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C. VIOLATIONS

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C.1. Specific Violations

C.1.a. Violations Related to Minors

C.1.a.1. Sale to Minor (ORS 471.410(2), ORS 471.315(1)(a)(G)) [(ORS 471.315(1)(a)(G), ORS 471.410(2), [ORS 472.180(1)(h)]]

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Case: *Clancy's*, OLCC-14-V-017/017A, March 2015.

Facts: Minor decoy and undercover officer went to the licensed premises, and after being seated by an employee were asked what they wanted to drink. The minor decoy ordered a bud light. The employee went to the bar area and told another employee about the drink order, and that other employee brought it to the minor. The employee asked who ordered the beer and the decoy replied “me,” the employee set it down and stepped away from the table. The undercover officer then contacted the employee and cited her for serving a minor. The employee who took the drink order was fired because he should have asked for ID when the drink was ordered. A few days after the incident, Licensee’s manager contacted the OLCC about the situation.

Abstract: Licensee’s employees failed to verify the age of a minor before allowing her to buy or be served an alcoholic beverage when she reasonably appeared to be under 26 years of age in violation of OAR 845-006-0335(1)(a), (b) and (c).

Licensee argued that the employee who took the drink order didn’t sell or serve alcohol, and therefore did not violate the liquor law, and to use his actions as aggravation would exceed the OLCC’s scope of authority. The Commission disagreed. Although there are no prior cases directly on point, based on the cases of *Giovanni’s Mountain Pizza* (OLCC Final Order, 03-V-013 & 018, February 2004) and *Handy Food Mart* (OLCC Final Order, 98-V-029, April 1999), the Commission concluded that two employees were involved in the sale, making aggravation appropriate.

Because aggravation existed, removal from the Responsible Vendor Program was also warranted.

Key Words/Phrases: minor, sale to minor, decoy, responsible vendor, sale, multiple employees, aggravation

Case: *Mt. Angel Deli Market & Deli, LLC*, OLCC-13-V-034/043A/043B, November 2014.

Facts: Licensee had a history of several violations involving sales to minors. Past violations had resulted in Licensee purchasing AVE and license restrictions requiring Licensee to train employees on AVE use, and for employees to use AVE when selling alcohol. Licensee’s employee sold to a minor decoy, after using AVE which indicated the sale was to a minor. The OLCC proposed to cancel Licensee’s license for this violation (as a Category I-violation of a license restriction).

Abstract: Violation for sale to a minor was proven.

No license restriction violation was proven when the evidence showed that Licensee’s employee used AVE (although ineffectively), and Licensee required the employee to use it. Therefore, without this Category I violation, cancellation is inappropriate.

Contrary to the cases of *Hunter's RV Park* and *Lava Lanes*, in this case the employee did use AVE. Therefore there is no aggravation for failure to use AVE, making removal of Licensee from the Responsible Vendor Program inappropriate.

There is a basis to refuse to renew Licensee's license due to a poor record of compliance. Licensee's transformation into an LLC from a sole proprietorship does not preclude the Commission from considering violations which occurred under the sole proprietorship. Per OAR 845-006-0550(9), a licensee cannot avoid sanction or application of successive violations merely by adding or dropping partners or converting from one legal entity to another when the individuals who own, operate or control the business are substantially similar.

In regards to the factor "licensee's personal involvement," the fact that licensee was not personally involved in violations is a neutral factor, not one that weighs in favor of good cause to overcome a refusal to renew basis. See also *US Market #260*, OLCC-11-L-003, March 2013.

Because there is a basis to refuse to renew Licensee's license, there is no license to penalize for the sale to minor violation. Therefore a Letter of Reprimand is appropriate.

Key Words/Phrases: service permit, revocation, DUII, relevant conviction, good cause, abstinence, probation

Case: *Julianna Mitchell*, OLCC-13-V-058, May 2014.

Facts: Permittee served alcohol to OLCC minor decoy without asking for ID or questioning minor about his age. Permittee stated that she believed decoy was 30 years old.

Abstract: Subjective belief of a server and witnesses is not determinative of whether a patron appears to be underage. A person's height and/or weight is not a reliable indicator of whether the person is at least 21 years old.

Key Words/Phrases: minor decoy, age verification, true age, subjective belief

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

Facts: Employee of Licensee sold alcohol to minor decoy. 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. Aggravation for failing to use AVE per prior penalty was appropriate, as well as removal from Responsible Vendor program and suspension or fine.

Abstract: In cases where AVE has been purchased in lieu of other penalty after a sale to a minor, the failure to use AVE on a subsequent violation is an aggravating factor in the second case. The factors set out in OAR 845-006-0500 apply to members of the Responsible Vendor Program, but they are not a basis for determining removal from the RVP. That analysis is under OAR 845-009-0135(7). However, subsection (3)(g) provides that aggravating factors are "not limited to" those enumerated, and the Commission is not precluded from considering other aggravating circumstances, including those from a different administrative rule.

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

Case: *Nick's AM/PM*, OLCC-13-V-093/093A, January 2014.

Facts: Employee of Licensee sold alcohol to minor decoy. OLCC had received a complaint of sales to minors, so included Licensee's premises in decoy operations. Employee did not ask for ID or ask minor's age.

Abstract: Licensee is responsible for the acts of employees.

Key Words/Phrases: minor decoy, responsible, employee conduct, age verification

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. Licensee had previously opted to install AVE equipment in lieu of paying a penalty for a 2007 sale to a minor. The same employee was again cited in June 2012 for selling alcohol to a minor, and on that occasion attempted to use the AVE equipment. OLCC staff initially alleged that Licensee violated its restriction for failing to use AVE equipment, and later amended the Notice of Violation to allege that Licensee violated the restriction when it "failed to require" its employee to use the AVE equipment. Licensee was unable to show evidence that its employee had been trained or required to use the AVE.

Abstract: Licensee's restriction required that all individual employees be required to use the AVE equipment. Licensee's managing member's testimony that he trained his employee to use it is not credible. The preponderance of the credible evidence shows that Licensee's employee did not use the AVE and was not trained to do so.

The Oregon Court of Appeals holdings in *US Market #109 v. OLCC*, 250 Or App 335 (2012), and *US Market #180, LLC v. OLCC*, 249 Or App 666 (2012), are distinguishable in this case. In the present case there was a failure to train appropriately, and as a consequence, a failure to require the employee to use the AVE to verify the age of the patron who appeared under the age of 26 years.

Utilizing the *Oceanside* factors, the violation was substantial. However, the combined weight of the *Oceanside* factors in this case may not by itself merit cancellation. Where, as here, only two of the four *Oceanside* factors are present, the presence of other aggravating or mitigating circumstances can be considered in determining whether or not a penalty of cancellation is warranted.

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: *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 provided a written, unsigned statement, and the other would not speak with OLCC investigators. Licensee requested to depose the minors before hearing. 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: *US Market #109*, OLCC-08-V-112, October 2012. (Final Order on Remand)

Facts: Licensee appealed the sanction imposed in prior licensing action and the Oregon Court of Appeals reversed and remanded the final order for reconsideration of the sanctions imposed. *US Market #109 v. OLCC*, 250 Or App 335, 341, 279 P3d 833 (2012).

Abstract: Licensee violated his licensing restriction because he did not train his employees on the use of AVE when the scanner function was not working.

Key Words/Phrases: restriction, failure to verify, AVE, key pad, scanner, license cancellation, Oceanside factors

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

Facts: Licensee's employee/bartender served a 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.

Abstract: Violation proven. Because it was the third Cat III violation a mandatory 30 day suspension was warranted.

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

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

Facts: Licensee served minor decoys after checking their IDs but not noticing the correct dates of birth. AVE was required per licensing restriction but licensee had not properly trained employees or required its use. Licensee argued that it shouldn't be responsible for an employee's "gross negligence."

Abstract: OAR 845-006-0362 provides that a Licensee is responsible for the actions of its employees. Nothing in the above rule absolves a licensee from responsibility for the grossly negligent acts or omissions of its employees. Moreover, the Commission has previously held a licensee responsible for an *intentional* sale of alcohol to minors.

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

Case: *Rainbow Market*, OLCC-10-V-001, June 2010.

Facts: Licensee sold to a minor decoy. Licensee stated he thought the decoy was 27 because he had hairy arms and was balding. Licensee had a homemade sign near the register stating ID for customers who look under 30 must be checked.

Abstract: Licensee's subjective belief that the minor appeared to be 27 years of age is not sufficient. The issue is whether, on an objective basis, a minor appeared to be over the age of 26 when the minor purchased alcohol from licensee. Here, 9 of 12 premises checked refused to sell to the same minor or admitted the minor appeared under 26. Furthermore, although not determinative, Licensee did not follow his own procedures when he sold alcohol to the minor, in that he had posted instructions on his premises to check the ID of any patrons appearing younger than the age of 30.

Key Words/Phrases: minor decoy, sale, failure to verify age, licensee procedure

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

Facts: 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: Licensee's denial of selling alcohol to a minor decoy, and denial of working behind the cash register, were determined false, material, and made to induce or prevent action by the OLCC.

Key Words/Phrases: minor decoy, failure to verify age, knowing sale, false statement, credibility determination, witness credibility

Case: *Big Shots Bar & Broiler*, OLCC-09-V-068/077, April 2010.

Facts: Licensee served alcohol to a minor who was using a fake ID. Licensee argued that because an ID card photo is only an inch and a quarter in size and a person's weight and appearance may change, security staff could have reasonably believed that the minor was the person pictured in the ID presented.

Abstract: Where the evidence shows that the minor bears little resemblance to the photo in the ID used to gain access to the licensed premises, it was not reasonable to believe the person presenting the ID was the one depicted in the license presented. A reasonable person verifying age would have seen they were not the same person, and consequently licensee has not shown that the false identification was convincing.

