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A.1. Right to Contested Case Hearing

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Case: *Lucky Jade Chinese Restaurant*, OLCC-09-V-055, April 2010.

Facts: Licensee's employee allowed friends to drink on the premises after the business was closed and after permissible hours for alcohol sales/service. Police were dispatched in the early morning due to a hang up 911 call from the licensed premises. The officer banged on the door as he could see and hear people in the premises. Licensee's employee saw the officer and did not come to the door until the other people had left out the back. When cover officers arrived, permittee told them they could not enter without a warrant and officers had to physically move permittee out of the way to enter. Licensee's employee gave false statements to OLCC investigators when they interviewed him about the events.

In a second incident, Licensee's corporate principal served a minor in the presence of OLCC inspectors.

Abstract: Licensee Corporation did not appear through an attorney at hearing and Licensee Corporation was found in default. Corporate principals were entitled to party status and appeared at hearing and represented themselves solely in regard to their personal interests. Because Licensee Corporation is in default, corporate principals' rebuttal evidence could only be considered if OLCC failed to make a prima facie case at hearing.

Key Words/Phrases: service permit, refusal, false statement, refuse to admit police officer, operating during prohibited hours, credibility determination, witness credibility

Case: *Stockman's Exchange*, OLCC-99-V-003, May 2000.

Abstract: Where agency procedural rule requires that a hearing be scheduled within 60 days of receipt of hearing request, dismissal of charging document is not a remedy for failure to so schedule where the agency has substantially complied by the statutory objective of the rule. The statutory objective, that reasonable notice be provided before a hearing, has been met. The delay here did not warrant dismissal, particularly since Licensee had not established that the delay hampered his ability to prepare an adequate defense to the charges.

Case: *Intergalactic Adventures*, OLCC-97-L-021, January 1998.

Abstract: The Applicant was not entitled to a contested case hearing for denial of special events licenses when the dates had passed when the licenses would have been in effect and the request for hearing was filed approximately two months after the licenses would have been in effect.

Case: *M & J Tavern*, OLCC-94-V-081, February 1996.

Abstract: The Commission concluded that parties are not entitled to a hearing for a written warning where the warning had no immediate effect on the parties' rights or license privileges. If the warning has a subsequent effect on a subsequent enforcement or licensing action, if the party is entitled to a hearing on the subsequent action, the party is also entitled to challenge the warning at that hearing.

Case: *La France Wine Co*, OLCC-95-MS-002, December 1995.

Abstract: The request for hearing was dismissed for lack of jurisdiction where the licensee sought to challenge a penalty for late payment of a privilege tax imposed under ORS 473.030, et al.

Case: *E. L. Benders*, OLCC-93-V-074, August 1995.

Abstract: The Hearings Division did not have jurisdiction to hold a hearing and licensees request for a hearing was dismissed for lack of presenting a contested issue where the Regulatory staff withdrew the charged violations and licensees could not show that the Regulatory staff had relied upon or used the alleged violations in a manner that adversely affected licensees subsequent to withdrawing the alleged violations.

Case: *Premier Technology v. Oregon State Lottery*, 136 Or App 124, 901 P2d 883 (1995).

Abstract: A civil action for breach of contract was proper where the state entered into a contract, then sought to invalidate the contract by issuing an administrative order. The purpose of the suit was not to determine whether the order in other than a contested case complied with the APA. The question at issue was whether the state had breached its contract by issuing the administrative order. The Circuit Court had jurisdiction in the breach of contract suit. The APA was not the exclusive remedy.

Case: *Colclasure v. Wash. County School Dist. No. 48-J*, 317 Or 526, 857 P2d 126 (1993).

Abstract: The court construed a statute for review of an administrator's order under Workers' Compensation statutes to require the following procedures: the director informally investigates and issues an order; the referee conducts a hearing at which the parties develop a record; on the basis of that record, the referee finds the facts from which to conclude whether, among other things, the director's decision survives review; the board then reviews based on the record developed before the referee. The board cannot rely on the administrator's legislative findings used in the initial decision. The administrator developed no evidentiary record and held no evidentiary hearing. The decision must be made on the record developed by the referee.

Case: *Mercy Medical Center v. Office of Health Policy*, 121 Or App 587, 855 P2d 1156 (1993).

Abstract: Initial determination by an agency whether a statutory threshold had been reached did not give rise to a contested case under state statutes or the federal constitution. ORS 183.310(2)(a)(A). The Court of Appeals lacked jurisdiction to review the decision as an order in a contested case.

Case: *Trio Tavern*, OLCC-90-L-010, March 1991.

Abstract: Where the case was dismissed because there was no longer a "contested case" within the meaning of ORS 183.310(2)(a) because the staff reconsidered its decision to refuse to renew the license and granted the license with restrictions, the licensee had a right to request a hearing on whether the restrictions should have been imposed.

Cases: *Niecey's*, OLCC-91-V-070, December 1991; *Don Juan's Mexican Cuisine*, OLCC-90-V-127, February 1991.

Abstract: Where the licensee and the agency have entered into a settlement agreement, there are no individual rights, duties, or privileges of parties to be determined. Therefore, there is no contested case within the meaning of ORS 183.310(2)(a). The Hearings Division does not have jurisdiction to hold a hearing and the licensee's request for a hearing is dismissed.

Case: *Clark Electric Inc. v. State Highway Division*, 93 Or App 693, 763 P2d 1199 (1988).

Abstract: If a contested case hearing is to be held, ORS 183.310(6) allows a person having an interest in the outcome of the proceeding or representing a public interest to petition the agency for party status. This person cannot, however, compel a hearing on his own initiative.

The rejection of a contractor's bid to do work for the state Highway Division did not involve the revocation or suspension of a right or privilege. Consequently, the rejection was an order in other than a contested case and does not require contested case proceedings.

Case: *Oregon Env. Council v. Oregon State Bd. of Ed.*, 307 Or 30, 761 P2d 1322 (1988).

Abstract: Where an agency rule gives "an opportunity to be heard" before a final agency action, and does not provide for procedures having the character of a contested case hearing (requiring evidence to be tested for relevance & truthfulness, challenging evidence by cross-examination and binding itself to make a decision on the record), the hearing does not rise to the level of a contested case. Thus, a person having an interest in the outcome of the proceeding or representing a public interest cannot compel such a hearing on his own initiative.

Case: *Pen-Nor, Inc. v. Oregon Dept. Higher Ed.*, 84 Or App 502, 734 P2d 395 (1987).

Abstract: Petitioner, a minority business, contended that the decision not to award him a subcontract on a construction project amounted to either an order in a contested case, or a rule; and, that the decision was, therefore, subject to review by the Court of Appeals. The court held that the decision was neither a contested case order under ORS 183.310(2), nor a rule under ORS 183.310(8), and dismissed the petition for lack of jurisdiction.

Case: *Oregon Env. Council v. Oregon State Bd. of Ed.*, 86 Or App 249, 739 P2d 581 (1987).

Abstract: An environmental group's interest in the Board of Education's correctly applying the law in approval of a school book was not a sufficient interest under ORS 183.310(2)(a)(A) to require that the board's decision be made in a contested case.

Case: *Morrison v. U. of O. Health Sciences Center*, 68 Or App 870, 685 P2d 439 (1984).

Abstract: The dismissal of a student from the school of dentistry calls for a contested case proceeding because it involves "agency discretion to suspend or revoke a right or privilege."

Case: *Carnine v. Oregon State Textbook Comm.*, 62 Or App 344, 660 P2d 201 (1983).

Abstract: Denial of a request to reconsider an earlier decision is not a Final Order in a contested case and does not provide an opportunity, under the guise of an attack on the "denial of reconsideration," to procure a de facto invalidation of the earlier decision where petitioner failed to file a timely appeal of the earlier decision.

Case: *Sayers v. Employment Division*, 59 Or App 270, 650 P2d 1024 (1982).

Employment Division's order finding petitioner lacked good cause for the late filing of his request for hearing was an order in a contested case reviewable by the Court of Appeals.

A.2. Adequacy of Hearing Process

A.2.a. Jurisdiction

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Case: *Couch Street Fish House*, OLCC-00-V-021, June 2001.

Abstract: An initial ruling allowing amendment of the charging document to add individuals alleged to be corporate officers was withdrawn/reversed where no evidence was presented at hearing that the individuals had ever been licensed by the Commission. The Commission is without authority to impose discipline pursuant to ORS 471.315(1) against persons who have not been licensed.

Case: *The Watering Hole*, OLCC-99-V-001, August 1999.

Abstract: Because the corporate licensee and its principal officers were not licensees at the time of the alleged violations, the Commission concluded there was a lack of jurisdiction to hold them responsible for the charged violation.

Cases: *Intergalactic Adventures*, OLCC-97-L-021, January 1998; *Cosmos Latino Discotheque*, OLCC-98-L-001, April 1998.

Abstract: There is no justiciable controversy and the request for hearing should be dismissed when the Regulatory Program proposes to deny an application for a Special license that has an event date that has passed by the time of the hearing. In order for an agency to take action in a licensing case, it must grant, deny, suspend, revoke, renew, or refuse to renew the agency's licensing permission. See ORS 183.310(2)(a)(C) and (4). In short, it must take some action affecting a license.

Case: *Intergalactic Adventures*, OLCC-97-L-021, January 1998.

Abstract: The Applicant was not entitled to a contested case hearing for denial of special events licenses when the dates had passed when the licenses would have been in effect and the request for hearing was filed approximately two months after the licenses would have been in effect.

Case: *Marquam Hill Vineyards*, OLCC-97-V-036, December 1997.

Abstract: Special License. Where a licensee holds two licenses - one a special license and the second an annual license, and the violation occurred under the special license which was no longer in existence at the time of the hearing, the Commission concluded that the penalty could be assessed against the licensees' annual license, based on the rationale that the annual license is a pre-requisite to qualify for the special license. The type of license involved was a Special Events Winery license.

Case: *Playa de Oro*, OLCC-97-V-007/010, September 1997.

Abstract: ORS 471.297(1) provides that a Temporary Letter of Authority does not constitute a license for the purpose of the contested case provisions of the APA.

Case: *Rod's Old Town*, OLCC-92-V-073, February 1993.

Abstract: The Commission has no jurisdiction to sanction a former licensee when the license is no longer in existence.

Case: *Charlie's Mountain View*, OLCC-91-V-008, August 1992.

Abstract: The Commission retained jurisdiction to sanction a seasonal license which still existed but was not useable at the time because it was off-season. Imposition of the sanction was reserved until the time when the license again became useable.

Case: *Demetris II*, OLCC-91-V-081, November 1991.

Abstract: The Commission has jurisdiction to issue a Letter of Reprimand to a former licensee to establish its record of compliance under ORS 471.295(4)(g) and ORS 472.160(4)(g) (allowing the Commission to deny a license when the licensee had a poor record of compliance when previously licensed). The Commission does not have jurisdiction to sanction (suspend or fine) a former licensee.

Case: *7-Eleven Store No. 2352-14501*, OLCC-90-V-122, April 1991.

Abstract: ORS 183.415(1) requires that the notice of charges be served personally or by registered or certified mail. Notice sent by ordinary first class mail does not comply with the service requirements of ORS 183.415(1). Where the Commission concluded that the licensee was not properly served as required by the APA and the Commission's rules, the charges were dismissed for lack of jurisdiction.

Case: OLCC-90-SP-102, March 1991.

Abstract: At the hearing, the applicant withdrew his request for a hearing. The Commission concluded that due to the withdrawal there was no contested case within the meaning of ORS 183.310(2)(a) and dismissed the applicant's request for hearing.

Case: *Stockman's Cafe & Lounge*, OLCC-90-V-076, February 1991.

Abstract: The Commission has jurisdiction to sanction a licensee where the licensee went out of business after the hearing, but did not surrender their current license.

Case: OLCC-90-SP-111, December 1990.

Abstract: The Commission does not have jurisdiction to hold a hearing where the Regulatory Process Division withdraws its proposed refusal of a service permit application.

Case: *Dillinger's Pub*, OLCC-90-V-003, September 1990.

Abstract: The Commission concluded that it had jurisdiction under OAR 845-06-200(9) to sanction the current corporate licensee because the individuals who own, operate, or control the business are substantially similar now as when the license was held by one licensee individually.

Cases: *Dillinger's Pub*, OLCC-89-V-131, January 1990; *Stockman's Restaurant & Lounge*, OLCC-90-V-197, OLCC-90-V-025, May 1990.

Abstract: Where a licensee's license is replaced by a license issued to a new licensee, the Commission does not have jurisdiction to sanction the former licensee. The former license is no longer in existence because it has been replaced by the new license.

Case: *Dekum Food Market*, OLCC-89-L-020, February 1990.

Abstract: The Hearings Division does not have jurisdiction to hold a hearing in a case where the license refusal letter

has been withdrawn and there are no contested issues under ORS 183.310(2)(a).

Case: *Plaid Pantry No. 101*, OLCC-89-V-168, February 1990.

Abstract: When the Regulatory Process Division withdrew its charges of violations after the hearing had been held but before a Final Order had been issued and there no longer was a contested case, the Commission had no jurisdiction to sanction a licensee.

Cases: *Millcamp No. 5, Eddie Douglas & Co.*, OLCC-88-V-034, October 1988; *Stockman's Restaurant & Lounge*, OLCC-90-V-197, OLCC-90-V-025, May 1990.

Abstract: The Commission is without jurisdiction to sanction a former licensee who no longer holds a license. Violation charges that are pending against a former licensee should be dismissed.

Case: *Pub 99*, OLCC-89-V-123, December 1989.

Abstract: The Commission has jurisdiction to sanction a licensee although a temporary license has been issued to another owner. Because the license had not been replaced or canceled, and had not expired, the Commission concluded that the license was still in effect.

Case: *Almond Tree Restaurant*, OLCC-88-V-098, November 1989.

Abstract: Where the charges have been withdrawn, there is no longer an issue involving suspension, revocation, or refusal to renew or issue a license. The Hearings Division, therefore, does not have jurisdiction to hold a hearing.

Case: *Donna Quinton*, OLCC-89-V-028, August 1989.

Abstract: The Commission is without jurisdiction to sanction a service permittee for a violation where the service permittee no longer holds a service permit and where the permittee's application for a permit had been refused.

Case: OLCC-89-SP-111, June 1989.

Abstract: The Commission does not have jurisdiction to deny a service permit application before the expiration of any previously granted extension period. The applicant had been granted an extension and no valid proposed refusal letter had been issued after the extension period.

Case: *Little Caesar's*, OLCC-88-V-138, May 1989.

Abstract: The Commission has jurisdiction to enter a Final Order in a violation case where the licensee submitted a renewal application and the Commission had not granted or refused licensee's renewal application as of the date of the hearing, despite licensee's post-hearing request that the Commission "cancel" whatever license he holds.

Case: *Pioneer Trust Bank v. Mental Health Div.*, 87 Or App 132, 742 P2d 51 (1987).

Abstract: General intention expressed by the Legislature in the APA to confer review of contested cases in the Court of Appeals does not negate the literal language of a subsequent statute that confers review jurisdiction of Mental Health Division orders in the Circuit Court.

Case: *Schurman v. Bureau of Labor*, 36 Or App 841, 585 P2d 758 (1978).

Abstract: Where statutory language does not provide authority to make a final administrative determination regarding a nonexistent license, an agency is without jurisdiction to act.

A.2.b. Notice

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Case: *Jasper's*, OLCC-13-V-058, May 2014.

Facts: Employee of Licensee sold alcohol to minor decoy with OLCC. Licensee was part of the Responsible Vendor program. Licensee had previously had a violation in 2009 for failing to verify age, and resolved by purchasing AVE. Licensee was required to use AVE on every point of sale of alcohol. Minor decoy was asked for ID which showed true age, employee reviewed it and told the decoy she was not 21. Employee did not use AVE and sold the alcohol to the decoy. Licensee argued that while it had reasonable notice that the AVE must be used, it did not have notice that failure to use it would be considered an aggravating circumstance such that it would be removed from the Responsible Vendor Program.

Abstract: Although Licensee argues fairness and lack of notice, it is logical that the failure to abide by an earlier settlement agreement requiring AVE usage would have consequences. Licensee's notice and fairness arguments are unpersuasive.

Key Words/Phrases: minor decoy, responsible vendor, age verification, AVE, rule construction, agency

Case: *Full Moon Bar & Grill*, OLCC-10-V-047/047A, April 2011.

Facts: Licensee's employee/bartender served minor decoy. It was the employee's second violation for minor service/sales; the first time Licensee did not terminate the employee due to her precarious financial situation, but required employee to pay \$2,000 of the fine. Employee was not happy about that. At hearing Licensee raised affirmative defense of lack of reasonable notice under ORS 183.415 because the notices were mailed more than four months after the violation. Licensee cites *Oregon Farm Bureau Insurance Co. v. Safeco*, 249 Or 449 (1968), in which the court held that notice of a claim given to an insurer more than two years after an accident did not satisfy the requirement of reasonable notice under the terms of the insurance contract.

Abstract: The agency is required to provide a "short plain statement of the matter asserted or charged" and opportunity for hearing. There is no statute of limitations under the APA or OLCC rules/laws.

Key Words/Phrases: employee, service, third violation, minor, decoy, reasonable notice

Case: *Lava Lanes of Medford*, OLC 10-V-018/018A/018B, February 2011.

Facts: Licensee had multiple violations with 2 years for server without a valid permit and sales to minors. The Commission proposed cancellation. Licensee argued that the Commission unfairly timed a decoy operation to allow issuance of a fourth Cat III violation within 2 years.

Abstract: It is unclear why Licensees believe that the Commission's actions were improper. This argument appears to suggest that Licensees were willing to take a risk that they would incur a third violation, but would have been extra vigilant to prevent a fourth. In effect, Licensees argue that they relied on the existence of only two Category III violations and were willing to accept the risk of a third one. However, Licensees were under the same obligation to comply with the law regardless of the number of violations or the potential consequences.

Key Words/Phrases: gross negligence, minor, decoy, responsibility for employee actions, mitigation, service permit

Case: *Hunter's R.V. Park*, OLCC-06-V-068, February 2007.

Facts: Licensee ran a convenience store on an RV park. A tenant of the park who was often behind in rent would occasionally perform tasks for Licensee in lieu of rent. Occasionally the tenant has worked in the store. One day the

tenant noticed the store wasn't open as it should be, while Licensee was away, and tenant retrieved the store keys from Licensee's residence and opened the store. The tenant called the manager who said he would be there shortly. In the time between calling the manager and his arrival, the tenant sold alcohol to a minor decoy.

At hearing Licensee objected to admission of the OLCC inspector's report because of errors in it, arguing it did not constitute proper notice of the underlying facts and allegations against Licensee.

Abstract: The fact that an inspector's report contained errors may raise issues regarding its accuracy, but does not render the document inadmissible, or constitute lack of proper notice of the underlying facts and allegations pertaining to the hearing.

Key Words/Phrases: admissibility, errors, police report, proper notice

Case: *ETU, Inc. v. Environmental Quality Commission*, 343 Or 57 (2007).

Abstract: When an agency "has actual knowledge that a person is represented by counsel," the agency "has a duty to provide the lawyer with copies of all important communications with the person, in addition to any required service on the person. And the represented person has a right to rely on the agency to do so, particularly after the lawyer specifically has requested to be kept so informed."

Case: *United Gas & Food Mart*, OLCC-01-V-047 & 048, February 2002.

Abstract: It was not a violation of due process for the OLCC to delay notification to licensee that two sales to minors had occurred until approximately five weeks after the second sale (and approximately nine weeks after the first sale). Licensee asserted that the unreasonable delay in notifying licensee of the first sale unfairly prevented licensee from avoiding the second sale, resulting in an additional violation and higher penalties than licensee would otherwise have had. The Commission concluded that licensee had not established unreasonable delay, much less an intentional delay for the purpose of gaining a tactical advantage (the stings were police operations, OLCC issued citations within a reasonable time after receipt of the police reports); and licensee had not demonstrated substantial prejudice to a fair trial. Consequently, there was no due process violation occasioned by the delay in notifying licensee of the violations.

Licensee was not subjected to penal entrapment when OLCC did not notify licensee of two sales to minors until approximately five weeks after the second sale (and nine weeks after the first sale). Licensee asserted that this delay in notification prevented licensee from taking measures to avoid the second sale, resulting in a greater penalty for the two violations.

Penal entrapment occurs when a defendant, although predisposed to commit a minor or lesser offense, is entrapped into committing a greater offense subject to greater punishment. The Commission determined that the elements of penalty entrapment had not been established: (1) Licensee was not entrapped; (2) Licensee did not commit a greater offense, because the offenses were the same; and (3) Licensee was not subjected to a greater punishment because OLCC charged both violations at the same, lower penalty level applicable to first violations due to the lack of intervention between the violations, rather than imposing the greater penalty allowed by the penalty rule for the second violation.

Cases: OLCC-01-SPR-008, December 2001; OLCC-01-SPR-009, October 2001.

Abstract: Two service permit refusal cases were remanded to the Hearing Officer Panel for further hearing, following proposed default orders. The hearings in both cases were held less than 14 days from time of the notice of hearing and, in both cases, Applicants showed good cause for relief from default relative to the short notice. In remanding the cases, the Commission set a minimal interval in service permit refusal cases of 14 days between notice of hearing and the hearing dates, absent personal waiver of the 14-day notice by applicant.

Case: *Michael Jacques*, OLCC-00-V-084, October 2001.

Abstract: Because of a scrivener's error, the date of the alleged incident entered in the charging document and inspector's report was off by one day (the date was entered for the date the inspector's shift began, rather than the post-midnight date the observation occurred). Permittee was not prejudiced at hearing by this error where other documents provided to Permittee in discovery, including police reports, bore the correct date; Permittee was provided with a detailed description of the charges against him; Permittee was provided with adequate notice of the charges against him and had ample time to prepare a defense; and the errors were corrected at hearing..

Case: *Balzer's Pub & Grill*, OLCC-99-V-019, March 2001.

Abstract: Incidents listed in background section of charging document will not be considered among those alleged incidents comprising the history of serious and persistent problems, absent notice and adequate proof.

Case: *Stockman's Exchange*, OLCC-99-V-003, May 2000.

Abstract: Where agency procedural rule requires that a hearing be scheduled within 60 days of receipt of hearing request, dismissal of charging document is not a remedy for failure to so schedule where the agency has substantially complied by the statutory objective of the rule. The statutory objective, that reasonable notice be provided before a hearing, has been met. The delay here did not warrant dismissal, particularly since Licensee had not established that the delay hampered his ability to prepare an adequate defense to the charges.

Case: *Texaco Star Mart*, OLCC-97-V-051, April 1998.

Abstract: A party is entitled to adequate notice of the charges against it. Adequate notice means notice before a hearing begins or at the commencement of the hearing. The Regulatory Staff's motion to amend the charge after the hearing was started and after testimony was taken was denied. The Commission concluded that licensees would not have been afforded adequate notice of the charge if the charge was changed after the hearing commenced and evidence was taken. OAR 845-03-015(2); ORS 183.415.

Case: *Don Juan's Mexican Restaurant*, OLCC-94-V-002, October 1994.

Abstract: A change in interpretation applicable to all similarly situated licenses in the future would not raise an equal treatment issue. A change in interpretation would only trigger a right to be heard on the issue. The licensee must be given an opportunity to prepare and present a defense to allegations before the new interpretation could be applied to the licensee. The Commission should make sure that the record is sufficient to allow the Commission to make the suggested change in interpretation.

Case: *Punjab Tavern*, OLCC-91-L-015/016, April 1992.

Abstract: At the Commission meeting, the Commission changed its policy with regard to what it considers to be a material false statement. Because the applicant had not had notice prior to the hearing of what the new standard would be, and because the new standard was adverse to the applicant, the Commission determined not to apply the new standard to the applicant in this case but to apply the new standard in future cases.

Case: *7-Eleven Store No. 2352-14501*, OLCC-90-V-122, April 1991.

Abstract: ORS 183.415(1) requires that the notice of charges be served personally or by registered or certified mail. Notice sent by ordinary first class mail does not comply with the service requirements of ORS 183.415(1). Where the Commission concluded that licensee was not properly served as required by the APA and the Commission's rules, the charges were dismissed for lack of jurisdiction.

Case: *Rastafarian Private Club*, OLCC-90-V-085, April 1991.

Abstract: Evidence that licensee was convicted of a felony was not admissible to prove a violation because the felony conviction was not charged as a basis for a violation. The evidence was admitted on the issue of mitigation with regard to whether the licensee had demonstrated a willingness and ability to adequately control the premises.

Case: *The Hide Out*, OLCC-89-L-019, September 1990.

Abstract: There was no prejudice where licensee received an amended license refusal letter the day before the hearing, where the licensee requested and was granted a continuance of 30 days to prepare and present evidence on the issues.

Case: *Don Juan's Mexican Cuisine*, OLCC-89-V-169, September 1990.

Abstract: Where the Regulatory Process Division offered a theory for aggravation of the penalty after two days of hearing, the Commission concluded that the argument was not made in a timely fashion. Licensee is entitled to notice of all issues at the beginning of the hearing. OAR 845-03-015.

Case: *The Winema*, OLCC-90-V-117, May 1990.

Abstract: Commission staff could not argue at the hearing stage that multiple violations should be found when its pre-hearing notice charged only a single violation for the same circumstances. ORS 183.415(2)(d) [reasonable advance notice of the matters asserted or charged].

Case: *Don Juan's Mexican Cuisine*, OLCC-89-V-012, July 1989.

Abstract: At the hearing, Regulatory Process Division amended the charge letter to correct the date and time that the noisy conduct allegedly occurred. Licensees were not prejudiced by defective notice in this case because licensees were given notice of the amended charge at the beginning of the hearing and the record was kept open for licensees to submit additional information they deemed necessary.

Case: *PNJ's Tippin Inn*, OLCC-88-V-040, January 1989.

Abstract: Where the written notice of issues asserted only that a violation for failing to operate as proposed occurred because licensee failed to provide proposed meal service, the notice was not adequate to allow consideration of the staff's assertion at the hearing that a violation also occurred because licensee reduced its seating.

Case: *The Station House*, OLCC-88-V-067, January 1989.

Abstract: Notice was not defective where staff orally amended charge at the hearing from "sold alcohol to a minor" to "made alcohol available to a minor" where the Hearings Examiner held the record open seven days to give licensee additional time to respond.

Case: *Eulah Faye Bergstrom*, OLCC-88-V-063, December 1988.

Abstract: A five-month delay between the violation and the notice of charges was not unfair and did not provide a basis to dismiss the charges.

Case: *Lloyd's of Bandon Restaurant & Lounge*, OLCC-88-L-007, November 1988.

Abstract: Ambiguous notice concerning an issue was adequate where the party was prepared to present and did present extensive evidence on the issue, and the party's request to hold the record open to present additional evidence was granted.

Case: *Marcoules v. OLCC*, 91 Or App 573, 756 P2d 661 (1988).

Abstract: The emergency suspension notice was deficient where the Commission failed to comply with its own rules regarding notice requirements for emergency suspension, OAR 845-03-025(2)(c), because it failed to refer "to the particular sections of the statutes and rules involved," which were ORS 471.315 and the sections of OAR 845-06-045 then applicable.

Licensee was not prejudiced by deficient emergency suspension notice where the violation notice referred to the particular statutes and rules under which OLCC was proceeding along with specific dates the alleged violations occurred. In addition, licensees' request to consolidate the two cases was granted and the hearing expedited. Licensees were not misled or uninformed about the basis for the emergency suspension or unable to contest any issues raised at the hearing. They did not request a continuance to meet evidence against them and counsel vigorously cross-examined witnesses. Licensees also had opportunity, and did, present evidence supporting their position.

Case: *Stirrup Room*, OLCC-88-L-001, June 1988.

Abstract: The Commission's failure to cite licensees' alleged failure to meet the food service waiver criteria is probably not a deficiency in the notice that ORS 183.415(2) and OAR 845-03-010 require because licensees have the burden of showing that all three waiver criteria apply. However, the issue was not decided because licensees met the criteria.

Case: *Sandy Jug Tavern*, OLCC-87-V-022, OLCC-87-V-023, January 1988.

Abstract: The Commission's notice of charges satisfied constitutional and statutory requirements, although two months elapsed between the violations and the notice, where the licensee had a reasonable opportunity to present evidence from a number of persons likely to be aware of facts relevant to the charges.

Case: *Tacoma Cafe*, OLCC-86-V-028, March 1987.

Abstract: A reference in a charge letter to a service permittee by her former name did not make the notice of charges invalid. There was no indication that anyone was confused by the reference.

Case: *Cooper v. Eugene Sch. Dist. No. 4J*, 301 Or 358, 723 P2d 298 (1986).

Abstract: Before an agency applies a broad statutory standard through refinement of that standard in a contested case, the agency may need to give prior warning to the affected party of the refined standard and how the agency believes the refined standard would affect the party.

Case: OLCC-86-SP-001, May 1986.

Abstract: Lack of endorsement under ORS 471.380(5) may not form the basis of a service permit denial where the applicant was not given notice, prior to her contested case hearing, that the lack of endorsement would be a basis for denial.

Case: *Shipley v. Salem School Dist.*, 64 Or App 777, 669 P2d 1172 (1983), *rev den.*, 296 Or 351 (1984).

Abstract: In a contested case involving the proposed dismissal of a teacher, the school district was required to prove a nexus between the teacher's improper conduct and his teaching responsibilities. The court held that the notice of dismissal must contain a statement of facts which either "expressly" sets out the nexus, or from which the nexus "may obviously be inferred."

Cases: *B & R Mercantile*, June 1984; *Pepper Tree Restaurant*, June 1984.

Abstract: When notice of charges or refusal letter contains incorrect rule number, but fully describes substance of rule licensee is charged with defending, licensee not prejudiced.

Case: *American Fidelity v. Builders Board*, 63 Or App 127, 662 P2d 785 (1983).

Abstract: An agency was required to comply with ORS 183.415(1), requiring notice of hearing by registered or certified mail, in order to have a basis to issue an award against a party to the hearing.

Case: *Chapman v. Employment Division*, 62 Or App 676, 662 P2d 19 (1983).

Abstract: Agency Appeals Board erred in considering whether claimant voluntarily left work because the question had not been raised at hearing. The notice of hearing did not apprise claimant of this issue. Raising a new issue in review of the record by the Agency Appeals Board denies the claimant the opportunity to be heard on that issue.

Case: *Payne v. Department of Commerce*, 61 Or App 165, 656 P2d 361 (1982).

Abstract: Department of Commerce notice of termination was insufficient to meet the requirements of either due process or the Personnel Division's rule because it did not notify petitioner of: (1) the dates of the incidents giving rise to alleged violation; (2) the nature of the improper acts of which petitioner was accused; or (3) the names of other individuals involved in the alleged improper acts.

Case: *Sayers v. Employment Division*, 59 Or App 270, 282, 650 P2d 1024 (1982).

Abstract: An agency acts reasonably when it requires a claimant to use the form provided to give notice of a change of address. Furthermore, it acts reasonably in relying on the information provided on that form.

Case: *George's Gold Coin v. OLCC*, 24 Or App 457, 545 P2d 1395 (1976).

