

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE CITY OF ST. PAUL

In the Matter of All Licenses Held by Jill Rasmuson,
d/b/a R & R Books for the Premises Located at 674
University Avenue West in Saint Paul

FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION

License ID No. 32901

The above-entitled matter came on for hearing before Administrative Law Judge Barbara L. Neilson on June 9, 1998, at 9:30 a.m. in Room 42 of the Saint Paul City Hall. Virginia D. Palmer, Assistant City Attorney, 400 City Hall, 15 West Kellogg Boulevard, St. Paul, Minnesota 55102, appeared on behalf of the Office of License, Inspections and Environmental Protection of the City of Saint Paul ("the City"). David Gronbeck, Attorney at Law, Gronbeck Law Office, Suite 1710, One Financial Plaza, Minneapolis, Minnesota 55402, appeared on behalf of the Licensee, Jill Rasmuson, d/b/a R & R Books. The record in this matter closed at the conclusion of the hearing on June 9, 1998.

This Report is a recommendation, not a final decision. The Saint Paul City Council will make the final decision after a review of the record. The City Council may adopt, reject or modify the Findings of Fact, Conclusions and Recommendations contained herein. Pursuant to Saint Paul Legislative Code section 310.05(c-1), the City Council shall provide an opportunity to present oral or written argument alleging error in this Report and to present argument related to any adverse action recommended in this Report. The parties should contact the City Clerk to ascertain the procedure for filing such argument or appearing before the Council.

STATEMENT OF ISSUES

The issue presented in this matter is whether or not an employee of R & R Books sold sexually explicit material to a minor in violation of Minn. Stat. § 617.293, subds. 1(a) and (b), and Saint Paul Legislative Code § 276.02(a) and, if so, whether adverse action should be taken against the licenses held by Jill Rasmuson d/b/a R & R Books.

Based on all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The Respondent, Jill Rasmuson, owns and operates R & R Books, an adult bookstore located at 674 University Avenue West, Saint Paul. Ms. Rasmuson's husband, Richard S. Rasmuson, Jr., assists with the day-to-day operations of the bookstore.

2. Ms. Rasmuson holds mechanical amusement device machine and mechanical amusement device operator licenses from the City of Saint Paul for use at R & R Books. These licenses will expire on October 31, 1998. Ex. 1.

3. There is a sign on the front door of R & R Books indicating that persons must be 21 or older and have an ID in order to enter the store. Even though persons who are 18 can legally be in the store, Mr. Rasmuson specified 21 on the sign because he did not want any kids to have contact with the materials. Mr. Rasmuson instructs clerks in the store to check a customer's ID if the customer looks younger than 21 years of age. If the customer looks over 21, the clerk is given discretion whether or not to check the individual's ID.

4. During the spring of 1998, the City's Office of License, Inspections and Environmental Protection was interested in the issue of the location of "adult uses" in the City. On approximately March 23, 1998, the Office sent a letter to adult bookstores indicating that relocation of their premises may be necessary under an ordinance that had been recently adopted.

5. In April, 1998, the City received a complaint regarding an adult bookstore other than R & R Books selling materials to a minor. As part of its investigation of the complaint, the City decided to conduct a compliance check to determine if employees would check for identification of a minor or sell a minor an item of a sexually explicit nature. R & R Books was selected at random for inclusion in the compliance check. There is no evidence that the City ever received any previous complaints alleging that R & R Books had sold sexually explicit material to a minor.

6. Compliance checks are also conducted by the City in stores selling liquor and tobacco products. The City has only infrequently conducted compliance checks with respect to adult businesses.

7. The City conducted compliance checks with respect to R & R Books and four other adult businesses on April 3, 1998. Prior to conducting the compliance checks, Kristina Schweinler, a senior investigator with the City's License Inspection and Environmental Protection Office, located a minor to serve as a decoy. She obtained the written permission of the boy's parent to participate in the compliance checks. The boy's mother verified to Ms. Schweinler that the boy was born on August 3, 1982, and thus was 15 years old. Ex. 5. In addition, Ms. Schweinler personally knew the boy and was familiar with his age.

8. Ms. Schweinler and Sgt. Richard Wachal and Officer Felicia Reilly of the St. Paul Police Department met with the boy in police headquarters on April 3, 1998, before

the compliance checks were conducted. A general search was conducted of the boy to confirm that he was not in possession of any sexually explicit material, extra cash, or a false ID. They then gave the boy money to purchase the materials and took him to the locations in question.