Key Words/Phrases: minor, false ID, identification, fake ID, convincing identification

Case: *US Market #180*, OLCC-08-V-043, October 2009. [Overruled by *US Market #180 v. OLCC (Or App 2012)*]

Abstract: Like the Commission's analysis in *Texaco Star Mart*, when a license restriction requires that age verification equipment be used to verify age for every sale of a patron who reasonably appears under the age of 26, simply using the equipment without verifying the information does not meet the "verify" requirement.

Case: *Six Corners Chevron*, OLCC-08-V-004/004A/004B, June 2008. [Overruled in part by rule change, see *Cabaret Lounge*, OLCC-08-V-061/064/097, October 2009.]

Facts: Licensee's employee sold alcohol to a minor without asking for ID. Minor was caught by police who saw the minor walking in the Licensee's parking lot with an 18-pack of beer. Licensee had a prior violation. Police told licensee they would not cite him for the sale but forwarded the report to OLCC. Licensee decided to move the

employee out of the store to the gas pumps to prevent future issues.

Abstract: Direct evidence of a sale is not necessary to prove a violation. The evidence showed the minor was in licensee's parking lot when contacted by police, he had an 18-pack of beer which would be hard to hide if he stole it, and no other close stores sold alcohol. There was no evidence the minor used a false ID, and the clerk did not deny the sale. This is sufficient evidence to show a sale to a minor.

Licensee's good faith efforts to comply before or after an incident in order to avoid a violation is reason to mitigate a penalty. Here, licensees train their employees on using AVE, require its use, and conduct internal "sting" operations to ensure compliance. Those efforts warrant mitigation.

Key Words/Phrases: minor sale, direct evidence of a violation, AVE, good faith efforts, mitigation

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: At the very least, tenant was a representative or servant of licensee at the time of sale to a minor, given the history of the tenant performing services for licensee in return for rent, including occasionally working in the store and making sales transactions. Therefore, even though he wasn't authorized to open the store when he did, licensee is still responsible for his actions.

An objective standard is used to determine whether there were reasonable grounds to believe that a person was a minor. The test is how old the person would look to an objective, impartial observer, rather than any particular individual's subjective personal judgment. *David Littlejohn*, OLCC-85-V-076, September 1986. An inspector's opinion of a minor's apparent age, while not solely determinative, is relevant to assessing whether the minor 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 assess the age appearance of minors for inclusion or exclusion from these operations, making the observations of inspectors in this regard somewhat more objective than many citizens without such widespread exposure to older minors.

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: *OLCC Agency No. 184*, OLCC-06-Ro-002, August 2006.

Facts: Agent's employee sold alcohol to a minor. Agent argued that given the number of mitigating circumstances (20 year history of compliance, good faith efforts to prevent a violation and acknowledgement of the violation) he would have gotten a warning if he'd been a licensee.

Abstract: As stated in *OLCC Agency 16*, the Commission has not applied mitigation, as that term is used in the context of penalties in contested cases for licensees and permittees, to penalties for agents involved in contested cases.

Therefore, the standard penalty of a Notice of Violation is the appropriate penalty for the violation that has been proved in this case. *See also, OLCC Agency 193* (Amended Final Order, 98-RO-001, August 1999) (a Notice of Violation is an appropriate sanction even though the agent had a good record of compliance and took steps to avoid violations).

Key Words/Phrases: Retail Sales Agent Agreement, mitigation, termination of employee, minor sale

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. Licensee contended that because more than half of the 17 premises checked on the date of the violation at issue sold an alcoholic beverage to the minor, he reasonably appeared to be over 21 on that date.

Abstract: The Commission found that given OLCC's policy and the minor's training and instructions as an agency decoy, it was unlikely that, if asked, the minor 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.

Both in person and in the photograph taken on the date of the violation, the minor had youthful, unlined facial features. He was clean shaven, with short cropped dark hair. Although the minor was relatively large in stature (6'2"), a person's height and/or weight are not a reliable indicator of whether the person is at least 21 years old. *See Quincy Store* (OLCC, Final Order, 02-L-001, December 2002), *aff'd Ban v. OLCC*, 196 Or App 545 (2004). Given the minor's youthful facial features, the Commission found that, on the date of the violation, he appeared his true age of 20. The subjective belief of the server and witnesses is not determinative. *Trails Inn Restaurant & Lounge* (OLCC, Final Order, 02-V-004, June 2004).

The fact that several clerks or servers failed to verify the minor's age during this compliance check does not necessarily mean that he looked age 26 or older on that day. These clerks or servers who sold to the minor may simply have been negligent in their duty to verify his age. Of the 31 licensed premises that the minor entered as an agency minor prior to his 21st birthday, two thirds asked to see his identification. The Commission was persuaded that the minor appeared his true age of 20 at the time in issue.

Key Words/Phrases: credibility determination, minor decoy, minor appearance, decoy operations

Case: *Circle K Store No. 468*, OLCC-04-V-047, April 2005. [**Distinguished by** *Chevron North Wilsonville*, OLCC-09-V-064/064A/064B, April 2010.]

Facts: Licensee's employee sold a can of "Spark" to a minor decoy, on employee's first day of work. Employee didn't know that "Spark" was alcoholic. Licensee previously had a sale to a minor within 2 years, and had numerous policies and practices to avoid sales to minors.

Abstract: The Commission has previously concluded that a clerk's mistaken belief that a product did not contain alcohol did not excuse the sale of an alcoholic beverage to a minor.

Licensee's practices constituted mitigation, even though same practices were also used as mitigation for prior minor sale violation. Licensees' efforts to prevent sales of alcoholic beverages to minors continue to exceed the requirements

of the Responsible Vendor Program. The Commission has previously awarded mitigation for the same circumstances in two consecutive cases.

The Commission reaffirms in this order that both the corporate entity and its individual corporate principals are licensees and are jointly and severally liable for violations of their servants, agents, employees or representatives. OAR 845-006-0362. The individual licensees are personally liable not on the basis of their status as corporate principals, but because the license has been issued directly to them in their personal capacity.

Case: *Quincy Store*, OLCC-02-V-008/L-001, February 2003, *affirmed in Ban v. OLCC*, 196 Or App 545, 102 P.3d 744 (2004).

Facts: Minor decoy took beer to the counter at Licensee's store. Licensee's nine-year-old daughter was at the register, told the decoy the price of the beer, pushed buttons on the register to ring up the sale, and gave the decoy change. Licensee was present when this occurred and told her daughter the price of the beer and helped recount the change given to the decoy.

Abstract: Where Licensee's nine-year-old daughter pushed the buttons on the cash register to ring up the sale, told the minor decoy the price of the beer, accepted payment, counted the change from the register and placed the change on the counter, the daughter made the sale of the alcohol, notwithstanding the fact that her mother told her the price of the beer, recounted the change, and bagged the beer. The sale was completed without verifying age.

Key Words/Phrases: decoy, minor, age verification, sale by minor, sale to minor, interpreter at hearing, credibility, knowing, sale by others, definition of employee, license refusal, good cause exception

Case: *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 for the sale which was dismissed without prejudice. Agent argues that it is not responsible for knowing sale by its employee, and that ORS 471.346(6) violated state and federal Equal Protection clauses.

Abstract: The second sentence of ORS 471.410(2) applies to sales of alcohol to adults and requires an element of knowledge on the part of the seller that the adult is buying the alcohol for a minor. The prohibition on sales to minors in the first sentence of ORS 471.410(2) does not require an element of knowledge for there to be a violation. The element of knowledge is imported into a violation for licensees through the administrative penalty statute, ORS 471.315(1)(a)(G). In order for a penalty to be imposed on licensees for sale to a minor under ORS 471.410(2), the licensee must make the sale knowingly. It is not necessary to prove that the seller of alcohol to a minor knew that the purchaser was a minor in order to violate ORS 471.410(2) when that statute is applied to OLCC agents. A negligent sale can also constitute a violation of the statute pursuant to Paragraph 11 of the Retail Sales Agent Agreement.

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: *Cheryl Nelson*, OLCC-00-V-00, July 2000.

Facts: Permittee sold to a minor without requesting age identification. Permittee did not receive notice of the minor decoy operation.

Abstract: The Commission concluded that lack of notice is not a defense. No OLCC policies provide that a failure to give written notice that a licensed business is going to be referred to the minor decoy program establishes a basis to nullify the violation that may result from an OLCC sting.

Four prior years of good compliance is a mitigating circumstance, warranting lesser suspension and fine penalties.

Key Words/Phrases: minor, decoy, failure, notice of decoy operation, sting, mitigation

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

Facts: Licensee's employee sold alcohol to a minor decoy. Decoy minor was told not to lie about his age, and testified that he did not say "yup" when asked if he was 21. Licensee disputed this testimony.

Abstract: Due to the minor's youthful appearance, the clerk's examination of the minor's valid identification, showing him to be a minor until, and the clerk's notation of the minor's birth date on the premises log, the Commission infers that the clerk knew that the purchaser was a minor at the time of the sale of alcohol.

Key Words/Phrases: minor, knowing sale, youthful, identification, sale, "fast track policy," witness credibility, rulemaking process, improperly adopted rule, invalid, inspector discretion, mitigation

Case: *OLCC Agency No. 91*, OLCC-98-RO-005, November 1999.

Facts: Agent's employee sold to a minor decoy without asking for identification. Minor looked true age of 18. Agent's employee testified that the minor looked like another customer who was over 21 and regularly purchased alcohol. Agent asked OLCC staff whether he was required to continue to request ID for customers who regularly made purchases and was told there was no such requirement.