Abstract: Applicant was not notified prior to the hearing that inadequate financing would be a basis for denial. However, the Examiner's findings and the Commission's proposed findings related that a reason for the denial was inadequate financing. Applicant filed exceptions disputing the accuracy of the findings but making no claim that he could have provided, or could have found, better financing. There was no request for reopening the case to present more evidence. The court upheld the denial based upon inadequate financing.

Case: *Haviland Hotels v. OLCC*, 20 Or App 110, 530 P2d 1259 (1975).

Abstract: Licensee's objection to the Commission's failure to cite the regulation number in its notice of charges held waived under former ORS 183.480(7)(a) where no objection made at or prior to the hearing.

Case: *Parker v. OLCC*, 18 Or App 339, 525 P2d 187 (1974).

Abstract: Inadvertent reference in findings of fact to incorrect statute number did not mislead licensee when the nature of the charge was fully described.

Case: *Campbell v. Bd. of Medical Exam*, 16 Or App 381, 386, 518 P2d 1042 (1974).

Abstract: Federal due process and the requirements under ORS 183.415(1) for reasonable notice are satisfied where the notice allows the party to prepare an adequate defense.

Case: *The Grog House v. OLCC*, 12 Or App 426, 507 P2d 419 (1973).

Abstract: Due process requires a detailed notice where defendant requires such notice to prepare a defense. However,

where petitioner had first-hand knowledge of every charge and was given time to prepare his defense, no prejudice resulted and there was no denial of due process.

A.2.c. Party Status

[\(return to index\)](#)

Case: *Merry Time Museum*, OLCC-90-L-003, March 1991.

Abstract: The majority stockholder was made a party and allowed to make comments on his own behalf when the Commission considered exceptions, where he could have been made a party at the hearing, but no formal request was made at that time.

Case: *Mustang Lounge*, OLCC-88-V-085, January 1989.

Abstract: Petition for party status was denied where petitioner's interests were represented by existing party and petitioner participated in the hearing as a witness.

Case: *Drive N' Save Markets*, OLCC-87-V-049, March 1988.

Abstract: An officer of a licensee that was a nonprofit corporation was not entitled to be made a party where the officer had no ownership interest in, and was not entitled to any benefits from, the corporation.

There was good cause to consider a request for party status, even though the request was not made in writing, ten days prior to the hearing, where the Commission failed to notify the corporate licensee that corporations were required to be represented by attorneys.

Cases: *Satyricon*, OLCC-88-V-060, December 1988; *Bayou Inn*, OLCC-85-V-067, March 1986.

Abstract: Where corporate licensees have not been represented by attorneys at contested case hearings, the Commission has granted party status to individuals who own all of the stock or a significant amount of the stock of the corporation.

A.2.d Subpoenas/Depositions/Records

[\(return to index\)](#)

Case: *La Burrita Mini Market & Deli*, OLCC-09-V-082/082A, June 2010.

Facts: OLCC minor decoy was sold alcohol by Licensee without being asked to verify her age. Licensee disputed that the sale ever occurred, that Licensee ever operated the cash register, and accused the decoy of stealing the alcohol. Licensee sought to admit records during hearing that he did not turn over to the agency per a discovery order.

Abstract: Licensee's offered exhibits were excluded because licensee failed to produce copies of documents to the OLCC 14 days before hearing, as stated in a discovery order, and did not show good cause for the failure.

Key Words/Phrases: minor decoy, sale, failure to verify age, evidentiary ruling, discovery order

Case: *Oregon Health Care Assn. V. Health Div.* 148 Or App 568, 941 P2d 593 (1997).

Abstract: The Court of Appeals has jurisdiction to review an agency order refusing to quash subpoenas duces tecum, which were issued by the agency. The Court of Appeals may review non-final orders in contested cases in two situations: where an agency is proceeding without probable cause and where a petitioner will suffer substantial and irreparable harm if interlocutory relief is not granted.

Case: *Marks v. McKenzie High School Fact-Finding Team*, 121 Or App 146, 854 P2d 488 (1993).

Abstract: A governmental body asked a private non-profit organization to appoint a team to investigate problems. The records of the investigation team were subject to the Public Records Law. A governmental body cannot escape scrutiny by delegating tasks to private groups.

Case: *Dept of Revenue v. Universal Foods Corp.*, 318 Or 78, 862 P2d 1288 (1993).

Abstract: Administrative subpoena of Dept. of Revenue upheld where "relevant to the needs of a lawful investigative purpose" and "no broader than the needs of the investigation."

Case: *La Brisa*, OLCC-91-L-037, December 1992.

Abstract: The licensee is responsible for serving subpoenas and paying witness fees for witnesses requested by a licensee.

Case: 7455 Incorporated, *Jiggles*, OLCC-85-L-013, February 1987, *affirmed*, *7455 Inc. v. Oregon Liquor Control Commission*, 94 Or App 780, 767 P2d 116 (1989), *affirmed on other grounds*, 310 Or 477, 800 P2d 781 (1990).

Abstract: The Commission will modify the scope of a subpoena issued by the attorney of a party in a contested case where the scope of the subpoena is not reasonable.

Where a person subject to a subpoena duces tecum asserted that items sought by the subpoena were privileged, the Hearings Examiner conducted an *in camera* inspection of the subpoenaed materials to determine which must be disclosed.

Case: *Carney v. MVD*, 100 Or App 533, 786 P2d 1319 (1990).

Abstract: A party cannot complain that he was denied due process when one adverse witness did not attend his hearing and a second one did not bring requested materials, when the party did not serve his subpoenas on these

witnesses within the time frames established by the agency's administrative rules.

Case: *The Grog House v. OLCC*, 12 Or App 426, 507 P2d 419 (1973).

Abstract: The OLCC's denial of petitioner's motion for production of records did not result in a denial of due process because petitioner did not avail itself of the proper procedure by seeking a subpoena duces tecum under ORS 183.440.

A.2.e. Default

A.2.e.1. Late Request for Hearing

[\(return to index\)](#)

Case: *Bennett v. Board of Optometry*, 125 Or App 66, 865 P2d 362 (1993).

Abstract: Under OAR 137-03-003(1) it is permissible for the board to extend the time allowed for request for a hearing if good cause is found. Good cause for extension is defined as beyond the reasonable control of the person.

Applicant failed to request a hearing where applicant received notice that he needed to request a hearing within 21 days and applicant responded by sending a letter in which he requested an alternative sanction, but said nothing about a hearing. The court affirmed the board's decision that applicant's letter failed to constitute a request for hearing.

Case: *OLCC Agency No. 113*, OLCC-91-RO-005, January 1992.

Abstract: Where the request for hearing was late, there was good cause to honor the agent's late hearing request where the Merchandising Division waived the late hearing request due to special circumstances.

Case: *OLCC Agency No. 224*, OLCC-91-RO-001, April 1991.

Abstract: When an Agency Agreement requires that a request for a hearing be submitted within ten days of the Commission's request for payment of a shortage, a request for hearing received after that ten-day period will be dismissed unless the party shows good cause for filing a late request.

Case: *Mr. C's Hippopotamus*, OLCC-85-L-047, July 1986.

Abstract: Where person requested hearing within the time allowed, although it was more than 60 days after the date the application was denied, there was good cause shown for the late request.

Case: *Voorhies v. Wood, Tatum, and Mosser*, 81 Or App 336, 725 P2d 405 (1986).

Abstract: The test for determining if good cause exists to excuse a late filing of a request for hearing has been equated to the standard of "mistake, inadvertence, surprise or excusable neglect."

Case: *Anchor Inn*, OLCC-85-V-020, August 1985.

Abstract: Late request for hearing may be excused if licensees establish good cause for failure to make timely request.

Case: *Sayers v. Employment Division*, 59 Or App 270, 650 P2d 1024 (1982).

Abstract: Employment Division's order finding petitioner lacked good cause for the late filing of his request for hearing was an order in a contested case reviewable by the Court of Appeals.

A.2.e.2. Withdrawal of Request for Hearing

[\(return to index\)](#)

Case: *Sprengers*, OLCC-88-L-011, September 1988.

Abstract: Where a party appears at a hearing and indicates for the first time that it wishes to withdraw its application or its request for hearing, the request is untimely, the hearing will proceed, and the Commission will make a determination based on the facts presented.

Case: *7-Eleven Food Store No. 19101*, OLCC-87-V-003, June 1987.

Abstract: Licensees' withdrawal of request for hearing was not accepted because the request was made without written confirmation. A default hearing was held where the Commission presented a prima facie case.

Case: *Mr. C's Hippopotamus*, OLCC-85-L-047, July 1986.

Abstract: Where person seeking authorization to exercise DA license privileges as an officer, director, and shareholder of a corporate licensee was not given notice of his right to hearing pursuant to ORS 183.415 and where the record does not show that he made a knowing waiver of his right to hearing, the Commission will not conclude that there was an effective withdrawal of his request for hearing.

A.2.e.3. Failure to Appear at Hearing

[\(return to index\)](#)

Case: *Colleen Serpico*, OLC-08-V-092, August 2009.

Facts: Permittee served a minor who had been admitted to the licensed premises by a door checker who checked the minor's ID which clearly indicated he was under 21. The cases were consolidated cases Permittee and her employer, but the employer settled before hearing. Permittee did not appear for hearing, and later sent a letter to OAH stating she thought she had to contact the OLCC to request her own hearing after her employer's case was settled.

Abstract: Permittee's letter to OAH explaining why she didn't appear for her hearing did not contain sufficient information to demonstrate that her failure to appear was caused by circumstances beyond her reasonable control. Therefore a default order following the OLCC's presentation of a *prima facie* case was appropriate.

Although another employee checked Mr. Apodaca's identification at the door, Permittee cannot rely upon that fact as a defense. OLCC permittees have an independent duty to verify the age of a person who appears to be under the age of 26, regardless of whether another employee should have done so. *See, e.g., Stockman's Exchange* (OLCC, Final Order, 99-V-003, May 2000).

Key Words/Phrases: minor service, door checker, ID checked by other employee, failure to appear, default order, circumstances beyond control

Cases: OLCC-01-SPR-008, December 2001; OLCC-01-SPR-009, October 2001.

Abstract: Two service permit refusal cases were remanded to the Hearing Officer Panel for further hearing, following proposed default orders. The hearings in both cases were held less than 14 days from time of the notice of hearing and, in both cases, Applicants showed good cause for relief from default relative to the short notice. In remanding the cases, the Commission set a minimal interval in service permit refusal cases of 14 days between notice of hearing and the hearing dates, absent personal contact for waiver of the 14-day notice.

Case: *Boones Tavern*, OLCC-96-V-076, June 1997.

Abstract: Where notice of the hearing was sent by certified mail to the address provided by the Licensee and the Licensee failed to appear at the time and place specified for the hearing, the Commission may issue a Default Order based on a *prima facie* case made on the record of the hearing. OAR 845-03-105(1) and (3).

Case: *Little Caesar's*, OLCC-88-V-138, May 1989.

Abstract: A party "appears" at a hearing where the party attends or submits information at the hearing or submits information as otherwise allowed by ruling in the hearing.

Case: *7-Eleven Food Store No. 19101*, OLCC-87-V-003, June 1987.

Abstract: When a party requests a hearing but fails to appear at the specified time and place after proper notice, the Commission shall issue an order in the matter based upon a *prima facie* case made on the record of the hearing. ORS 183.415(6); OAR 845-03-030.

A.2.f. Interpreters

[\(return to index\)](#)

Case: *JR's Convenience Store*, OLCC-06-V-084, OLCC-07-L 005, December 2007.

Abstract: Applicant wished to have her daughter act as an interpreter at counsel table. OLCC had provided a professional interpreter and did not allow the daughter in accordance with the policy of not allowing the public to attend hearings. Applicant argued that she was prejudiced by an inability to give information to counsel during the hearing. There was no prejudice to applicant where her attorney had sufficient opportunity to interview his client before the hearing and a translator was provided at the hearing. *JR's Convenience Store*, OLCC-06-V-084, December 2007.

Code of Professional Responsibility for Interpreters in the Judiciary shall guide and be binding upon all persons, agencies and organizations who administer, supervise use, or deliver interpreting services to the judiciary. *Oregon Appellate Courts Advance Sheets, No. 24*, December 5, 1994, at A-11.

Case: *Mascorro v. Employment Division*, 70 Or App 531, 689 P2d 1326 (1984).

Abstract: Failure of agency to appoint interpreter for party who cannot understand or communicate English is reversible error.

Note: The court applied ORS 183.418, which requires interpreters at agency expense under certain conditions. ORS 183.418(2)(a)(A) and (B) impose specific procedural steps to be undertaken by the party before an interpreter will be required. The facts stated in the case suggest these steps were not taken by the party and were ignored by the court.

A.2.g. Offer of Proof

[\(return to index\)](#)

Case: *Frank v. Employment Division*, 57 Or App 646, 646 P2d 70 (1982).

Abstract: Petitioner failed to preserve as error on review any objection to the exclusion of evidence because she did not make an offer of proof as to what her testimony would have been.

A.2.h. Compelled Testimony

[\(return to index\)](#)

Case: 7455 Incorporated, *Jiggles*, OLCC-85-L-013, February 1987, *affirmed*, 7455 Inc. v. Oregon Liquor Control Commission, 94 Or App 780, 767 P2d 116 (1989), *affirmed on other grounds*, 310 Or 477, 800 P2d 781 (1990).

Abstract: ORS 471.770 does not provide immunity against cancellation or non-renewal of a liquor license in exchange for compelled testimony.

Under ORS 471.770, a person must assert her right not to testify without a grant of immunity and then be ordered to testify before she is entitled to statutory immunity.

A.2.i. Ex Parte Communications

[\(return to index\)](#)

Case: *Turnquist v. Employment Division*, 72 Or App 101, 694 P2d 1021 (1985).

Abstract: Court remanded order to EAB for reconsideration where EAB received ex parte communications but failed to comply with the statutory directive of ORS 183.462 to notify other parties and give an opportunity to rebut.

Case: *Stadelman v. Builders Board*, 62 Or App 1, 659 P2d 1017 (1983).

Abstract: The court was unable to determine whether the Builders Board considered untimely ex parte communications submitted by a party, and therefore remanded the board's order for reconsideration under ORS 183.482(8)(b)(B).

Case: *Markantonatos v. OLCC*, 29 Or App 79, 562 P2d 570 (1977).

Abstract: Prior to the hearing, the Examiner informed applicants that he had access to the entire file of the OLCC. The court held that as applicants were fully apprised of this fact and as the material did not form the basis for the Commission's decision, this error was not prejudicial.

Case: *Graham v. OLCC*, 20 Or App 97, 530 P2d 858 (1975).

Abstract: Ex parte communication with Commission subsequent to hearing and at Commission meeting did not substantially prejudice applicant's rights, and thus was not grounds for reversal.

A.2.j. Presiding Officer's Development of Record

[\(return to index\)](#)

Case: *In re Mettler*, 305 Or 12, 748 P2d 1010 (1988).

Abstract: Attorney-client relationship does not exist between a lawyer employed as a securities examiner and the government agency he is employed by. Where the duties of the examiner's job do not require that the examiner be a lawyer, examiner did not violate Bar's disciplinary rule which prohibits lawyers who represent clients from directly communicating with person represented by an attorney, when he communicated directly with party to hearing who was represented by an attorney. The securities examiner was not representing a client when he had the communication.

Case: *Hyde v. Employment Division*, 302 Or 171, 728 P2d 21 (1986).

Abstract: Hearings Examiners cannot fulfill their duty to fully inquire "into the matters at issue" by simply offering parties an opportunity to explain their positions. When explanations are provided, Hearings Examiners must seek both supporting and contradictory details. Hearings Examiners do not, however, have any duty to seek out evidence from sources not present at the hearing.

Case: *Dennis v. Employment Div.*, 77 Or App 633, 714 P2d 618 (1986), *affirmed on other grounds*, 302 Or 160, 728 P2d 12 (1986).

Abstract: Hearings Officer's failure to assist unrepresented claimant "by following up potentially favorable lines of inquiry and by helping her to present her evidence in the best light" held denial of due process under 14th Amendment to the United States Constitution.

Case: *Dennis v. Employment Div.*, 302 Or 160, 728 P2d 12 (1986).

Abstract: A Hearings Officer's duty under Employment Division rule, to inquire fully into the matters at issue, is simply a requirement that relevant evidence does not go unrepresented because of the ignorance or inexperience of a party. The necessary inquiry should be apparent from the nature of the proceedings and the evidence adduced. The referee is not required to cast aimlessly for evidence.

Case: *Humphries v. AFSD*, 77 Or App 548, 713 P2d 1073 (1986).

Abstract: Hearings Officer failed to perform duty to provide petitioner a full and fair hearing where Hearings Officer failed to take reasonable steps to help petitioner get evidence needed for a decision.

Case: *Graves v. AFSD*, 76 Or App 215, 708 P2d 1180 (1985).

Abstract: Where a claimant for general assistance benefits is mentally ill, is not represented by counsel and appears to be unable to address the issues involved in the hearing, the Hearings Officer must develop the record adequately to determine whether the claimant is entitled to benefits. If the Hearings Officer is unable to develop an adequate record by the hearing process, legal counsel must be appointed.

Case: *Berwick v. AFSD*, 74 Or App 460, 703 P2d 994 (1985).

Abstract: Where evidence presented by claimant unrepresented by counsel was insufficient to prove that she was entitled to benefits, Hearings Officer had duty to assist claimant in presenting evidence in her favor, explore all of the relevant facts, and develop a full record.

Case: *Black v. Corporation Division*, 54 Or App 432, 634 P2d 1383 (1981).

Abstract: Hearings Officers have a duty to develop a full record and have a right to question witnesses.

A.2.k. Change of Presiding Officers

[\(return to index\)](#)

Case: *Davidson v. Oregon Government Ethics Comm.*, 300 Or 415, 712 P2d 87 (1985).

Abstract: Challenge to agency change of Hearings Officers rejected where appellant failed to show bias or prejudice. To show bias or prejudice, appellant was required to show either that the agency had prejudged the facts of the case, was personally biased against appellant, or would gain financially.

A.2.I. Bias

[\(return to index\)](#)

Case: *Landmark Saloon*, OLCC-91-L-005, January 1992.

Abstract: Applicant made a Motion to Disqualify the Hearings Examiner and a Motion for Rehearing for the reason that the Hearings Examiner was prejudiced against him and he felt that he could not have a fair and impartial hearing. The Commission affirmed the Order of the Director of Hearings denying applicant's Motion to Disqualify the Hearings Examiner for the reason that the applicant failed to establish actual bias and failed to show that he was prejudiced.

Case: *Samuel v. Board of Chiropractic Examiners*, 77 Or App 53, 712 P2d 132 (1985).

Abstract: Board member should have disqualified self for bias where petitioner had filed lawsuit against board member. Lawsuit created the possibility of personal animosity by board member against petitioner and created the appearance of a substantial basis for bias.

Case: *Davidson v. Oregon Government Ethics Comm.*, 300 Or 415, 712 P2d 87 (1985).

Abstract: Challenge to agency change of Hearings Officers rejected where appellant failed to show bias or prejudice. To show bias or prejudice, appellant was required to show either that the agency had prejudged the facts of the case, was personally biased against appellant, or would gain financially.

Case: *Black v. Corporation Division*, 54 Or App 432, 634 P2d 1383 (1981).

Abstract: To disqualify a Hearings Examiner for bias, the party must demonstrate actual personal bias. It is not enough that the referees were employed by the agency which initiated the proceeding and performed the roles of prosecutor and Hearings Officer. The Hearings Officer's questions did not, in form or substance, evidence bias or tend to influence witnesses.

Cases: *Teledyne Wah Chang v. Energy Fac. Siting Council*, 298 Or 240, 262, 692 P2d 86 (1984); *Black v. Corporation Division*, 54 Or App 432, 634 P2d 1383 (1981).

Abstract: To successfully claim Hearings Officer bias, claimant must show actual bias.

A.2.m. Issue Preclusion/Claim Preclusion

[\(return to index\)](#)

Case: *Mt. Angel Market & Deli*, OLCC-12-V-003/003A/003B, July 2013.

Facts: On October 28, 2011, Licensee's employee sold alcohol to minor decoys without checking ID and did not use AVE equipment required by licensing restriction. Employee pled guilty to violation of furnishing alcohol to minors, and stipulated to a fact in the criminal proceeding related to his belief of the minor's age. Licensee sought to use that stipulated fact in the administrative proceeding.

Abstract: Issue preclusion arises in a subsequent proceeding when an issue of ultimate fact has been determined by a valid and final determination in a prior proceeding. Five elements are required to preclude relitigation of an issue in a subsequent proceeding:

- (1) The issue in the two proceedings is identical.
- (2) The issue was actually litigated and was essential to a final decision on the merits in the prior proceeding.
- (3) The party sought to be precluded has had a full and fair opportunity to be heard on that issue.
- (4) The party sought to be precluded was a party or was in privity with a party to the prior proceeding.
- (5) The prior proceeding was the type of proceeding to which the Oregon Supreme court will give preclusive effect.

Nelson v. Emerald People's Utility District, 318 Or 99, 104, 862 P2d 1293 (1993).

In this case there was no issue preclusion; neither Licensee nor the Commission were a party to the criminal proceeding, the issue was not actually litigated in the criminal proceeding, the employee did not have both full opportunity and incentive to contest the allegation, and a plea bargain is not the sort of proceeding to which the court will give preclusive effect.

Key Words/Phrases: restriction violation, AVE, age verification equipment, sale to minor, failure to verify, failure to train, failure to require, Oceanside factors, cancellation, substantial violation, issue preclusion

Case: *Tollgate Mountain Chalet*, OLCC-02-L-004, September 2002.

Abstract: Because the applicable five-part test for issue preclusion set out in *Nelson v Emerald People's Utility Dist.*, 318 Or 99 (1999) was met, the Commission gave preclusive effect to a Real Estate Agency Final Order on Default, which found four violations of real estate law and revoked Applicant's real estate license:

- (1) The issue(s) of ultimate fact in the two proceedings were identical - whether Applicant committed enumerated violations of real estate law (the same enumerated violations resolved in the Real Estate Agency contested case);
- (2) The issue(s) was/were actually litigated - that is, it was decided in the prior proceeding and was necessary to the decision;
- (3) Applicant had a full and fair opportunity to be heard on the issue, though she did not appear at the Real Estate Agency hearing, as she had full opportunity and incentive to contest the alleged violation of enumerated real estate laws on a record that was subject to judicial review and the administrative process provided Applicant a full and fair opportunity to litigate the issue for which preclusion of re-litigation is sought;
- (4) Applicant was a party to both proceedings;
- (5) The Real Estate Agency proceeding was the type of proceeding to which the court will give preclusive effect, in that the Real Estate Agency forum maintained procedures that are sufficiently formal and comprehensive; the Real Estate Agency proceedings are trustworthy; the application of issue preclusion

would facilitate prompt, orderly and fair problem resolution; and the same quality of proceedings and the opportunity to litigate is present in both proceedings.

Case: *Blondy's Market*, OLCC-V-013, February 2001.

Abstract: Before considering whether a charged violation should be dismissed based on an asserted dismissal of a similar charge in court, there must be corroboration of the dismissal and evidence concerning the basis for it.

Case: *Kowloon's*, OLCC-99-V-088, November 2000.

Abstract: The Commission declined to give preclusive effect to the outcome of a Municipal Court trial where failure to verify the age of a minor was not charged or litigated in the Municipal Court trial, there was insufficient evidence to show that issues in the two proceedings were the same, the burdens of proof in the forums differ, and OLCC is not in privity with the City of Eugene.

Case: *21st Street Quick Stop Market*, OLCC-97-V-025 and OLCC-97-V-060, August 1999.

Abstract: Citing *Drews v EBI Companies*, 310 Or 134, 795 P2d 531 (1990), the Commission distinguished the legal doctrines of claim preclusion (*res judicata*) and issue preclusion (*collateral estoppel*). To determine whether the doctrine of issue preclusion prevented the Commission from prosecuting an alleged violation of ORS 471.410(2), following the court's dismissal of a citation for the same sale, the Commission applied the criteria set out in *Nelson v. Emerald People's Utility District*, 318 Or 99, 104, 862 P2d 1293 (1993).

Case: *In re Brown*, 326 Or 582, 594, 956 P2d 188 (1998).

Abstract: In concluding that the accused's *res judicata* argument failed, the court stated that issue preclusion requires, among other things, that the issue in two separate proceedings be identical. Claim preclusion requires, among other things, that the second proceeding be based on the same factual transaction that was at issue in the first.

Case: *Stanich v. Precision Body and Paint, Inc.*, 151 Or App 446, 950 P2d 328 (1997).

Abstract: An administrative determination can be used as a basis for issue preclusion in a later civil proceeding. The doctrine of issue preclusion bars relitigation of an issue if five requirements are met. The issue sought to be precluded in the second proceeding must actually be litigated in the first proceeding. The issue must be essential to a final decision on the merits in the first proceeding.

Case: *Kimmel's Little Giant*, OLCC-95-V-028, June 1996.

Abstract: The Commission has concluded that it will not question or retry the underlying facts involved in a conviction.

Case: *Patterson v. Kanna*, 126 Or App 18, 867 P2d 518 (1994).

Abstract: The party raising judicial estoppel as a defense has the burden of showing that it relied to its detriment on a position taken by the other party in the earlier proceeding.

Case: *Marshall v. Korpa*, 118 Or App 144, 846 P2d 445 (1993).

Abstract: Findings in a workers' compensation proceeding that are determined on appeal not to be essential to the determination of compensability do not have preclusive effect.

Issue preclusion precludes future litigation of an issue only when the issue was actually litigated and determined in a

setting where its determination was essential to the final decision.

Judicial estoppel bars a party from asserting a position that is in conflict with a position that it successfully asserted in an earlier judicial proceeding. The doctrine connotes a situation where a litigant takes a current position contrary to an earlier position and the defending party relies on that position to his detriment. The purpose of the doctrine of judicial estoppel is to safeguard the judicial process from abuse by litigants who play fast and loose with the judicial system.

Case: *Caplener v. U.S. National Bank*, 317 Or 506, 857 P2d 830 (1993).

Abstract: The doctrine applies to preclude a party from asserting a position that is inconsistent with one the party successfully maintained in an earlier judicial proceeding.

Case: *Power Master, Inc. v. National Council on Comp. Ins.*, 109 Or App 296, 820 P2d 459 (1991).

Abstract: Under the doctrine of issue preclusion, future litigation is precluded between the parties on any issue of fact or law that was actually litigated and determined in a setting where its determination was essential to the final decision reached.

Case: *Heller v. Ebb Auto Co.*, 308 Or 1, 774 P2d 1089 (1989).

Abstract: Express findings and conclusions after a full administrative hearing would be entitled to preclusive effect, so that a claimant would be barred from bringing a separate civil action on the same issue. Here, an issue of religious discrimination was not decided by the Hearings Referee or the Employment Appeals Board. Thus, a separate Title VII action is not precluded.

Case: *In re White*, 305 Or 48, 750 P2d 468 (1988).

Abstract: The procedural requisites of res judicata are met where the quality of proceedings, opportunity to litigate, and incentives to litigate are essentially the same.

Cases: *Hanson v. Dept. of Rev.*, 294 Or 23, 30, 653 P2d 964 (1982); *John Myshak*, OLCC-88-V-002, May 1988; OLCC-88-SP-002, September 1988.

Abstract: The applicant is collaterally estopped from relitigating the facts surrounding her felony convictions because the issues underlying the convictions were fully litigated before a Circuit Court jury which found applicant guilty of the three felonies.

Case: *In re White*, 305 Or 48, 750 P2d 468 (1988).

Abstract: The rule of issue preclusion, stated in *State Farm Fire & Cas. v. Reuter*, 299 Or 155, 700 P2d 236 (1985), is that if a claim is litigated to final judgment, the decision on a particular issue or determinative fact is conclusive in a later or different action between the same parties if the determination was essential to the judgment. In this case, the claimant could not use an aggravation claim as a back door to relitigate underlying causation issues. The finding of no permanent partial disability at the first hearing did not bar the assertion of all later aggravation claims as a matter of law.

Case: *First Avenue Market*, OLCC-87-V-040, July 1988

Abstract: In a case involving an allegation that licensee had violated a settlement agreement, the licensee was collaterally estopped from relitigating issues that the Commission had decided in a previous case that involved licensee's request to modify the terms of the settlement agreement.

Case: *Dick v. Spaur*, 93 Or App 448, 762 P2d 1045 (1988).

Abstract: The Workers' Compensation Board's determination in a hearing about the compensability of a claimant's injury became "law of the case." Consequently, it was error for the board to redetermine the compensability of the injury in a later hearing.

Case: *Estate of Bocek v. Greentree Development Co.*, 86 Or App 320, 738 P2d 1080 (1987).

Abstract: For the doctrine of collateral estoppel to apply in a case where the deciding body in the prior litigation had substantial discretion, the deciding body's findings must have been explicit.

Case: *State v. Ratliff*, 304 Or App 254, 744 P2d 247 (1987).

Abstract: Under the doctrine of collateral estoppel, the decision of a Hearings Officer in an administrative contested-case proceeding under the Implied Consent law may not be used against the state in a subsequent criminal proceeding.

Case: *Hanson v. Dept. of Rev.*, 294 Or 23, 653 P2d 964 (1982).

Abstract: Collateral estoppel acts to prevent litigating more than once, the same issue, where the issue is identical to the one previously litigated, and where the matter was actually decided.

A.2.n. Late Exceptions/Good Cause (OAR 845-03-080(4))

[\(return to index\)](#)

Case: *J. Cole's Brew Pub*, OLCC-88-V-110, June 1989.

Abstract: Licensee did not show good cause for filing late exceptions when licensee did not pick up from the post office the certified letter containing the Proposed Order, licensee failed to request an extension of the period to file exceptions from the Director of Hearings, and the Commission had already determined the issues raised in the late exceptions during the companion case involving the service permittee who actually committed the violations charged.

A.2.o. Finalization of Proposed Order

[\(return to index\)](#)

Case: *Miller's Cave*, OLCC-88-V-134, May 1989.

Abstract: The Commission's administrator and a licensee agreed to a settlement of violation charges. The agreement provided that it would not be final until approval by the Commissioners. However, once the agreement was submitted at a hearing, OAR 845-03-090 governed whether the Commissioners' review of the Proposed Order was required.

Case: *Chuck Wagon*, OLCC-89-V-044, May 1989.

Abstract: The introduction of a settlement agreement into the record of a hearing in a violation case affects the provision in the agreement that it is conditioned on final approval by the Commissioners. The agreement will, in effect, become final without further Commission review upon issuance of the Final Order.

Case: *Sprengers*, OLCC-88-L-011, September 1988.

Abstract: A Proposed Order concerning a new dispenser application became final without Commission review where the order decided the case on a procedural basis and did not address the merits of the application under the licensing criteria.

Case: *Royal 99*, OLCC-84-L-024, February 1985.

Abstract: Proposed Order on renewal of DA license was finalized without review by Commissioners where no exceptions filed and no basis for automatic review present.

A.2.p. Reopening/Reconsideration

[\(return to index\)](#)

Case: *Omey v. Senior and Disabled Services Div.*, 124 Or App 112, 861 P2d 394 (1993).

Abstract: There was no error where the Hearings Officer refused on reconsideration to allow an additional physician's report that could have been submitted at the original hearing. OAR 461-25-380.

