-17; App.Br., pp. 8, 12-13], appellant should not be held responsible.

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<sup>3</sup> Issues 1, 2, 3 and 5.

Appellant relies on McFaddin San Diego 1130, Inc. v. Stroh (1989) 208 Cal.App.3d 1384 [257 Cal.Rptr. 8], which held that a licensee could not be held responsible for drug sales on the premises where there was no proof that the licensee or its employees could have known of the drug transactions. The McFaddin case is readily distinguishable.

In the instant case, the licensee's owner personally decided upon the place in the store where the adult videos were to be displayed [RT 36]. A Department investigator testified that the video tape display was in plain view "immediately by the entrance to the store" [RT 11], and the photographs introduced as exhibits [Exhibits 5 and 6) appear to bear this out. The photos also depict the conspicuous absence of any sign warning the general public that the tapes on display were intended for adults only.<sup>4</sup> There is only speculation as to how the specific video tape came to be turned so that the explicit nature of its subject matter was exposed. The clerk on duty on the day in question did not testify.

The violation of §313.1, subdivision (e), was clearly proven. None of the issues raised by appellant refute the clear evidence of the violation. Appellant has devoted much unnecessary attention to the question of how the specific tape in question came to be displayed in the manner it was. The violation in question was

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<sup>4</sup> Exhibits A and B, photographs offered by appellant, show the display after the required signs were posted [RT 32-33].

the failure to post an "adults only" sign. The added visibility of one of the boxed tapes would simply be an item of evidence, and should not be the focus of attention on the issue of this violation. It is clear that appellant's duty to comply with Penal Code §313.1, subdivision (e), arose once he elected to offer the tapes for sale. Speculation seeking to shift the blame for the wayward tape to a customer, competitor or unhappy employee proves nothing with respect to the underlying violation.

Appellant also complains that the Department has not issued guidelines for vendors of videotapes containing harmful matter. The absence of any Department guidelines regarding video tapes containing harmful matter, even if true, is no excuse for a failure to obey the law. The statute itself is clear in its mandate that an "adults only" sign be displayed.

Appellant challenges the ALJ's determination that cause for suspension was established under §24200, subdivision (b). Even if the ALJ's conclusion was erroneous, which the Board need not decide, it would not require a different result. The ALJ also found discipline warranted under the constitutional provisions regulating the sale of alcoholic beverages, as well as under §24200, subdivision (a). We agree with the Department's position that a violation of Penal Code §313.1, subdivision (e) is clearly within the scope of those constitutional and statutory provisions affecting the public welfare and morals.

## II

Appellant attacks the penalty order on several fronts.<sup>5</sup> It contends the Department failed to warn appellant and other licensees of the “severe sanctions” attached to violations of the penal code provision; the penalty fails to differentiate between different degrees of culpability; the time afforded appellant to assess the options offered in the Department’s order is inadequate; and the ALJ improperly excluded evidence of “household income” that would have illustrated the severity of the 15-day suspension.<sup>6</sup>

Collectively, appellant’s complaints about the order amount to a contention that the Department abused its discretion.

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].)

Appellant claims that licensees are not put on notice regarding the penalties

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<sup>5</sup> Issues 4,6,7,9 and 10.

<sup>6</sup> The reference to the 15-day suspension is to the net suspension if appellant declines the option to discontinue the sale of adult video tapes.

which may be imposed for violations of Penal Code §313.1, subdivision (e). However, the Department cites the range of suggested penalties in its procedures manual, and states that penalties actually imposed may or may not coincide with what is stated in the manual, since every case turns on its own facts and circumstances. We know of no requirement that a licensee be told in advance what the precise penalty will be for a hypothetical violation. Where a penalty so exceeds the norm for a particular violation as to amount to an abuse of discretion, this Board has never hesitated to strike it down. We do not consider the penalty in this case to fall within that category.

Appellant's concerns that the time period given it to assess its options with regard to abandoning the sale of adult videos was too short are misplaced. The time for the election does not begin to run until the effective date of the decision, which will not be until the Board's decision on this appeal is final. (Bus. & Prof. Code §23082.)

Appellant's contention that the Department does not recognize different degrees of culpability is belied by the very order entered in this proceeding. Moreover, appellant's attack on the penalty is premised on its erroneous assumption that the penalty was for the single misplaced video tape, rather than for the non-compliance with the penal code sign requirement. (See App.Br., pp. 6-7.)

The contention that financial data was improperly excluded (evidence of the



amount of household income generated by the premises for appellant's owner) rests on the premise that the Department, in determining an appropriate penalty, must look to the financial conditions of the shareholder or shareholders of the licensee, rather than the licensee itself. It seems clear that such a rule would entangle the Department and its licensees in interminable and distracting discovery and accounting issues, and generally weaken the enforcement of the alcoholic beverage laws by diverting the Department's energies away from essential activities.

Appellant has not cited any authority for its contention the \$100 fine set by the legislature for a violation of the penal code provision imposes a limitation on any discipline the Department may impose, nor are we aware of any. We are inclined to think that the regulation of the sale of alcoholic beverages must, of necessity, take into consideration a number of factors as to proper discipline which may not be relevant in a criminal prosecution of a business not engaged in the sale of alcohol. The sign requirement is a general mandate to all businesses, not merely those in the business of selling alcoholic beverages.

This Board sees nothing in the penalty aspect of the Department's order that can be characterized as an abuse of discretion. Indeed, the Department was generous in offering the trade-off of tapes vs. suspension. Appellant's counsel

expressly urged the ALJ to consider such an option [see RT 54-58].<sup>7</sup> Nor do we think it an infringement of appellant's First Amendment rights, since he is free to reject the option offered, a penalty more lenient than what is said to be the Department's standard penalty for such an offense.

The Department had a number of factors to consider, the most obvious being the fact that the violation was clear, in that no sign was posted. Additionally, the tape containers were displayed in such a manner as to be readily accessible to children. Considering such factors, the appropriateness of the penalty should be left to the discretion of the Department. We do not find the penalty excessive.

### III

Appellant attacks the fact that the ALJ is an employee of the Department, contending that it is entitled to a "neutral and detached" magistrate.<sup>8</sup> Appellant has made no specific contention that the ALJ displayed any bias or prejudice toward it or in favor of the Department.

This argument is, in effect, a challenge to the constitutionality of Business and Professions Code §24210, which authorizes the Department to employ administrative law judges to conduct administrative hearings involving claims by the

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<sup>7</sup> If the ALJ erred, which we do not suggest, the error was invited. (See 9 Witkin, California Procedure, Appeal, §301-303, pp.311-315.)

<sup>8</sup> Issue 11.

Department of violations of the alcoholic beverage laws.

This Board, by reason of article 3, §3.5, of the California Constitution, lacks jurisdiction to hold a statute unconstitutional. We therefore decline to address this issue.

#### CONCLUSION

The decision of the Department is affirmed.<sup>9</sup>

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

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<sup>9</sup> 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.