Abstract: Where a liquor agent's employee sold liquor to a minor who, because of the similarity of appearance, the employee mistakenly believed to be a regular customer whose age was known, the Commission concluded that the employee negligently sold to the minor, even though the minor was very similar in appearance to the regular customer, because the minor patron objectively appeared to be his true age of 18 years. Agent received a Notice of Violation of the Retail Sales Agreement pursuant to Paragraphs (22)e and (23) of the Agreement for the employee's violation of ORS 471.410(2).

Key Words/Phrases: minor, decoy, sting, mistake, mistaken identification, negligence, age, similar appearance, age verification, negligent sale, Retail Sales Agent Agreement

Case: *Food Sak Deli*, OLCC-97-V-054, September 1999.

Facts: Licensee's employee sold alcohol to decoy minors on 2 occasions. In the first, employee asked for ID and looked at it twice before selling. After the sale the employee realized she made a mistake and went outside the store to find the minor when she saw the decoy with police. Licensee agreed the decoy looked under 26, but argued the OLCC used illegal selective enforcement practices in violation of antitrust laws and equal protection, and that sting operations are unfair. Licensee asserted the decoy lied about his age to trick licensee contrary to OLCC instructions.

Abstract: Where licensee's clerk looked at minor's identification two times before making the sale and, after she made the sale, she realized she had made a mistake and left the store to try to find the minor to retrieve the beer, the Commission concluded that the clerk did not make a "knowing" sale to the minor, but, instead, made a mistake.

Key Words/Phrases: minor, decoy, sting, age verification, knowing, selective enforcement practices, antitrust, equal protection, failure to verify, witness credibility, witness lie, preponderance of the evidence standard, mitigation, aggravation, successive violations

Case: *OLCC Agency No. 193*, OLCC-98-RO-001, August 1999.

Facts: Employee of Agent sold alcohol to a minor decoy who was 20. Employee asked for ID but misread the DOB on it. Agent argued that the minor misrepresented her age, unlawfully entered a business where minors are not permitted, and that the sting operation was not in accordance with OLCC guidelines/referral criteria.

Abstract: Any crimes committed by the minor decoy by entering the business prohibited to minors and in purchasing an alcoholic beverage are not a defense to a charge of selling alcoholic beverages to minors.

The Commission determined that a sale to a minor by an agent's employee under ORS 471.410(2) was a violation of the Retail Sales Agent Agreement where the sale was negligent, but not "knowing." The Retail Sales Agent Agreement subjects the agent to liability for the employee's act whether committed willfully or negligently. ORS 471.410(2) does not, by its own terms, require a "knowing" violation. [Note: ORS 471.410(2) does not contain a requirement that the sale to minor be "knowing"; the "knowing" requirement pertains to licensees, permittees and clerks via ORS 471.315(1)(a)(G), the penalty provision for such sales. Subject licensees, permittees and clerks may only be sanctioned by the Commission for a "knowing" sale. For agents, the sanction is determined by the contract. The contract allows a sanction to agent for the acts or omissions of employees, within the course and scope of their duties, whether negligent or willful.]

Key Words/Phrases: minor, sale, Retail Sales Agent Agreement, decoy, sting, police operation, good faith, fair dealing, decoy referral criteria, estoppel, reasonable expectations, contract

Case: *Stuart Anderson's Cattle Company*, OLCC-98-V-040 and OLCC-98-V-050, June 1999.

Facts: Licensee's employees sold alcoholic beverage to minor decoys on two occasions. On the first the decoys entered the restaurant with an adult plain-clothed officer. The server/employee heard someone order a beer from their table and thought it was the adult when in fact it was the minor. Server delivered the beer to the adult. Server argued it was a mistake, she did not see who ordered it because her back was turned and when she turned to look at the table, she thought the adult made the order and that was who she delivered it to. On the second the decoys and adult plain clothed officer entered premises, and were asked if they wanted to sit in the bar. Both ordered beers and were served and no ID was requested. Server was on second day of the job, was supposed to be with a trainer but was not.

Abstract: Where three patrons (two minors and one undercover police officer) were seated at a table and permittee heard the order for an alcoholic beverage, but did not see who ordered, and permittee served the adult police officer, permittee did not sell or serve an alcoholic beverage to a minor in violation of OR 471.410(2), even though, in fact, it was one of the minors who ordered the beer.

The Commission's authority to sanction a licensee for a violation of OAR 845-006-0035(1) is found in ORS 471.315(1)(a)(A). OAR 845-006-0035(1) and ORS 471.315(a)(A) do not require proof of "knowledge" by the seller that the purchaser was a minor. On the other hand, ORS 471.410(2) and ORS 471.315(1)(a)(A) require that the seller have "knowledge" that the purchaser was a minor before a sanction can be imposed for the "knowing" sale of an alcoholic beverage to a minor.

Key Words/Phrases: minor, decoy, sting, police, verify, witness credibility, mistake, knowing, bootstrapping, preventative and remedial efforts, mitigation, rulemaking authority, reasonable doubt, appearance, failure to verify

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

Facts: Licensee sold alcohol to a minor decoy with Portland Police without asking for ID. Licensee argued that 1) no sale to a minor occurred because minor was acting on behalf of the police; 2) OAR 845-006-0035(1)(a) exceeds the OLCC's rulemaking authority and/or only applies to clerks (not licensees/permittees); 3) the minor appeared to be more than 21 years old; and 4) that the sale couldn't be "knowing" without being deliberate.

Abstract: In order for there to be a knowing violation of ORS 471.410(2), the record must include evidence that the trier of fact can assess when determining the state of mind of the seller from all of the circumstances in the case.

A sale of alcohol to a minor decoy constitutes a prohibited sale to minor even though the minor decoy is acting as an agent of the police and the minor never intended to keep or to consume the alcohol. A sale occurred when the clerk took money from the minor decoy in exchange for the alcoholic liquor. Whether the minor intended to keep or use the alcoholic beverage or whether the minor used his own money is irrelevant. See also *Murrayhill Thriftway*, OLCC-98-V-027 and OLCC-98-V-046, April 1999.

Key Words/Phrases: minor, decoy, sting, defense of impossibility, rulemaking authority, knowing, reasonable doubt, appear, failure to verify, agency interpretation, validity, should have known, state of mind of seller, mitigated penalty

Case: *Murrayhill Thriftway*, OLCC-98-V-027 and OLCC-98-V-046, April 1999.

Facts: Licensee's employees sold alcoholic beverages to minor decoys working with Beaverton PD on two occasions. Licensee argued that sale was not "knowing" because the clerk did not know the beverage being purchased was alcoholic, and no sale occurred because decoy was an agent of the police. Licensee raised affirmative defenses of entrapment, and that Commission has previously excused violations and dismissed charges when the violation was created by actions of OLCC staff.

Abstract: A sale of alcohol to a minor decoy constitutes a prohibited sale to minor even though the minor decoy is acting as an agent of the police and the minor never intended to keep or to consume the alcohol. A sale occurred when the clerk took money from the minor decoy in exchange for the alcoholic liquor. Whether the minor intended to keep or use the alcoholic beverage or whether the minor used his own money is irrelevant. See also *Handy Food Mart*, OLCC-98-V-029, April 1999.

A clerk is required to verify whether the product s/he is selling is an alcoholic beverage. Knowledge that the product is an alcoholic beverage will be inferred where the label indicates in any way that the product contains alcohol (i.e., alcoholic beverage, malt beverage, Surgeon General's warnings regarding the consumption of alcoholic beverages).

Relevant defenses to the crime of selling liquor to a minor include entrapment and outrageous conduct defenses. Under Oregon law, simply using decoys does not constitute entrapment. The use of decoys is a permissible method in the enforcement of criminal law. The use of decoys becomes invalid only when badgering or importuning takes place to an extent and degree that it is likely to induce an otherwise law abiding person to commit a crime.

Key Words/Phrases: minor, decoy, knowing, agent, mistake, verify, age verification, beverage label, defenses, entrapment, induce, outrageous conduct, badgering, preventative and remedial efforts, mitigation, choice of penalty

Case: *Plaid Pantry 55*, OLCC-98-V-063, October 1998.

Abstract: The Commission reinterprets ORS 471.315 to require that an order to suspend or cancel a license for a sale of alcohol to a minor must be based on a finding that the sale was made knowingly. A "knowing" sale is not synonymous with "should have known." State of mind is a question of fact to be determined in view of all the circumstances as shown by the evidence.

Case: *Capital Market*, OLCC-98-V-021, September 1998.

Facts: Employee of Licensee sold alcohol to a minor decoy without asking for proof of age.

Abstract: The Commission concluded that a knowing violation of ORS 471.410(2) was proven where the minor

decoy appeared to be her true age of 18 years and where minor was refused service at all of the other six premises where she attempted to purchase alcohol that evening. From these facts, the Commission inferred that the clerk “knew” the purchaser was a minor.

Key Words/Phrases: minor, decoy, sting, police, age verification, objective, subjective, personal judgment, reasonable grounds, appearance, fine in lieu of suspension, mitigation, penalty

Case: *Sunshine Market*, OLCC-97-V-061, July 1998.

Facts: Licensee sold alcohol to minor decoys on two occasions. On the first, the minor was a Portland PD decoy and Licensee's employee made the sale. Employee was Licensee's daughter who didn't usually work in the store. Employee asked for ID that clearly showed it was a minor. Decoy was mature looking with facial hair but looked under 26. On the second, the minor was a decoy for OLCC. Licensee made the sale after asking for ID which clearly stated it was a minor.

Abstract: In a sale to minor case, the Commission inferred that licensee's clerk “knew” the patron was a minor because of the patron's youthful appearance and because the clerk examined the patron's valid identification which showed the patron to be a minor until a certain future date.