Case: OLCC-91-L-011, February 1992.

Abstract: Commission reopened the record to receive evidence of applicant's current use of alcohol, diagnosis, and treatment.

Case: *Scott v. Oregon State Penitentiary*, 117 Or App 182, 843 P2d 512 (1992).

Abstract: An agency cannot issue a valid order on reconsideration without first withdrawing the original order.

Case: *Landmark Saloon*, OLCC-91-L-005, January 1992.

Abstract: Where a licensee requests reconsideration, the Commission may do nothing. If the Commission does not act on the petition, the petition is deemed denied 60 days from its filing. ORS 183.482.

Case: *OLCC Agency No. 74*, OLCC-90-RO-001, April 1991.

Abstract: The Commission determined not to reopen the record to include evidence that the clerk involved in the sale to minor violation had been acquitted on criminal charges. This is consistent with prior Commission precedent in *Capital Market*, OLCC-88-V-030, September 1988, where the Commission concluded that the clerk's acquittal on a criminal charge did not prove the violation did not occur. In that case, the Commission reasoned that it did not know why the jury acquitted the clerk and that the standard of proof of "beyond a reasonable doubt" required to establish a criminal conviction is higher than the standard of proof required in a contested case where the facts must be established by a preponderance of the evidence.

Case: *Foghorn Tavern*, OLCC-90-V-092, April 1991.

Abstract: The record was reopened and the case reconsidered in light of the Court of Appeals reversing licensee's conviction for promoting gambling and the Regulatory Process Division withdrawing its charge that licensees committed a violation of permitting unlawful activity based upon promoting gambling conviction. Commission dismissed the contested case and vacated previous Final Order that concluded a violation had occurred.

Case: *Stockman's Cafe & Lounge*, OLCC-90-V-076, February 1991.

Abstract: Record was not reopened to consider new evidence that licensees had gone out of business and would not renew the license. The new information would not alter the Commission's jurisdiction to sanction licensees where they had not surrendered their current license.

Case: *Trocadero Inn*, OLCC-90-V-055, February 1991.

Abstract: Where licensee did not appear at Commission meeting, but alleged hidden owner who was not a party to the case attended, alleged hidden owner was not allowed to present oral argument because he was not a party to the case.

Case: *Linda Van Cleve*, OLCC-90-V-088, October 1990.

Abstract: The Commission will not reopen a record to consider whether an applicant passed the alcohol server education after the Proposed Order has been issued. The exceptions were dismissed for untimely filing.

Case: *Goldies*, OLCC-89-L-011, March 1990.

Abstract: Regulatory staff's request to amend their charges after the record was closed would require the Commission to reopen the record. The request was denied because the additional charges were based upon information that was available at the time of the hearing and failing to consider this information would not substantially prejudice the development of a party's case.

Case: *Beehive Grocery & Deli*, OLCC-89-V-184, March 1990.

Abstract: Exceptions filed to the Proposed Order that raised issues that were outside of the record were treated as a request to reopen the record to consider new information. Exceptions were dismissed and the evidentiary record remained closed where the Commission's jurisdiction continued because licensee still held a license.

Case: *SAIF v. Fisher*, 100 Or App 288, 785 P2d 1082 (1990).

Abstract: The fact that a petition for judicial review has been filed under ORS 183 does not limit the authority of an agency to reconsider an order before the order becomes final.

Case: OLCC-89-SP-010, May 1989.

Abstract: After the Proposed Order was issued, the Commission would not reopen the record to take new information that service permit applicant had taken and passed Alcohol Server Education course after the hearing had been held.

Case: *Kim Hong Restaurant*, OLCC-88-L-015, November 1988.

Abstract: The Commission granted a petition for reconsideration where the applicants had failed to file exceptions as a result of their difficulty with English.

Case: *J.B.'s Paradise Room*, OLCC-86- L-002, April 1987.

Abstract: Commission reopened hearing record to take additional information regarding more recent food sales information.

A.2.q. Stay of Final Order

[\(return to index\)](#)

Case: *Landmark Saloon*, OLCC-91-L-005, January 1992.

Abstract: OAR 845-03-110(2) provides that the Administrator may grant a stay pending reconsideration if the licensee shows both irreparable injury and a colorable claim of error in the order. The Commission denied applicant's request for a stay of the Final Order because the licensee's request for stay does not contain any colorable claim of error.

Case: OLCC-90-SP-237, August 1991.

Abstract: The Commission granted a stay of a Final Order where the Final Order denied the applicant a service permit because of a recent felony conviction. The Commission granted the stay because the applicant was in the process of having her felony conviction reduced to a misdemeanor and the misdemeanor would not be a basis to deny the permit. After her felony conviction was reduced to a misdemeanor by the court, the applicant made a new application and the service permit was granted on the new application.

Case: *Plaid Pantries, Inc. v. OLCC*, 16 Or App 199, 517 P2d 1192 (1974).

Abstract: The court denied a motion to dismiss a Proposed Order as moot where suspension had been fully executed but the penalties would have an adverse affect on the overall record of the petitioner.

Case: *Von Weidlein/N.W. Bottling v. OLCC*, 16 Or App 81, 514 P2d 560 (1973).

Abstract: A party who wants an agency order in a contested case stayed pending judicial review should first move for a stay before the administrative agency that issued the order.

Motion for stay of OLCC Final Order pending appeal was granted where points of appeal were colorable, where failure to grant stay would likely result in bankruptcy, and where no public harm would be caused by granting stay.

A.2.r. Attorney General/Agency Representation

[\(return to index\)](#)

Case: *Handy Food Mart No.5*, OLCC-97-079, August 1998.

Abstract: The use of Commission employees as lay representatives in contested case hearings does not represent the unauthorized practice of law. ORS 9.320 provides that while a proceeding may be prosecuted or defended by a party in person, or by the party's attorney, the state must appear by an attorney in all cases unless otherwise specifically provided by law. ORS 183.450(7) provides that express specific authority for the Commission to be represented in its contested case hearings by lay representatives. Since the Commission is in compliance with ORS 183.450(7), it may be represented in contested case hearings by nonmembers of the Oregon State Bar, so long as such representatives do not present legal argument. Legal argument has been defined by the Attorney General by rule. As long as the Commission and its lay representatives comply with ORS 183.450(7) and (8) and the required rule, the lay representatives would not commit the unauthorized practice of law while representing the Commission in a contested case hearing.

Cases: *Stars Cabaret & Steak House*, OLCC0-96-V-077, February 1998, and *Jazz de Opus*, OLCC-96-V-078, February 1998.

Abstract: Licensee filed a motion to disqualify the Assistant Attorney General representing the Regulatory Program at hearing, arguing that the representation of the Regulatory staff by the Attorney General's office in this case poses a conflict of interest when it is the Attorney General's office that would provide legal advice to the Administrative Law Judge in this case, if legal advice were needed. Licensee argued that DR-5-109(A) of the Code of Professional Responsibility for Oregon attorneys precludes the Attorney General's office from advising an OLCC Administrative Law Judge and representing Regulatory staff in the same matter without consent of the parties.

The Commission determined that it had no jurisdiction to apply Bar Association disciplinary rules to administrative proceedings and concluded that the OLCC was not the proper forum to address the basis for Licensee's complaint, DR-5-109(A). Moreover, the Commission referenced Formal Opinion No. 1991-83, in which the Board of Governors of the Bar Association recognized that in some instances, depending on the nature of the statutes creating the state agency, it would be permissible ex parte contact under the disciplinary rules for the same Assistant Attorney General to prosecute the case and advise the hearing officer while the decision is pending. The Commission declined to disqualify the Assistant Attorney General prosecuting the s matter on behalf of Regulatory staff.

Case: *Local 555 v. Fred Meyer*, Employment Appeals Board Opinions, April 1995.

Abstract: The Employment Appeals Board held that the Employment Department violated the rights of the parties to a fair and independent decision where the Department instructed the Administrative Law Judge that he could not ignore the advice of the Attorney General and the lawyers had advised the department to deny benefits.

Case: *Llewellyn v. Board of Chiropractic Examiners*, 119 Or App 397, 850 P2d 411 (1993).

Abstract: The Attorney General did not violate ORS 183.450(8) by presenting legal argument or giving legal advice to the Board of Chiropractic Examiners during a license revocation contested case hearing. The Attorney General is not the "agency representative" within the meaning of ORS 183.450(8). ORS 183.450(7) and (8) are designed to give an agency limited authority to appear through its officers or employees in a contested case hearing before another agency. Limitations placed on agency employees and officers of those statutes do not apply to the Attorney General.

The assistant attorney general's representation of SAIF Corporation in a prior civil action in which petitioner was defendant did not offend petitioner's due process rights when the same assistant attorney general represented the Board of Chiropractic Examiners in the subsequent license revocation proceeding. Petitioner presents no evidence

that the board members abdicated their responsibility and duty to find the facts from the evidence and presents no evidence that the board members failed to judge whether the facts warranted imposition of authorized sanctions.

ORS 183.450(7) and (8) authorize agency representation by someone other than the Attorney General only where the agency participates in a contested case hearing before another agency. The court determined that these provisions do not apply to the agency that conducts the contested case hearing. *Llewellyn v. Board of Chiropractic Examiners*, 119 Or App 397, 850 P2d 411 (1993).

The Court of Appeals held that ORS 183.450(7) and (8) allowing an agency to appear by an agency representative applies only in contested case hearings before "another agency." *Llewellyn v. Board of Chiropractic Examiners*, 119 Or App 397, 850 P2d 411 (1993). The Supreme Court on review did not take up this issue.

Case: *Llewellyn v. Board of Chiropractic Examiners*, 318 Or 120, 863 P2d 469 (1993).

Abstract: The intent of the Legislature in ORS 183.450(8) was to allow agency officers or employees to "represent" the agency in contested case hearings, but the statute limits the participation of the agency representative. The agency representative is not permitted to present legal argument or to give legal advice to the agency. If the agency wanted legal advice or legal arguments to be made, it must utilize the Attorney General.

The Legislature intended ORS 183.450(8) to preclude employees of an agency who represent the agency in contested case hearings from presenting legal arguments and giving legal advice, but did not intend the statute to preclude the Attorney General from making legal arguments or giving legal advice in contested case proceedings.

A.3. Adequacy of Statute/Rule

A.3.a. Constitutionality of Statute/Rule

A.3.a.1. Agency Authority to Decide Constitutional Issues

[\(return to index\)](#)

Case: *Cooper v. Eugene Sch. Dist. No. 4J*, 301 Or 358, 723 P2d 298 (1986).

Abstract: An agency ordinarily can interpret a statute so as to exclude unconstitutional application before the agency is forced to consider whether the statute itself is constitutional. The agency should consider whether anyone can obtain higher review if the agency erroneously concludes that the statute is unconstitutional.

Case: *Nutbrown v. Munn*, 311 Or 328 (1991).

Abstract: Although it is an authority to be exercised infrequently, and always with care, Oregon administrative agencies have the power to declare statutes and rules unconstitutional.

A.3.a.2. Specific Constitutional Issues

A.3.a.2.a. Vagueness

[\(return to index\)](#)

Case: *Jiggles*, OLCC-85-L-013, February 1987, *affirmed*, *7455 Inc. v. Oregon Liquor Control Commission*, 94 Or App 780, 767 P2d 116 (1989), *affirmed on other grounds*, 310 Or 477, 800 P2d 781 (1990).

Abstract: The traditional analysis applied to criminal cases under Article 1, Section 21 of the Oregon Constitution, concerning whether a statute or rule is so vague as to constitute an ex post facto law, does not apply to administrative proceedings.

Cases: *Hughes v. Adult & Family Services*, 58 Or App 478, 484, 648 P2d 1324 (1982); *Marcoules v. OLCC*, 91 Or App 573, 756 P2d 661, (1988).

Abstract: Licensee argued that the term "disorderly premises" in ORS 471.315(1)(d) and other terms in OAR 845-06-045 were unconstitutionally vague, not that they could be applied only after being defined by agency rules. Because the issue of rulemaking was not raised below, the court did not consider it for the first time on appeal.

Case: *Stagecoach Saloon*, OLCC-85-V-035, October 1986.

Abstract: OAR 845-06-045(2), prohibiting noisy conduct on the licensed premises, is not unconstitutionally vague.

Case: *Tacoma Cafe*, OLCC-86-ES-001, October 1986.

Abstract: ORS 471.315(1)(d) is not unconstitutionally vague nor violative of the Oregon or U.S. Constitutions.

OAR 845-06-045(2), which proscribes the licensee from permitting or tolerating boisterous conduct, etc. is not vague because it is capable of being consistently administered. The Commission maintains a digest of contested case opinions, and any deviation from prior treatment must be identified and rationally explained. Contested case orders are also reviewed and adopted or amended by the five OLCC Commissioners.

Case: *Korgan v. OLCC*, 72 Or App 31, 695 P2d 81 (1985).

Abstract: The statutory term "lewd" is not void for vagueness under Article 1, Section 21, of the Oregon Constitution and the 14th Amendment to the U.S. Constitution. "Lewd" is a Springfield class term which the agency can interpret either by rule or contested case. The interpretation must be consistent with legislative policy.

Case: *State v. Berman*, 63 Or App 301, 663 P2d 815 (1983).

Abstract: Administrative rules as well as statutes may be held void for vagueness.

Case: *Megdal v. Board of Dental Examiners*, 288 Or 293, 605 P2d 273 (1980).

Abstract: "Unprofessional conduct" is not vulnerable to attack under the state constitution for improper transference of legislative power to the board, or empowering the board to make laws ex post facto, because the object of the law is not to punish misconduct but to confine practice of the profession to those who maintain professional standards of conduct.

Case: *Taylor's Coffee Shop v. OLCC*, 28 Or App 701, 560 P2d 693 (1977).

Abstract: Terms "sanitary" and "insanitary" are not void for vagueness. These terms have a common and precise meaning when applied to eating establishments.

Case: *Oakridge Moose Lodge v. OLCC*, 28 Or App 397, 400, 559 P2d 925 (1977).

Abstract: Test of constitutionality for vagueness under Article 1, Section 10, of the Oregon Constitution is not specificity but opportunity for review.

Case: *Haviland Hotels v. OLCC*, 20 Or App 115, 530 P2d 1261 (1975).

Abstract: OLCC regulation requiring that a commercial establishment provide regular meals during usual business hours when such meals are regularly served and provide short orders or other cooked foods at other times is not void for vagueness.

Case: *Sun Ray Drive-In Dairy v. OLCC*, 20 Or App 91, 530 P2d 887 (1975).

Abstract: A regulation which stated that "Package Store licenses shall not be issued . . . to an outlet which primarily sells petroleum products if there are other outlets with packaged liquor privileges within a reasonable distance" held to be neither vague nor overbroad.

Case: *LaMar's Enterprises, Inc. v. OLCC*, 18 Or App 77, 524 P2d 336 (1974).

Abstract: The term "lewd" as used in ORS 472.180(5) is not void for vagueness.

Case: *Von Weidlein/N.W Bottling v. OLCC*, 16 Or App 81, 96, 517 P2d 295 (1973).

Abstract: The phrase in ORS 471.290(1) that a person applying for a liquor license may be compelled to provide "such other pertinent information as the Commission may require" is not void for vagueness.

Case: *Palm Gardens, Inc. v. OLCC*, 15 Or App 20, 514 P2d 888 (1973).

Abstract: Word "lewd" in statute prohibiting maintenance of lewd establishments by licensees is not unconstitutionally vague under either federal or state standards.

A.3.a.2.b. Overbreadth

[\(return to index\)](#)

Case: *Sandy Jug Tavern*, OLCC-87-V-022, OLCC-87-V-023, January 1988, *affirmed without opinion*, *Sahli v. Oregon Liquor Control Commission*, 94 Or App 575, 767 P2d 934 (1989).

Abstract: ORS 471.315(1)(d) (maintained lewd establishment) and OAR 845-06-045(2) (permitted lewd activities) are not overbroad under Article 1, section 8 of the Oregon Constitution where the Commission construes them to not apply to protected or communicative acts and to apply only to acts which are otherwise within the Commission's proper regulatory authority over conduct in liquor-licensed establishments.

Case: *Sekne v. City of Portland*, 81 Or App 630, 726 P2d 959 (1986).

Abstract: A city ordinance against all nude dancing was overbroad because it could not be given a constitutional construction "without straining the boundaries of what the city sought to accomplish or what the ordinance itself conveys to the reader." Citing *City of Portland v. Gatewood*, *supra*.

Case: *State v. House*, 66 Or App 953, 676 P2d 892 (1984), *modified in* 68 Or App 360, 681 P2d 173, *affirmed on other grounds*, 299 Or 78, 698 P2d 951 (1985).

Abstract: Term "sexual conduct" in ORS 167.062(1) was held overbroad.

Case: *City of Portland v. Gatewood*, 76 Or App 74, 708 P2d 615 (1985).

Abstract: Ordinance forbidding public nudity not overbroad under Article 1, Section 8, of the Oregon Constitution, because the ordinance regulated conduct that was injurious to health, safety and morals, rather than regulating protected, symbolic or communicative acts.

Case: *Sun Ray Drive-In Dairy v. OLCC*, 20 Or App 91, 530 P2d 887 (1975).

Abstract: Regulation that stated that "Package Store licenses shall not be issued to an outlet which primarily sells petroleum products if there are other outlets with packaged liquor privileges within a reasonable distance" was not overbroad.

A.3.a.2.c. Free Speech and Expression

[\(return to index\)](#)

Case: *Boogie Woogies/Stars Cabaret*, OLCC-01-V-051, September 2002.

Abstract: The OLCC's interpretation of "performing" which prohibits minor dancers from soliciting in areas prohibited to minors, does not violate the minor dancers' free speech rights protected by Article I, Section 8 of the Oregon Constitution. OLCC does not prohibit minor dancers from expressing themselves freely on stage or in other areas not prohibited to minors. OLCC's interpretation of "performing" which precludes solicitation in areas prohibited to minors, furthers the legislative policy of proscribing harm to minors from exposure to alcohol, and does not violate minor dancers' free speech rights, including commercial speech, under the Oregon Constitution.

Case: *Pop-A-Top Pub*, OLCC-96-V-049, August 1997.

Abstract: To establish that an activity is protected by the Oregon Constitution, a licensee must first establish that the performance was intended as a form of expression. If so, then the conduct may be protected, unless it is sexual intercourse or masturbation, which may be prohibited in any event. If the activity was not intended as a form of expression, it is not protected by the constitutional provision. Based on the record, the Commission found that the dancers' conduct was not protected symbolic or communicative acts.

Case: *Meltebeke v. Bureau of Labor and Industries*, 120 Or App 273, 852 P2d 859 (1993).

Abstract: The Supreme Court remanded the Final Order to BOLI with instructions to dismiss the complaint. The court declared BOLI's rule prohibiting religious harassment unconstitutional. An employer punished for a religious practice (giving testimony) must know that the conduct causes an effect forbidden by law (harassing employees). The employer must know his conduct creates an intimidating, hostile, or offensive working environment. That the employer "should have known", as BOLI's rule states, is not enough. In its quest for facts upon which a contested case may depend, an administrative agency need not eschew logic.

BOLI rule regarding religious harassment was not unconstitutional as written, but it was unconstitutional as applied. The rule was not the least restrictive means of advancing an overriding governmental interest.

Case: *Sekne v. City of Portland*, 81 Or App 630, 726 P2d 959 (1986).

Abstract: The Twenty-First Amendment does not augment the states' power to regulate expression in establishments licensed to serve liquor as against the Oregon Constitution Article 1, Section 8.

Portland city ordinance that prohibits nude dancing extends into areas of constitutionally protected expression.

Case: *City of Portland v. Gatewood*, 76 Or App 74, 708 P2d 615 (1985).

Abstract: Ordinance forbidding public nudity not overbroad under Article 1, Section 8, of the Oregon Constitution, because the ordinance regulated conduct that was injurious to health, safety and morals, rather than regulating protected, symbolic or communicative acts.

Case: *State v. House*, 66 Or App 953, 676 P2d 892 (1984), *modified in*, 68 Or App 360, 681 P2d 173, *affirmed on other grounds*, 299 Or 78, 698 P2d 951 (1985).

Abstract: The term "sexual conduct" in ORS 167.062(1) was held to the Freedom of Expression clause in the Oregon Constitution.

Case: *Palm Gardens, Inc. v. OLCC*, 15 Or App 20, 514 P2d 888 (1973).

Abstract: Prohibition against maintenance of lewd establishment by licensees does not violate federal right of free expression.

A.3.a.2.d. Police Power

[\(return to index\)](#)

Case: *American Can Co. v. OLCC*, 15 Or App 618, 517 P2d 691 (1973).

Abstract: "Bottle Bill" statute was a legitimate exercise of police power.

A.3.a.2.e. Commerce Clause

[\(return to index\)](#)

Case: *American Can Co. v. OLCC*, 15 Or App 618, 517 P2d 691 (1973).

Abstract: "Bottle Bill" statute was valid under the commerce clause.

A.3.a.2.f. **Liquor by the Drink (Art. 1, Sec. 39, Oregon Constitution)**

[*\(return to index\)*](#)

Case: *Van Ripper v. Liquor Cont. Com.*, 228 Or 581, 365 P2d 109 (1961).

Abstract: Article 1, Section 39, of the Oregon Constitution provides the Commission authority to promulgate a regulation requiring dispenser licensees to sell at least 25 percent food.

The term "where food is cooked and served" in Article 1, Section 39, of the Oregon Constitution refers to bona fide eating establishments, in which the cooking and serving of food is an important feature of the business. The term does not refer to saloons, where the sale of alcoholic beverages is the principal or possibly the sole pursuit.

A.3.a.2.g. Equal Protection (14th Amend., U.S. Constitution; Art. 1, Sec. 20, Oregon Constitution)

[\(return to index\)](#)

Case: *OLCC Agency No. 16*, OLCC-02-RO-004, December 2002.

Facts: Agent's employee sold to minor decoy through Independence police. Employee was served with criminal complaint which was dismissed without prejudice. Agent argued that it is not responsible for knowing sale by its employee, and that ORS 471.346(6) violate Equal Protection clauses.

Abstract: The distinction in treatment drawn in ORS 471.346, between requiring certain uniform decoy operation standards for sellers located in areas of more than 20,000 people and exempting sellers from those standards in areas of less than 20,000 people, does not violate either Article I, Section 20 of the Oregon Constitution or the Equal Protection clause of the Fourteenth amendment to the U.S. Constitution. The legislature had the authority to act, the class distinction was based on personal characteristics (geographic location) that are not immutable, and the disparate treatment occasioned by the distinction has a rational basis.

Key Words/Phrases: minor, decoy, knowledge, true age, knowing violation, reasonably appears, negligent sale, agent, employee, Equal Protection, reduced penalty to other agents, Retail Sales Agent Agreement, effect of criminal proceeding

Case: *Boogie Woogies/Stars Cabaret*, OLCC-01-V-051, September 2002.

Abstract: OLCC's interpretation of "performing" in OAR 845-006-0335(6)(a) is applied equally to minor dancers, most of whom are female, and to minor musicians, most of whom are male. Licensees did not establish that OLCC's interpretation of "performing," as applied, violates the minor dancers' equal protection rights based on gender guaranteed by the 14th amendment to the U.S. Constitution and Article I, Section 20 of the Oregon Constitution.

Case: *Gabi's Restaurant & Lounge*, OLCC-92-L-011, March 1994.

Abstract: Record showed reasons other than arbitrary treatment or racism (fewer serious problems and none with weapons, absence of recent complaints, monthly meetings with OLCC staff and police) that reasonably explained why the Commission treated a white Dispenser Class A licensee differently than a black African American Dispenser Class A licensee.

A.3.b. Rule Exceeds Statutory Authority and Rule Construction

[\(return to index\)](#)

Case: *Jasper's*, OLCC-13-V-058, May 2014.

Facts: Employee of Licensee sold alcohol to minor decoy with OLCC. Licensee was part of the Responsible Vendor program. Licensee had previously had a violation in 2009 for failing to verify age, and resolved by purchasing AVE. Licensee was required to use AVE on every point of sale of alcohol. Minor decoy was asked for ID which showed true age, employee reviewed it and told the decoy she was not 21. Employee did not use AVE and sold the alcohol to the decoy. The Commission argued for aggravation due to the lack of using AVE. Licensee argued that the Commission misconstrued OAR 845-009-0135(3)(g) as a basis for aggravation.

Abstract: OAR 845-009-0135(3)(g) is required in determining aggravating circumstances, and Commission's reliance on it was correct.

While the Commission is correct that OAR 845-006-0500 applies to members of the RVP, the pertinent question is whether those factors, and particularly the factors in subsection (7)(c), are the basis for determining removal from the RVP. They are not. Removal from the RVP is based upon an analysis of aggravating circumstances under OAR 845-009-0135(7), which specifically addresses removal from the RVP, and specifically incorporates subsection (3)(g) of the same rule.

Key Words/Phrases: minor decoy, responsible vendor, age verification, AVE, rule construction, agency interpretation, notice

Case: *Blue Iguana Mexican Restaurant & Cantina*, OLCC-09-V-035/035A/035B, April 2010.

Facts: Licensee with #1 minor posting. During a compliance check inspectors found 8 employees working as security with no DPSST certification, and two were minors. Licensee also had a band playing, two were minors. Licensee raises a number of defenses, including arguing that its employees were exempt from the DPSST certification under ORS 181.187(1)(k), that there is an exemption for "organized events," and OLCC lacked authority to find a violation for lack of DPSST certification.

Abstract: Licensee argues that hiring an employee who does not have DPSST certification when otherwise required is not "unlawful activity" for which OLCC can impose a sanction on a Licensee. First, Licensee points out that a person who performs private security services without being certified is subject to three sanctions: the criminal sanction under ORS 181.991(1)(b); the DPSST sanction of imposing a civil penalty; and OLCC's sanction for allowing or permitting unlawful activity upon the premises. Licensee asserts that OLCC's assertion that it is only enforcing its "unlawful activity" rule is merely a guise, and that OLCC is actually just enforcing DPSST's certification requirements under ORS Ch. 181 and imposing them on Licensee. Licensee maintains that such use of the rule is beyond OLCC's statutory authority, is not a reasonable interpretation of its own rule and is outside the scope of its authority as an agency.

Actually, a "person" as described by Licensee, is not subject to three sanctions. The individual who acts as a private security provider is subject to the criminal sanction and may also be subject to DPSST's administrative sanction. However, OLCC's sanction is not against that individual, it is against the licensee who permitted non-DPSST certified personnel to perform security services on the licensed premises. OLCC is enforcing OAR 845-006-0347(3). It is within OLCC's authority as an agency to take administrative action against a licensee for the actions of individuals employed by that licensee, whether or not any of the other sanctions against that individual are imposed or not.

Along these same lines, Licensee also argues that there is nothing in ORS Ch. 471 that would allow the OLCC to classify an activity based on failure to be DPSST certified as a violation of liquor laws or an “unlawful activity.” Licensee maintains that DPSST laws have nothing to do with the OLCC’s purpose of enforcing liquor laws under ORS 471.030. The OLCC has full authority to require their licensees to follow the law, including requiring DPSST certification of private security providers, and can sanction licensees who hire employees that run afoul of that requirement. The Liquor Control Act cited by Licensee includes as stated purposes the prevention of: “the recurrence of abuses associated with saloons or resorts for the consumption of alcoholic beverages” as well as protecting the safety of Oregonians. ORS 471.030. These are broad ranging purposes and rationally can include regulation of licensees for purposes related to prohibiting fights, minors on premises and other “abuses” associated with a licensed premises, as well as protecting the safety of those Oregonians involved or in proximity to fights and minors who may attempt to consume alcoholic liquor or be in prohibited places on the premises.

Lastly, Licensee argues that OLCC does not have rules requiring an employee of a licensee to be DPSST certified, and is selectively enforcing the DPSST certification requirement as an “illegal activity” on premises. Licensee asks that OLCC dismiss this action and cease such actions until it has made clear by rule which employees in a licensed premises must be DPSST certified and defines the circumstances under which the ORS 181.871(1)(k) exemption applies. Licensee maintains that OLCC Regulatory Staff’s interpretation of the requirements for DPSST certification results in DPSST certification for all of a Licensee’s employees, and that if that is not the outcome of Staff’s interpretation, then the interpretation is not clear and should be clarified.

Licensee specifically contends that licensees that hold dances or attract larger crowds are being targeted by OLCC, while “fine dining establishments” with the same liquor license privileges are ignored, even though their employees perform, or are expected to perform the same duties that OLCC is attempting to sanction in this case. However, there is no evidence in this record to suggest that OLCC treated Licensee differently from any other similarly situated licensee. This record suggests only that OLCC takes action against any licensee that permits unlawful activity by employing non-DPSST certified personnel to perform security services on the licensed premises.

As to Licensee’s request that OLCC dismiss this action and cease other similar actions until it promulgates clearer rules and guidelines, the rule defining “unlawful activity” (OAR 845-006-0347(3)(a)) is clear insofar as it defines the terms as a violation of a criminal statute. While the Commission understands that Licensee takes issue with the entire policy and practice of OLCC sanctioning licensees using uncertified private security providers, that policy, as demonstrated in this case, appears to be coherent, rational and systematic. Petitioner’s arguments are not persuasive.

Key Words/Phrases: permitting, unlawful activity, DPSST, security, defenses

Case: *Downtown Delicatessen*, OLCC-04-V-022 August 2007, amended final order following *Papas v. OLCC*, 213 Or App 369 (2007).

Abstract: In analyzing the validity of a rule the trier of fact looks at 1) whether the agency had the authority to take the action it did; 2) whether procedures prescribed by statute or rule were correctly followed in taking action; and 3) whether the action was consistent with the legal standard expressed or implied in a particular law or statute. This analysis comes from *Planned Parenthood Assoc. Inc. v. Department of Human Resources of Oregon*, 297 OR 562, 565 (1984).

Where the agency’s interpretation of a rule is inconsistent with the wording of the rule and its context the agency interpretation is not entitled to the court’s deference. Nothing in the interpretation or application of OAR 845-006-0345(11)(c) identified the consumption or quantities against which the required increase for a drinking contest is measured.

Case: *Felipe’s Finest Mexican & Seafood Restaurant*, OLCC-06-V-016, February 2007.

Facts: Licensee initially ran a Mexican restaurant, and then expanded to an adjacent space for a dance club. Numerous instances of fights and disturbances, over-service and intoxicated patrons were documented. The OLCC

held intervention meetings and issued verbal warnings, as well as several violations. Licensee agreed to a compliance plan and the number of instances reduced, but then rose again several months later. Licensee was then discovered to not be serving food during the minimum 3-hour required period. When the OLCC proposed to cancel the license, Licensee argued that the agency had a “double standard” and treated Licensee differently because of his and/or his patrons’ race/ancestry, and challenged the OLCC’s ability to promulgate rules regarding food service requirements.

Abstract: Food service rules are consistent with legislative direction regarding licensing and regulating commercial establishments and are within statutory authority. The ALJ’s proposed order had said that OLCC’s food service rules exceeded the Commission’s statutory authority.

Key Words/Phrases: history of serious and persistent problems, food service requirements, cancellation, Oceanside factors, willingness to control, control plan, similarly situated licensees

Case: *The Table Restaurant & Lounge*, OLCC-03-V026/026A, May 2004.