9. At approximately 4:00 p.m. on April 3, 1998, the boy went into R & R Books. Sgt. Wachal followed him in shortly thereafter. The boy did not use any of the machines in R & R Books that are licensed by the City. He selected a movie called "Our Bang . . . An Orgy in Every Box" and a two-pack of magazines sealed in plastic entitled "Adam and Raider" and took them to the clerk behind the counter. The clerk without hesitation rang up the purchase without asking the boy for an ID, placed the items in a bag, took the money from the boy, and gave the items to him. The boy then left the store and went to the car where Officer Reilly and Ms. Schweinler were waiting. Ex. 2.

10. Sgt. Wachal, Officer Reilly, and Ms. Schweinler then went into R & R Books to confront the cashier. The boy remained in the car. Sgt. Wachal displayed his badge and identified himself as a Saint Paul Police Department sergeant in the Vice Unit. The cashier, Calvin Dirl, said, "It's my fault" and admitted that he did not check the boy's ID. He said that he had been working at R & R Books for ten years. Ex. 2. He also said that he was sick and needed to go to the doctor and was going to undergo a lung reduction. Mr. Dirl believed that the boy looked at least 25 years old.

11. The magazines and the video purchased by the boy contained sexually explicit material. The magazines purchased by the boy contained numerous photographs of nude men and women in intercourse positions, but did not show actual penetration. The ten-minute video showed nude men and women engaging in sexual intercourse, oral sex, mutual masturbation, sexual intercourse with multiple partners, and other sexual conduct.

12. By letter dated April 17, 1998, the Respondent was notified that the Director of the City's Office of License, Inspections, and Environmental Protection was recommending that adverse action be taken against the licenses held by Ms. Rasmuson d/b/a R & R Books because sexually explicit material had been sold to a minor on or about April 6 [sic], 1998. The letter informed the Respondent of its right to request an evidentiary hearing before an Administrative Law Judge. Ex. 3.

13. The Respondent submitted a timely request for hearing, and this proceeding was commenced. Ex. 4.

14. The Director of the City's Office of License, Inspections, and Environmental Protection has recommended a fine of \$500 for R & R Books' alleged violation of state law and city ordinance. The amount of the fine is based upon a matrix set forth in Section 409.26 of the Saint Paul Legislative Code which establishes presumptive penalties for liquor violations based upon the square footage of the business involved in the violation. The City has not established a specific matrix applicable to violations involving adult bookstores.

15. Criminal charges are pending against the R & R Books clerk who sold the materials to the boy. As of the date of the hearing, there had been no disposition of the charges.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Saint Paul City Council and the Administrative Law Judge have jurisdiction in this matter pursuant to Minn. Stat. §§ 14.55 and 340A.415 and Saint Paul Legislative Code §§ 310.05 and 310.06.

2. The Notice of Hearing issued by the City was proper and all applicable substantive and procedural requirements have been fulfilled.

3. The City bears the burden in this matter of proving by a preponderance of the evidence that adverse action is warranted with respect to the mechanical amusement device and operator's licenses at issue.

4. Chapter 310 of the Saint Paul Legislative Code contains general provisions relating to licenses issued by the City. Section 310.06(b)(6) provides that adverse action may be taken against any or all licenses or permits held by a licensee where the licensee (or a person whose conduct may by law be imputed to the licensee) "has violated, or performed any act which is a violation of, any of the provisions of these chapters or of any statute, ordinance or regulation reasonably related to the licensed activity, regardless of whether criminal charges have or have not been brought in connection therewith." Section 310.17 provides that "[a]ny act or conduct by any clerk, employee, manager or agent of a licensee . . . which act or conduct takes place . . . on the licensed premises . . . and which act or conduct violates any state or federal statutes or regulations, or any city ordinance, shall be considered to be and treated as the act or conduct of the licensee for the purpose of adverse action against all or any of the licenses held by such licensee." "Adverse action" is defined in sections 310.01 and 310.05(l) of the Saint Paul Legislative Code to include the imposition of a fine.

5. Minn. Stat. § 617.293, subd. 1 (1996), provides that it is "unlawful for any person knowingly to sell or loan for monetary consideration to a minor: (a) [a]ny . . . motion picture film, or similar visual representation or image of a person or portion of the human body which depicts nudity, sexual conduct, or sadomasochistic abuse and which is harmful to minors, or (b) [a]ny . . . magazine . . . which contains any matter enumerated in clause (a)" Section 276.02 of the Saint Paul Legislative Code contains the same prohibition as Minn. Stat. § 617.293. "Nudity" is defined in both the statute and the Saint Paul Legislative Code to mean "the showing of the human male or female genitals" with less than a fully opaque covering. Minn. Stat. § 617.292, subd. 3; Saint Paul Legislative Code § 276.01. "Sexual conduct" is defined in both to include "acts of masturbation, homosexuality, sexual intercourse, or physical contact with a person's unclothed

genitals”^[1] The phrase “harmful to minors” is defined in Minn. Stat. § 617.292, subd. 7, as follows:

“Harmful to minors” means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when it

- (1) predominantly appeals to the prurient, shameful or morbid interest of minors, and
- (2) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and
- (3) is utterly without redeeming social importance for minors.