Key Words/Phrases: minor, decoy, sting, police, age verification, knowing, objective, verify, allowing, reasonable grounds, true age, mature looking, penalty, compliance plan, cancellation, poor risk of compliance

Case: *7-Eleven No. 15133A*, OLCC-97-V-066, April 1998.

Facts: Employee of Licensee sold alcoholic beverages to a minor, after asking for and examining ID. Employee claimed it showed the customer was 21. The minor was 19 and denied using a fake ID. Minor was cited for Minor in Possession and pled guilty. Employee was cited for Furnishing Alcohol to a Minor but charge was dismissed because prosecutor could not prove an element beyond a reasonable doubt. Minor resided at a fraternity house with the University of Oregon two blocks from the licensed premises. There was a "trend" in creating false IDs around U of O by altering dates of birth and "minor until" portions of IDs. Minor had had at least 7 Oregon DMV licenses made over the course of several months.

Abstract: The Commission concluded that the charge against Licensee for sale to minor should be dismissed because it determined by a preponderance of the evidence that the minor had presented convincing false identification. The Commission was persuaded that the minor presented convincing false identification where: (1) the clerk testified that the birth date on the authentic identification confiscated by OLCC did not match the birth date on the identification presented at the time of purchase; (2) the minor has had multiple licenses issued by DMV; (3) the minor's stories about the multiple licenses were improbable; (4) the minor was a college student at a place where the trend existed to alter the license birth date; (5) the minor took the authentic, confiscated identification from his wallet, while he took the identification used to purchase the alcohol from his pocket; (6) a neighboring business manager observed a young man hiding outside the store watching the transaction and arrest, who stated that he was watching his friend, who he thought was getting busted for his fake identification.

Key Words/Phrases: minor, false identification, witness credibility, motive to lie, defense, burden of proof, circumstantial evidence

Case: *OLCC Agency No. 155*, OLCC-97-RO-001, January 1998.

Facts: Employee of Agent sold alcohol to a minor decoy. Minor appeared objectively older than 21. Employee did not ask minor for ID. Agent does not dispute the factual issues, but raises numerous legal arguments.

Abstract: The proscription of ORS 471.410(2) applies to every person not the parent or guardian of a minor, consequently it applies to liquor agents. Because Paragraph (7)(b) of the Retail Sales Agent Agreement mandates that an agent comply with and be subject to statutes of the state of Oregon, a violation of ORS 471.410(2) constitutes a violation of Paragraph (7)(b), subjecting the agent to a Notice of Violation pursuant to Paragraph (22)(e) of the Agreement. Additionally, the Retail Operations Manual is incorporated by reference into Paragraph (7)(b) of the Agreement. The Retail Operations Manual advises agents they must not sell alcoholic liquor to minors and must verify the age of customers who look younger than 26 years of age. The text of ORS 471.410 and OAR 845-006-0035(1) is recited in full in the Retail Operations Manual. Incorporation into the Retail Operations Manual, and, thereby, the Agreement itself, eliminates any doubt that the Commission intended that agents comply with liquor laws governing sales to minors and age verification.

Key Words/Phrases: minor, decoy, Retail Sales Agent Agreement, age verification, verify, true age, objective observer, compliance, strict liability for employees, training, negligence, willfulness, quasi-criminal, penalty, strict construction

Case: *Burt Lee's Tahiti Restaurant/Lounge*, OLCC-97-V-022, December 1997.

Facts: Employee of licensee provided alcohol to minor decoy with Salem PD without asking for ID. Minor appeared her true age of 19. The Commission found that although this was Licensee's third Cat III violation in two years, multiple efforts to obtain compliance were reasons to mitigate the penalty.

Abstract: Licensees' employee sold alcoholic liquor to a minor in violation of ORS 471.410(2) where the minor objectively appeared to be under 21 years of age and the employee did not ask the minor for any proof of age prior to selling her the alcoholic beverage.

Key Words/Phrases: minor, decoy, appearance, age verification, objective, mitigate, mitigation, efforts to obtain compliance

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

Facts: Licensees with a Winery License and Special Events Winery License allegedly provided wine to a minor during a seafood festival. Licensee disputed that the minor was served, and said her companion (age 26) was the only one who purchased/tasted the wine. Licensee presented her testimony and that of other witnesses that the minor was not at the wine booth when the wine was poured, served or paid for.

Abstract: The Commission concluded that Licensee violated ORS 471.410(2) (sale to a minor) where Licensee served a minor wine to taste and then served the minor a full glass of wine at a sea food festival.

Key Words/Phrases: minor, winery, special events, conflicting testimony, witness credibility

Case: *Benny's Tavern*, OLCC-97-V-042, November 1997.

Facts: Employee of Licensee sold alcoholic beverage to minor decoy with police, after requesting and viewing ID showing customer was a minor. Employee claimed the ID was false. Decoy denied having a fake ID.

Abstract: The Commission concluded that Licensee committed a violation of ORS 471.410(2) because Licensees' employee knowingly sold alcoholic liquor to a minor where the record showed that prior to selling beer to the minor, the employee asked the minor for identification, the minor showed her Oregon driver's license to the employee, the driver's license showed the minor's true age and stated "minor until 7/25/97", and the employee sold the minor the beer. The employee contended the minor showed her identification which showed the minor to be 21 years of age. The minor denied using false identification. The record showed that the minor was checked for identification prior to

going out on the minor decoy operation to ensure that she was not carrying identification other than her Oregon Driver's License. Prior to going out on the sting operation, the minor did not have any identification other than her Oregon Driver's License.

Key Words/Phrases: minor, decoy, sting, fake ID, witness credibility, knowing, mitigation, choice in penalty

Case: *M & J Tavern*, OLCC-94-V-014, December 1994.

Facts: Employees of Licensee sold alcoholic beverage to a minor and permitted another to remain on premises where alcohol was sold. The minor snuck past the "door checkers" at the Licensee's premise, using the cover of a large group of patrons whose IDs had been checked and hands were stamped to remain unobserved. While inside he danced in a crowd and avoided eye contact with the bartenders, aware that he clearly looked under 21. Licensee argued that it shouldn't be held to the standard of checking IDs of patrons inside when it had security measures of "door checkers" and hand stamps reasonably calculated to keep minors out.

Abstract: Those who serve an alcoholic drink will usually be held responsible for independently verifying the age of a patron of questionable age regardless of whether co-workers should have already verified a patron's age. However, the particular facts of a case may justify an exception to this rule where a bartender may reasonably infer that the preceding bartender had verified a patron's age.

A bartender was excused from not checking a minor's ID where the premises were not crowded, there was an overlapping shift, the preceding shift's bartender was still at the bar finishing his duties, the patron in question was seated at the bar and drank beer in plain view of the preceding bartender who had served her, and the preceding bartender had received Alcohol Server Education training and was skilled in age identification.

Key Words/Phrases: minor, age verification, reasonably calculated, sufficient opportunity to observe, busy, permitting, should have known, large crowds, sneaking in, witness credibility, false/fake identification, questionable age, preventative/remedial steps, mitigation, penalty

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: A violation of ORS 471.410(2) can occur when a licensee mistakenly fails to verify the age of young-looking patrons before selling them alcoholic beverages. Such unintentional violations are still violations if the patron appeared to be under 21 years old and licensee should have known that the patron was a minor. Proof of such violation need not include proof that the sale to a minor was made deliberately. Without regard to whether a licensee deliberately intended to disobey the law, violations can occur when licensees make mistakes.

Key Words/Phrases: minor, age verification, witness credibility, inconsistencies, unfair, discrimination, amended charges, language differences, ethnic origin, aggravated penalty

Case: *Trapper's Lodge*, OLCC-93-V-018, July 1993.

Abstract: The fact that two minors showed false identification was not a defense where one identification, a driver's license, had expired, the photographs were of other people, and the heights and weights on the identifications did not match those of the minors.

Case: *Lowell Market*, OLCC-91-V-098, December 1991.

Abstract: Videotaped recordings of statements are properly offered as direct evidence of a person's youthful physical appearance or demeanor. However, videotaped statements are not admissible for the truth of their content unless the requirements for the taking of depositions have been satisfied.

Case: *17th & Lincoln Market*, OLCC-91-V-061, December 1991.

Abstract: The burden of proving that the false identification was convincing false identification is on the licensee. Where the licensee failed to prove that the false identification was a motor vehicle operator's license or an identification card issued by the Oregon Motor Vehicles Division, the Commission concluded the licensee failed to meet the burden of proof for proving a defense of false identification.

Case: *John Dough's Pizza*, OLCC-90-V-161, August 1991.

Abstract: The minor's false identification was not a defense to the charge because the identification was not a motor vehicle operator's license or an Oregon Department of Motor Vehicle identification card as required by ORS 417.130.

Case: *Golden Slipper*, OLCC-90-V-154, July 1991.

Abstract: Licensee failed to establish a defense in a sale to a minor case where the false identification shown by the minor was a hand lettered piece of identification stating "Idaho Operator." The Commission concluded that the identification failed to meet the requirements of ORS 471.130 and that a reasonable person would have determined that the identification was altered or false.

Case: *Plaid Pantry No. 96*, OLCC-90-V-048, January 1991.

Abstract: The Commission concluded it is an aggravating circumstance if a violation involves a person who objectively appears to be under 21 years old and that person is, in fact, under 18 years old.

Case: *East 20th Market*, OLCC-88-V-094, January 1989.

Abstract: Grocery store committed violation for sale to minor where it was apparent another customer was buying beer for a minor.

Case: *Master Mart*, OLCC-88-V-032, November 1988.

Abstract: Licensee failed to establish a defense that buyer furnished acceptable identification where buyer displayed only a photocopy of a birth certificate and a student identification card, without completing an S-146 Form.

Case: *Handy Pantry*, OLCC-88-V-005, May 1988.