Facts: Licensee in a known high-crime/drug use area with history of problems. Based on tips police conducted covert investigations regarding drug sales on the premises. Several of licensee’s employees were arrested and convicted of sales/possession of cocaine and meth. During a search warrant licensee was found to have prescription meds (oxycodone) belonging to someone else. The OLCC proposing to cancel the license. Licensee argued that he lacked knowledge of the drug sales, would violate due process to cancel the license, no nexus between the liquor regulation and activities at issue, and cancellation is not the prescribed sanction.

Abstract: Licensees questioned the validity of OAR 845-006-0347(3) as exceeding the scope of ORS 471.425(2), the statute the rule purports to implement. The Commission relies upon its authority in ORS 471.030, 471.040, and 471.730(1) & (5) for adoption of OAR 845-006-0347(3). In these statutes, the Commission is given broad authority to make rules to regulate the operation of premises that serve or sell alcoholic beverages. This broad grant of authority provides the necessary authority for promulgation of OAR 845-006-0347(3).

Because there can be no reasonable question the Commission has the statutory authority to promulgate OAR 845-006-0347(3), the concern with the rule really translates to a question of whether the rulemaking requirements of ORS 183.335 were followed, given the incorrect implemented statute reference.

Key Words/Phrases: permitting unlawful activity, license privilege, aggravation

Case: *Trails Inn Restaurant & Lounge*, OLCC-02-V-004, June 2002.

Abstract: That the Commission issues citations for violations of OAR 845-006-0035(1) only when the alcohol purchaser is actually under 21 years of age, does not render the rule invalid as applied. The age verification rule is designed to further the underlying statutory policy of preventing the sale of alcoholic beverages to minors and, as the Commission has previously determined, the rule is within the OLCC’s statutory authority. Under these circumstances, it is appropriate for the Commission to limit the rule’s application to circumstances in which failure to verify age results in the sale to a minor.

Case: *Handy Food Mart*, OLCC-98-V-029, April 1999.

Abstract: OAR 845-006-0035(1) serves the underlying policy of ORS 471.130, that is, to verify the age of young-looking customers so as to prevent the sale of alcohol to minors. The Commission concluded that the rule reasonably advances a statutory purpose and does not exceed the statutory authority of the Commission.

Case: *Don't Waste Oregon Com. v. Energy Facility Siting*, 320 Or 132, 881 P2d 119 (1994).

Abstract: When an agency's interpretation its own rule is consistent with the wording of that rule, considered in its context, and when no other source of law establishes that the agency's interpretation of the rule is impermissible, a

reviewing court will not find that the agency has "erroneously interpreted a provision of the law" under ORS 183.482(8)(a).

Case: *Oregon Occupational Safety v. PGE*, 119 Or App 17, 849 P2d 544 (1993).

Abstract: When a rule is subject to two reasonable interpretations, courts look at the context in which the rule was adopted and determine which interpretation is more reasonably consistent with the rule and the underlying statute.

Case: *Gilliam County v. Dept. of Environmental Quality*, 316 Or 99, 849 P2d 500 (1993).

Abstract: Judicial review of administrative regulations pursuant to ORS 183.400 is limited to the face of the rule and the law pertinent to it. The rule may be declared invalid only if the court finds that it was adopted without applicable rulemaking procedures, that it exceeds that statutory authority of the agency, or that it is unconstitutional. The court may not review the rule as applied to individual fact situations.

Case: *England v. Thunderbird*, 315 OR 633, 848 P2d 100 (1993).

Abstract: Court's role in statutory interpretation is to discern and apply the legislature's intent, with the best indication of legislative intent being the words of the statute themselves.

Case: *State v. Long*, 315 Or 95, 843 P2d 420 (1992).

Abstract: Regarding delegation of legislative power, the court does not draw a distinction based on whether the delegation is to a state or local agency, but rather focuses on a determination of whether adequate legislative standards are present, and whether the legislative policy has been followed.

Case: *AFSCME Local 2623, et al. v. Department of Corrections, et al.*, 315 Or 74, 843 P2d 409 (1992).

Abstract: Aside from questions that might arise concerning the facts surrounding the process of adopting a rule, judicial review under ORS 183.400 is limited to the face of the rule and the law pertinent to it.

Numerous individual fact situations can arise under any rule, but judicial review of the rule as applied to each of those situations is reserved to forums other than a proceeding brought under ORS 183.400.

The legislature need not name the particular way in which an agency must fulfill its duties in order for the particular way selected by the agency and promulgated as a rule to be permissible.

Case: *Unified Sewerage Agency v. Dept. of Environmental Quality*, 117 Or App 29, 843 P2d 502 (1992).

Abstract: Under ORS 183.400, review by the Court of Appeals of a rule establishing assessments for compliance with a pollution abatement program, the court does not examine the factual basis for the rule or inquire whether the agency's assessments are supported by the evidence. The court's review determines whether the rule is within the range of discretion allowed by the general policy of the statutes.

Case: *Merrick v. Board of Higher Education*, 103 Or App 328, 797 P2d 388 (1990).

Abstract: Under ORS 183.400(1), the Court of Appeals has jurisdiction to determine the validity of any rule on a petition of any person. The petitioner also has the option of seeking a declaratory ruling from the agency under ORS 183.410.

Case: *Clark v. Schumacher*, 103 Or App 1, 795 P2d 1093 (1990).

Abstract: Where the director of the Department of Corrections is empowered by statute to "adopt rules for the A.3.b. Rule Exceeds Statutory Authority and Rule Construction Revised April 2015
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government and administration of the department," and statutory limitations require that sanction rules be "appropriate" and not "inflict any cruel or unusual punishment," the court found that the agency did not exceed its statutory rulemaking authority by imposing fines as disciplinary sanctions because this is within the "general policy" of the statutory framework.

Case: *Weyerhaeuser Company v. Miller*, 306 Or 1, 760 P2d 1317 (1988).

Abstract: A rule requiring proof of mailing in a certain manner did not exceed scope of the board's authority to make rules for the conduct of its own procedures.

Case: *Cook v. Workers' Compensation Dept.*, 306 Or 134, 758 P2d 854 (1988).

Abstract: Workers' Compensation Department director has a duty to apply statutes to individual factual situations. That process involves interpretation of statutory terms, either by rule or order in a contested case. Thus, the director had the authority to promulgate a rule interpreting the term "doctor or physician." Rule was invalid, however, because the interpretation was not consistent with the policy underlying the legislative enactment. The Department's interpretation of the statutory language did not comport with the statutory intent.

Cases: *Oreg. Fire/Police Retire. v. PERB*, 62 Or App 777, 662 P2d 729 (1983); *Weyerhaeuser Company v. Miller*, 88 Or App 286, 745 P2d 429 (1987).

Abstract: Regulations may be adopted only to carry out provisions of a statute and not to change them. An agency may adopt rules to carry out provisions of enabling legislation. It may not by rule amend, alter, enlarge or limit the terms of a statute.

Case: *Valley View Vineyards*, OLCC-87-V-014, November 1987.

Abstract: OAR 845-06-045(6) [now (8)] does not interpret ORS 471.405. It is a delegative rule promulgated under the authority of ORS 471.730.

Authority: *Administrative Rule Review Report No. 7608*, by the Legislative Counsel, September 18, 1987.

Abstract: OAR 845-10-127, effective January 1, 1987, exceeded the intent and scope of the enabling statute, ORS 471.465, which was in effect at the time the rule was adopted. However, amendments to ORS 471.465, which became effective on September 22, 1987, now provide the necessary statutory authority for the rule.

Case: *Realty Group v. Department of Revenue*, 299 Or 377, 702 P2d 1075 (1985).

Abstract: An agency can change or replace a legislative rule for any legitimate reason, so long as it remains within the explicit or implicit bounds of the policy delegated to it. An agency also may change an interpretive rule without awaiting amendment of the statute or other terms that the rule interprets, if the agency concludes that a new formulation is appropriate to clarify its view of the terms in question.

The agency is bound to follow their rules until it replaces them, but the validity of a rule can always be challenged by one in a procedural posture to do so. If a party convinces an agency that its interpretation is wrong, the agency is not bound to persist in the error.

Case: *Planned Parenthood Assn. v. Dept. of Human Res.*, 297 Or 562, 687 P2d 785 (1984).

Abstract: The meaning of the word "authority" in ORS 183.400(4)(b) cannot be taken to mean only the overall area of an agency's authority or "jurisdiction," because that construction would leave rules open to substantive review only for constitutional violations under ORS 183.400(4)(a). In effect, such an interpretation would expand every official's rulemaking power on matters within his general assignment to the limits of constitutional law, whatever the legislative

policy of the statute might be.

The proper sequence of analyzing the legality of action taken by officials under delegative authority is to first consider whether actions fall within reach of their authority; second, whether action was taken by procedures prescribed by statute or regulation; and third, whether substance of action, though within the scope of the agency or official's general authority, departed from the legal standard expressed or implied in the particular law being administered or contravened some other applicable statute.

Case: *Corvallis Lodge No. 1411 v. OLCC*, 67 Or App 15, 677 P2d 76 (1984).

Abstract: Rule overturned because did not protect from arbitrariness, but instead constituted an improper delegation of governmental authority, where it failed to protect against the unaccountable exercise of government power delegated to DA licensees.

Case: *Joint Council of Teamsters v. OLCC*, 46 Or App 135, 610 P2d 1250 (1980).

Abstract: Rule held invalid because it conflicted with the plain wording of the statute, and thus constituted a greater exercise of power by the Commission than had been delegated to it.

Case: *Miller v. OLCC*, 42 Or App 555, 600 P2d 954 (1979).

Abstract: Validity of the Commission's price posting rules upheld because they reasonably advanced statutory and constitutional purposes. The court noted that an agency's interpretation of its statutory authority is entitled to deference by the courts.

Case: *Kids Against the Cut v. Wage and Hour Comm.*, 41 Or App 179, 597 P2d 1264 (1979).

Abstract: Rule declared invalid because Commission exceeded its statutory authority. Statute required that Commission make determination that minimum wage would substantially curtail opportunities for persons under 18 years of age as a prerequisite for adopting a new rule which would reduce the minimum wage for those persons. Rulemaking record did not reflect that the required determination was made.

Case: *Morishige v. OLCC*, 29 Or App 651, 564 P2d 1359 (1977).

Abstract: Dissenting opinion argued that the Commission may not deny a license based solely on an unreasoned city recommendation. To do so would be an unqualified delegation of the Commission's licensing power and would, therefore, exceed the Commission's authority.

Case: *Taylor's Coffee Shop v. OLCC*, 28 Or App 701, 560 P2d 693 (1977).

Abstract: Commission rule forbidding "permitting" insanitary conditions is a reasonable means of achieving the statutory objective of protecting public health and preventing "maintenance" of an insanitary establishment. *Powderhorn*, OLCC-92-V-004, February 1993 (same reasoning adopted for rule which makes it a violation to permit a disorderly activity).

Case: *Van Ripper v. OLCC*, 228 Or 581, 365 P2d 109 (1961).

Abstract: The Commission has the authority to promulgate a regulation requiring that a dispenser outlet must sell at least 25 percent food.

A.3.c. Improper Rulemaking

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Case: *The Table Restaurant & Lounge*, OLCC-03-V026/026A, May 2004.

Facts: Licensee in a known high-crime/drug use area with history of problems. Based on tips police conducted covert investigations regarding drug sales on the premises. Several of licensee's employees were arrested and convicted of sales/possession of cocaine and meth. During a search warrant licensee was found to have prescription meds (oxycodone) belonging to someone else. The OLCC proposing to cancel the license. Licensee argued that he lacked knowledge of the drug sales, would violate due process to cancel the license, no nexus between the liquor regulation and activities at issue, and cancellation is not the prescribed sanction.

Abstract: OLCC incorrectly cited ORS 471.425(2) as the statute implemented for the entirety of OAR 845-006-0347, including section (3) of that rule. Providing references to authorizing statutes as well as the implemented statutes are part of the requirements set forth in ORS 183.335(2)(b). The purpose of the requirements of ORS 183.335(1) and (2), generally, is to provide notice of the subject matter and purpose of the intended action in sufficient detail to inform a person that the person's interests may be affected. ORS 183.335(2)(a). It is sufficient if the notice substantially complies with the requirements of ORS 183.335(2). See ORS 183.335(11)(a). Moreover, the reviewing body must consider all information provided in the notice when determining the sufficiency of the notice. See *Oregon Funeral Directors Association V. Oregon State Mortuary and Cemetery Board*, 132 Or App 318, 323, 888 P2d 104 (1995). There is no question the notice relating to OAR 845-006-0347(3), taken as a whole, was more than adequate to comply with ORS 183.335. The Notice unquestionably describes the rule, the effect of the rule and the statutory authority for the rule.

Key Words/Phrases: permitting unlawful activity, license privilege, aggravation

Case: *Shelly May Wilder*, OLCC-01-V-073, June 2002.

Abstract: Commission's conclusion in two prior contested cases that convictions for DWR were similar enough to DWS convictions to be considered the same for purposes of service permit refusal under OAR 845-009-0020(6), was not improper rulemaking. Permittee argued that because the Commission was changing the clear language of the rule, it could not do so through a contested case final order, but was required to do so by amending the rule through the rulemaking process. The Commission determined that OLCC could interpret its validly promulgated rules through the contested case process and had properly done so.

Case: *Peterson's on 4th*, OLCC-97-V-062, December 1999.

Abstract: In January 1997, the Commission adopted a new violation policy, PAP 845-112-004 (commonly called "fast track" cases.) The provision in the policy that limits an Administrative Law Judge who finds mitigating circumstances to no more than a 40 percent reduction of the standard penalty, is a rule for the following reasons: (a) It is a directive implementing the mitigation factors, which are listed in OAR 845-006-0200; (b) the policy is applicable to the general public, not just a single individual; and (c) it directly affects the amount payable by licensees, which substantially affects the interests of the public. Since the policy constitutes a rule, the rule is invalid because it was improperly adopted. Therefore, Administrative Law Judges may choose to follow, but are not bound by, the 40 percent limitation policy.

Cases: *Stars Cabaret & Steak House*, OLCC0-96-V-077, February 1998, and *Jazz de Opus*, OLCC-96-V-078, February 1998.

Abstract: The Commission concluded that the interpretation of "material" in *AM/PM Market No. 756* was

reasonable and permissible, as honesty in dealing with government directly relates to the Commission's license refusal criterion "not of good moral character" in ORS 471.295(4)(f). Additionally, the Commission concluded that in *AM/PM Market No. 756*, the Commission had interpreted the legislative policy contained in the statutory language "material false statement or misleading information" by final order in a contested case, based on ORS 183.355(5). Such an interpretation was authorized and did not require prior rulemaking.

Case: *McCleery v. Board of Chiropractic Examiners*, 132 Or App 14, 887 P2d 390 (1994).

Abstract: When a "policy statement" is not directed to a named person(s) but applies to all people in a classification, involves a "quasi-legislative act" of general applicability, and interprets or prescribes law, it is not a policy statement. It is a rule under ORS 183.310(8). Because the board adopted the policy statement/rule without following applicable rulemaking procedures, the rule is invalid.

Case: *Troutlodge, Inc. v. Dept. of Fish & Wildlife*, 113 Or App 123, 830 P2d 622 (1992).

Abstract: Fiscal impact statement was sufficient even though it said, "The potential magnitude of these additional costs can't be quantified at this time." The purpose of ORS 183.335(2)(b)(D) was met because the fiscal impact statement informed license holders of potential financial impact, the extent of which was unknown. Moreover, the statute provides that the "agency shall utilize available information."

Case: *Dika v. Dept. of Ins. and Finance*, 312 Or 106, 817 P2d 287 (1991)

Abstract: A materially deficient statement of fiscal impact that accompanies a notice of intended action in a rulemaking proceeding can result in invalidation of the rule that ultimately is enacted. ORS 183.335(2)(b)(E).

Case: *Employment Division v. Ring*, 104 Or App 713, 803 P2d 766 (1991).

Abstract: Where terms were given a precise meaning by statute, they were not in need of agency interpretation. The court held that the agency's rule interpreting the terms was invalid.

Case: *Waterwatch of Oregon v. Oregon Water Res. Comm.*, 97 Or App 1, 774 P2d 1118 (1989).

Abstract: Temporary rule was found to be invalid where the stated purpose was that it was justified by a need to resolve an ambiguity in the rule it amended, but it instead amended the regulatory substance of the rule. The temporary rule was found to be unsupported by the findings and statement of need required by ORS 182.335(5).

Case: *Watson v. OSP*, 90 Or App 85, 750 P2d 1188 (1988).

Abstract: The rule was invalid, see ORS 183.335(10)(a), where the purpose and subject matter of a proposed rule was not stated with sufficient detail in the rulemaking notice to inform a person that their interest may be affected. ORS 183.335(2). There was nothing in the notice to suggest that a rule concerning disciplinary fines for rule violations would be considered. The rule relating to fines did not appear in the rulemaking process until the final version of the rule was submitted to the secretary of state.

Case: *Oregon Env. Council v. Oregon State Bd. of Ed.*, 86 Or App 249, 739 P2d 581 (1987).

Abstract: It was not necessary for the record of rulemaking to contain findings to show that the agency applied required criteria in adopting the rule, where there was no specific statutory requirement of an agency finding or determination as a condition precedent to the adoption of the rule. The statute simply required the agency to apply certain criteria in making textbook selections, but did not require that findings be discernible from the record.

Case: *Int'l Cncl Shopping Cntrs v. Env. Quality Comm.*, 27 Or App 321, 556 P2d 138 (1977).

Abstract: Rulemaking under Oregon Administrative Procedures Act is conducted under informal rulemaking procedures. In informal rulemaking, the agencies can look beyond the hearings record to any and all information available. The Oregon APA permits a state agency to adopt rules based on information that is not placed in the record of the rulemaking proceeding. The agency can properly rely on data gathered from publications, interviews, advisory committees, and informal conversations.

Case: *Fulgham v. SAIF*, 63 Or App 731, 666 P2d 850 (1983).

Abstract: The board attempted to change longstanding procedures for enforcing a valid rule by publishing in its publication, "Case News and Notes," a statement announcing a change in its practice making an application to schedule a hearing an insufficient response to an order to show cause. Such action was an "interpretive amplification or refinement of an existing rule," a new exercise of agency discretion which require promulgation as a rule.

A.3.d. Retroactivity

[\(return to index\)](#)

Case: *Delehant v. Board on Police Standards*, 317 Or 273, 839 P2d 737 (1993).

Abstract: BPST rule was adopted during a contested case and then applied in the Final Order. The application of the rule was not retroactive when it was clear from the record that the board intended to apply the rule to this specific case and the new rule did not establish any policy different from the controlling statute.

Case: *Delehant v. Board on Police Standards*, 115 Or App 598, 839 P2d 737 (1992).

Abstract: Because an applicant had no vested right to approval, application of new administrative rules passed while the application was pending did not violate US Const, Art I, Section 10 or Or Const, Art 1, Section 21 proscription against *ex post facto* laws.

Case: *Drive N' Save Markets*, OLCC-87-V-049, March 1988.

Abstract: The Commission did not apply an amended version of a procedural rule that became effective after the hearing where the amended rule would not have changed the information in the record or affected whether there was a full and fair record.

Case: *Coca Cola Bottling*, OLCC-85-V-071, April 1987.

Abstract: In a violation case, the Commission applied the version of the rule under which the licensee was charged that was in effect at the time of the violation. The Commission declined to apply a later version of the rule that might have made the licensee's conduct no longer a violation.

Case: *Guerrero v. AFSD*, 67 Or App 119, 676 P2d 928 (1984).

Abstract: Retroactive application of a rule that does not, by its terms, provide for retroactivity is disfavored.

Case: *Applicant J.S.*, December 1984.

Abstract: The Commission promulgated a new rule after an application was made, and used the new rule to deny the application.

Case: *Gooderham v. AFSD*, 64 Or App 104, 667 P2d 551 (1983).

Abstract: Like retroactive statutes, retroactive rules are valid if they are reasonable but are invalid if their retroactivity is unreasonable in the circumstances. The court listed factors to be weighed in determining whether retroactivity is reasonable.

A.3.e. Need for Prior Rulemaking

[\(return to index\)](#)

Case: *Boogie Woogies/Stars Cabaret*, OLCC-01-V-051, September 2002.

Abstract: ORS 471.430(3) and ORS 471.482(3) give the Commission direct statutory authority to promulgate rules allowing minors access to areas in licensed premises prohibited to them. Because of this direct delegation, the Commission is given considerable deference in defining exceptions to the prohibitions against minors in prohibited areas. A court is authorized to overrule an agency's interpretation of a rule if an agency has "erroneously interpreted a provision of law." Where the "provision of law" is the rule itself, and the agency's plausible interpretation of its own rule cannot be shown either to be inconsistent with the wording of the rule itself, or with the rule's context, or with any other source of law, there is no basis on which to conclude the rule has been interpreted "erroneously" and the court cannot overrule, under ORS 183.482(8)(a), the agency's interpretation of its own rule. OLCC's interpretation of "performing" (OAR 845-006-0335(6)(a)) is not inconsistent with the wording of the rule itself, the context of the rule, or any other source of law. OLCC was not required to promulgate further rules to define the term "performing."

Similarly, while "performing" is subject to various reasonable interpretations, Licensees did not demonstrate OLCC had changed its interpretation such that OLCC was required to give notice of such a change, either by a rule change or a final order in a contested case.

Licensees did not establish that OLCC's interpretation of "performing" must be promulgated in a rule before it can be enforced.

Case: *Shelly May Wilder*, OLCC-01-V-073, June 2002.

Abstract: Commission's conclusion in two prior contested cases that convictions for DWR were similar enough to DWS convictions to be considered the same for purposes of service permit refusal under OAR 845-009-0020(6), was not improper rulemaking. Permittee argued that because the Commission was changing the clear language of the rule, it could not do so through a contested case final order, but was required to do so by amending the rule through the rulemaking process. The Commission determined that OLCC could interpret its validly promulgated rules through the contested case process and had properly done so.

Case: *Dinkins v. Board of Accountancy*, 118 Or App 220, 846 P2d 1186 (1993).

Abstract: In general, an agency may use contested case orders, as well as rules, to interpret statutes. The legislature may expressly require an agency to engage in rulemaking and to act under its rules. The court reversed the agency's decision denying a professional license where the agency adopted standards through contested case order rather than adopting required rules.

Case: *Martini v. OLCC*, 110 Or App 508, 823 P2d 1015 (1992).

Abstract: When an agency changes the established interpretation of a rule during the course of a contested case proceeding to the extent that the OLCC did here, the parties must be given the opportunity to present evidence and arguments that are responsive to the new standard. The new interpretation was not adopted until OLCC issued its Final Order, long after the hearing was over. The court held that the licensee was denied required contested case procedures and that he is entitled to a new hearing.

Cases: *Associated Oregon Veterans v. DVA*, 94 Or App 510, 766 P2d 1040 (1988); *Burke v. Public Welfare Div.*, 31 Or App 161, 570 P2d 87 (1977).

Abstract: An agency pronouncement of how a validly promulgated rule operates in a specific context does not need

to be promulgated as a rule "if the existing rule necessarily requires the result set forth in that pronouncement." However, if the pronouncement is an "interpretative application or a refinement of an existing rule," it must be promulgated as a rule under the APA or set forth in a contested case holding to be valid since it is a new exercise of agency discretion.

Case: *Forelaws on Board v. Energy Fac. Siting Council*, 306 Or 205, 760 P2d 212 (1988).

Abstract: An agency may interpret a statutory term either through rulemaking procedures or through its order in a contested case unless the legislature specifically intends the interpretation to be made through rulemaking. Where the parties have an opportunity to present evidence on the interpretation, the agency does not act unlawfully in interpreting the statute in its order rather than through rulemaking proceedings.

Cases: *Hughes v. Adult & Family Services*, 58 Or App 478, 484, 648, P2d 1324 (1982); *Marcoules v. OLCC*, 91 Or App 573, 756 P2d 661, (1988).

Abstract: Licensees argued that the term "disorderly premises" in ORS 471.315(1)(d) and other terms in OAR 845-06-045 were unconstitutionally vague, not that they could be applied only after being defined by agency rules. Because the issue of rulemaking was not raised below, the court did not consider it for the first time on appeal.

Case: *Strance Alcohol Programs*, OLCC-87-MS-002, February 1988.

Abstract: "Role-playing" need not be specifically defined by administrative rule. Its meaning may be defined through an order in a contested case.

No rule is required to prohibit closed-book examinations because a provider is required to ensure against cheating, and it can be inferred from that requirement that the test be taken as a closed-book examination.

Case: *Staff Jennings*, OLCC-87-L-009, February 1988.

Abstract: Applicants and the public would be well served if they were provided with notice of major policy changes in license requirements through rulemaking. Affected persons could then plan their investment decisions accordingly.

Case: *Glide Lumber Prod. Co. v. Emp. Div. (Smith)*, 86 Or App 669, 741 P2d 907 (1987).

Abstract: An agency is not required to adopt a new rule before deciding a contested case, so long as the agency can apply its existing rule to reach a reasoned result.

Case: *Standard Ins. Co. v. Olin*, 81 Or App 405, 725 P2d 934 (1986).

Abstract: The statutory term "fair, just and equitable" is delegative, and the Court of Appeals will review agency decision under that statute only to determine whether it is within the range of discretion allowed by general statutory policy.

Case: *Ross v. Springfield School Dist. No. 19*, 300 Or 507, 716 P2d 724 (1986).

Abstract: An agency itself must interpret an inexact statutory term, rather than delegating that duty to an outside group, such as a professional organization or the public. The Fair Dismissal Appeals Board erred in applying the statutory term "immorality" by making findings about what the public believed is immoral.

Agency was required to interpret statutory term "immorality" by rule or by order in a contested case.

Case: *Trebesch v. Employment Division*, 300 Or 264, 710 P2d 136 (1985).

Abstract: An agency's responsibility to develop a rule in order to implement a statute is dependent on the character of the statutory term, the tasks assigned to the agency, and the structure by which the agency executes its tasks. If the agency head has authority to reconsider the implementation of the statute by agency employees, this tends to indicate that the statute may be construed either through rulemaking or through a contested case order.

Case: *Pratt v. Real Estate Division*, 76 Or App 483, 709 P2d 1134, (1985).

Abstract: "Negligence" and "incompetency" held to be inexact terms that the agency was required to interpret consistent with legislative policy through rule or contested case order.

Case: *Fitzgerald v. Oregon Board of Optometry*, 75 Or App 390, 706 P2d 586 (1985).

Abstract: The Board of Optometrists' pass-no pass grading standard implements the board's statutory duty to examine applicants and to license applicants "who satisfactorily pass the examination." That standard is therefore within the definition of a rule under ORS 183.310(8).

Case: *Korgan v. OLCC*, 72 Or App 31, 695 P2d 81 (1985).

Abstract: "Lewd" is a Springfield class 2 term which the agency can interpret either by rule or contested case. The interpretation must be consistent with legislative policy.

Case: *Fulgham v. SAIF*, 63 Or App 731, 666 P2d 850 (1983).

Abstract: The board attempted to change longstanding procedures for enforcing a valid rule by publishing in its publication, "Case News and Notes," a statement announcing a change in its practice making an application to schedule a hearing an insufficient response to an order to show cause. Such action was an "interpretive amplification or refinement of an existing rule," a new exercise of agency discretion which required promulgation as a rule.

Case: *Employment Division v. Bingham*, 63 Or App 451, 664 P2d 1124 (1983).

Abstract: The term "suitable work" is a delegative term. Agency must "flesh out" the term, "refining and executing generally expressed legislative policy." In this case the term had been sufficiently fleshed out, since both the agency and the court had been able to successfully apply the term in numerous cases.

Case: *Oregon Shores v. Oregon Fish and Wildlife*, 62 Or App 481, 662 P2d 356 (1983).

Abstract: The statutory term "necessary" use is one of noncompleted legislation, authorizing the agency to construe it through refining the general policy of the statute by application in specific fact situations.

Case: *Rogue Flyfishers v. Water Policy Review Bd.*, 62 Or App 412, 660 P2d 1089 (1983).

Abstract: An action taken by the Water Policy Review Board in which the board changed the methodology by which its staff was to make future stream computations was held not to be a rule but only an internal management directive. The action only affected the board's staff and not any private or general public interests and the action was not "self-executing."

Case: *Miller v. OLCC*, 61 Or App 505, 657 P2d 1250 (1983).

Abstract: The Commission must define in advance by rulemaking any standards the Commission wishes to apply to Seasonal Dispenser applicants for determining adequate service.

Case: *Ross v. Springfield School Dist. No. 19*, 294 Or 357, 657 P2d 188 (1982).

Abstract: Prior rulemaking was not required to define the term "immorality" as the term applied to a teacher's conduct, because the term involved interpretive rather than policy-making discretion and because the agency's enabling legislation did not indicate legislative intent to require prior rulemaking (reversed because agency failed to state a standard in its order).

Cases: *Price v. Employment Division*, 60 Or App 279, 653 P2d 581 (1982); *Springfield Education Assn. v. School Dist.*, 290 Or 217, 621 P2d 547 (1980); *McPherson v. Employment Division*, 285 Or 541, 591 P2d 1381 (1979).

Abstract: An agency acts improperly if it relies on a judicial statement construing an imprecise statutory term if the statement was developed prior to the line of cases represented by *Price v. Employment Division*, 60 Or App 279, 653 P2d 581 (1982), *Springfield Education Assn.*, *supra*, and *McPherson v. Employment Division*, 285 Or 541, 591 P2d 1381 (1979).

Case: *Red Robin Enterprises v. OLCC*, 55 Or App 720, 639 P2d 710 (1982).

Abstract: Commission's order remanded because the two reasons cited for refusal (exposure of passersby to drinkers; attractiveness of menu to minors) were not listed as license criteria in the Commission's rules.

Case: *Springfield Education Assn. v. School Dist.*, 290 Or 217, 621 P2d 547 (1980).

Abstract: There are three categories of terms which determine the responsibilities of the legislature, administrative agencies and courts in construing and applying statutes: precise terms, inexact terms, and delegative terms. If a term is inexact as opposed to delegative, an agency may interpret the statute either by rule or by order in a contested case. However, rulemaking is mandatory with delegative terms unless otherwise indicated by the legislature.

Case: *Megdal v. Board of Dental Examiners*, 288 Or 293, 605 P2d 273 (1980).

Abstract: Board was required to define statutory term "unprofessional conduct" by rule where 1) legislative intent was to authorize the board to create standards expanding the reach of "unprofessional conduct," and 2) based on a comparison with similar licensing agencies, the court inferred that the Legislature intended that the board create standards by rulemaking. One basis for this inference was that the Legislature should not be assumed to be insensitive to the importance of fair notice of grounds that may lead to loss of one's profession or occupation, whether or not this was a constitutional requirement.

Case: *Cottrell v. OLCC*, 27 Or App 525, 556 P2d 982 (1976).

Abstract: OLCC conclusion that an applicant's premises had the design and facilities of a tavern was not sustained by the court because of the absence of a rule providing guidance on this issue and the absence of a controlling statute.

Case: *Graham v. OLCC*, 25 Or App 759, 551 P2d 112 (1976).