Section 276.01 of the Saint Paul Legislative Code includes substantially the same definition of “harmful to minors.”^[2] Finally, the term “knowingly” is defined in the statute to mean “having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry or both . . . (1) the character and content of any material which is reasonably susceptible of examination by the defendant, and (2) the age of the minor, provided however that an honest mistake shall constitute an excuse from liability hereunder if the defendant made a reasonable bona fide attempt to ascertain the true age of such minor.”^[3]

6. In addition, section 276.03 of the Saint Paul Legislative Code provides that a person who engaged in conduct prohibited by section 276.02 “is presumed to do so with knowledge of the character and content of the material sold . . . , or the motion picture . . . to be exhibited” and that it is an affirmative defense in a prosecution for disseminating harmful materials to minors that “[t]he defendant had reasonable cause to believe that the minor involved had reached his or her eighteenth birthday” and the minor “exhibited to the defendant a draft card, driver’s license, birth certificate or other official or apparently official document purporting to establish that such minor had reached his or her eighteenth birthday.”^[4]

7. The City has established by a preponderance of the evidence that a clerk at R & R Books sold magazines and a video to an individual under eighteen years of age without requesting proof that the individual had reached his eighteenth birthday. R & R Books is a “totally adult” bookstore, and there is no claim by R & R Books that the clerk who sold the materials to the minor lacked knowledge of the character and content of the magazines or video. The magazines and video purchased by the minor at R & R Books contained photographs and motion pictures depicting nudity and sexual conduct within the meaning of Minn. Stat. § 617.293 and section 276.02 of the Saint Paul Legislative Code. Based upon the testimony of the St. Paul police sergeant who reviewed the materials concerning their content, it is evident that the materials predominantly appealed to prurient interests, were patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, lacked serious literary, artistic, political or scientific value, and lacked redeeming social importance for minors. The

Licensee did not make any argument to the contrary. Therefore, the City has shown by a preponderance of the evidence that the materials were "harmful to minors" within the meaning of Minn. Stat. § 617.293 and section 276.02 of the Saint Paul Legislative Code.

8. The foregoing Conclusions are made for the reasons set forth in the attached Memorandum, which is hereby incorporated in these Conclusions by reference.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RESPECTFULLY RECOMMENDED: that the Saint Paul City Council take adverse action against the licenses held by Jill Rasmuson d/b/a R & R Books.

Dated this _____ day of July, 1998

BARBARA L. NEILSON
Administrative Law Judge

NOTICE

The City is respectfully requested to provide a copy of its final decision to the Administrative Law Judge by first class mail.

Reported: Tape recorded (not transcribed).

MEMORANDUM

Based upon the record in this case, it is evident that the clerk at R & R Books sold sexually explicit material to a 15-year-old decoy on April 3, 1998, without checking the boy's identification card. The City's witnesses indicated that the decoy had been promised confidentiality and, for that reason, the City did not call the boy as a witness or introduce a picture of him into evidence. This failure is not fatal to the City's case. Sufficient proof of the decoy's age was provided by the City through the testimony of Sgt. Wachal and Ms. Schweinler concerning the boy's date of birth as relayed by his mother, the written permission slip signed by the mother providing the date of birth, and Ms. Schweinler's personal knowledge of the boy and his age. Although the statute and ordinance at issue proscribe "knowing" sales to minors and the clerk testified that he believed that the boy looked at least 25 years old, the statute and ordinance only excuse honest mistakes as to a person's age if the customer's ID was checked or some other reasonable attempt was made to determine the true age of the customer. That did not happen in the present case. The clerk had sufficient general knowledge of the decoy's age, based upon the boy's appearance. The clerk undoubtedly also had a general knowledge of the character and content of the material he was selling—he had worked at R & R Books, an adult

bookstore, for ten years. The City thus has shown by a preponderance of the evidence that the statute and ordinance were violated.