Abstract: The Commission concluded that the charge against licensee for sale to a minor should be dismissed because the minor showed false identification that convincingly showed the minor to be over 21. The false identification was an Alaska drivers' license. The date of birth on the Alaska driver's license indicated that the person was 21 years of age or older. The photograph on the license bore a close resemblance to the minor.

Case: *TNT Market*, OLCC-87-V-054, February 1988.

Abstract: Seller's uncertain, uncorroborated testimony that minor had shown valid identification on a previous

occasion was not sufficient to prove that the minor had, in fact, shown such identification.

Case: *Prefetto's Pizza*, OLCC-86-V-035, January 1987.

Abstract: Licensees established a defense where findings of fact based on credibility were that the minor had, on prior occasions, presented an Oregon driver's license that convincingly showed he was over 21 years old. See also *Superfine Food*, OLCC-90-V-001, February 1999.

Charges for sale to a minor and failure to check identification were dismissed where findings, based on credibility, were that licensees did not sell or provide beer to the minor.

Case: *Brandy's Restaurants, Inc., Brandy's Restaurant and Lounge*, OLCC-86-V-027, December 1986.

Abstract: Where minor was 20 years old, six feet four inches tall, weighed approximately 185 pounds, and no one could describe his facial features, there was not sufficient evidence to prove that the minor appeared to be of questionable age.

Case: *David Littlejohn*, OLCC-85-V-076, September 1986.

Abstract: The Commission applied an objective standard to determine whether there were reasonable grounds to believe that a person was a minor. The test was how old the person would look to an impartial observer, rather than any particular individual's personal judgment.

Case: *Albert H. Grossman, Handy Pantry*, OLCC-86-V-005, April 1986.

Abstract: It is not a defense that the licensee simply failed to look at the buyer of alcoholic beverages closely enough to determine if there were reasonable grounds to believe the buyer was under 21 years of age.

Case: *Circle K Corporation, Circle K, No. 541*, OLCC-85-V-060, March 1986.

Abstract: Reasonable grounds existed to believe that two minors were under 21 where one of the minors definitely looked under 21 and his companion's age appearance was questionable. The appearance of the one provided reasonable grounds to doubt the age of the other.

Case: *Shop N Go*, OLCC-85-V-025, November 1985.

Abstract: There was reasonable doubt that a minor was at least 21 years old, despite the minor's success in buying alcohol without ID on other occasions, where the minor's youthful facial features indicated it was more likely than not that the minor was under 21. The close question of age was mitigating, however.

Case: *Day & Night Grocery*, OLCC-84-V-026, May 1985.

Abstract: The knowledge of the licensee's employee may be attributed to the licensee even where the licensee was in the hospital at the time of the violations for sale to minors.

Case: *Plaid Pantry, Inc., Plaid Pantry No. 13*, OLCC-84-V-040, March 1985.

Abstract: Licensee may be found guilty of "knowing sale to minor," even where facts clearly indicate seller believed buyer was over 21 years old, if there was reasonable ground to believe buyer was under 21 because of buyer's appearance.

Case: *7-Eleven Store, No. 20806*, OLCC-84-V-022, November 1984.

Abstract: Regardless of whether licensee charged with violation of ORS 471.410 or 471.315(1)(g), the sale must be knowing.

Case: *Hilyard Street Market*, OLCC-84-V-010, November 1984.

Abstract: Even if the Compliance Service's staff proves that the person was and looked under 21, the charge of selling alcoholic liquor to a minor will be dismissed if the licensee proves that the minor displayed a driver's license with a photo that convincingly showed the minor to be over 21 years of age. See also *Handy Pantry*, OLCC-88-V-005, May 1988; *Prefetto's Pizza*, OLCC-86-V-035, January 1987.

Although a licensee who requires a purchaser to produce a driver's license with a photograph or an Oregon Motor Vehicle Department identification card has a defense against a charge of sale to a minor, even if no S-146 card was taken, such licensee has the burden of proving that the identification was properly accepted under the standards stated in ORS 471.135(2). See also *Swartz Brothers Market, Inc.*

The Commission concludes that a fair reading of ORS 471.130 and 471.135(2) indicates that a licensee who requires a purchaser to produce a driver's license with a photograph or an identification card from the Department of Motor Vehicles has a defense against a charge of sale to minor, even if no S-146 card was taken, unless a reasonable person would have determined that the driver's license or identification card was altered or did not accurately describe the purchaser.

Case: *Mac's Market*, August 1983.

Abstract: Licensee's sale to a minor was not knowingly made because the minor reasonably appeared to be 21 years of age at the time of the sale. There is no reasonable basis to conclude that licensee knew that minor was under 21 years.

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

Abstract: In order to be found to have sold to a minor, the sale must have been knowing, regardless of objective language of ORS 471.410. In order for sale to be knowing, there must have been reasonable ground for licensee to believe individual was under 21.

C.1.a.2. Permitted Minor to Consume (OAR 845-006-0335(3)(a)) [OAR 845-06-035(3)(a)]

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

Case: *The Grove Restaurant & Bar*, OLCC-13-V-025, July 2014.

Facts: Licensee's bartender permitted a minor and her friends to come on the premises and served them alcohol. Minors stayed for four hours and were involved in a traffic crash upon leaving. Bartender later asked minors to tell a story that exonerated him from serving minors, by saying they didn't know him and showed fake IDs. After the minors informed police that the bartender did know them, and shared his Facebook and text messages asking them to lie, police interviewed the bartender. The bartender admitted knowing the minors were underage and asking them to lie. Bartender was charged with Furnishing Liquor to an Intoxicated Person (misdemeanor) and Witness Tampering (Class C Felony). Bartender's girlfriend called the licensed premises the next day to report that he would be late because he had been snowboarding, when in fact he was in jail awaiting release. Two days later bartender informed Licensee that he had been "caught serving minors," the first notice to Licensees, and Licensees suspended him pending an investigation. Licensee notified the OLCC of the incident the next day.

Abstract: Though the rule that a licensee will be held responsible for the acts/omissions of its employees/agents is stated in the permissive ("each licensee may be held responsible"), the Commission has consistently held licensees responsible for the actions of employees who violate the liquor laws. However, the Commission has also held that a licensee is not responsible for the criminal acts of an employee where the employee was not on duty or otherwise acting on the licensee's behalf. The common law doctrine of *respondeat superior* is illustrative in this case. In deciding whether an employee was acting within the scope of his employment, consider the following factors: whether the act in question is of a kind the employee was hired to perform, whether the act occurred substantially within the authorized limits of time and space, and whether the employee was motivated, at least in part, by a purpose to serve the employer.

In this case, the employee was not acting within the course and scope of his employment when he asked the minors to lie, and therefore Licensee was not held responsible for its employee's conduct in that regard.

Key Words/Phrases: minor, premises, consume, conceal evidence, witness tampering, agent, *respondeat superior*, termination of employee

Case: *Cinnabar*, OLCC-11-V-060, August 2012.

Facts: Licensee permitted a minor decoy to enter after the decoy showed ID revealing her true age. Minor decoy was served by the bartender who did not check ID. The bartender stated that she relied on the employee checking IDs at the door. The door checker stated that she misread the date of birth on the ID.

Abstract: Even though bartender believed the door checker had verified ID, the violation is proven when no one on the licensed premises verified identification of minor patrons.

Key Words: witness credibility, credibility determination, bar fight, brawl, permitted, minor, consume, door checker, reliance, rely

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: The Commission concluded that Licensee established the defense of fake ID because there was no

testimony to contradict the bartender's assertion that the minor presented an ID, when the officer did not search the minor for any identification. The minor's testimony was deemed unreliable and therefore his statements that he did not use a fake ID were not given any weight.

For the defense of false identification, the Licensees bear the burden of proving that the minor showed Licensees convincing false identification. *Mini Mart* (OLCC Final Order, 97-V-066, June 1997); and see ORS 183.450(2). The Commission has held that a minor's presentation of a convincing false identification is a defense to charges of permitting a minor on a prohibited premises and of selling or serving alcoholic liquor to a minor. *Kowloons* (OLCC Final Order, 99-V-088, November 2000); *John Doughs Pizza* (OLCC Final Order, 90-V-161, August 1991). To be a convincing false identification, the identification must be one of the types described in ORS 471.130(1), such as a state-issued motor vehicle operator's license or an identification card. It must look real and must not appear to be altered. *John Doughs Pizza, id.* The licensee must reject any "obviously altered document" or one which "obviously does not identify the person offering it." OAR 845-006-0335(1)(b).

Key Words/Phrases: minor, permit to consume, defense, false identification, fake ID, credibility determination

Case: *Aminata's*, OLCC-11-003, February 2011.

Facts: Licensee's employee allowed several minors to be in the bar area where minors were permitted, and served them alcohol. Licensee was present at the time, and even conversed with the minors at their table. A police officer performed a premises check and discovered the minors consuming alcohol. At hearing Licensee claimed that he told his employee to check the minors' IDs and assumed the employee had done so.

Abstract: Licensees are responsible for acts and omissions of their employees that violate any law or rule affecting the license privileges, even if the employee acted contrary to Licensee's instructions.

A licensee's post-violation actions, while laudable, do not provide grounds for mitigation when they are not taken promptly after the violation at issue. *Dad's Restaurant & Lounge* (OLCC Final Order, 06-V-029, December 2007). In this case Licensee did not take steps to change its minor posting until after another incident involving minors had occurred, and he subsequently requested to return to the previous minor posting. Therefore, no mitigation is warranted.

Discharge of an employee is not a basis for mitigation. See *Thrifty Nifty Market* (OLCC Final Order, 05-V-011, December 2005). A "previous lengthy history of compliance" is not a mitigating factor. *Cabaret Lounge* (OLCC Final Order, 08-V-061, October 2009).