Abstract: Commission denial of a license application based on criteria set forth by rule, concerning traffic, proximity to schools and churches, parking, public opinion and adequate service, gave sufficient notice of the guidelines the Commission would consider in making a decision.

Case: *Sun Ray Dairy v. OLCC*, 16 Or App 63, 517 P2d 289 (1973).

Abstract: The OLCC must formulate and publish as rules the broad bases upon which decisions regarding issuance of a liquor license will be made.

A.3.f. Statutory Construction

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Case: *Lava Lanes of Medford*, OLC 10-V-018/018A/018B, February 2011.

Facts: Licensees had multiple violations through employees, and argued for mitigation because cancellation of the license would put many people out of work and effect the local economy negatively, and would be contrary to the OLCC's public mission set forth in ORS 471.030.

Abstract: Negative impact to local economy is not a valid basis to mitigate a penalty. The Commission is required to regulate the sale of alcoholic beverages to prevent abuse and to protect public safety, health, welfare and morals. Thus, the Commission cannot excuse violations of liquor laws under the general rubric of economic development. Any actions taken by the Commission to encourage economic development must be consistent with the express public welfare provisions set forth in ORS 471.030(1).

Key Words/Phrases: mitigation, local economy impact, protect public safety, public welfare

Case: *The Vault Bistro & Lounge*, OLCC-10-V-006/006A, December 2010.

Facts: Licensee contracted to have two "Jack Daniels girls" serving free drinks as a promotion for the licensed premises. The "Jack Daniels girls" were observed drinking while serving patrons. Licensee argued that the "Jack Daniels girls" were not Licensee's agents.

Abstract: Where the Commission has established the meaning of a term through case precedent, this precedent dictates the result in the present case.

Key Words/Phrases: drinking on duty, agent, agency

Case: *Mt. Hood Winery*, OLCC-09-M-003, July 2010.

Facts: Licensee had underpaid its Oregon privilege taxes for 2007. Licensee claimed an exemption for "small producers" because it claimed to have produced less than 40,000 gallons of wine in the tax year.

Abstract: A winery that does not produce wine by fermentation in a calendar year is not eligible for the "small producer exemption" from privilege tax under ORS 473.050(5) for that year.

Key Words/Phrases: privilege tax, statutory interpretation

Case: *Clackamas Grocery Outlet*, OLCC-08-M-001, April 2010.

Facts: Local grocery chain Licensee (with off-premises retail sales license) used Clackamas location to warehouse wine for sale at other locations. Licensee did not have a wholesale malt beverage and wine license. Licensee had previously been advised by the OLCC that this practice was compliant with Oregon Liquor Act, but OLCC later reversed position. The Commission concluded that by using the Clackamas warehouse facility as a distribution hub for wine to its 31 Oregon locations, GOI is engaging in wholesale alcohol sales in violation of ORS 471.405 (selling alcohol in a manner "other than the license permits the licensee to sell") and ORS 471.394 (prohibition on selling at both wholesale and retail).

Abstract: A liquor license grants the holder the ability to operate only in accordance with the privileges specified in statute for the particular license. A retail licensee is prohibited from the practice of central warehousing by ORS

471.405 and ORS 471.394.

Key Words/Phrases: wholesale, warehouse, summary determination, three tier system, tied-house

Case: *Blue Iguana Mexican Restaurant & Cantina*, OLCC-09-V-035/035A/035B, April 2010.

Facts: Licensee with #1 minor posting. During a compliance check inspectors found 8 employees working as security with no DPSST certification, and two were minors. Licensee also had a band playing, two were minors. Licensee raises a number of defenses, including arguing that its employees were exempt from the DPSST certification under ORS 181.187(1)(k), that there is an exemption for “organized events,” and OLCC lacked authority to find a violation for lack of DPSST certification.

Abstract: The OLCC has full authority to require their licensees to follow the law, including requiring DPSST certification of private security providers, and can sanction licensees who hire employees that run afoul of that requirement.

Licensee argues that the subsections of ORS 181.871(2) must be read to establish two independent limitations on the exemption: that ORS 181.871(2)(a) applies in all cases without reference to subsections (b) or (c). Licensee contends that the word “and” at the end of section (b) connects only subsections (b) and (c) and does not refer to subsection (a). Licensee asserts that “[p]ursuant to the rules of statutory construction this means that (a) stands alone from (b) and (c) as a modifier of the exception, while (b) and (c) must be read together as a further modifier.” Licensee offers no authority for this construction of the statute. Interpretation of statutory terms is governed by the analytical method first announced in *PGE v. Bureau of Labor and Industries*, 317 Or 606 (1993), which held that to determine legislative intent, a court begins by examining a statute’s text, giving words of common usage their plain meaning. If the legislative intent is unambiguous, the court stops at that first level of analysis. *PGE*, 371 Or at 610-611. Generally, in Oregon statutes, periods are used to separate subunits that stand alone, while semicolons are used for series of subunits and require the use of “and” or “or” preceding the last subunit. *Form and Style Manual for Legislative Measures* 6 (2008- 2009 Online Edition). While the use of the punctuation and grammatical forms in the *Form and Style Manual* is not dispositive when deciding statutory construction, it is persuasive and informs the determination. Under that theory, Licensee’s interpretation that subsection (a) is separate from subsections (b) and (c) ignores the use of a semicolon at the end of subsection (a). A correct grammatical reading of the statute is that subsections (a), (b) and (c) are written as a series, not as stand-alone subunits. Also, if the legislature had intended subsection (b), but not subsection (a) to apply only during times when a crowd has assembled for an organized event, there would be no reason to separate the language into two subparts. Therefore, it is reasonable to conclude that the exemption from certification requirements applies only when all three subsections of ORS 181.871(2) are met. Because all three subsections must be met, the exemption also requires an “organized event.” *Tommy’s Too* (OLCC, Final Order, 09-V-024, October 2009).

Licensee argues that even if the exemption requires an “organized event” in order to be operative, there is no definition of that term, therefore, a licensee could have an “organized event” as part of its day to day business activities, or simply declare a certain time as being an organized event. The phrase “organized event” was interpreted in *Tommy’s Too* (OLCC, Final Order, 09-V-024, October 2009) as, by its terms, not applying to normal day-to-day business activities. Furthermore, as a factual matter, there was no “organized event” in this case, as there was no special themed party or event at the licensed premises on the date in question. On that night, Licensee was simply engaged in its regular business activity.

Licensee argues that, under certain criminal statutory defenses regarding physical force, the eight employees at issue here had a legal right and obligation under OLCC laws to perform any of the activities required of an employee of the Licensee without being DPSST certified. The employees were therefore selectively prosecuted and discriminated against without a valid basis for such discrimination. The criminal defenses listed by Licensee are: ORS 161.205 (Use of physical force generally); ORS 133.225 (Arrest by private person); ORS 161.209 (Use of physical force in defense of a person); ORS 161.225 (Use of physical force in defense of premises); and ORS 161.255 (Use of physical

force by private person making citizen's arrest). While these defenses could have been raised by the employees in their respective criminal proceedings, the defenses simply do not apply to an administrative proceeding alleging a violation of OLCC's statutes and rules. Those employees are not parties to this action.

Key Words/Phrases: permitting, unlawful activity, DPSST, security, defenses

Case: *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009).

Abstract: Modifies the requirement in *PGE v. Bureau of Labor and Industries* that legislative history can be considered by courts only if the text and context of the statute is ambiguous as to legislature's intent. A party is free to proffer legislative history to the court, and the court will consult it after examining text and context, even if the court does not perceive an ambiguity in the statute's text, where that legislative history appears useful to the court's analysis. Step three of *PGE* is still valid (if text and legislature's intent is unclear then the court may resort to general maxims of statutory construction to aid in resolving the remaining uncertainty).

Case: *Morchella Wine Cellars, LLC*, OLCC-06-L-003, December 2006.

Facts: Washington company applied for Wholesale Malt Beverage Wine (WMBW) license, and listed an Oregon law firm as a registered agent for a place of business. OLCC denied based on its status as an out-of-state entity.

Abstract: The Commission cannot process the application of a business for a WMBW license where the applicant has no Oregon premises. The applicant's status as a winery in its home state and/or the foreign business registration with Oregon's Secretary of State do not create a right to apply for and obtain an Oregon liquor license and then conduct the privileges of that license from outside of Oregon. While the plain wording of the statute authorizing WMBWs does not include the requirement for an Oregon location the Commission construes the statute and rules to require an Oregon premises. Because the applicant did not have an Oregon location to accept imported alcoholic beverages it would only be an exporter from Washington, and not an importer in Oregon. Retailers in Oregon do not have statutory authority to import, and thus could not receive the product from the Washington exporter.

Key Words/Phrases: statutory interpretation, meaning, licensed premises location, out-of-state entity, physical location of licensed premises, motion for summary determination

A.4. Constitutional Issues

A.4.a. Agency Authority to Decide Constitutional Issues

A.4.b. Specific Constitutional Issues

A.4.b.1. Due Process

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Case: *Eclectic Restaurant*, OICC-09-V-028/028A/028B, October 2009.

Facts: Licensed premises continued to employ a number of non-DPSST certified security personnel, despite being told by OLCC inspectors of the need to be certified when cited for the violation previously. Licensee's employee also permitted a minor to enter with a non-convincing fake ID. Licensee raised numerous defenses.

Abstract: Licensee argued that double jeopardy applies because the security persons were already criminally cited for their non-DPSST certified activities, and therefore OLCC is barred from maintaining a separate prosecution for the same conduct. An OLCC sanction is not a criminal prosecution, but an administrative sanction. The Oregon courts have generally held that administrative sanctions are not separate prosecutions for purposes of double jeopardy under either the Oregon or Federal constitution. *Mannelin v. DMV*, 176 Or App 9 (2000), citing to *State v. Phillips*, 138 Or App 468 (1996). Licensee's argument is not persuasive.

Key Words/Phrases: equal protection, selective enforcement, laches, DPSST certification, permitting unlawful activity, minor, fake ID, double jeopardy, aggravation, minor under 18, prior warning

Case: *The Table*, OLCC-03-V-019-ES, July 2003.

Abstract: Licensees challenged summary suspension of their liquor license as a deprivation of due process. The Commission concluded that summary suspension was not a "taking of private property without just compensation" as a liquor license is a purely personal privilege and does not constitute property. Further, the Oregon Supreme Court has determined that due process concerns were adequately addressed through the opportunity for a pre-deprivation or prompt post-deprivation hearing where the issue of probable validity of the deprivation is addressed. *Cole v. Oregon Dept. of Revenue*, 294 Or 188, 193, 655 P2d 171 (1982). The post-deprivation hearing in this case is intended to, and does, meet this requirement. See *Marcoules v. Oregon Liquor Control Commission*, 91 Or App 573, 756 P2d 661 (1988). Licensees have been afforded required due process.

Case: *Boogie Woogies/Stars Cabaret*, OLCC-01-V-051, September 2002.

Abstract: OLCC's definition of "performing" in OAR 845-006-0335 (6)(a) is not so arbitrary or capricious that it violates the minor dancers' substantive due process rights under the 14th Amendment to the U.S. Constitution. OLCC's interpretation furthers the legislative mandate of preventing the presence of minors in areas not open to them and is reasonable.

Case: *United Gas & Food Mart*, OLCC-01-V-047 & 048, February 2002.

Abstract: It was not a violation of due process for the OLCC to delay notification to licensee that two sales to minors had occurred until approximately five weeks after the second sale (and approximately nine weeks after the first sale). Licensee asserted that the unreasonable delay in notifying licensee of the first sale unfairly prevented licensee from avoiding the second sale, resulting in an additional violation and higher penalties than licensee would otherwise have

had. The Commission concluded that licensee had not established unreasonable delay, much less an intentional delay for the purpose of gaining a tactical advantage (the stings were police operations, OLCC issued citations within a reasonable time after receipt of the police reports); and licensee had not demonstrated substantial prejudice to a fair trial. Consequently, there was no due process violation occasioned by the delay in notifying licensee of the violations.

Case: *Sidetrack Tavern* (Amended Final Order), OLCC-00-V-075, February 2002.

Abstract: During an undercover investigation of the licensed premises, the name of the alleged visibly intoxicated person was not obtained. In defense of charged violations of ORS 471.410(1) and, alternatively, ORS 471.412, citing *Cole v. DMV*, 172 Or App 132, 17 P3d 573 (2001), licensee asserted it was a denial of due process to be charged with these offenses when it was unable to adequately defend itself because the name of the VIP was unknown (i.e., by possibly demonstrating that the signs attributed to the alleged VIP were not caused by excessive alcohol consumption). The Commission determined that licensee's reliance on *Cole* for a due process argument was misplaced and that *Cole* was otherwise factually distinguishable, lending no support to any requirement that the identity of the VIP be preserved by the Commission. The mere availability of a defense does not require the Commission to protect, obtain, or ensure the availability of a witness or other evidence to secure that defense. The Commission concluded, as a matter of law, that either of these alternative charges could be sustained without identifying the alleged VIP by name.

Case: *State v. Phillips*, 138 Or App 468, 909 P2d 882 (1996).

Abstract: The administrative suspension of a driver's license does not constitute a "punishment" for the purpose of Double Jeopardy. The state can suspend a person's driver's license in addition to criminally prosecuting the person for DUII.

Case: OLCC-93-SPR-117, April 1993.

Abstract: The Double Jeopardy Clause of the US Constitution and the Oregon Constitution would not apply to a service permit applicant previously convicted of a felony crime. The denial of a service permit because the applicant is ineligible is not a "punishment."

Case: OLCC-91-SP-002, July 1991.

Abstract: The applicant was not entitled to a court-appointed attorney for this administrative hearing. ORS 135.050 provides that the court will appoint an attorney in situations where a person has been charged with a crime and can show financial need. The applicant was not charged with a crime and he did not establish financial need pursuant to ORS 135.050.

The applicant's argument that the telephone hearing was unfair because he was denied his constitutional right to "face his accusers" was without merit for the following reasons. The applicant was able to present evidence and question witnesses at the hearing; the Hearings Examiner asked witnesses questions in order to develop a full and fair record; and the record was held open to give the applicant time to submit information that he wanted to have considered.

Case: *Carney v. MVD*, 100 Or App 27, 786 P 2d 1319 (1990).

Abstract: Article I, Section 11 of the Oregon Constitution and the Sixth Amendment to the U.S. Constitution, regarding the right to confront witnesses, apply to criminal prosecutions. They do not apply to administrative contested cases which cannot result in criminal sanctions. By statute (ORS 183.450(3)) a party to a contested hearing may cross-examine adverse witnesses and present rebuttal evidence. A party may subpoena witnesses and their records as provided by the agency's administrative rules. Due Process is not violated when subpoenaed witnesses and records are not at a hearing, where the party did not follow the agency's rules regarding subpoenas.

Case: *Sandy Jug Tavern*, OLCC-87-V-022, OLCC-87-V-023, January 1988, *affirmed without opinion*, *Sahli v. Oregon Liquor Control Commission*, 94 Or App 575, 767 P2d 934 (1989).

Abstract: The Commission's notice of charges satisfied federal due process requirements, although two months elapsed between the violations and the notice, where the licensee had a reasonable opportunity to present evidence from a number of persons likely to be aware of facts relevant to the charges.

Case: *Marcoules v. OLCC*, 91 Or App 573, 756 P2d 661 (1988).

Abstract: Licensee was not prejudiced by deficient emergency suspension notice where the violation notice referred to the particular statutes and rules under which OLCC was proceeding along with specific dates the alleged violations occurred. In addition, licensee's request to consolidate the two cases was granted and the hearing expedited. Licensees were not misled or uninformed about the basis for the emergency suspension or unable to contest any issues raised at the hearing. They did not request a continuance to meet evidence against them and counsel vigorously cross-examined the witnesses. The licensees also had opportunity, and did, present evidence supporting their position.

Case: *Dennis v. Employment Div.*, 77 Or App 633, 713 P2d 1079, 714 P2d 618 (1986), *affirmed on other grounds*, 302 Or 160, 728 P2d 12 (1986).

Abstract: Hearings Officer's failure to assist unrepresented claimant "by following up potentially favorable lines of inquiry and by helping her to present her evidence in the best light" held denial of due process under 14th Amendment to the United States Constitution.

Case: *Davidson v. Oregon Government Ethics Comm.*, 300 Or 415, 712 P2d 87 (1985).

Abstract: Commission's substitution of one Hearings Officer for another after Commission's rejection of the first Hearings Officer's Proposed Order did not violate due process absent a specific showing of bias or prejudice. If there had been an issue of fact which depended upon the credibility of a witness, there may have been a basis for a claim of prejudice.

Case: *Babcock v. Employment Division*, 72 Or App 486, 696 P2d 19 (1985).

Abstract: Telephone hearing afforded due process. The Hearings Officer did not have to see a witness in order to make credibility determinations. *Cf. State Ex rel Juv. Dept. v. Gates*, 86 Or App 631, 740 P2d 217 (1987) (telephone testimony not allowed in Oregon Court trials).

Case: *Payne v. Department of Commerce*, 61 Or App 165, 656 P2d 361 (1982).

Abstract: Department of Commerce notice of termination was insufficient to meet the requirements of either due process or the Personnel Division's rule because it did not notify petitioner of: (1) the dates of the incidents giving rise to alleged violation; (2) the nature of the improper acts of which petitioner was accused; or (3) the names of other individuals involved in the alleged improper acts.

Case: *Megdal v. Board of Dental Examiners*, 288 Or 293, 605 P2d 273 (1980).

Abstract: Federal due process does not require that standards for occupational licensing decisions meet those for penal laws. Unlike penal deprivations, Federal Courts have not insisted on prior specification of grounds as a prerequisite of due process in administrative deprivations. The factors underlying due process requirements, outlined in *Matthews v. Eldridge*, 424 US 319, 965 S Ct 893, 47 LEd2d 8 (1976), are, in this state, met by the Administrative Procedures Act. A Federal due process attack, based on a requirement that adverse action be restricted to enforcement of previously stated norms, is perhaps only premature.

Cases: *Swearingen v. OLCC*, 29 Or App 743, 564 P2d 1102 (1977); *Palm Gardens, Inc. v. OLCC*, 15 Or App 20, 514 P2d 888 (1973).

Abstract: Fact that investigating agency also adjudicates issues it investigates is not violation of Federal due process guarantees.

Cases: *Campbell v. Bd. of Medical Exam.*, 16 Or App 381, 386, 518 P2d 1042 (1974); *The Grog House v. OLCC*, 12 Or App 426, 507 P2d 419 (1973).

Abstract: Due process requires a detailed notice where defendant requires such notice to prepare a defense. However, where petitioner had first-hand knowledge of every charge and was given time to prepare his defense, no prejudice resulted and there was no denial of due process.

Case: *The Grog House v. OLCC*, 12 Or App 426, 507 P2d 419 (1973).

Abstract: The OLCC's denial of petitioner's motion for production of records did not result in a denial of due process because petitioner did not avail itself of the proper procedure by seeking a subpoena duces tecum under ORS 183.440.

A.4.b.2. Search and Seizure

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Case: *Dillinger's Pub*, OLCC-97-V-038, October 1997.

Abstract: Illegally seized evidence may only be excluded in a criminal or quasi-criminal proceeding and only if obtained by law enforcement officers investigating criminal activity. The Commission's enforcement proceedings are civil licensing actions, rather than "quasi-criminal" proceedings. Thus, court rulings regarding the suppression of evidence do not apply.

Case: *State v. Kissell*, 83 Or App 630, 732 P2d 940 (1987).

Abstract: The exclusionary rule for evidence obtained in an illegal search and seizure does not extend beyond the criminal trial setting to a probation revocation proceeding.

Case: *Eddie's Supper Club v. OLCC*, 23 Or App 493, 543 P2d 19 (1975).

Abstract: ORS 472.170, allowing inspection of books, premises or liquor, does not violate federal constitutional prohibitions against warrantless search.

A.4.b.3. Speedy Trial (Art. I, Sec. 10, Oregon Constitution)

[\(return to index\)](#)

Case: *Charlie's Mountain View*, OLCC-91-V-008, August 1992.

Abstract: Assuming, without deciding, that the Commission failed to provide a speedy hearing to a licensee, Article I, Section 10 of the Oregon Constitution did not require the dismissal of the charges against the licensee. The Oregon Supreme Court in *State v. Kuhnhausen*, 201 Or 478, 266 P2d 698 (1954) excluded civil litigants from Article I, Section 10's guarantee to a speedy trial and clarified that it only applied to criminally charged defendants where the loss of personal liberty, freedom, or life was at stake.

A.4.b.4. Right to Counsel

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Case: *Gildroy v. Motor Vehicles Division*, 315 Or 617, 848 P2d 96 (1993).

Abstract: Article I, section II, of the Oregon Constitution ["In all criminal prosecutions, the accused shall have the right...to be heard by himself and counsel..."] does not apply in an administrative civil proceeding.

A.4.b.5. Equal Protection (14th Amend., U.S. Constitution; Art. I, Sec. 20, Oregon Constitution)

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Case: *Eclectic Restaurant*, OICC-09-V-028/028A/028B, October 2009.

Facts: Licensed premises continued to employ a number of non-DPSST certified security personnel, despite being told by OLCC inspectors of the need to be certified when cited for the violation previously. Licensee's employee also permitted a minor to enter with a non-convincing fake ID. Licensee raised numerous defenses.

Abstract: In *The Blue Parrot* (OLCC, Final Order, 03-V-043, June 2004), the Commission held that the mere fact that there are differences in how cases are prosecuted does not of itself constitute prohibited discrimination. A selective enforcement claim arises only if there is no coherent, rational, or systematic policy for choosing to enforce in some cases, but not others, without any attempt to strive for consistency among similar cases. Licensee has not provided evidence to factually support a contention of selective enforcement. Licensee's argument is not persuasive. A total of 8 months passed from the original incident to the original suspension notice, and Licensee did not show that the defense of laches applied. *Rise v. Steckel*, 59 Or App 675 (1982) described the elements of a "laches" defense.

Aggravation was warranted for the service to a minor under the age of 18.

Key Words/Phrases: equal protection, selective enforcement, laches, DPSST certification, permitting unlawful activity, minor, fake ID, double jeopardy, aggravation, minor under 18, prior warning

Case: *The Blue Parrot*, OLCC-03-V-043, June 2004.

Abstract: The mere fact that there are differences in how cases are prosecuted does not of itself constitute prohibited discrimination. An Article I, section 20 selective enforcement claim arises only if there is no coherent, rational, or systematic policy for choosing to enforce in some cases, but not others, without any attempt to strive for consistency among similar cases. Where policy memo establishes current policy for the treatment of service permit violations, the policy has a rational basis and establishes systematic treatment for similarly situated licensees, and licensees have not shown they have been treated differently than similarly situated licensees, there is no Article I, section 20 violation.

Case: *Boogie Woogies/Stars Cabaret*, OLCC-01-V-051, September 2002.

Abstract: OLCC's interpretation of "performing" in OAR 845-006-0335(6)(a) is applied equally to minor dancers, most of whom are female, and to minor musicians, most of whom are male. Licensees did not establish that OLCC's interpretation of "performing," as applied, violates the minor dancers' equal protection rights based on gender guaranteed by the 14th amendment to the U.S. Constitution and Article I, Section 20 of the Oregon Constitution.

Case: *Don Juan's Mexican Restaurant*, OLCC-94-V-002, October 1994.

Abstract: A change in interpretation applicable to all similarly situated licenses in the future would not raise an equal treatment issue. A change in interpretation would only trigger a right to be heard on the issue. The licensee must be given an opportunity to prepare and present a defense to allegations before the new interpretation could be applied to the licensee. The Commission should make sure that the record is sufficient to allow the Commission to make the suggested change in interpretation.

Case: *Gabi's Restaurant & Lounge*, OLCC-92-L-011, March 1994.

Abstract: Record showed reasons other than arbitrary treatment or racism (fewer serious problems and none with weapons, absence of recent complaints, monthly meetings with OLCC staff and police) that reasonably explained why the Commission treated a white Dispenser Class A licensee differently than a black African American Dispenser Class A licensee.

Case: *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977).

Abstract: In the absence of direct, stated evidence of racist motivation, the courts may look to other factors to infer that racial discrimination was the motivating factor. The courts will consider:

- 1) Whether a statute, neutral on its face, clearly bears more heavily on one race than another, and the disproportionate impact is unexplainable on grounds other than race.
- 2) The historical background of the decision.
- 3) The specific sequence of events leading up to the challenged decision.
- 4) Departures from the normal procedural sequence.
- 5) Substantive departures by policy makers, particularly if factors usually considered important strongly favor a decision contrary to the one reached.
- 6) The legislative or administrative history of the decision documented by the contemporary statements by members of the decision-making body, minutes of its meetings, or reports.

However, even when a defendant is shown to have had a discriminatory purpose, a defendant can still escape liability, if it shows that it would have reached the same decision based upon other legitimate considerations.

A.4.b.6. Cruel and Unusual Punishment

[\(return to index\)](#)

Case: *Cinnabar*, OLCC-11-V-060, August 2012.

Facts: Licensee had multiple violations, and argued that aggravating the sanctions for multiple violations was unduly harsh.

Abstract: Even though the civil penalty and license suspension may cause Licensee significant financial loss, there is nothing unconstitutional about the sanction. Constitutional prohibitions against “excessive punishment” apply only in the criminal context and not civil administrative actions. See also *OLCC Agency 183* (OLCC Final Order, 03-R0-002, 2003); *The Crown Room*, OLCC-11-V-071/071A/071B/071C, October 2012.

Key Words: excessive punishment, criminal, civil, unduly harsh.

Case: *OLCC Agency No. 183*, OLCC-03-RO-002, October 2003.

Abstract: Agent challenged the penalty of a notice of violation for sale to a minor as excessive on two basis: (1) that one notice of violation would disqualify him from applying for a second store; and (2) there is no opportunity for mitigation of penalty for a notice of violation. The Commission determined that the Agent’s “excessive punishment” argument likely stemmed from the Eighth Amendment to the United States Constitution and/or Article I, Section 16 of the Oregon Constitution. Because both constitutional provisions apply only to criminal cases, they are inapplicable to OLCC’s proceeding.

A.4.b.7. Right to Confrontation

[\(return to index\)](#)

Case: *88 Market*, OLCC-12-V-032, April 2013.

Facts: Minors were found intoxicated by Portland PD after a disturbance downtown. Minors were generally uncooperative during the OLCC investigation. One of the minors informed the OLCC investigator that an “older Asian guy” had sold the alcohol to them without asking for ID, and provided a written, unsigned statement. The other would not speak with OLCC investigators. Licensee requested to depose the minors before hearing, and the OLCC objected stating that the minors would be subpoenaed for hearing and Licensee could cross examine them at that time. OLCC failed to subpoena the minors for the hearing and they did not attend.

Abstract: Under the APA, hearsay evidence is generally admissible unless there is some reason to find it unreliable. Whether an agency decision may rest entirely on hearsay evidence depends on whether the hearsay is sufficiently reliable to constitute substantial evidence.

The Oregon Supreme Court has articulated a “nonexclusive list of five factors” to consider when determining whether hearsay is substantial evidence:

1. [T]he alternative to relying on the hearsay evidence;
2. the importance of the facts sought to be proved by the hearsay statements to the outcome of the proceeding and considerations of economy;
3. the state of the supporting or opposing evidence, if any;
4. the degree of lack of efficacy of cross-examination with respect to the particular hearsay statements; and
5. The consequences of the decision either way.

Cole/Dinsmore, 336 Or at 570, (citing *Reguero v. TSPC*, 312 Or 402, 418 (1991)).

When unsworn hearsay constitutes the major support for an agency decision, the importance of providing the adversary with the opportunity to test on cross-examination each of the available declarants’ perception, memory, narration, and veracity is undeniable. *Cole/Dinsmore*. See also *The Rainbow Market*, OLCC Final Order, 08-V-124, October 2009.

In this case, there were multiple levels of hearsay, and factors weighing against the hearsay constituting substantial evidence. The OLCC did not establish that Licensee failed to verify the age of a minor before allowing her to purchase alcohol.

Key Words/Phrases: sale to minor, hearsay evidence, reliable, factors, uncooperative witness

Case: *Helena’s Place*, OLCC-04-024/024A, June 2005.

Facts: Licensed premises had numerous incidents of violence/threats of violence, including a patron being stabbed to death. After the stabbing Licensee agreed to stop operating as a night club and close by midnight. Portland police requested immediate suspension of the license if those restrictions were not agreed to. Numerous DUII and intoxicated patron incidents occurred after those restrictions were imposed.

Abstract: When much of the Commission’s evidence included hearsay the ALJ applied the multifactor analysis from *Reguero v. Teacher Standards and Practices*, 312 Or 402 (1991), to evaluate the reliability of that evidence. The factors the ALJ found most important were 1) that officer observations in police reports are generally the type of evidence that reasonably prudent persons would rely upon in the conduct of serious affairs; 2) while OLCC did not

provide specific evidence regarding witness unavailability either party could have subpoenaed the witnesses, and neither did so; 3) the facts to be established by the hearsay were important because the allegations were that there were serious problems at the premises; 4) licensee did not provide reliable rebuttal evidence to the hearsay evidence and, at times, corroborated the incidents; and 5) cross-examination of the declarants, while helpful, may not have been dispositive and licensee did not establish that the declarants were unavailable.

Key Words/Phrases: serious and persistent problems, hearsay, double hearsay, authority to interpret, foreseeability, restrictions, persistent defined

Case: *Sugar Pine Inn*, OLCC-02-V-052, July 2003.

Facts: A minor entered the licensed premises with another group and sat down in the bar. Police came to check for the presence of minors and found the minor. He had a bottle of beer in front of him which he said he brought with him. The minor had only been in the premises for a brief period of time before police arrived. At hearing the minor was not produced to testify, and Licensee raised objections based on the Confrontation Clause and hearsay grounds.

Abstract: The Commission determined that the rights to confrontation under Article I, Section 11, of the Oregon Constitution, and the Sixth Amendment to the United States Constitution apply only to criminal prosecutions. A contested case hearing under the Oregon APA cannot result in criminal sanctions and does not implicate criminal constitutional provisions. While there is a statutory right to cross-examine under the APA, it applies only to witnesses who appear and testify. The failure of the minor to appear and testify did not violate either the constitutional or statutory rights of confrontation and cross-examination.

A. 5. Adequacy of Evidence

A.5.a. Burden of Proof

[\(return to index\)](#)

Case: *OLCC Agency No. 1113*, OLCC-07-RO-001, January 2008.

Abstract: Agent stipulated that the violations occurred, but argued that the rule against allowing licensees to pay for alcoholic liquor with bank cards is not uniformly applied. Agent did not present evidence that the rule is not uniformly applied or evidence that OLCC is aware of other violations and intentionally not issuing Notice of Violation Tickets; therefore, Agent did not prove by a preponderance that the rule is not uniformly applied.

Case: *Felipe's Finest Mexican & Seafood Restaurant*, OLCC-06-V-016, February 2007.