Because there is no allegation that the minor operated any of the mechanical amusement device machines for which the Licensee is licensed, the Licensee contends that it is inappropriate under the circumstances for the City to take adverse action against these licenses. This argument is not persuasive. Section 310.06(b)(6) of the Saint Paul Legislative Code expressly authorizes adverse action against “any or all licenses” held where the licensee (or a person whose conduct may by law be imputed to the licensee) has “violated, or performed any act which is a violation of, any of the provisions of these chapters” The actions of the clerk are considered to be the actions of the Licensee pursuant to Section 310.17 of the Code. Accordingly, the clerk’s violation of Section 276.02 of the Saint Paul Legislative Code prohibiting sales of sexually explicit materials to minors provides a sufficient basis for the imposition of discipline against the mechanical amusement device machine and mechanical amusement device operator licenses held by the Licensee.

The Licensee further contends that the City improperly entrapped the clerk into committing the violation. She emphasizes that R & R Books does not have any history of complaints concerning sales to minors and thus argues that the City cannot show that R & R Books was predisposed to sell sexually explicit materials to minors. As noted by the Court of Appeals in a recent case, “it is not clear whether the entrapment defense is available in administrative proceedings.”^[5] In any case, for the entrapment defense to be successfully asserted, the defendant must first show that the government induced the commission of the crime by doing something more than mere solicitation. If inducement is shown, the public authority must show beyond a reasonable doubt that the defendant was predisposed to commit the crime.^[6]

The initial inducement element is established only by showing “something in the nature of persuasion, badgering, or pressure by the state.”^[7] The United States Supreme Court has noted that “the fact that officers or employees of the government merely afforded opportunities or facilities for the commission of the offense does not defeat the prosecution. Artifice and strategem may be employed to catch those engaged in criminal enterprises.”^[8] The Licensee in the present case has not established that her clerk was induced by the City’s decoy to commit the violation. As in In re Pedley, the decoy here “did no more than any young person might do” in an attempt to obtain sexually explicit material, but “merely provided an opportunity for relators to make illegal sales.”^[9] There is no evidence that the decoy in any way attempted to persuade, badger, or pressure the clerk into selling the materials to him; in fact, it appears that he simply presented the materials at the counter for purchase and had no significant interchange with the clerk. Because the Licensee has not shown the requisite inducement, it is not necessary to reach the further issue of whether the City has shown beyond a reasonable doubt that the Licensee was predisposed to commit the crime.^[10]

The Administrative Law Judge thus respectfully recommends that adverse action be taken against the licenses held by Jill Rasmuson d/b/a R & R Books. The fact that the

Licensee has no history of violations should be taken into consideration in arriving at the penalty to be imposed, as should the fact that the clerk sincerely believed that the decoy was of legal age. The City has urged that a \$500 fine be imposed, using (by analogy) the matrix set forth in Section 409.26 of the Saint Paul Legislative Code applicable to liquor violations. The Judge urges the City Council to consider whether a lesser fine is appropriate under the circumstances of this case.

B.L.N.

^[1] Minn. Stat. § 617.292, subd. 4; Saint Paul Legislative Code § 276.01.

^[2] The only differences between the statutory and Code provisions is that the Code refers in item (1) to a depiction which, “[t]aken as a whole, predominantly appeals to the prurient interest in sex of minors” and in item (3) to a depiction which, “[t]aken as a whole, lacks serious literary, artistic, political or scientific value for a legitimate minority of older, normal minors.”

^[3] Minn. Stat. § 617.292, subd. 8. The Saint Paul Legislative Code does not define “knowingly.”

^[4] There is no similar provision in Minn. Stat. §§ 617.291-617.296.

^[5] *In re Pedley*, 1993 WL 79588 (Minn. App. 1993) (unpublished).

^[6] *Jacobson v. United States*, 112 S. Ct. 1535 (1992); *State v. Abraham*, 335 N.W.2d 745, 747 (Minn. 1983); *State v. Ford*, 276 N.W.2d 178, 182 (Minn. 1979).

^[7] *State v. Olkon*, 299 N.W.2d 89, 107 (Minn. 1980), *cert. denied*, 449 U.S. 1132 (1981); *see also State v. Abraham*, 335 N.W.2d 745, 747 (Minn. 1983); and *In re Pedley*, *supra*.

^[8] *Sorrells v. United States*, 287 U.S. 435 (1932).

^[9] *In re Pedley*, 1993 WL 79588 (Minn. App. 1993).

^[10] *Id.* In addition, there is no convincing evidence that the compliance checks were carried out in bad faith or were motivated by changes in City ordinances that will possibly affect the location of “adult uses” in the City.