Key Words/Phrases: consume, premises, permitted, mitigation, mitigate, responsible, employee, contrary to instruction

Case: *R Palate Restaurant & Bar*, OLCC-09-V-018/A/B/C, September 2009.

Facts: Police observed a fight outside the licensed premises, and contacted one of the participants who was under 21 and intoxicated. He had been allowed into the licensed premises and served using a fake ID. Officers contacted the door security employee and Licensee's corporate principal, both of whom were obviously intoxicated. The door employee acknowledged allowing the minor in with a fake ID. Licensee did not appear for hearing.

Abstract: OLCC has demonstrated a prima facie case supporting the violations of drinking on duty and service of a minor. Aggravation was appropriate because both the door employee and an unnamed bartender failed to verify age of the minor, and Licensee's corporate principal was personally involved in the drinking on duty violation.

Key Words/Phrases: drinking on duty, minor sale, permitting a minor on licensed premises, multiple employees

involved in the violation, corporate principal personal involvement, aggravation, letter of reprimand

Case: *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 the minor's picture and indicated he was over 21, but could not run it through AVE because it had a new address sticker on it. Another employee testified that the minor had been on at the 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: *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. OLCC consolidated cases against Permittee and her employer, but the employer settled its violations before hearing. Permittee did not appear for hearing, and later sent a letter to OAH stating that 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

Case: *Chu's Eatery II*, OLCC-V-075, April 1998.

Abstract: Licensee's employees did not permit minor to consume where: (1) the bartender asked security to check his age as soon as he was detected in the premises (he had not been served alcohol and was not consuming alcohol when detected); (2) security recognized him as the person who had pointed a gun at security personnel in the premises parking lot on another occasion, and advised the bartender not to serve him, but to stall him; (3) employees called Licensee for instruction on removing the minor, given the security risk; (4) Licensee instructed employees not to attempt to remove the minor, but to call the police instead; (5) the police took 15 minutes to arrive; and (6) the minor was not sold alcohol, but was observed consuming alcohol from an unknown source when the police arrived. The Commission concluded that Licensee's employees acted reasonably to prevent the minor from consuming alcoholic beverages on the premises.

Case: *Cherette Hoek*, OLCC-97-026, August 1997.

Abstract: The Commission concluded that Permittee violated OAR 845-06-035(3)(a), allowing a minor to consume alcoholic beverages, because Permittee had sufficient opportunity to observe the minor under the following circumstances: the premises was not crowded; Permittee was not overly busy; the minor was on the licensed premises for over an hour; the minor was not attempting to hide himself although he was not visible to Permittee from where she worked behind the bar; Permittee was not overly busy and could have seen the minor if she had come out from behind the bar and walked around the premises.

Case: *Leipzig Tavern*, OLCC-94-V-012, August 1994.

Abstract: The Commission concluded that licensees' employees had ample opportunity to observe the minors even though neither of the minors was served by employees because the two minors were on the premises for one and one-half hours in an area of the premises that could be seen by the bartenders, and one of the minors was 16 years of age and looked very youthful. OAR 845-06-035(3)(a).

Case: *E.L. Benders*, OLCC-93-V-016, October 1993.

Abstract: The Commissioners determined that the server did not have an adequate opportunity to observe that the minor was consuming alcohol under the following circumstances: the minor sat at the bar consuming beer for approximately 10 to 15 minutes, she was seated facing away from the bartender, and the bar area was very crowded.

Case: *Punjab Tavern*, OLCC-92-V-088, June 1993.

Abstract: Licensee's employee did not permit minors to consume where permittee was the only person on duty, the premises was very crowded, the two minors were seated in an area where they could not be seen by the permittee, the minors had not been served but drank beer that had been served to other persons, and the minors were on the premises for approximately 10 to 15 minutes.

Case: *Wayne J. Silveira*, OLCC-91-V-066, November 1991.

Abstract: Permittee did not permit minor to consume because evidence failed to show permittee had sufficient opportunity to observe the minors consuming. Permittee was assigned to work in the service bar area and could not see the minors consuming because of the crowd of customers lined up in front of him.

Case: *John Dough Pizza*, OLCC-90-V-161, August 1991.

Abstract: Licensees permitted a minor to consume even though the minor was attempting to hide the fact that he was drinking where the minor clearly appeared to be a minor, the minor was on the premises for approximately one hour sharing a pitcher of beer, and licensees had opportunity to observe both the minor's presence and consumption of beer because licensees had three or four employees on duty and the minor was seated 20 feet from the counter where the employees were working.

Case: *Trapper's Lodge*, OLCC-90-V-066, January 1991.

Abstract: Licensee's employee did not permit minor to consume where the employee did not have sufficient opportunity to observe the minor consuming because the minor attempted to conceal the fact that he was drinking by hurriedly drinking and then sliding the glass away from himself.

Case: *O'Ryan's Irish Sports Pub*, OLCC-89-V-190, November 1990.

Abstract: The Commission concluded that licensee permitted minor to consume where minor's youthful appearance made it possible for inspectors to single her out in a crowd and where minor was in premises drinking beer with

another minor for approximately one hour and forty-five minutes.

Case: *Aloha Station*, OLCC-88-V-106, April 1989.

Abstract: Licensee's employee permitted a minor to consume when the minor reasonably appeared to be a minor, the minor purchased beer two times, the minor was on the licensed premises for approximately one and one-half hours and the minor consumed beer.

Case: *Prefetto's Pizza*, OLCC-86-V-035, January 1987.

Abstract: Licensees permitted a minor to consume in violation of OAR 845-06-035(2)(a) where they were aware the minor was drinking, and they took no corrective action, other than to remove the beer. Thus, licensee had ample time and opportunity to discover the minor was sneaking drinks on the premises.

Case: Brandy's Restaurants, Inc., *Brandy's Restaurant and Lounge*, OLCC-86-V-027, December 1986.

Abstract: Licensee permitted a minor to consume where minor drank beer on the premises over a 35-minute period. This was ample time for the licensee's employee to detect the minor and to determine his age. See also *Murphy's Oyster Bar and Grill*, OLCC-85-V-046, December 1985.

**C.1.a.3. Permitted Minor on Premises (OAR 845-006-0335(3)(b))
[(OAR 845-06-035(3)(b))]**

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

Case: *Silver Dollar Pizza*, OLCC-13-V-020, OLCC-13-L-005, November 2014.

Facts: Licensee permitted minors (age 19) to operate a food (hot dog) cart on the sidewalk in front of the licensed premises. Minors used the licensed premises regularly including the kitchen, restrooms, safe for deposits, getting change, and socializing after hours. When Licensee decided to cancel the arrangement the minors got upset, and reported the liquor law violations to the OLCC. Licensee also had his minor son as an employee in the kitchen. When he got notice of violation, he argued that he should be permitted to have minor employees in the kitchen area. OLCC investigators informed him he must have a modification approved by the Commission, and until approval he could not have minors on the premises at any time.

Abstract: The exception for minor contractors set out in OAR 845-006-0335(5) intends to apply to visits by contractors, and for only so long as necessary to complete the contracted task. It is not intended to allow minors access to prohibited premises for purposes of operating their (the minors') business. It also does not apply to minors who regularly and repeatedly work on licensed premises. Rather, the exception applies to minors who enter premises briefly and for reasons unrelated to the licensee's core business (with citations discussed).

Key Words/Phrases: minor, permitted, premises, contractors, core business

Case: *Undefeated Sports Bar & Grill*, OLCC-14-V-13/13A, August 2014.

Facts: Licensee worked as a bartender until about 8 pm when another employee came on duty. One employee was scheduled to work because Licensee did not expect it to be busy. Licensee began playing cards with friends/other patrons at 9 pm, and consumed alcohol while playing cards. At 10 pm approximately 30-40 other patrons, including 3 minors, came into the bar for a birthday party. The party got out of hand. Licensee attempted to call for a security service, and then instructed his employee to shut the party down. The employee did not immediately do so, and Portland Gang Enforcement Team arrived on a tip that known gang members were present. They recognized one of the minors and arrested him for a probation violation. Police ordered the premises shut down and contacted the OLCC, who came to the premises and detected signs of intoxication in the Licensee. The employee claimed she had checked the ID of every patron in the bar, which was approximately 50-60 patrons when police arrived.

Abstract: Although there was no evidence that the employee knew minors were present, there was sufficient opportunity to detect their presence as none of the minors were attempting to hide and were in plain view. Had Licensee not been understaffed for the overcrowded bar, under the circumstances there existed sufficient time and opportunity for employees to detect the minors (analyzing other Commission cases in support).

Key Words/Phrases: drinking on duty, intoxication, signs, control conduct, minor, presence, plain view, understaffed, sufficient time, opportunity, detect

Case: *The Grove Restaurant & Bar*, OLCC-13-V-025, July 2014.

Facts: Licensee's bartender permitted a minor and her friends to come on the premises and served them alcohol. Minors stayed for four hours and were involved in a traffic crash upon leaving. Bartender later asked minors to tell a story that exonerated him from serving minors, by saying they didn't know him and showed fake IDs. After minors informed the police that the bartender did know them and shared his Facebook and text messages asking them to lie, police interviewed the bartender. The bartender admitted knowing the minors were underage and asking them to lie. Bartender was charged with Furnishing Liquor to an Intoxicated Person (misdemeanor) and Witness Tampering

(Class C Felony). Bartender's girlfriend called the licensed premises the next day to report that he would be late because he had been snowboarding, when in fact he was in jail awaiting release. Two days later, bartender informed Licensee that he had been "caught serving minors," the first notice to Licensees, and he was suspended pending investigation. Licensee notified the OLCC the next day of the incident.