Facts: Licensee initially ran a Mexican restaurant, and then expanded to an adjacent space for a dance club. Numerous instances of fights and disturbances, over-service and intoxicated patrons were documented. The OLCC held intervention meetings and issued verbal warnings, as well as several violations. Licensee agreed to a compliance plan and the number of instances reduced, but then rose again several months later. Licensee was then discovered to not be serving food during the minimum 3-hour required period. When the OLCC proposed to cancel the license, Licensee argued that the agency had a "double standard" and treated Licensee differently because of his and/or his patrons' race/ancestry, and challenged the OLCC's ability to promulgate rules regarding food service requirements.

Abstract: Licensee did not prove by a preponderance of the evidence that the treatment he received was different than the treatment of similarly situated licensees who were not Mexican-American. The testimony that there were problems at other licensed premises did not show the number of incidents, type of incidents, period of time, and efforts to prevent incidents by other licensees; therefore, this was not true comparative evidence.

Key Words/Phrases: history of serious and persistent problems, food service requirements, cancellation, *Oceanside* factors, willingness to control, control plan, similarly situated licensees

Case: *Cisco & Pancho's*, OLCC-99-V-080ES, September 2000.

Abstract: The Commission considers reports written by police officers who had no personal knowledge about an incident to be less reliable, and, therefore, to have less probative weight than a report written by an officer with personal knowledge of the incident. The Commission generally considers the most reliable testimony to be that of a live witness who has personal knowledge of the incident at issue and who is subject to cross-examination, particularly when that witness testifies consistently with what he or she said at the time of the incident.

Case: *Texaco Star Mart*, OLCC-97-V-051, April 1998.

Abstract: The Commission concluded that the evidence failed to prove the violation charged where the licensee was provided information identifying the wrong minor. The evidence showed that a different minor was involved in the incident. The Commission concluded that the evidence failed to prove the charge and dismissed the charge.

Case: *Jody's Restaurant & Lounge*, OLCC-97-V-015, August 1997.

Abstract: The burden of presenting evidence to support a fact of position in a contested case rests on the proponent of the fact or position. Proof must be by a preponderance of the evidence. ORS 183.450(2); OAR 845-03-045(3). Where Licensee implied in his argument that the customer had a medical condition in his inner ear that could have caused him to lose his balance and stagger when he walked, the Commission concluded that the Licensee failed to meet the

burden of proof where the Licensee stopped short of actually asserting that the customer had such a condition and where the Licensee did not produce any evidence to prove that the customer had such a condition.

The burden of presenting evidence to support a fact or position rests on the proponent of fact or position. In a violation case alleging sale to a visibly intoxicated person, Licensee asserted that the customer was not visibly intoxicated and that the customer always behaves the way he did at the time of the incident. The Licensee did not identify the specific behaviors that the customer normally exhibits that are signs of intoxication. Nor did the Licensee prove that the customer exhibits these behaviors when he has not been drinking. The Commission concluded that the Licensee failed to meet its burden of proving that the customer normally behaved the way he did at the time of the incident. The Commission concluded that the customer behaved the way he did because of his consumption of alcoholic liquor.

Case: *Mini Mart*, OLCC-97-V-006, June 1997.

Abstract: Where the Licensee contended that the minor showed him false identification on previous occasions, the burden was on the Licensee to prove that the minor showed him false identification. ORS 183.450(2); OAR 845-03-045(3). The minor denied that he ever showed the licensee false identification. The minor testified that he has previously purchased alcohol from the licensee numerous times and the only time that the licensee asked him for identification was at the time of his first purchase. The minor testified that on that occasion, the licensee asked him his age and he verbally gave the licensee a false date of birth that would make him of legal age. According to the minor, the licensee accepted his verbal representation of legal age. No false identification was entered into evidence. The Commission concluded that Licensee failed to prove that the minor showed convincing false identification.

Case: *Geno's Food Mart*, OLCC-93-V-054, May 1994.

Facts: Licensees sold alcohol to two minors without asking for proof of age. Both minors appeared their true ages of 18. Licensees disputed the date of the alleged sale, amount paid, and other aspects of the charges. Licensees' also argued that inconsistencies in the minors' statements and the investigator's report undermined the minors'/investigators credibility; the manner in which the complaint was investigated was unfair and discriminatory; and that they have high moral standards.

Abstract: The burden of presenting evidence to support a fact or position in a contested case rests on the proponent of the fact or position. ORS 183.450(2). On this basis, Regulatory staff has the burden of establishing the facts which prove the elements of the violation charged. Licensees have provided rebuttal arguments which the Commission must weigh along with the other evidence which has been presented when determining whether a preponderance of the evidence supports a fact or position. Licensees have the burden of proving contentions they have raised regarding claims of discrimination.

Case: *Lane County Public Works Assn. v. Lane County*, 118 Or App 46, 846 P2d 414 (1993).

Abstract: Lane County's contention that it would not have hired complainant despite its unlawful motive was an affirmative defense, and the county had the burden of proving it. ORS 183.450(2), (5).

Case: *Rastafarian Private Club*, OLCC-90-V-085, April 1991.

Abstract: Where licensee argued that she was being harassed by the police, the burden of proving this argument was on licensee. ORS 183.450(2). Licensee failed to meet the burden of proof because she failed to show that the police were treating her differently from any other licensee. Licensee did not show that similar activities at other premises were allowed to go unchecked.

Case: *Dillinger's Pub*, OLCC-90-V-003, September 1990.

Abstract: The Commission concluded that the burden of proof is on the Regulatory Process Division to prove by a preponderance of the evidence that licensee or licensees' employees permitted lewd activities. ORS 183.450, OAR 845-03-045(3). The Regulatory Process Division failed to meet its burden of proof because the evidence failed to show that licensee had knowledge, either direct or imputed, of the conditions which led to the lewd activity.

Case: *The Hide Out*, OLCC-89-L-019, September 1990.

Abstract: Where licensee argued that it was not fair to refuse to renew her license because there are illegal activities, altercations, and disturbances at two other nearby premises, the burden of proving this position was on licensee. ORS 183.450(2). Licensee failed to meet her burden of proof because she failed to offer evidence to show what the incidents of illegal activities, altercations, or disturbances were at these other premises.

Case: *Satyricon*, OLCC-88-V-060, December 1988.

Abstract: Where the staff has charged a licensee with a violation of permitting criminal activity on the licensed premises as the result of the licensee's responsibility for his employee's actions (OAR 845-06-025), the burden is upon the staff to prove by a preponderance of the evidence that the person was licensees' employee. ORS 183.450.

Case: *Katina's Deli*, OLCC-88-V-036, September 1988.

Abstract: Where the Commission is unable to determine what occurred from the evidence presented, the contention that a sale occurred is not supported by substantial evidence and the charge should be dismissed.

Case: *Lay-Z-Lou's Saloon*, OLCC-87-V-001, May 1987.

Abstract: Staff failed to meet its burden of proving that licensee's food sales percentage was 20 percent where the evidence offered was only opinion, without any factual basis for support.

Case: *The Jack Room*, OLCC-84-L-021, February 1985.

Abstract: The staff failed to prove that an application should be denied because the applicant was not the most suitable location for a new license in the area, where the staff presented no evidence in support of this argument.

Case: *City of Portland v. Bureau of Labor and Ind.*, 298 Or 104, 690 P2d 475 (1984).

Abstract: One who merely establishes a prima facie case and rests will not necessarily win, even if the opposing party offers no evidence and simply denies the allegations, if the fact finder cannot draw a required inference from the facts proved.

Case: *Metcalf v. AFSD*, 65 Or App 761, 672 P2d 379 (1983).

Abstract: The burden of presenting evidence to support a fact or position in a contested case rests on the proponent of the fact or position. ORS 183.450(2).

A.5.b. Standard of Proof

[\(return to index\)](#)

Case: *Sunseri Dutch Mill*, OLCC-07-V-024, December 2007.

Facts: Licensee employed a bartender who had altered her service permit card (which was expired). Licensee believed it expired in 2008 but it had expired in 2005, and did not believe it had been altered.

Abstract: The inspector did not see the waitress serve or sell alcoholic beverages, so there was no direct evidence that she had served, but the licensee acknowledged that alcohol service was part of the waitress' duties and expected her to have a service permit as part of the job; therefore, it is reasonable to infer that the waitress mixed, sold, or served alcoholic beverages during the six months she worked as a waitress at the premises. Direct evidence that she sold or served alcoholic beverages is not necessary to establish a violation in these circumstances.

Key Words/Phrases: service permit, expired, altered

Case: *Hunter's R.V. Park*, OLCC-06-V-068, February 2007.

Facts: Licensee ran a convenience store on an RV park. A tenant of the park who was often behind in rent would occasionally perform tasks for Licensee in lieu of rent. Occasionally the tenant has worked in the store. One day the tenant noticed the store wasn't open as it should be, while Licensee was away, and tenant retrieved the store keys from Licensee's residence and opened the store. The tenant called the manager who said he would be there shortly. In the time between calling the manager and his arrival, the tenant sold alcohol to a minor decoy.

Abstract: An inspector's opinion of age appearance, while not solely determinative, is relevant to assessing whether the decoy appeared to be under the age of 26 years to an objective observer. Inspectors who run decoy operations select decoys based, in part, on age appearance; regularly assessing the age appearance of minors from these operations makes the observations of inspectors in this regard somewhat more objective than many citizens without such widespread exposure to older minors. Such testimony is relevant to consider in determining the overall objective age appearance of the decoy.

Key Words/Phrases: minor decoy, relevancy, evidentiary issues, number of premises, objective appearance, objective age, appearance of minor decoy, responsibility for employees, servants, representatives, aggravation

Case: *Sobel v. Board of Pharmacy*, 130 Or App 374, 882 P2d 606 (1994).

Abstract: The court drew a distinction for standards of proof between licensing cases and violation cases involving fraud. The court held that standard of proof for license cases involving fraud is a preponderance of the evidence, but the standard of proof for violation cases involving fraud is clear and convincing evidence. In this case, an applicant for a pharmacy license misrepresented his prior violation history. He said that he had a clean record when in fact he had been suspended. See *Bernard V. Bd. of Dental Examiners*, 2 Or App, 22, 36, 465 P2d 917 (1970) for cancellation case.

Case: *Fast Market*, OLCC-90-L-004, May 1991.

Abstract: When the agency proposes an action under ORS 471.295(4)(f) based on fraud or misrepresentation, the standard of proof is proof by clear and convincing evidence.

Case: *OSCI v. Bureau of Labor and Industries*, 98 Or App 548, 780 P2d 743 (1989).

Abstract: The burden of proof in an administrative hearing is by a preponderance of the evidence unless the legislature adopts a different standard. This applies to both the agency's prima facie case and any affirmative defenses. The Commissioner does not have the authority to adopt by rule the clear and convincing standard for evaluating an affirmative defense.

Case: *Automotive Technology v. Employment Division*, 97 Or App 320, 323, 775 P2d 916 (1989).

Abstract: In the absence of legislation adopting a different standard, the burden to prove a particular fact or position in an administrative proceeding is by a preponderance of the evidence.

Case: *Satyricon*, OLCC-88-V-060, December 1988

Abstract: Proof by a preponderance of the evidence means the greater weight of evidence. It is such evidence that, when weighed against that opposed to it, has more convincing force. If the evidence appears to be equally balanced, or if it cannot be determined upon which side it weighs more heavily, the question must be resolved against the party upon whom the burden of proof rests.

Case: *Capital Market*, OLCC-88-V-030, 031, September 1988.

Abstract: To make findings in a contested case, the facts must be established by a preponderance of the evidence, not the higher standard of proof required in a criminal prosecution. OAR 845-03-045(3). The clerk was found to have committed a sale to minor violation even though acquitted on the criminal charge where the reasons for an acquittal were not in the record, or evident from the fact of the acquittal.

Case: *Jiggles*, OLCC-85-L-013, February 1987, *affirmed*, *7455 Inc. v. Oregon Liquor Control Commission*, 94 Or App 780, 767 P2d 116 (1989), *affirmed on other grounds*, 310 Or 477, 800 P2d 781 (1990).

Abstract: The standard of proof for violation charges under ORS 471.315(1)(b) for false statements is the general standard of proof that would apply under ORS Chapter 183. This general standard is probably by a preponderance of the evidence.

Cases: *Riley Hill General Contractor, Inc. v. Tandy Corporation*, 303 Or 390, 737 P2d 595 (1987); *Cook v. Michael*, 214 Or 513, 330 P2d 1026 (1958).

Abstract: There are three standards of proof in Oregon: "A preponderance of the evidence," "clear and convincing" and "beyond a reasonable doubt." In civil cases, the standard of proof shall be the preponderance of evidence. Preponderance of evidence means that the facts asserted are more probably true than false. In civil actions for common law deceit, the standard of proof shall be clear and convincing. To be clear and convincing, evidence must establish that the truth of the facts asserted is highly probable. In criminal cases, guilt shall be established beyond a reasonable doubt. Beyond a reasonable doubt means that the facts asserted are almost certainly true.

Case: *Stop Inn Dine & Dance*, OLCC-84-L-025, April 1985.

Abstract: The Commission may give weight to the expertise of its staff when the Commission reviews contested cases. However, the Commission does not limit its consideration to whether the staff's decision was "clearly erroneous" or was an abuse of discretion.

A.5.c. Admissibility

A.5.c.1. Cumulativeness

A.5.c.2. Relevance

[\(return to index\)](#)

Case: *Hunter's R.V. Park*, OLCC-06-V-068, February 2007.

Facts: Licensee ran a convenience store on an RV park. A tenant of the park who was often behind in rent would occasionally perform tasks for Licensee in lieu of rent. Occasionally the tenant has worked in the store. One day the tenant noticed the store wasn't open as it should be, while Licensee was away, and tenant retrieved the store keys from Licensee's residence and opened the store. The tenant called the manager who said he would be there shortly. In the time between calling the manager and his arrival, the tenant sold alcohol to a minor decoy.

At hearing Licensee raised numerous objections including relevance of an inspector's testimony regarding the number of establishments that checked the minor decoy's ID on the same day as the visit to Licensee.

Abstract: Ordinarily, as here, a number of licensed premises will be visited in a single decoy operation on a given date (or within a few days) with a given minor. The proportion of premises that ask for the decoy's identification before allowing the decoy to purchase alcohol is relevant to consider in determining the overall objective age appearance (e.g., age appearance under 26 years) of the minor decoy. Such testimony has regularly been admitted as relevant in OLCC hearings of this type. *See, e.g., Cozy Corner Tavern*, OLCC-05-V-028, December 2005.

Key Words/Phrases: minor decoy, relevancy, evidentiary issues, number of premises, objective appearance, objective age, appearance of minor decoy, responsibility for employees, servants, representatives, aggravation

Case: *Handy Food Mart*, OLCC-91-L-020, December 1992.

Abstract: Commission determined that incidents occurring inside the licensed premises did not have to be alcohol related to be relevant.

Where the charge was a history of serious and persistent problems, the Commission determined that a prior owner's history of problems at the location was not relevant where more than one year passed between the time when the previous owner stopped his operation at the location and the current owner began his, and where the new owner made changes in the store's physical layout and operation. A prior owner's history would be relevant where there was no significant delay in changing over to the new ownership and where there was no significant change in the operation of the business or its patrons.

Case: *Sao-Mai Restaurant*, OLCC-91-V-136ES, January 1992.

Abstract: Where the charge was a history of serious and persistent problems, the Evidence relating to gang members frequenting the premises was not admitted into the record because the evidence was not relevant. None of the charges alleged gang activity as a basis for a violation.

Case: *Rastafarian Private Club*, OLCC-90-V-085, April 1991.

Abstract: Where the charge was a history of serious and persistent problems, the Commission concluded that only incidents occurring during the time specified in the charge letter (prior to the date the charge letter was issued) were

relevant to proving the prima facie violation. Incidents occurring after the charge letter was issued were not relevant for purposes of proving a prima facie violation because they were not charged and licensee did not receive notice. However, these incidents which occurred after the charge letter was issued but before the hearing date were admissible on the issue of mitigation because they were relevant to whether the licensee had demonstrated a willingness and ability to adequately control the premises.

Where the licensee was not charged with having committed a violation based on her felony conviction for delivery of a controlled substance, her felony conviction was not admissible to prove a violation. However, the felony conviction was admissible with regard to mitigation on the issue of whether licensee had demonstrated a willingness to adequately control the premises.

Case: 7455 Incorporated, *Jiggles*, OLCC-85-L-013, February 1987, *affirmed*, *7455 Inc. v. Oregon Liquor Control Commission*, 94 Or App 780, 767 P2d 116 (1989), *affirmed on other grounds*, 310 Or 477, 800 P2d 781 (1990).

Abstract: Evidence that a person was engaged in a continuing enterprise to hold hidden ownerships in liquor-licensed premises was relevant to whether the person held such an interest in the applicant's premises.

Case: *Trocadero Inn*, OLCC-88-V-058, December 1988.

Abstract: Evidence of prior bad acts is admissible under the Oregon Evidence Code if logically relevant to prove a fact of a case, so long as the evidence is not admitted to prove the defendant's bad character or propensity to commit crimes. *State v. Johns*, 301 Or 535, 725 P2d 312 (1986); *State v. Gailey*, 301 Or 563, 725 P2d 328 (1986); *State v. Allen*, 301 Or 569, 725 P2d 331 (1986).

Case: *Nichols v. Board of Pharmacy*, 61 Or App 274, 657 P2d 216 (1983).

Abstract: Court held that admission of immaterial evidence does not preclude agency action, unless it is shown to have "substantially prejudiced" petitioner's rights.

A.5.c.3. Reliability

[\(return to index\)](#)

Case: *88 Market*, OLCC-12-V-032, April 2013.

Facts: Minors were found intoxicated by Portland PD after a disturbance downtown. Minors were generally uncooperative during the OLCC investigation. One of the minors informed the OLCC investigator that an “older Asian guy” had sold the alcohol to them without asking for ID, and provided a written, unsigned statement. The other would not speak with OLCC investigators. Licensee requested to depose the minors before hearing, and the OLCC objected stating that the minors would be subpoenaed for hearing and Licensee could cross examine them at that time. OLCC failed to subpoena the minors for the hearing and they did not attend.

Abstract: Under the APA, hearsay evidence is generally admissible unless there is some reason to find it unreliable. Whether an agency decision may rest entirely on hearsay evidence depends on whether the hearsay is sufficiently reliable to constitute substantial evidence.

The Oregon Supreme Court has articulated a “nonexclusive list of five factors” to consider when determining whether hearsay is substantial evidence:

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Cole/Dinsmore, 336 Or at 570, (citing *Reguero v. TSPC*, 312 Or 402, 418 (1991)).

When unsworn hearsay constitutes the major support for an agency decision, the importance of providing the adversary with the opportunity to test on cross-examination each of the available declarants’ perception, memory, narration, and veracity is undeniable. *Cole/Dinsmore*. See also *The Rainbow Market*, OLCC Final Order, 08-V-124, October 2009.

In this case, there were multiple levels of hearsay, and factors weighing against the hearsay constituting substantial evidence. The OLCC did not establish that Licensee failed to verify the age of a minor before allowing her to purchase alcohol.

Key Words/Phrases: sale to minor, hearsay evidence, reliable, factors, uncooperative witness

Case: *Yogee’s*, OLCC-10-V-066/066A/066B, December 2011.

Facts: Minor entered establishment and drank. Licensee argued that minor had a false ID, minor denied it.

Abstract: When testimony conflicts on central issues, the Commission makes a credibility determination by considering the probabilities or improbabilities of the witnesses’ testimonies, the internal consistency of the testimonies, and the witnesses’ motivations for lying. See *Kowloons* (OLCC Final Order, 99-V-088, November 2000).

Key Words/Phrases: minor, permitted, false ID, fake ID, identification

Case: *Yogee's*, OLCC-09-V-073, April 2011.

Facts: In one instance minor entered licensed premises. Owner was playing pool and noticed the minor, and went to the bartender to warn him. Bartender finished making the drink he was making and then started to go over to the table the minor was seated at when police came in the premises (for unrelated reasons). The officer recognized the minor from previous interactions and arrested him.

In second instance, minor was arrested outside the premises, intoxicated, and claimed he had been in the licensed premises but not drinking there.

Abstract: No violations were proven because the hearsay evidence was not reliable. To impose sanctions on the Licensee, OLCC must present "reliable, probative and substantial evidence" of the violations. ORS 183.450(5). Reliable hearsay evidence alone can be substantial evidence to establish a fact, even though the hearsay proponent had direct, corroborating evidence available but chose not to offer it. *Reguero v. Teacher Standards and Practices*, 312 Or 402, 417-420 (1991). But "although hearsay evidence may constitute substantial evidence, nothing in *Reguero* compels the conclusion that the hearsay evidence in a particular case will satisfy that standard." *Cole v. Driver and Motor Vehicle Services Branch*, 336 Or 565, 571 (2004).

Factors to be considered in determining whether hearsay evidence may be sufficient to establish a violation in a contested case: (1) the alternative to relying on the hearsay evidence; (2) the importance of the facts sought to be proved by the hearsay statements to the outcome of the proceeding and considerations of economy; (3) the state of the supporting or opposing evidence, if any; (4) the efficacy of cross-examination with respect to the particular hearsay statements; and (5) the consequences of the decision either way.

"When the alternative to relying on hearsay is to get the better evidence that is readily available, refusing to rely on the hearsay is appropriate." *Reguero*, 312 Or at 419, citing 3 Davis, *Administrative Law Treatise* 243 (2d ed 1980).

Key Words/Phrases: minor, hearsay, reliable evidence

Case: *Last Frontier*, OLCC-10-V-040, December 2010.

Facts: Licensed premises had 127 problem incidents over a period of time. Approx. 60 alleged incidents were documented in Licensee's incident logs. On a compliance check police noted a bartender they didn't recognize and asked to see her service permit. Licensee said it was in her office, and came back 5 minutes later with a forged application for a temporary permit. Licensee also employed a former OLCC employee with DPSST peace officer certification, but not private security certification.

Abstract: Incident logs fall within exceptions to hearsay under ORS 40.450(4)(b) as a statement made by a party opponent and ORS 40.460(6) as business records kept in the ordinary course of business. Because these records fall within exceptions to the hearsay rule for civil litigation, the incident logs are reliable under the evidentiary standard in ORS 183.450(1).

Key Words/Phrases: history of serious and persistent problems, lewd/unlawful activities, false statement, forgery, forged service permit application, permitting unlawful activity, DPSST certification, hearsay, reliable

Case: *The Rainbow Market*, OLCC-08-V-124/124A/124B, October 2009.

Facts: An employee was caught by police with meth and marijuana on the licensed premises after hours. The employee told police he found the drugs on the floor of the licensed premises, but officers did not believe him.

Abstract: Whether the Commission's decision may rest entirely on hearsay evidence depends on whether the hearsay

is substantial evidence. The Commission balanced the five factors in *Cole/Dinsmore v. DMV*, 336 Or 565, 87 3d 1120 (2004) to make this determination. Hearsay evidence that Licensee's employee was in possession of drugs while at the premises and on duty was not substantial evidence when the evidence consisted only of an admission by the employee and the police officer felt the statement was not true.

Key Words/Phrases: permitting unlawful activity, controlled substances, reliable evidence, hearsay, acting on behalf of a licensee, on duty

Case: *Hunter's R.V. Park*, OLCC-06-V-068, February 2007.

Facts: Licensee ran a convenience store on an RV park. A tenant of the park who was often behind in rent would occasionally perform tasks for Licensee in lieu of rent. Occasionally the tenant has worked in the store. One day the tenant noticed the store wasn't open as it should be, while Licensee was away, and tenant retrieved the store keys from Licensee's residence and opened the store. The tenant called the manager who said he would be there shortly. In the time between calling the manager and his arrival, the tenant sold alcohol to a minor decoy. At hearing Licensee raised numerous objections including the reliability of the inspector's testimony.

Abstract: Hearsay is generally admissible in administrative proceedings, so long as there is no evidence that would cast doubt on its reliability. *Pierce v. MVD*, 125 Or App 79, 85 (1993).

Key Words/Phrases: minor decoy, relevancy, evidentiary issues, number of premises, objective appearance, objective age, appearance of minor decoy, responsibility for employees, servants, representatives, aggravation

Case: *Omar's*, OLCC-04-V-031/031A/031B, August 2005.

Facts: Undercover OLCC inspectors observed a very obnoxious, profane patron being served by a Permittee at licensed premises. The patron was a regular and typically acted in that manner. After the patron consumed one drink the Permittee noted the patron was intoxicated and served him water when he ordered another drink. Permittee made remarks to the inspectors (who he did not know were with OLCC) indicating he knew the patron was intoxicated before serving the first drink.

Abstract: Licensee and Permittee objected to the admission of an Inspector's Intake/Compliance Action Report on the basis that it was hearsay evidence not subject to cross examination and that it was merely cumulative evidence. The report bears the indicia of reliability because it incorporates the observations of two inspectors and was prepared by them close in time to the incident at issue. The Inspector's testimony is the best evidence, but the report gives further weight to his testimony regarding his observations, particularly with regard to the disputed issues such as the signs of intoxication exhibited by the visibly intoxicated patron and the observations and actions of the Permittee. The Administrative Law Judge admitted the exhibit but declined to rely upon it to support the OLCC's prima facie case. The Commission has determined that evidence that meets the reliability standards in ORS 183.450(1) should both be admitted and relied upon, to supplement other evidence in the record.

Key Words/Phrases: credibility determination, VIP, visually intoxicated, signs of intoxication, contrary ALJ finding, regular patron/customer demeanor, flag factor, interaction with VIP, hearsay, reliable

Case: *Cabana Club Café & Grill*, OLCC-03-L-010/010A, April 2005.

Facts: Licensed premises was located in a popular area of McMinnville for young people, frequented as part of a "pub crawl." Licensee entered into a settlement with the OLCC for license restrictions due to a history of serious and persistent problems. The problems continued and the city requested the license not be renewed due to DUII arrests and significant amount of police time dedicated to problems created by the premises. Licensee had a number of policies in place to deal with problem situations and patrons.

Abstract: The Commission considers reports written by police officers who had no personal knowledge about an incident to be less reliable, and, therefore, to have less probative weight than a report written by an officer with personal knowledge of the incident. The Commission generally considers the most reliable testimony to be that of a live witness who has personal knowledge of the incident at issue and who is subject to cross-examination, particularly when that witness testifies consistently with what he or she said at the time of the incident.

Case: *Cisco & Pancho's*, OLCC-99-V-080ES, September 2000.

Abstract: The Commission considers reports written by police officers who had no personal knowledge about an incident to be less reliable, and, therefore, to have less probative weight than a report written by an officer with personal knowledge of the incident. The Commission generally considers the most reliable testimony to be that of a live witness who has personal knowledge of the incident at issue and who is subject to cross-examination, particularly when that witness testifies consistently with what he or she said at the time of the incident.

Case: *Handy Food Mart*, OLCC-91-L-020, December 1992.

Abstract: A witness's testimony and prior statements were not reliable and were excluded from the record where the witness's testimony was often vague, and the witness refused to answer material, relevant questions on cross examination.

Case: *Lowell Market*, OLCC-91-V-098, December 1991.

Abstract: Video-taped statements which are offered as evidence of the truth of the statements, but which do not meet the requirements for the taking of depositions, are unreliable and, therefore, inadmissible.

Case: OLCC-91-SP-096, November 1991.

Abstract: Commission ruled that a probation officer's written report to the court was made in the ordinary course of business and was reliable. Applicant's argument that there were inaccuracies in the report goes to the weight given the evidence rather than to its admissibility.

Case: *Reguero v. Teacher Standards and Practices Commission*, 101 Or App 27, 789 P2d 11 (1990).

Abstract: Hearsay evidence is not rendered inadmissible simply because it is offered in connection with a "central" or major question of fact. Nor is it rendered inadmissible because it depends for its reliability on the credibility of the person making the statement. If hearsay evidence is properly before a fact finder, the fact finder may rely on it to establish the fact that it tends to prove. *Higley* is discussed and explained.

Case: *7455 Incorporated, Jiggles*, OLCC-85-L-013, February 1987, *affirmed*, *7455 Inc. v. Oregon Liquor Control Commission*, 94 Or App 780, 767 P2d 116 (1989), *affirmed on other grounds*, 310 Or 477, 800 P2d 781 (1990).

Abstract: The testimony of a representative of the Washington Liquor Control Board that Washington law requires approval of owners and managers of premises with liquor licenses was sufficiently reliable for admission. The testimony was straightforward, limited, easily subject to verification, and uncontradicted.

Case: *Clark v. MVD*, 89 Or App 254 748 P2d 178 (1988).

Abstract: Hearsay is admissible in contested cases under ORS 183.450(1). Officer's testimony regarding statements that other officers made to him, that they believed petitioner was intoxicated at time they arrested him, was not hearsay because it was not offered to prove the truth of the matter asserted, (i.e., that petitioner was intoxicated.) Rather, the statement was offered to prove that the officer had a reasonable belief that petitioner was intoxicated.

Case: *Parker v. OSCI*, 87 Or App 354, 742 P2d 617 (1987).

Abstract: In a prison disciplinary case, polygraph evidence may not be relied on as affirmative evidence that a prisoner acted as charged.

Case: *Wiggett v. OSP*, 85 Or App 635, 738 P2d 580 (1987).

Abstract: Polygraph evidence is sufficiently reliable to be admitted in a prison disciplinary case, where relevant to the credibility of an unnamed informant, even if the party objects to its admission.

Case: *Graham v. OSP*, 83 Or App 567, 733 P2d 39 (1987).

Abstract: It is not error to admit polygraph evidence in an administrative hearing where there is no objection. *Cf. State v. Lyon*, 304 Or App 221, 744 P2d 231 (1987) (polygraph evidence is inadmissible in Oregon Courts, even when the parties have stipulated to admissibility).

Case: 7455 Incorporated, *Jiggles*, OLCC-85-L-013, February 1987, *affirmed*, *7455 Inc. v. Oregon Liquor Control Commission*, 94 Or App 780, 767 P2d 116 (1989), *affirmed on other grounds*, 310 Or 477, 800 P2d 781 (1990).

Abstract: Conclusions set out in a report were not sufficiently reliable for admission where the report gave little indication of the evidence that led to the conclusions, where the hearing record contained only a minor portion of the information considered by the report's author, and where the report did not show whether the subjects of the report had an opportunity to present contrary information.

The uncontradicted testimony of an agency's custodian of licensing records that the agency had no records showing a license had ever been issued to a certain person was sufficiently reliable for admission.

Case: *Tri-Met v. Employment Division*, 88 Or App 122, 744 P2d 296 (1987).

Abstract: A party may prove a case by hearsay evidence, even if the other party presents direct evidence. ORS 183.450(1).

Case: *Kuykendall v. AFSD*, 70 Or App 526, 690 P2d 517 (1984).

Abstract: A report is of questionable reliability under ORS 183.450(1) where the evidence shows neither the identity nor the qualifications of the report's authors, nor whom the authors may have consulted. Such a report does not allow the opportunity for cross-examination.

Case: *Columbia Cafe & 3 C's Club*, OLCC-86-V-034, January 1987.

Abstract: Out-of-hearing statements were held not sufficiently reliable for admission under ORS 183.450(1) where not sworn, no opportunity for cross-examination, and no opportunity to determine credibility of declarants. Proponent of the statements did not make adequate showing that declarants were unavailable for hearing.

Case: *Higley v. Edwards*, 67 Or App 488, 678 P2d 775 (1984).

Abstract: In contested case, admission of results of polygraph exam over objection of a party is reversible error.

The fact that evidence is hearsay does not per se require its exclusion under ORS 183.450(1). However, unsworn and uncorroborated statement by convicted felon, who failed to appear and testify, alleging deputy sheriff had sexual contact with her against her wishes, was not evidence that a reasonably prudent person would rely on.

Case: *McCann v. OLCC*, 27 Or App 487, 556 P2d 973 (1976).

Abstract: Admission of hearsay evidence that was inadmissible under a statute then in effect was prejudicial error.

A.5.c.4. Privilege

[\(return to index\)](#)

Case: *Cabana Club Café & Grill*, OLCC-03-L-010/010A, April 2005.

Facts: Licensed premises was located in a popular area of McMinnville for young people, frequented as part of a “pub crawl.” Licensee entered into a settlement with the OLCC for license restrictions due to a history of serious and persistent problems. The problems continued and the city requested the license not be renewed due to DUII arrests and significant amount of police time dedicated to problems created by the premises. Licensee had a number of policies in place to deal with problem situations and patrons.

Abstract: Draft settlement agreement and correspondence relating to the draft settlement were admitted into evidence for the purpose of showing that licensee had a willingness and ability to control the premises. The settlement resolved a previous Proposed Refusal of License Renewal and the Commission had issued a new Proposed Refusal of License Renewal letter based on more recent serious and persistent problems.

Case: OLCC-91-SP-096, November 1991.

Abstract: Commission ruled that statements made by an applicant to her probation officer were not privileged. The probation officer did not need applicant's consent to release information obtained from the applicant that the applicant believed would be kept confidential.

Case: *7455 Incorporated v. OLCC*, 310 Or 477, 800 P2d 781 (1990).

Abstract: Under certain circumstances, a witness may obtain immunity from prosecution if the person is ordered to provide incriminating evidence. To be afforded immunity, witnesses should state that they are invoking the right not to testify without immunity and the agency should clearly order them to testify or produce documents.

A.5.d. Factors Affecting Credibility

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Case: [Nicole Degroot, OLCC-14-V-006, February 2015.](#)

Facts: Permittee was contacted by a police officer on the licensed premises about an alleged assault. The officer noted Permittee appeared intoxicated. Permittee claimed she had one shot of vodka after she went off duty only. A patron testified to seeing Permittee taking shots on duty and that Permittee appeared “loaded.” A co-worker disputed this testimony, stating that she served Permittee a shot only after Permittee was off duty.

Abstract: Permittee was under the influence of intoxicants while on duty at Lydia’s on the night of April 12, 2014, in violation of OAR 845-006-0345(1). The alternate violation for drinking on duty should be dismissed. No aggravating or mitigating circumstances were present, making the standard sanction of a 30-day suspension appropriate.

By prior Final Order precedent, the Commission has held that a person is “under the influence of intoxicating liquor” when that person:

displays not only all well-known and easily-recognized conditions and degrees of intoxication, but any abnormal mental or physical condition which is the result of indulging in any degree in intoxicating liquors, which tends to deprive one of that clearness of intellect and control of himself which he would otherwise possess.

Bill's Place (OLCC, Final Order, 88-V-001, July 1988), citing *Black's Law Dictionary* (Fifth ed. 1979). Under the influence of intoxicants is a different, and lesser, standard than visible intoxication. *Undefeated Sports Bar* (OLCC Final Order, 14-V-013, August 2014).

The testimony of Permittee and her co-worker have less weight than the investigating officer and patron who witnessed Permittee drinking. The officer is a trained observer who is experienced in investigating and evaluating persons who are under the influence of intoxicants.

Key Words/Phrases: drinking on duty, under the influence, credibility determination, signs of intoxication, police officer, trained observer

Case: [Cinnabar, OLCC-11-V-060, August 2012.](#)

Facts: Licensee’s corporate principal was at the licensed premises to see his son, a disk jockey. Prior to arriving he had been drinking. A fight broke out between two patrons and when police arrived Licensee’s corporate principal tried to prevent law enforcement from entering the premises (saying “everything’s fine”). Witnesses stated that the corporate principal showed up intoxicated and had not been drinking at the premises.

Abstract: In *Tew v. DMV*, 179 Or App 443 (2002), citing to the passage from *Lewis and Clark College*, the court cited to several factors that a fact finder may rely upon in assessing the credibility and reliability of various witnesses. As relevant to this matter, the court in *Tew* noted that, in assessing credibility, a fact finder may take note that police officers, as trained observers with the benefit of written reports completed shortly after the incident to refresh their memories of the events in question, are often reliable witnesses. The court also held that it is appropriate to take into account the well-known fact that alcohol consumption can affect a person’s ability to perceive and remember events.

Key Words: witness credibility, delay entrance, bar fight, brawl, drinking on duty

Case: [La Burrita Mini Market & Deli, OLCC-09-V-082/082A, June 2010.](#)

Facts: OLCC minor decoy was sold alcohol by Licensee without being asked to verify her age. Licensee disputed that the sale ever occurred, that Licensee ever operated the cash register, and accused the decoy of stealing the alcohol.

Abstract: The concurring opinion in *Lewis and Clark College v. Bureau of Labor*, 43 Or App 245 (1979), provides a good analysis of factors to be considered in determining credibility:

“credibility (more properly weight) is determinable from a number of factors other than witness demeanor. The credibility, i.e., weight that attaches to testimony can be determined in terms of the inherent probability, or improbability of the testimony, the possible internal inconsistencies, the fact it is or is not corroborated, that it is contradicted by other testimony or evidence and finally that human experience demonstrates it is logically incredible.”

As to the testimony of the Redmond police officer who corroborated the minor decoy’s testimony, the Supreme Court of the United States has noted, in another context:

The officer * * * is a trained observer and investigator. He is, by reason of his training and experience, well suited for the role the statute accords him in the presuspension process. And, as he is personally subject to civil liability for an unlawful arrest and to criminal penalties for the willful misrepresentation of the facts, he has every incentive to ascertain accurately and truthfully report the facts. The specific dictates of due process must be shaped by “the risk error inherent in the truth finding process as applied to the generality of cases” rather than the “rare exceptions.” *Mathews v. Eldridge*, 424 US 310 (1976). And, the risk of erroneous observation or deliberate misrepresentation of the facts by the reporting officer in the ordinary case seems unsubstantial. *Mackey v. Montrym*, 443 US 1 (1979).

Key Words/Phrases: minor decoy, sale, failure to verify age, credibility determination, licensee not credible, licensee untruthful, lie, police officer testimony

Case: *Cozy Corner Tavern and Long, Thomas*, OLCC-05-V-028/029, December 2005.

Facts: Minor decoy was served at licensed premises by permittee without being asked for ID. Permittee claimed that he asked minor if he was 21 and minor said yes, and that minor’s height and size made him appear 27-28. Decoy denied lying about his age.

Abstract: The Commission found the testimony of the minor decoy and the OLCC inspector more reliable than that of the Permittee and the premises patron. On the evening in question, the minor and the inspector were conducting an undercover compliance check. They were specifically concerned with whether servers and/or clerks asked the minor's age or to see his identification. They were paying attention to the circumstances at each business they entered. Permittee and the patron, on the other hand, were not alerted to the circumstances. Neither knew, at the time the minor entered the premises, that he was an OLCC decoy. Given the very brief time the minor was inside the premises, and the unremarkable circumstances of the sale, the Commission found it unlikely that Permittee and the patron would have such a specific recollection of Permittee's very brief contact with the minor.

Given OLCC's policy and the minor’s training and instructions as an agency decoy, it is unlikely that, if asked, he would falsely represent that he was 21 in lieu of presenting his identification.

The Commission found Permittee's testimony to be internally inconsistent. Permittee testified that he subjectively believed that the minor was 26 or older. If Permittee truly believed the minor was at least 26 years old, he would have had no reason to ask the minor if he was 21. Permittee would only have asked the minor if he was 21 if Permittee had some doubt about the minor having reached that age.

Key Words/Phrases: credibility determination, minor decoy, minor appearance, decoy operations

Case: *Corey's*, OLCC-04-V-038/038A, August 2005.

Facts: Licensee's bartender served a patron who undercover OLCC inspectors believed was visibly intoxicated. The bartender denied seeing any signs of intoxication.

Abstract: OLCC inspector's testimony is given less weight where it is contradicted by video evidence showing the actions and behavior of an alleged VIP. Contrary to the inspector's testimony the video showed the patron walking without swaying, resting an arm on the bar while talking to someone instead of sleeping on it, and looking for something underneath the bar instead of falling off the stool. These behaviors were seen not as signs of visible intoxication, and the testimony by the inspector was viewed as exaggerated in light of the video evidence. *Corey's*, OLCC-04-V-038, August 2005.

Because the permittee is charged with a "knowing" violation of selling, giving, or making alcohol available to a VIP her credibility may be critical to the outcome.

Key Words/Phrases: credibility determination, report delay

Case: *Justin Scriber*, OLCC-04-V-050, August 2005.

Facts: Undercover OLCC inspectors observed a patron behaving oddly. Permittee was coming on-duty when patron was already there, and was told by out-going bartender that the patron had one drink. Patron did not directly get another drink from Permittee, and instead gave money to another patron to purchase drinks.

Abstract: Where the permittee's testimony is credible on the issue of whether a patron was visibly intoxicated the inspector's testimony must be persuasive enough to impeach the permittee. The ALJ noted that the permittee's demeanor as well as the internal consistency and inherent probability of his testimony established credibility. The inspectors' testimony was given less weight as the ALJ believed it was not an unbiased, objective assessment of the signs of intoxication and the inspectors omitted details of the alleged VIP's ability to play pool, which the ALJ considered to be significant. The ALJ also felt that the inspectors placed too much weight on the alleged VIP's general appearance.

Key Words/Phrases: credibility determination, visibly intoxicated, VIP, purchase by another, disputed testimony

Case: *Ararat Restaurant & Lounge*, OLCC-04-V-070/070A/070B, August 2005.

Facts: Licensee's corporate principal served minor decoy, after checking ID. Licensee disputed the decoy's version of what happened, claiming that the decoy lied about his age.

Abstract: The Commission was persuaded by the testimonies of the minor and the inspectors. They all testified to the same facts which were consistent with what the inspectors saw from outside the premises. The Commission was especially persuaded by the inspector's contemporaneous notes which corroborated that Licensee first said she did not ask for identification and then later said she had asked before serving the minor. Those notes do not include comments about the minor running from the premises or that Licensee asked to check identification a second time. The minor also wrote a contemporaneous report of the transaction. The Commission finds these reports to be more reliable than Licensee's witnesses' testimony of what actually happened during the incident because they were written close upon the time of the incident and there was no motivation for them to lie.

The Commission noted that Licensee's version of what occurred changed at least three times. This did not bolster the reliability of her testimony. She has incentive to color the truth to prevent finding a violation in this matter.

Key Words/Phrases: AVE, prevent sales, mitigation, credibility determination

Case: *Marquam Hill Vineyards*, OLCC-97-V-036, December 1997.

Abstract: The Commission concluded that the testimony of OLCC Inspectors was more persuasive than the testimony of Licensees' witnesses where the Inspectors corroborated each others' testimony and gave more specific details concerning the actions of the minor.

Case: *Kim Lan*, OLCC-94-V-008, October 1994.

Abstract: The Commission concluded that log entries made by the witness at the time that specific incidents occurred were credible and bolstered the testimony of the witness. There was no evidence that the log entries lacked trustworthiness because the entries were made by someone with personal knowledge, without regard to a contested case hearing and before problems between the licensee and witness occurred.

Case: *The B Mart*, OLCC-94-V-007, August 1994.

Abstract: The Commission has the discretion to give different weight to particular facts or to make other findings of fact when the evidence is subject to alternative interpretations. However, in the absence of a complete review of the pertinent portions of the record in the case, the Commission will defer to the decision of the Hearings Examiner in the area of determining the credibility of witnesses.

Case: *State v. Keller*, 315 Or 273, 844 P2d 195 (1992).

Abstract: A trial witness may not testify about the credibility of another trial witness. The rule applies whether the witness testifies about the credibility of the other witnesses in relation to the latter's testimony at trial or about the credibility of the other witness in relation to statements made on some other occasion or for some reason unrelated to the current litigation.

Case: *OLCC Agency No. 74*, OLCC-90-RO-001, April 1991.

Abstract: The Commission found the minor's testimony more credible that a sale to minor occurred than the clerk's testimony denying the sale where the minor's testimony was more straightforward and consistent with the circumstances than the clerk's. The clerk gave inconsistent statements by stating to OLCC inspectors after the incident that the minor had previously shown him valid identification, and then testified at the hearing that he had never seen the minor before. A witness corroborated the minor's testimony by testifying that he had observed the minor purchase alcoholic liquor from this agency on a prior occasion. And, the minor's employer located across the street from the liquor store observed that the minor was returning from his 15-minute breaks with distilled liquor purchases and there was no other liquor store in the area.

Case: *Trapper's Lodge*, OLCC-90-V-066, January 1991.

Abstract: The Commission concluded the testimony of the employee was credible because her demeanor was sincere. Her testimony that she did not hear the inspector when he asked her to call the police was consistent with the inspector's account that when he first requested her to call the police, she continued to clear glassware from the tables. The employee's testimony was probable. When the inspector made the request, his back was to the employee. This would have made it difficult for her to hear him. Her testimony was reliable. She was present at the time of the incident and is the best person to testify about whether she heard the inspector. Her testimony was corroborated by another witness who was present at the time.

Case: *The Winema*, OLCC-90-V-117, May 1990.

Abstract: A witness' testimony that her former employer had committed liquor law violations lacked credibility where the witness: (1) reported the alleged violations after hard feelings had developed between her and licensee over wage and rent disputes; (2) could not recall basic features of her employment but could clearly remember matters surrounding the violations that she alleged the employer had committed; (3) had been convicted of a felony [ORS 40.355(1) provides that a witness' credibility may be attacked where the witness has been convicted of a felony]; and [4] had lied at another point in her testimony [ORS 10.095(3) by analogy states that in jury trials " a witness false in one part of the testimony is to be distrusted in others"].

Case: *The Silver Fox*, OLCC-89-V-039, September 1989.

Abstract: The witness's testimony was not entitled to much weight because he was not in a good position to evaluate the condition of the alleged VIP. The witness was preoccupied with personal problems and the antics of the people in the group that he was with.

Case: *Wolf Den*, OLCC-89-V-021, July 1989.

Abstract: Licensee's testimony at the hearing was not credible because it was inconsistent with what licensee told inspectors at the time of the incident, seven months prior to the hearing. The licensee had not had time to fabricate his story when the inspectors talked to him immediately after the incident.

Case: *7455 Incorporated, Jiggles*, OLCC-85-L-013, February 1987, *affirmed*, *7455 Inc. v. Oregon Liquor Control Commission*, 94 Or App 780, 767 P2d 116 (1989), *affirmed on other grounds*, 310 Or 477, 800 P2d 781 (1990).

Abstract: A witness' credibility was diminished where the witness had made prior inconsistent statements, where the witness lied to the Commission in the investigation, where the witness' testimony was improbable, and where the witness' testimony conflicted with the testimony of other witnesses.

Case: *River Road House*, OLCC-88-V-018, June 1988.

Abstract: The inspector's testimony was more credible because it was a more probable account of what occurred and it was more consistent with all of the circumstances. The inspector was more certain about what he observed and his testimony was corroborated by that of another inspector.

Case: OLCC-88-SP-002, September 1988.

Abstract: The Commission concluded that the applicant's testimony was not credible. The applicant gave inconsistent reasons for her failure to list prior felony convictions. The applicant's testimony was improbable because she testified that she did not remember having had a jury trial on the charges which resulted in her felony conviction.

Case: *Town & Country Tavern*, OLCC-85-V-047, April 1986.

Abstract: In making a credibility determination, the Commission considered the witnesses' demeanor, the probabilities or improbabilities of the testimony, the internal consistency or lack of it in the different witnesses' testimony and the witnesses' motivations for lying.

Case: *Hill v. Employment Division*, 73 Or App 422, 698 P2d 1010 (1985).

Abstract: Credible testimony is that which is consistent, sincere and straightforward.

Case: *Babcock v. Employment Division*, 72 Or App 486, 696 P2d 19 (1985).

Abstract: Judging credibility is one of referee's functions. Referee does not need to see witness in order to judge

credibility. Referee can make credibility finding by hearing witness testify over telephone.

Case: *Pastime Tavern*, October 1984.

Abstract: Witnesses were not credible where they were intoxicated at the time of their observations, they had a motive to lie, they had made prior inconsistent statements, and there were conflicts in their stories.

Case: *Coleman and Coleman*, 71 Or App 313, 692 P2d 129 (1984).

Abstract: Inconsistent opposing affidavits require credibility determination of applicants. Such determination requires an evidentiary hearing.

Case: *Westmoreland v. Iowa Beef Processors*, 70 Or App 642, 690 P2d 1105 (1984).

Abstract: Testimony of witness who lies about some issues not wholly impeached; even though less trustworthy, witness may retain some credibility as to other issues.

Case: *Shop N Go*, OLCC-85-V-025, November 1985.

Abstract: The testimony of a minor was more credible than that of the licensees where the minor's testimony was consistent, detailed and certain and the licensees' testimony was vague and inconsistent.

Case: *Smith v. OLCC*, 31 Or App 167, 570 P2d 90 (1977).

Abstract: The Commission, as trier of fact, decides the weight to be given to the applicant's explanation of false statements.

A.5.e. Official/Judicial Notice

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Case: *T. J.'s Venture Inn*, OLCC-93-L-002, July 1993.

Abstract: The Regulatory Staff requested that the Commission take official notice of the following statement:

. . . persons who consume alcohol are much more likely to create disturbances than persons who don't consume. The more emphasis a business has on the sale of alcoholic beverages, the greater the likelihood that the business' patrons will engage in problem behaviors.

The Commission declined to take official notice of the statement. The statement failed to meet the test for facts officially noticed which is that the fact is not subject to reasonable dispute because it is generally known or can be accurately and readily determined by resort to sources whose accuracy cannot reasonably be questioned.

Case: *State v. Cervantes*, 118 Or App 429, 848 P2d 118 (1993).

Abstract: A trial court may take judicial notice of the location of well known geographical features. The court could have taken judicial notice that the City of Coos Bay is located in Coos County.

Case: *Club 101*, OLCC-85-ES-001, February 1986.

Abstract: The tendency of alcoholic liquor to reduce inhibitions and increase the potential for violence, criminal activity, or other anti-social behavior is so well known as to be indisputable. It is, thus, a fact that may be noticed under ORS 183.450(4).

Case: *Benson v. AFSD*, 69 Or App 185, 684 P2d 624 (1984).

Abstract: Hearings Officer's official notice that "persons with similar ... disabilities are gainfully employed" did not fall under the provision of ORS 183.450(4) that official notice may be taken of "general, technical or scientific facts within the agency's specialized knowledge."

Case: *Rolfe v. Psychiatric Security Review Board*, 53 Or App 941, 633 P2d 846 (1981).

Abstract: Board member's statement of his experience with subjects of a certain psychological profile held to be supplying evidence from personal experience rather than using "experience, technical competence and specialized knowledge" (ORS 183.450(4)) to evaluate evidence. Thus, procedure was faulty because applicant was not given opportunity to contest such evidence.

A.5.f. Witness Testimony/Perjury

[\(return to index\)](#)

Case: *State v. Hayes*, 116 Or App 287, 843 P2d 944 (1992).

Abstract: Because a statement may be so vague or ambiguous as to preclude a satisfactory demonstration that it is false, precise questioning is imperative as a predicate for the offense of perjury. It is impermissible to infer that a statement meant one thing instead of another when the ambiguity could easily have been resolved by thorough examination.

A.6. Adequacy of Contested Case Order

A.6.a. Adequate Findings

A.6.a.1. Failure to Make Findings

[\(return to index\)](#)

Case: *Tri-Met v. Employment Division*, 88 Or App 122, 744 P2d 296 (1987).

Abstract: The Hearings Examiner must assess both hearsay and non-hearsay evidence and explain which evidence was persuasive and credible. Hearsay evidence is not per se less credible or less persuasive than non-hearsay.

Case: *Pruett v. Employment Division*, 86 Or App 516, 740 P2d 196 (1987).

Abstract: Generally, when it becomes apparent to a reviewing court that necessary findings have not been made, the proper remedy is to remand for appropriate findings. However, when the evidence relevant to the findings is uncontroverted, remand becomes unnecessary, and the court may consider the findings that should have been made. Citing *Michelet v. Morgan*, 11 Or App 79, 83, 501 P2d 984 (1972).

Case: *C & C Construction v. The Senior Services Division*, 82 Or App 682, 728 P2d 962 (1986).

Abstract: An agency decision in a contested case must allow the reviewing court to determine what are findings of fact and what are conclusions of law.

Case: *Amundson v. AFSD*, 63 Or App 313, 663 P2d 810 (1983).

Abstract: Hearings Referee did not make own findings of fact, but impermissibly delegated medical eligibility decision-making responsibility to a group of agency medical experts.

Case: *May v. Employment Division*, 63 Or App 208, 662 P2d 801 (1983).

Abstract: An agency's order will be reversed and remanded if it is based on a crucial finding of fact that neither the agency nor the Hearings Officer made.

Case: *Norvell v. Portland Area LGBC*, 43 Or App 849, 853, 604 P2d 896 (1979).

Abstract: In order to support a decision, an agency is obligated to find facts. "What must be employed . . . is a declarative sentence stating a fact qua fact."

Case: *Graham v. OLCC*, 25 Or App 759, 762, 551 P2d 112 (1976).

Abstract: The Commission is not bound to make a finding in every case on all criteria listed in its regulations.

Case: *Battle Creek Golf Course v. OLCC*, 21 Or App 179, 534 P2d 204 (1975).

Abstract: Commission's order was not sufficient because it failed to state what facts the Commission found and to explain why the facts supported the order.

Case: *Graham v. OLCC*, 20 Or App 97, 530 P2d 858 (1975).

Abstract: The court remanded the Commission's order because no findings were made on the issue of whether there were sufficient licensed premises and because what were set forth as findings were only summaries of the evidence.

Case: *Lincoln Loan Co. v. City of Portland*, 317 Or 192, 855 P2d 151 (1993).

Abstract: In *Omey v. Senior and Disabled Services Div.*, 124 Or App 112, 861 P2d 394 (1993), the court held that the Hearings Officer made a full and fair inquiry into the facts as required by ORS 183.415(10) which provides:

The officer presiding at the hearing shall insure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the presiding officer in the case.

An order requiring demolition of a structure was reversed where the order failed to show that the action chosen by the Hearings Officer was a reasonable one among the methods available to correct the violation. The Hearings Examiner must make findings and indicate why the particular method is appropriate. The court's decision was based on a statute identical to ORS 183.470(2).

Case: *Douglas County v. Employment Div.*, 99 Or App 625, 783 P2d 1019 (1989).

Abstract: An administrative agency is required to state clearly and precisely what it finds to be the facts and why those facts rationally lead to the decision that it makes. An agency is not required to make a finding of fact on all evidence received. However, it must make findings on all essential facts and pertinent issues.

Case: *Bird v. Employment Division*, 90 Or App 404, 752 P2d 1239 (1988).

Abstract: Under *Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986), there is no need for the referee to make a credibility determination when the claimant's testimony is contradicted by other evidence on which the referee based the findings. The inference is clear that the testimony was not believed. However, when evidence is uncontradicted, and the referee or board does not find in accordance with it, an express finding respecting credibility is necessary.

A.6.a.2. Findings Not Supported by Substantial Evidence

[\(return to index\)](#)

Case: *Brown v. AFSD*, 75 Or App 98, 705 P2d 236 (1985).

Abstract: Order was not based upon substantial evidence where based on a single report and the record showed numerous reports taking contrary position.

Case: *In re Morrow*, 297 Or 808, 688 P2d 820 (1984).

Abstract: When fact-finder cannot determine from the evidence whether alleged fact is or is not accurate, fact is not established.

Case: *Lewis v. Employment Division*, 66 Or App 303, 673 P2d 1376 (1984).

Abstract: Where credibility is crucial to the outcome of a contested case, the order must explain credibility determinations in order to allow review for substantial evidence.

Case: *Red Robin Enterprises v. OLCC*, 55 Or App 720, 639 P2d 710 (1982).

Abstract: There was not substantial evidence to support Commission's finding that menu was attractive to minors.

Case: *Ainsworth v. OLCC*, 55 Or App 259, 637 P2d 936 (1981).

Abstract: Although a reviewing court may disagree with the conclusions drawn by the Commission, the court will uphold the Commission's findings where they are supported by substantial evidence.

Case: *Cook v. Employment Division*, 47 Or App 437, 441, 614 P2d 1193 (1980).

Abstract: Substantial evidence means "any reasonable evidence or such proof as a reasonable mind would employ to support a conclusion."

Case: *Polizos v. OLCC*, 37 Or App 757, 588 P2d 681 (1978).

Abstract: OLCC order held invalid where the findings were not supported by the record.

Case: *Swearingen v. OLCC*, 29 Or App 743, 564 P2d 1102 (1977).

Abstract: Indisputed testimony of OLCC inspector about contents of licensee's food sales records, and his analysis of them, sufficient to constitute substantial evidence.

Case: *Morishige v. OLCC*, 29 Or App 651, 564 P2d 1359 (1977).

Abstract: The court reversed OLCC's denial of renewal of a license because the conclusions that applicant had made a false statement and that the city council had refused to endorse the renewal were not supported by the evidence.

Case: *Haviland Hotels v. OLCC*, 20 Or App 120, 530 P2d 1263 (1975).

Abstract: The court is bound by the finding of the Commission where the finding was supported by substantial evidence.

Case: *Von Weidlein/N.W. Bottling v. OLCC*, 16 Or App 81, 102, 517 P2d 295 (1973).

Abstract: Where there is a conflict in the testimony of two witnesses, there is necessarily substantial evidence to support either account.

Case: *Canfield v. Yamhill County*, 142 Or App 12, 920 P2d 558 (1996).

Abstract: There are three ways to challenge the evidentiary support for a finding of fact. 1) Argue that there is no supporting evidence or that the evidence relied on as supporting the finding does not in fact do so; 2) Argue that although there is some supporting evidence, that the evidence is not substantial when viewed together with the countervailing evidence in the whole record; or 3) Make both arguments. No identification of evidence in the record is possible or necessary for a party to obtain review of a contention that there is no evidence that supports the finding. Where there is some evidence that supports a finding, it is the parties' burden to attack or defend the finding by identifying the supporting or countervailing evidence on which they rely.

Case: *Pierce v. MVD*, 125 Or App 79, 864 P2d 1355 (1993).

Abstract: Hearsay evidence can constitute substantial evidence if the finding is reasonable in light of the countervailing as well as the supporting evidence. This case follows the holding in *Reguero v. Teacher Standards and Practices*, 312 Or 402, 822 P2d 1171 (1991).

Case: *State v. Jacobs*, 109 Or App 444, 819 P2d 766 (1991).

Abstract: Testimony of a police officer about a defendant's likely blood-alcohol level was mere speculation. The officer did not administer the test. The officer's training and experience did not qualify him as an expert to predict results.

Case: *Reguero v. Teacher Standards and Practices*, 312 Or 402, 822 P2d 1171 (1991).

Abstract: In a case involving denial of a teacher's license, the court held that hearsay testimony of sixth grade students was not substantial evidence to support the conclusion of law finding lack of good moral character where the students were apparently available to testify. Case reversed and remanded.

Case: *Fast Market*, OLCC-90-L-004, May 1991.

Abstract: Written police reports were sufficient to establish that unlawful incidents occurred where there was no conflicting evidence in the reports and there was no evidence offered to rebut them.

Case: *Shakerin v. MVD*, 101 Or App 357, 790 P2d 1180 (1990).

Abstract: The court limited its review to determine whether a reasonable person could have made the findings supporting the decision, not whether a reasonable person could have made different findings.

Case: *Reguero v. Teacher Standards and Practices*, 101 Or App 27, 789 P2d 11 (1990).

Facts: A teacher's certificate was denied based upon hearsay evidence contained in police reports and in the testimony of investigators and counselors who spoke to young school girls which established that the teacher had sexually molested and intimidated the girls.

Abstract: In certain cases, hearsay evidence, if it is reliable, can be sufficient by and of itself ("substantial evidence")

to establish a critical fact. For purposes of review by the Court of Appeals under ORS 183.482(8)(c) hearsay evidence can be "substantial evidence." This can be the case even when direct, corroborating evidence was available to those who offered the hearsay evidence, but they made a conscious decision to offer only the hearsay evidence.

Case: *Garcia v. Boise Cascade Corp.*, 309 Or 292, 787 P2d 884 (1990).

Abstract: The appropriate question is not whether substantial evidence supported a claimant's position, but whether substantial evidence supported the referee's decision.

Case: *1,000 Friends of Oregon v. LCDC*, 305 Or 384, 752 P2d 271_(1988).

Abstract: The court does not evaluate the credibility of the witness. It is not a review de novo; however, questioning credibility can suggest the potential lack of substantial evidence to support a conclusion.

Cases: *Younger v. City of Portland*, 305 Or 346, 752 P2d 262 (1988); *1,000 Friends of Oregon v. LCDC*, 305 Or 384, 752 P2d 271 (1988).

Abstract: Although admissibility in court is not the standard that should be used to judge evidence, the county must make certain that the evidence presented to LCDC viewed as a whole, would permit a reasonable person to make the finding.

Case: *Armstrong v. Asten Hill Co.*, 90 Or App 200, 752 P2d 312 (1988).

Abstract: The difference between the "any evidence" rule and the substantial evidence test in ORS 183.482(8)(c) will be decisive only when the credible evidence apparently weighs overwhelmingly in favor of one finding and the board finds the other without giving a persuasive explanation.

If an agency's finding is reasonable, keeping in mind the evidence against the finding as well as the evidence supporting it, there is substantial evidence. It is not what has been referred to as the "any evidence" rule, but it is also not de novo review.

Case: *Bunnell v. Employment Division*, 304 Or 11, 741 P2d 887 (1987).

Abstract: There was no substantial evidence in the record "when viewed as a whole" to permit the referee or EAB to make a finding that claimant's act amounted to willful misconduct. Claimant's act amounted to no more than an isolated instance of poor judgment. Case was remanded to enter an order allowing benefits.

Case: *Parks v. MVD*, 83 Or App 413, 732 P2d 52 (1987).

Abstract: Findings based on information in computer records were not proper where the meaning of the computer entries was neither self-evident nor satisfactorily explained. The court did not consider whether the meaning of a coded computer entry was a proper subject of agency notice.

Case: *Laws v. AFSD*, 77 Or App 611, 714 P2d 614 (1986).

Abstract: Referee's finding that physician's treatment of claimant was inappropriate was mere conjecture based upon the referee's own lay opinion and not based on facts on the record. There must be facts on the record to support the findings.

A.6.a.3. Credibility Determinations

A.6.a.3.a. Hearings Examiner Determinations

[\(return to index\)](#)

Case: *Nicole Degroot*, OLCC-14-V-006, February 2015.