Abstract: Though the rule that a licensee will be held responsible for the acts/omissions of its employees/agents is stated in the permissive ("each licensee may be held responsible"), the Commission has consistently held licensees responsible for the actions of employees who violate the liquor laws. However, the Commission has also held that a licensee is not responsible for the criminal acts of an employee where the employee was not on duty or otherwise acting on the licensee's behalf. The common law doctrine of *respondeat superior* is illustrative in this case. In deciding whether an employee was acting within the scope of his employment, consider the following factors: whether the act in question is of a kind the employee was hired to perform, whether the act occurred substantially within the authorized limits of time and space, and whether the employee was motivated, at least in part, by a purpose to serve the employer.

In this case, the employee was not acting within the course and scope of his employment when he asked the minors to lie, and therefore Licensee was not held responsible for its employee's conduct in that regard.

Key Words/Phrases: minor, premises, consume, conceal evidence, witness tampering, agent, *respondeat superior*

Case: *Yogee's*, OLCC-09-V-073, April 2011.

Facts: In the first incident a minor entered the 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 a second incident a 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: *Aminata's*, OLCC-11-003, February 2011.

Facts: Licensee's employee allowed several minors to be in the bar area where minors were permitted, and served them alcohol. Licensee was present at the time, and even conversed with the minors at their table. A police officer performed a premises check and discovered the minors consuming alcohol. At hearing licensee claimed that he told his employee to check the minors' IDs and assumed the employee had done so.

Abstract: Licensees are responsible for acts and omissions of their employees that violate any law or rule affecting the license privileges, even if the employee acted contrary to Licensee's instructions.

A licensee's post-violation actions, while laudable, do not provide grounds for mitigation when they are not taken promptly after the violation at issue. *Dad's Restaurant & Lounge* (OLCC Final Order, 06-V-029, December 2007). In this case Licensee did not take steps to change its minor posting until after another incident involving minors had occurred, and he subsequently requested to return to the previous minor posting. Therefore, no mitigation is warranted.

Discharge of an employee is not a basis for mitigation. See *Thrifty Nifty Market* (OLCC Final Order, 05-V-011, December 2005). A "previous lengthy history of compliance" is not a mitigating factor. *Cabaret Lounge* (OLCC Final Order, 08-V-061, October 2009).

Key Words/Phrases: consume, premises, permitted, mitigation, mitigate, responsible, employee, contrary to instruction

Case: *Lucky Jade Chinese Restaurant*, OLCC-09-V-055/055A, April 2010. See also *Jialin Chan*, OLCC-09-V-056, February 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 was responsible for violations of employee for false statement, permitting the sale/service of alcohol during prohibited hours, and refusal to admit a police officer. Violation of permitting a minor to be in a prohibited area was also proven. See *Lava Lanes of Medford* (OLCC, Final Order, 04-V-007, February 2005) (the Commission held that the rule prohibiting minors does not include a requirement that the minor drink alcoholic beverages or mingle with persons who had consumed alcoholic beverages).

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

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.

Abstract: Police officers were clearly identified, asked to enter to conduct a reasonable search to ensure compliance with alcoholic beverage laws, and had to physically move permittee out of the way to enter the premises. Therefore permittee refused to admit officers onto the licensed premises.

Selling to employees or friends rather than the general public is not a defense to the charge of operating during prohibited hours. See also *Amber Inn* (OLCC, Final Order, 85-V-014, July 1985).

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

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 which looked like the minor's picture and indicated he was over 21, but could not run it through AVE because it had a new address sticker on it. Another employee testified 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: *Lava Lanes of Medford*, OLCC-04-V-007/007A/007B/007C, February 2005.

Facts: Licensed premises was a 40 lane alley with attached lounge called Bleachers with a Number 2 minor posting. The OLCC had received multiple prior complaints related to lack of age verification for younger patrons. OLCC requested a minor decoy operation due to ongoing concerns about failure to verify ages of patrons and allowing minors in prohibited areas. An inspector and decoy went on a busy night, and sat at a table for a long time before being attended to. The server did ask the decoy for ID and told him he could not drink or be in the area. OLCC commended the server for refusing service, but cited Licensee for permitting a minor to be in a prohibited area.

Abstract: The administrative rule prohibiting minors on premises prohibited to minors, OAR 845-006-0335(3), makes no distinction between minors who enter on their own and minor decoys. It also does not include any requirement that the minor drink alcoholic beverages or mingle with persons consuming alcoholic beverages. The only relevant issues are, whether the minor appears to be under the age of 26 (an issue not disputed here) and whether the licensee's employees permitted the minor to be on the premises. The Commission has interpreted the term "permitted" to mean that the Licensee had knowledge of the minor's presence or had sufficient time and opportunity to detect and determine the minor's presence. A minor seated at a booth for at least 30 minutes was "permitted" in a prohibited area, despite the premises being busy and the fact that the decoy had his head turned away from the bar watching television. It is not necessary to show that the licensee had knowledge of the presence of the minor on the premises; the licensee also permits a minor to remain if the licensee had sufficient time and opportunity to detect the minor. Thirty minutes is far more than sufficient time to detect a minor who is sitting at a booth waiting for service. The minor was not hiding or obscuring his presence.

The Commission also stated that "The Licensees have a responsibility to maintain adequate staff to prevent minors

from entering or remaining on the premises.”); *Sugar Pine Inn*, (OLCC, Final Order, 02-V-052, July 2003) (Minor was in the prohibited portion of the premises “for a brief period of time” before being detected by police.)

Key Words/Phrases: minor, permitted in prohibited area, adequate staffing, minor decoy, knowledge of minor’s presence, sufficient time and opportunity to detect, personal liability of corporate officers

Case: *Sugar Pine Inn*, OLCC-02-V-052, July 2003.

Facts: A minor entered the premises with another group and sat down in the bar. Police came to check for minors and found him with a bottle of beer in front of him. The minor stated he said he brought the beer 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.

Generally speaking, there is no requirement on a party with the burden of proof to call any witness in a civil proceeding, even if available to testify, if the party believes it can sustain its burden without the witness. While first-hand testimony might have been more probative of the minor’s age and appearance, the absence of that testimony does not diminish the probative value of the evidence (photographs of the minor), upon which the agency relied in this proceeding.

Hearsay testimony is admissible as long as it meets the statutory test of reliability. Investigative and police reports containing details recorded at the time or shortly after an incident are evidence of a type commonly relied upon by reasonably upon by reasonably prudent persons and routinely admitted in administrative hearings.

The Commission has held that proof is not required that minor both entered and remained; it is sufficient to prove that the minor was permitted to enter an area posted prohibited to minors. *Don Juan's* (OLCC, Final Order, 87-V-026, January 1988); *Brandy's Restaurant and Lounge* (OLCC, Final Order, 86-V-027, December 1986). There was ample time for the licensee's employees to detect the minor and determine age.

Key Words/Phrases: age verification, minor, physical appearance, evidence, witnesses, burden of proof, lack of witness, not present to testify, right to confrontation, hearsay, objective appearance

Case: *Kowloons*, OLCC-97-V-090, September 1998.

Abstract: Where minors were on the premises for several hours and were not trying to hide from Licensee’s employees, but openly dancing and they looked their true ages, the Commission concluded Licensees had sufficient opportunity to detect them. However, because the minors presented convincingly false identification to gain entry and the Licensees had effective age identification procedures, and because the minors did not come into direct contact with Licensees’ employees by attempting to purchase alcohol, there would have been little reason for Licensees’ employees to check the minors’ identification. Charge of violation of OAR 845-006-0035(3) was dismissed.

The Commission determined that licensee had established a defense to the charge of permitting minor on premises where licensee or licensee’s employees requested and were shown a valid-appearing driver’s license with a photograph that showed the minor to be over 21 years of age. The following circumstances were determined to be sufficient to sustain licensee’s burden of proof establishing that convincing false identification had been presented by the minors: (1) licensee had a strict policy for checking identification at the door, and employed four people to simultaneously staff the entrance door for this purpose B one employee was required to check the identification, while two employees watched to make sure all patrons were being checked; (2) patrons were required to enter in single file so that the identification of each could be checked; (3) licensee was watching the identification checker and observed

both minors enter and present identification to the checker; (4) OLCC was responding to a detailed tip that two described minor females who used false identification were routinely on the premises; (4) when confronted, the minors attempted to avoid showing the OLCC inspector any identification -- one minor eventually showed him her authentic identification, the other showed no identification; (5) the two minors were accompanied by the adult sister of one; (6) the adult sister and one of the minors had been issued a number of licenses by DMV; (7) the minors had been on the premises a number of times previously after going through the identification checking process.

Case: *M & J Tavern*, OLCC-94-V-014, December 1994.

Facts: Employees of Licensee sold alcoholic beverage to a minor and permitted another to remain on premises where alcohol was sold. The minor snuck past the "door checkers" at the Licensee's premise, using the cover of a large group of patrons whose IDs had been checked and hands were stamped to remain unobserved. While inside he danced in a crowd and avoided eye contact with the bartenders, aware that he clearly looked under 21. Licensee argued that it shouldn't be held to the standard of checking IDs of patrons inside when it had security measures of "door checkers" and hand stamps reasonably calculated to keep minors out.

Abstract: Where the presence of a crowd of patrons contributed to a licensee not detecting a minor on the premises, the licensee cannot claim surprise that the premises was crowded when the licensee scheduled live entertainment for the night in question.

The fact that a minor snuck past the "door checker," when a large number of patrons arrived at the door at the same time and provided a visual cover for the minor did not provide a defense, but rather pointed out that licensees need to have contingency plans for dealing with the arrival at one time of a large number of people.

Key Words/Phrases: minor, age verification, reasonably calculated, sufficient opportunity to observe, busy, permitting, should have known, large crowds, sneaking in, witness credibility, false/fake identification, questionable age, preventative/remedial steps, mitigation, penalty

Case: *Beer Nutz*, OLCC-92-V-003, May 1992.