Facts: Permittee was contacted by a police officer on the licensed premises about an alleged assault. The officer noted Permittee appeared intoxicated. Permittee claimed she had one shot of vodka after she went off duty only. A patron testified to seeing Permittee taking shots on duty and that Permittee appeared “loaded.” A co-worker disputed this testimony, stating that she served Permittee a shot only after Permittee was off duty.

Abstract: Permittee was under the influence of intoxicants while on duty at Lydia’s on the night of April 12, 2014, in violation of OAR 845-006-0345(1). The alternate violation for drinking on duty should be dismissed. No aggravating or mitigating circumstances were present, making the standard sanction of a 30-day suspension appropriate.

By prior Final Order precedent, the Commission has held that a person is “under the influence of intoxicating liquor” when that person:

displays not only all well-known and easily-recognized conditions and degrees of intoxication, but any abnormal mental or physical condition which is the result of indulging in any degree in intoxicating liquors, which tends to deprive one of that clearness of intellect and control of himself which he would otherwise possess.

Bill's Place (OLCC, Final Order, 88-V-001, July 1988), citing *Black's Law Dictionary* (Fifth ed. 1979). Under the influence of intoxicants is a different, and lesser, standard than visible intoxication. *Undefeated Sports Bar* (OLCC Final Order, 14-V-013, August 2014).

The testimony of Permittee and her co-worker have less weight than the investigating officer and patron who witnessed Permittee drinking. The officer is a trained observer who is experienced in investigating and evaluating persons who are under the influence of intoxicants.

Key Words/Phrases: drinking on duty, under the influence, credibility determination, signs of intoxication, police officer, trained observer

Case: *La Burrita Mini Market & Deli*, OLCC-09-V-082/082A, June 2010.

Facts: OLCC minor decoy was sold alcohol by Licensee without being asked to verify her age. Licensee disputed that the sale ever occurred, that Licensee ever operated the cash register, and accused the decoy of stealing the alcohol.

Abstract: The concurring opinion in *Lewis and Clark College v. Bureau of Labor*, 43 Or App 245 (1979), provides a good analysis of factors to be considered in determining credibility:

“credibility (more properly weight) is determinable from a number of factors other than witness demeanor. The credibility, i.e., weight that attaches to testimony can be determined in terms of the inherent probability, or improbability of the testimony, the possible internal inconsistencies, the fact it is or is not corroborated, that it is contradicted by other testimony or evidence and finally that human experience demonstrates it is logically incredible.”

As to the testimony of the Redmond police officer who corroborated the minor decoy’s testimony, the Supreme Court of the United States has noted, in another context:

The officer * * * is a trained observer and investigator. He is, by reason of his training and experience, well suited for the role the statute accords him in the presuspension process. And, as he is personally subject to civil liability for an unlawful arrest and to criminal penalties for the willful misrepresentation of the facts, he has every incentive to ascertain accurately and truthfully report the facts. The specific dictates of due process must be shaped by “the risk error inherent in the truth finding process as applied to the generality of cases” rather than the “rare exceptions.” *Mathews v. Eldridge*, 424 US 310 (1976). And, the risk of erroneous observation or deliberate misrepresentation of the facts by the reporting officer in the ordinary case seems unsubstantial. *Mackey v. Montrym*, 443 US 1 (1979).

Key Words/Phrases: minor decoy, sale, failure to verify age, credibility determination, licensee not credible, licensee untruthful, lie, police officer testimony

Case: *Casa Colonial*, OLCC-09-V-084/084A/084B, April 2010.

Facts: Licensee with #1 minor posting had a minor, and her older sister, who were to dance topless. Licensee’s managing member got into a physical altercation with one of the dancers when she tried to change her clothes in his office. Licensee had inquired of the OLCC how he could have nude dancing and change his minor posting, but never submitted the required documentation and request.

Abstract: The Commission offered hearsay statements from key witnesses. The Commission did not call key witnesses and did not explain their failure to do so. Although the witnesses were reluctant to speak with any and did not return calls, the Commission could have subpoenaed them. The proffered hearsay is critical in determining the outcome of the most serious allegation in this case. Furthermore, the penalty proposed by the Commission, a 41-day license suspension, is a serious consequence. These factors all weigh against consideration of the hearsay evidence. However, in assessing the substantiality of hearsay evidence, the most critical factor to consider is the state of opposing and corroborating evidence. *See, e.g., Petteys v. DMV*, 195 Or App 644, 650 (2004). After determining that Licensee’s proffered testimony was not credible, the Commission determined that the hearsay statements of non-appearing witness dancers were reliable and more credible than Licensee’s. Violation found.

Key Words/Phrases: minor, nude dancing, credibility determination, witness statements, testimony, hearsay, reliability

Case: *Jialin Chan*, OLCC-09-V-056, February 2010. See also *Lucky Jade Chinese Restaurant*, OLCC-09-V-055/055A, April 2010.

Facts: Permittee was employed by the Lucky Jade Chinese Restaurant. Police were dispatched in the early morning due to a hang up 911 call from the licensed premises. The officer could see and hear people in the premises drinking and banged on the door. Permittee saw the officer and did not come to the door until the other people had fled out the back. Permittee admitted to the drinking after 2 a.m. but stated it was “okay” because the business was closed. When cover officers arrived, permittee told them they could not enter without a warrant and officers had to physically move permittee out of the way to enter. Permittee gave false statements to OLCC investigators when they interviewed him about the events.

Cases: *Rococo Cedar Mill*, OLCC-08-V-118/118A/118B, June 2009; *Cristy Cumiford*, OLCC-08-V-123, June 2009.

Facts: Permittee served a minor who alleged presented a fake ID. There was conflicting testimony between witnesses about whether a fake ID was used. The minor later got in an assault and said he had been drinking at the licensed premises, and that Permittee did not ask for ID. Permittee recalled seeing an ID that looked like his picture and indicated he was over 21, and could not run it through AVE because it had a new address sticker on it. Another employee also testified that the minor had been on the licensed premises before and presented ID indicating he was over 21.

Abstract: Violations not proven. After a credibility determination, the Commission concluded that the Permittee's in-person testimony was more credible and reliable than staff's evidence offered through written statements from the minor and his companion. Same result for license violation against Licensee.

Key Words/Phrases: credibility determination, fake ID, minor, conflicting statements, hearsay, credible, reliable, in-person testimony

Case: *Cabana Club Café & Grill*, OLCC-04-V-066/066A, October 2005.

Facts: Undercover inspectors witnessed a visibly intoxicated patron being served by Licensee. Licensee denied seeing signs of intoxication prior to serving the patron.

Abstract: At hearing two versions of the OLCC investigator's report were in the record: the initial draft report, and final approved report. The investigator testified that other OLCC staff would review reports, offer input and suggestions on phrasing for subsequent drafts. Given the evidence that the final report is more of a group effort, the Commission gives the most weight to the inspector's field notes and his earlier unapproved draft report. These documents were generated closer in time to the events in issue, and with less outside influence.

Case: *Long Branch*, OLCC-94-V-048, December 1994.

Abstract: Inconsistencies in Permittee's account of what occurred weighed against finding permittee credible.

Case: *Donn's Den*, OLCC-89-V-099, December 1989.

Abstract: The Commission concluded that the licensee's evidence was not credible because licensee's employee gave testimony at the hearing that was inconsistent with a statement she gave at the time of the incident; licensee's testimony was vague and uncertain; and licensee falsified a till slip in an attempt to show that he had a second employee on duty.

Case: *Bird v. Employment Division*, 90 Or App 404, 752 P2d 1239 (1988).

Abstract: Under *Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986), there is no need for the referee to make a credibility determination when the claimant's testimony is contradicted by other evidence on which the referee based the findings. The inference is clear that the testimony was not believed. However, when evidence is uncontradicted, and the referee or board does not find in accordance with it, an express finding respecting credibility is necessary.

Case: *Staffords on Broadway*, OLCC-87-V-039, January 1988.

Abstract: When credibility is important to the decision of a case, the Commission should make an express credibility determination. *Steinkellner v. Employment Division*, 67 Or App 50, 676 P2d 941 (1984). The Commission concluded that testimony of licensee's witnesses was less credible than the testimony of the staff's witnesses because one of licensee's witnesses had a poor memory of what occurred at the time of the incident, and licensee's second witness did not observe what was going on. In contrast, the staff's witnesses were able to give a detailed account of what they observed.

Case: *Precision Castparts Corp. v. Emp. Div.*, 88 Or App 562, 746 P2d 740 (1987).

Abstract: The presence of flatly contradictory testimony on relevant factual issues creates a credibility issue that the Hearings Examiner must resolve in making findings of fact.

Case: *Harris v. Employment Division*, 83 Or App 443, 732 P2d 64 (1987).

Abstract: Hearings Examiner's finding rejecting petitioner's testimony was not supported by the record in the absence of a finding that petitioner was not credible.

Case: *Hyde v. Employment Division*, 302 Or 171, 728 P2d 21 (1986).

Abstract: A referee need explain credibility findings only when a reviewing court would not otherwise be able to find support in the record for the referee's decision.

Case: *Dennis v. Employment Div.*, 302 Or 160, 728 P2d 12 (1986).

Abstract: Where a referee declines to find in accordance with the uncontradicted evidence because it comes from a source that the referee finds to be unreliable, the referee should identify the unreliability to explain the findings.

Where there is evidence in the record both to make more probable and to make less probable the existence of any particular basic fact, a referee need not explain why he or she chose which evidence to believe.

Cases: *Dennis v. Employment Div.*, 77 Or App 633, 713 P2d 1079 (1986); *Allen v. Employment Division*, 73 Or App 426, 698 P2d 1009 (1985).

Abstract: Hearings Officer's implication that witness was not credible is insufficient to support determination. When credibility decides the case, there must be an express credibility determination.

Case: *Kuykendall v. AFSD*, 70 Or App 526, 690 P2d 517 (1984).

Abstract: Order must explain an agency's determination that one expert was more persuasive than another and why agency believes there is sufficient evidence for determination that the one expert was more persuasive.

Case: *Coleman and Coleman*, 71 Or App 313, 692 P2d 129 (1984).

Abstract: Inconsistent opposing affidavits require credibility determination of applicants.

Cases: *Ashmore v. Employment Division*, 70 Or App 516, 690 P2d 522 (1984); *Steinkellner v. Employment Division*, 67 Or App 50, 676 P2d 941 (1984).

Abstract: Where testimony is conflicting, determination of credibility is crucial to resolution of the case. The referee must make explicit findings on credibility when credibility is determinative so that court on judicial review can determine whether the order was supported by substantial evidence.

A.6.a.3.b. Review Board Determinations

[\(return to index\)](#)

Case: *SAIF v. Doolittle*, 140 Or App 373, 914 P2d 1112 (1996).

Abstract: The court remanded the order to the board for reconsideration when the board adopted additional findings that were inconsistent with the ALJ's findings. The court reasoned that the board must resolve the inconsistencies and explain how the findings led to its conclusions.

Case: *Erck v. Brown Oldsmobile*, 311 Or 519, 815 P2d 1251 (1991).

Abstract: Failure of the Workers' Compensation Board to explain its rejection of a referee's credibility finding was not reversible error. It was adequate that the board addressed the credibility finding by clearly setting forth the findings of fact which supported the conclusions of law.

Where the Workers Compensation Board rejected the Referee's credibility findings and did not explain its reasons for rejection, the court held that the board is allowed to do this so long as the board's findings are supported by substantial evidence. The court stated:

A request for a hearing is made to the board, which then refers the request to a referee. ORS 656.283(4). In essence, the referee aids the operation of the board by conducting an evidentiary hearing and producing an order. Although the board may adopt the referee's order, it is the decision and order of the board that the Court of Appeals examines.

The court concluded that if a board's order is supported by substantial evidence in the record, the board need not choose between adopting the Hearing Officer's findings and explaining them away. It is enough that the order is supported by the record.

Case: *Cascade Corp. v. Employment Division*, 104 Or App 238, 800 P2d 305 (1990).

Abstract: Where an issue was raised for the first time on appeal to the Employment Appeals Board, the party did not have an opportunity to present argument and evidence on the issue. The court found that the record was incomplete and reversed the board's decision.

Case: *International Paper Co. v. McElroy*, 101 Or App 61, 789 P2d 269 (1990).

Abstract: When a referee makes a credibility finding based on demeanor, a de novo review board shall defer to the referee's determination. However, where the referee does not explain a credibility finding, the reviewing board is free to make its own credibility determination.

Cases: *Whitney v. Employment Division*, 84 Or App 206, 210, 733 P2d 493 (1987); *Thomas v. Employment Division*, 90 Or App 454, 752 P2d 1248 (1988). Similar holding in workers compensation case of *Benson v. Multnomah County School District #1*, 101 Or App 122, 789 P2d 694 (1990).

Abstract: EAB did not explain its reversal of the referee's decision in light of the referee's determination of petitioner's credibility. By rejecting a referee's determination of credibility, EAB must explain its credibility finding by specifically describing why it disagrees with that determination.

Cases: *Ledbury v. Montgomery Ward & Co.*, 99 Or App 631, 783 P2d 1022 (1989); *Burns Brothers Inc. v. Employment Div.*, 99 Or App 714, 784 P2d 117 (1989).

Abstract: When EAB reversed a referee's finding, it was required to explain why it disagreed with the referee, make its own findings, and explain how those facts led to its conclusion.

Cases: *Bird v. Employment Division*, 86 Or App 733, 740 P2d 243 (1987); *de St. Germain v. Employment Division*, 74 Or App 484, 703 P2d 986 (1985); *Derochier v. Employment Division*, 70 Or App 521, 690 P2d 519 (1984); *Bush v. SAIF*, 68 Or App 230, 680 P2d 1010 (1984); *Lewis v. Employment Division*, 66 Or App 303, 673 P2d 1376 (1984).

Abstract: In a case hinging on credibility, a review board must make explicit, reasoned, logical credibility findings, including a designation of evidence on which it relies in reaching its decision. Failure to do so requires remand.

Case: *Coastal Farm Supply v. Hultberg*, 84 Or App 282, 734 P2d 1 (1987).

Abstract: Although the court will normally defer to a Hearings Officer's determination of credibility based on the Hearings Officer's opportunity to observe a witness (i.e., demeanor), the court did not defer where the Hearings Officer's conclusion was based not on a witness's demeanor, but on an objective evaluation of the substance of a witness's testimony.

On de novo review of Workers' Compensation claims, the Court of Appeals generally defers to the referee's credibility determination, where that determination was based on the witness's demeanor. However, where the referee's credibility determination was based not on demeanor, but on the substance of the witness's testimony, the court did not defer to the referee's determination, concluding the referee had no greater advantage in determining credibility than the court.

Case: *Whitney v. Employment Division*, 84 Or App 206, 733 P2d 493 (1987).

Abstract: A review board's conclusion that one witness was more credible, based on the finding that the witness was "consistent, sincere and straightforward" does not explain why the review board disagreed with the referee.

Case: *Hill v. Employment Division*, 73 Or App 422, 698 P2d 1010 (1985).

Abstract: When EAB reverses a referee's credibility decision, it must explain why, state precisely what it found to be the facts and explain how those facts led it to a conclusion different from the referee's.

A.6.b. Adequate Reasoning/Conclusions

[\(return to index\)](#)

Case: *Drew v. PSRB*, 322 Or 491, 909 P2d 1211 (1996).

Abstract: The Agency must state facts and articulate a rational connection between the facts it finds and the legal conclusions it draws. The issue was whether petitioner was entitled to be released or whether she should not be released because she continued to be a substantial danger to others. The agency concluded that the patient was a danger to others and should not be discharged. The Supreme Court reversed and remanded the case because the Agency failed to demonstrate the reasoning leading to its conclusion.

Case: *Tilden v. Board of Chiropractic Examiners*, 135 Or App 276, 898 P2d 219 (1995).

Abstract: Where the board's order indicated that reasonable professionals could disagree on whether the licensee met the standard of care, the board's order must include its rationale for finding that the licensee failed to meet the standard. The order was reversed and remanded for reconsideration.

Case: *Lincoln Loan Co. v. City of Portland*, 317 Or 192, 855 P2d 151 (1993).

Abstract: An order requiring demolition of a structure was reversed where the order failed to show that the action chosen by the Hearings Officer was a reasonable one among the methods available to correct the violation. The Hearings Examiner must make findings and indicate why the particular method is appropriate. The court's decision was based on a statute identical to ORS 183.470(2).

Case: *Dan McCormack Agency v. Employment Division*, 99 Or App 47, 781 P2d 370 (1989).

Abstract: A Final Order must respond to all contentions that the parties raise, must contain a reasoned explanation of the relationship between the facts found and the conclusion that the board draws, and must explain any disagreement with the referee's findings.

Case: *Keller v. Oregon Government Ethics Commission*, 94 Or App 462, 766 P2d 402 (1988).

Abstract: Ethics Commission's interpretation of an inexact statutory term was remanded where the order failed to identify the legislative policy underlying the term and failed to demonstrate how the Commission's interpretation advanced that policy.

Case: *Marcoules v. OLCC*, 91 Or App 573, 756 P2d 661 (1988).

Abstract: When the rational nexus between a fact and an inference is obvious, the Commission need not expressly set forth its reasoning. The Conclusions of Law reasonably followed from the Findings of Fact.

Case: *1,000 Friends of Oregon v. LCDC*, 305 Or 384, 752 P2d 271 (1988).

Abstract: The substantial evidence test is not met by evidence that lacks a reasonable connection between the evidence and the conclusion which the evidence is designed to support.

Case: *Armstrong v. Asten Hill Co.*, 90 Or App 200, 752 P2d 312 (1988).

Abstract: In order to conduct review for substantial evidence under ORS 183.482(8)(c), court must be able to

know what the board found as fact and why it believes its findings led to the conclusions that it reached. That requires a reasoned opinion based on explicit findings of fact.

Case: *Frakes v. AFSD*, 88 Or App 506, 746 P2d 233 (1987).

Abstract: The conclusions in a contested-case order were based on adequate reasoning where the conclusions logically followed from the applicable agency rules and reasonably distinguished a prior contested-case which the agency decided a different way.

Case: *Harris v. Employment Division*, 83 Or App 443, 732 P2d 64 (1987).

Abstract: Hearings Examiner's conclusion that petitioner presumed she had received a college degree, logically conflicted with examiner's conclusion that petitioner knowingly lied in saying she had a college degree. Thus, the examiner's conclusion was not adequately explained.

Case: *Dennis v. Employment Div.*, 302 Or 160, 728 P2d 12 (1986).

Abstract: If, from the basic facts found by a referee, one could rationally infer a further fact, the referee need not explain the rationale by which the inferred fact is reached.

Case: *Hoard v. Employment Division*, 72 Or App 688, 696 P2d 1168 (1985).

Abstract: An agency must demonstrate a rational relationship between the facts it finds and the legal conclusion it reaches.

Case: *1,000 Friends of Oregon v. LCDC*, 72 Or App 443, 696 P2d 550 (1985), *rev den.*, 299 Or 584 (1985).

Abstract: An agency's (LCDC's) conclusion in an adjudication on an issue that can be decided differently in different factual contexts does not give rise to an inconsistency requiring explanation under ORS 183.482(8)(b)(B).

Case: *Assoc. of Engineering Employees v. Dept. of Trans.*, 72 Or App 371, 695 P2d 961 (1985).

Abstract: A pronouncement in a prior agency order was neither an "agency rule," an "officially stated agency position," nor a "prior agency practice" requiring explanation of an inconsistency under ORS 183.482(8)(b)(B). The pronouncement was not related to the result in the prior case, did not purport to be an interpretation of a statute or a court case, cited no authority, contained no legal reasoning, and was not clearly shown to be inconsistent.

An agency order is subject to remand for inconsistency with prior agency practice under ORS 183.482(8)(b)(B) only upon a clear showing of an unexplained inconsistency.

Case: *Zack's Restaurant*, OLCC-84-L-026, December 1984.

Abstract: Although the Commission would otherwise have discretion to deny an application under its license criteria, the Commission will grant the application where the record does not show any reasons for distinguishing the applicant from other applications the Commission has granted.

Case: *Moki, Inc. v. OLCC*, 68 Or App 800, 683 P2d 159 (1984).

Abstract: An order must explain inconsistencies with prior orders. Where the OLCC granted one application, yet denied petitioner's similar application and failed to explain why, there was no substantial evidence to support the order.

Case: *Eugene Ed. Assoc. v. Eugene Sch. Dist. 4J*, 58 Or App 32, 648 P2d 56 (1982).

Abstract: The court upheld an agency's order interpreting an "imprecise" term because the order: (1) expressed a correct interpretation of the statute; (2) correctly applied the term to the facts of the case; and (3) explained why it reached the result it did.

Case: *City of Roseburg v. Roseburg City Firefighters*, 292 Or App 266, 639 P2d 90 (1981).

Abstract: A contested-case order must demonstrate a rational basis for any inferences from the basic facts.

Case: *Polizos v. OLCC*, 37 Or App 757, 588 P2d 681 (1978).

Abstract: Commission order that available licenses should be granted to family dining outlets rather than entertainment establishments held improper because such policy does not appear in statute or rule, and was not shown by internal reasoning in the order to advance a statutory purpose.

Case: *Taylor's Coffee Shop v. OLCC*, 28 Or App 701, 560 P2d 693 (1977).

Abstract: Failure to make written rulings on prehearing motions will be deemed denials; the omission is a nonprejudicial procedural defect and is not reversible error.

The Commission's failure to cite ORS 471.315(1)(a) in its order as the source of authority to suspend a license for violation of the recited regulation does not invalidate the order.

Case: *McCann v. OLCC*, 27 Or App 487, 556 P2d 973 (1976).

Abstract: The Commission's conclusions of law must be supported by substantial reason, citing *Oakridge Moose Lodge v. OLCC*, 28 Or App 397, 559 P2d 925 (1977).

Case: *Graham v. OLCC*, 25 Or App 759, 763, 551 P2d 112 (1976).

Abstract: The court will not disturb the Commission's decision unless the decision is "arbitrary" or "ad hoc."

Case: *Battle Creek Golf Course v. OLCC*, 21 Or App 179, 534 P2d 204 (1975).

Abstract: Commission's order was not sufficient because it failed to explain why the facts supported the order.

Case: *Home Plate, Inc. v. OLCC*, 20 Or App 188, 530 P2d 862 (1975).

Abstract: Commission order found to be insufficient because it said nothing as to why five outlets were sufficient for the area in question and did not explain how the facts led to the ultimate conclusion that the license was not demanded by the public interest or convenience.

Case: *Haviland Hotels v. OLCC*, 20 Or App 110, 114, 530 P2d 1259 (1975).

Abstract: The Commission's failure to cite regulation number at issue in its order held error in substance requiring

remand under former ORS 183.480(7)(a).

Failure of Commission order to cite ORS 472.180(1) (which sets forth that the Commission may cancel or suspend a license for violation of a statute or rule) held not to invalidate order where the order cited the specific statute violated.

A.6.c. Addressing Parties' Arguments

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Case: *Klumb v. Employment Division*, 123 Or App 295, 858 P2d 1354 (1993).

Abstract: The decision of the board was reversed where the board failed to consider a factor specifically set out in the rule.

Case: *Bird v. Employment Division*, 90 Or App 404, 752 P2d 1239 (1988).

Abstract: Under *Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986), there is no need for the referee to make a credibility determination when the claimant's testimony is contradicted by other evidence on which the referee based the findings. The inference is clear that the testimony was not believed. However, when evidence is uncontradicted, and the referee or board does not find in accordance with it, an express finding respecting credibility is necessary.

Cases: *Bird v. Employment Division*, 86 Or App 733, 740 P2d 243 (1987); *Pruett v. Employment Division*, 86 Or App 516, 740 P2d 196 (1987).

Abstract: An order that fails to address a party's explanation of what happened is inadequate.

Case: *Hannah v. Employment Division*, 83 Or App 104, 730 P2d 600 (1986).

Abstract: EAB's findings did not address claimant's contentions and, thus, were insufficient.

Cases: *Hertel v. Employment Division*, 80 Or App 784, 724 P2d 338 (1986); *Cascade Forest Products v. Accident Prev. Div.*, 60 Or App 255, 260, 653 P2d 574 (1982).

Abstract: Failure by an agency to address each defense raised by the petitioner who was charged with a violation renders the agency's order finding a violation insufficient.

Cases: *Kuykendall v. AFSD*, 70 Or App 526, 690 P2d 517 (1984); *Wasson v. AFSD*, 59 Or App 634, 652 P2d 358 (1982).

Abstract: Agencies must respond in their orders to all contentions raised by parties in contested case procedures.

A.6.d. Scope of Review

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Case: *Downtown Delicatessen*, OLCC-04-V-022 August 2007, amended final order following *Papas v. OLCC*, 213 Or App 369 (2007).

Abstract: Where the agency's interpretation of a rule is inconsistent with the wording of the rule and its context the agency interpretation is not entitled to the court's deference. Nothing in the interpretation or application of OAR 845-006-0345(11)(c) identified the consumption or quantities against which the required increase for a drinking contest is measured.

Case: *Mendieta v. Division of State Lands*, 148 Or App 586, 941 P2d 582 (1997)

Abstract: Plaintiffs may seek a court order to compel agency action under ORS 183.490, where an agency has failed to act, or seek an order to change actions an agency has taken contrary to its policies, under ORS 183.484 (2). The court distinguishes between a claim that an agency has violated a statute, rule or policy governing the conduct of the agency and a claim that an agency has acted in a manner that breaches a contract, which is not reviewable under the APA.

Case: *Oregon Health Care Assn. V. Health Div.* 148 Or App 568, 941 P2d 593 (1997).

Abstract: The Court of Appeals has jurisdiction to review an agency order refusing to quash subpoenas duces tecum, which were issued by the agency. The Court of Appeals may review nonfinal orders in contested cases in two situations: where an agency is proceeding without probable cause and where a petitioner will suffer substantial and irreparable harm if interlocutory relief is not granted.

Case: *Lake County v. State of Oregon*, 142 Or App 162, 920 P2d 1115 (1996).

Abstract: Agency actions were "orders" within the meaning of ORS 183.310(5) and ORS 183.484 because they were agency orders in other than contested cases. The APA provides for circuit court review of these matters as the exclusive review.

Case: *Local No. 290 v. Dept. Of Envir. Quality*, 136 Or App 213, P2d (1995).

Abstract: Standing to pursue judicial review under the APA may be based on individual injury (direct standing) or representation of individuals harmed (representational standing).

Case: *Anderson v. Public Employees Retirement Board*, 134 Or App 422, 895 P2d 1377 (1995).

Abstract: Under ORS 183.480(3), interlocutory judicial review of agency action is available if the agency is proceeding without probable cause or if the agency's action will cause substantial and irreparable harm. "Probable cause" means that the facts and circumstances provide an objectively reasonable basis for the agency to proceed.

Case: *Alexanderson v. Clackamas County*, 126 Or App 549, 869 P2d 873 (1994).

Abstract: Earlier decisions by Planning Department personnel involving the same ordinance were not binding on the Hearings Officer, to whom staff decisions are appealable. In the absence of any indication that the different interpretations are the product of a design to act arbitrarily or inconsistently from case to case, a higher tribunal is not bound to follow the interpretations of a lower one. This situation is distinguishable from different interpretations by different Hearings Officers.

Case: *Burns v. Board of Psychologist Examiners, et al.*, 116 Or App 422, 841 P2d 680 (1992).

Abstract: "Ancillary relief" under ORS 183.486(1)(b) does not include what are, in substance, tort damages allegedly arising out of the agency order of which judicial review is sought.

Case: *Laing v. Employment Division*, 119 Or App 256, 850 P2d 1136 (1993).

Abstract: On judicial review, the court does not substitute its judgment for that of the agency which has drawn an inference from the facts; instead, the court determines whether the agency's inference from the facts is reasonable.

Case: *Scovell v. Goldschmidt*, 106 Or App 111, 806 P2d 181 (1991).

Abstract: The proper method to compel agency action is a petition to a court under ORS 183.490 and ORS 183.484 (orders other than contested cases). Because judicial review under the APA is exclusive, the trial court erred in issuing a writ of mandamus under ORS 34.110.

Case: *Oceanside Restaurant & Lounge, OLCC-88-V-123*, August 1989, *affirmed on other grounds, P.G. Enterprises, Inc. v. OLCC*, 103 Or App 132, 796 P2d 1212 (1990).

The court in *Ross v. Springfield School District No. 19*, 300 Or 507, 519, 716 P2d 724 (1986) pointed to ORS 183.355(5) and ORS 183.484(4)(b)(B) as the source of authority for the court to require consistent interpretation of the law. ORS 183.355(5) states "if an agency, in disposing of a contested case, announces in its decision the adoption of a general policy applicable to such case and subsequent cases of like nature the agency may rely upon such decision in disposition of future cases." ORS 183.484 (4)(b)(B) and ORS 183.482(8)(b)(B) both allow the court to remand an agency order which is "Inconsistent with an agency rule, an officially stated agency position, or a prior agency practice, if the inconsistency is not explained by the agency."

The Commission is required to be consistent in its decision of contested cases unless an inconsistency is explained. ORS 183.482(8)(b)(B).

Case: *Tompkins v. Forest Grove School Dist. #15*, 86 Or App 436, 740 P2d 186 (1987).

Abstract: Where there was a conflict between federal law and state law as to procedure for review of a referee's decision regarding the educational rights of a handicapped child, it was reversible error for the reviewing officer to follow state law. The federal law, in pertinent part, required that the reviewing officer make an independent decision based upon the record. The state law, in pertinent part, required that the reviewing officer review for substantial evidence. The reviewing officer merely reviewed the referee's decision to determine whether there was substantial evidence to support the decision. He did not make an independent decision based on the record. Court held that this was reversible error.

A.7. Rulings and Motions in Contested Cases

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Case: *Cabana Club Café & Grill*, OLCC-03-L-010/010A, April 2005.

Facts: Licensed premises was located in a popular area of McMinnville for young people, frequented as part of a “pub crawl.” Licensee entered into a settlement with the OLCC for license restrictions due to a history of serious and persistent problems. The problems continued and the city requested the license not be renewed due to DUII arrests and significant amount of police time dedicated to problems created by the premises. Licensee had a number of policies in place to deal with problem situations and patrons.

Licensee submitted a motion to dismiss for failure to abide by a settlement agreement at hearing. Licensee argued that, in a prior settlement agreement with the OLCC, Licensee agreed to accept responsibility for a charge in exchange for agreement by the OLCC not to enforce restrictions on the license until there were two or more “proved serious incidents” within a 30-day period. Licensee contended that “proved serious incidents” meant proven at hearing, and that the OLCC’s issuance of a refusal notice in this case violated the agreement.

Abstract: Because Licensee consented to the settlement agreement, it was obligated to follow the restrictions on the license, whether or not the restricted license was actually issued. Licensee’s read of the settlement agreement as requiring that it be charged with two serious violations within 30 days, have them adjudicated against him, and then stop serving at 1 a.m. before any other sanction could be imposed is erroneous. Motion denied.

Case: *Patterson v. Kanna*, 126 Or App 18, 867 P2d 518 (1994).

Abstract: To prevail in a motion for summary judgment, a party must show that there is no genuine issue of material fact and that they are entitled to judgment as a matter of law. Where the parties disputed the amount owing on the note of debt, there was a genuine issue of material fact, and it was error for the trial court to grant summary judgment.