Abstract: The Commission overrules the portions of the *Drumstick Tavern*, OLCC-89-V-018, April 1989, and *Eola Inn*, OLCC-90-V-105, June 1991, which established precedents holding that mitigation is appropriate when minors did not attempt to consume alcohol or did not, in fact, consume alcohol when they were unlawfully on the licensed premises. The Commission concludes that the fact that a violation did not occur is not in itself a mitigating circumstance.

Case: *Trapper's Lodge*, OLCC-90-V-066, January 1991.

Abstract: The charge that licensee permitted a minor to be on licensed premises was not proved where the evidence failed to establish characteristics of the minor's appearance from which an objective observer could conclude the minor was under 21 years of age.

Case: *Phyllis J. Gorby*, OLCC-88-V-009, June 1988.

Abstract: "Permitting" is proved by establishing that the licensee or permittee had knowledge of or had sufficient time and opportunity to detect and determine the minor's presence on the premises. See also *Fish Grotto*, OLCC-88-V-021, July 1988; *Sparkles Tavern*, OLCC-88-V-107/127, September 1989.

Case: *Drumstick Tavern*, OLCC-89-V-010, April 1989. [Overruled in part, *Beer Nutz*, OLCC-92-V-003, May 1992.]

Abstract: Licensee permitted minors to enter and remain when minors waited inside the premises to act as drivers for

two customers who had been consuming alcoholic liquor. Because the minors were not attempting to consume alcoholic liquor, there is a basis for mitigation of the penalty.

Case: *Don Juan's*, OLCC-87-V-026, January 1988.

Abstract: OAR 845-06-035(2)(b) does not require proof that minor both entered and remained. It is sufficient to prove that the minor was permitted to enter an area posted prohibited to minors. See also *Brandy's Restaurant and Lounge*, OLCC-86-V-027, December 1986.

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

Abstract: Permittee violated OAR 845-006-035(2)(b) where the permittee saw minors enter and permitted the minors to remain in the premises for ten minutes before she decided to contact them to check their ages. Ten minutes was more time than necessary or reasonable for the permittee to contact the minors.

Case: *Murphy's Oyster Bar and Grill*, OLCC-85-V-046, December 1985.

Abstract: Licensee permitted a minor to enter and remain where the minor was in the prohibited portion for 15 to 25 minutes. This was ample time for the licensee's employees to detect the minor and determine his age.

**C.1.a.4. Age Verification (ORS 471.130, OAR 845-006-0335(1))
[(ORS 471.130, OAR 845-06-035(1))]**

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Case: *Clancy's*, OLCC-14-V-017/017A, March 2015.

Facts: Minor decoy and undercover officer went to the licensed premises, and after being seated by an employee were asked what they wanted to drink. The minor decoy ordered a bud light. The employee went to the bar area and told another employee about the drink order, and that other employee brought it to the minor. The employee asked who ordered the beer and the decoy replied “me,” the employee set it down and stepped away from the table. The undercover officer then contacted the employee and cited her for serving a minor. The employee who took the drink order was fired because he should have asked for ID when the drink was ordered. A few days after the incident, Licensee’s manager contacted the OLCC about the situation.

Abstract: Licensee’s employees failed to verify the age of a minor before allowing her to buy or be served an alcoholic beverage when she reasonably appeared to be under 26 years of age in violation of OAR 845-006-0335(1)(a), (b) and (c).

Licensee argued that the employee who took the drink order didn’t sell or serve alcohol, and therefore did not violate the liquor law, and to use his actions as aggravation would exceed the OLCC’s scope of authority. The Commission disagreed. Although there are no prior cases directly on point, based on the cases of *Giovanni’s Mountain Pizza* (OLCC Final Order, 03-V-013 & 018, February 2004) and *Handy Food Mart* (OLCC Final Order, 98-V-029, April 1999), the Commission concluded that two employees were involved in the sale, making aggravation appropriate.

Because aggravation existed, removal from the Responsible Vendor Program was also warranted.

Key Words/Phrases: minor, sale to minor, decoy, responsible vendor, sale, multiple employees, aggravation

Case: *Mt. Angel Deli Market & Deli, LLC*, OLCC-13-V-034/043A/043B, November 2014.

Facts: Licensee had a history of several violations involving sales to minors. Past violations had resulted in Licensee purchasing AVE and license restrictions requiring Licensee to train employees on AVE use, and for employees to use AVE when selling alcohol. Licensee’s employee sold to a minor decoy, after using AVE which indicated the sale was to a minor. The OLCC proposed to cancel Licensee’s license for this violation (as a Category I-violation of a license restriction).

Abstract: Violation for sale to a minor was proven.

No license restriction violation was proven when the evidence showed that Licensee’s employee used AVE (although ineffectively), and Licensee required the employee to use it. Therefore, without this Category I violation, cancellation is inappropriate.

Contrary to the cases of *Hunter’s RV Park* and *Lava Lanes*, in this case the employee did use AVE. Therefore there is no aggravation for failure to use AVE, making removal of Licensee from the Responsible Vendor Program inappropriate.

There is a basis to refuse to renew Licensee’s license due to a poor record of compliance. Licensee’s transformation into an LLC from a sole proprietorship does not preclude the Commission from considering violations which occurred under the sole proprietorship. Per OAR 845-006-0550(9), a licensee cannot avoid sanction or application of

successive violations merely by adding or dropping partners or converting from one legal entity to another when the individuals who own, operate or control the business are substantially similar.

In regards to the factor “licensee’s personal involvement,” the fact that licensee was not personally involved in violations is a neutral factor, not one that weighs in favor of good cause to overcome a refusal to renew basis. See also *US Market #260*, OLCC-11-L-003, March 2013.

Because there is a basis to refuse to renew Licensee’s license, there is no license to penalize for the sale to minor violation. Therefore a Letter of Reprimand is appropriate.

Key Words/Phrases: service permit, revocation, DUII, relevant conviction, good cause, abstinence, probation

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

Facts: Licensee’s employee sold alcohol to minor decoys without checking ID and did not use AVE required by licensing restriction. Employee pled guilty to violation of furnishing alcohol to minors. Licensee had previously opted to install AVE equipment in lieu of paying a penalty for a 2007 sale to a minor. The same employee was again cited in June 2012 for selling alcohol to a minor, and on that occasion attempted to use the AVE equipment. OLCC staff initially alleged that Licensee violated its restriction for failing to use AVE equipment, and later amended the Notice of Violation to allege that Licensee violated the restriction when it “failed to require” its employee to use the AVE equipment. Licensee was unable to show its employee had been trained/required to use the AVE.

Abstract: Licensee’s restriction required that all individual employees be required to use the AVE equipment. Licensee’s managing member’s testimony that he trained his employee to use it is not credible. The preponderance of the credible evidence shows that Licensee’s employee did not use the AVE and was not trained to do so.

The Oregon Court of Appeals holdings in *US Market #109 v. OLCC*, 250 Or App 335 (2012), and *US Market #180, LLC v. OLCC*, 249 Or App 666 (2012), are distinguishable in this case. In the present case there was a failure to train appropriately, and as a consequence, a failure to require the employee to use the AVE to verify the age of the patron who appeared under the age of 26 years.

Utilizing the *Oceanside* factors, the violation was substantial. However, the combined weight of the *Oceanside* factors in this case may not by itself merit cancellation. Where, as here, only two of the four *Oceanside* factors are present, the presence of other aggravating or mitigating circumstances can be considered in determining whether or not a penalty of cancellation is warranted.

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

Case: *Cinnabar*, OLCC-11-V-060, August 2012.

Facts: Licensee permitted a minor decoy to enter after the decoy showed ID revealing her true age. Minor decoy was served by the bartender who did not check her ID. The bartender stated that she relied on the employee checking IDs at the door. The door checker stated that she misread the date of birth on the ID.

Abstract: The Commission has held that those who serve alcoholic beverages will generally be held responsible for independently verifying the age of a patron of questionable age regardless of whether a co-worker should have already verified the patron’s age. *Benjamin Soto Lopez* (OLCC Final Order, 01-V-008, August 2001). Here, considering that the server recognized that the minor “looked young,” she should have independently verified his age before selling and serving him an alcoholic beverage.

Key Words: minor, service, decoy, independently verify, questionable age, co-worker, reliance, rely

Case: *Stone Cliff Inn*, OLCC-11-V-041, April 2012.

Facts: Minor decoy was served at the licensed premises. Licensee's bartender asked for ID, misread it and thought the minor had just turned 21, stating "you just made it."

Abstract: When a minor decoy nodded affirmatively in response to the statement "You just made it," the minor did not misrepresent his age because the meaning of the statement was not clear.

OAR 845-006-0335 does not just require examination of a license. It requires that the seller actually verify that the person is 21 years old.

Key Words/Phrases: minor decoy, verify, questionable age, examine, minor decoy operation standards, entrapment

Case: *US Market #180*, OLCC-08-V-043, October 2009. [overruled in *US Market #180 v. OLCC*]

Abstract: Like the Commission's analysis in *Texaco Star Mart*, when a license restriction requires that age verification equipment be used to verify age for every sale of a patron who reasonably appears under the age of 26, simply using the equipment without verifying the information does not meet the "verify" requirement.

Age verification equipment gave two different age displays where one reading said patron was "19 years old" yet another portion of the screen said "approved." Analyzing the *Oceanside* willful factor, it is not a willful violation if an employee uses age verification equipment and its gives contradictory data about patron's age and one of the data read outs said patron was approved for sale.

Case: *U-Licious Smokehouse & Grill*, OLCC-06-V-058, February 2007.

Facts: Licensee served a minor decoy without asking for ID. Licensee "let his guard down" because he believed the decoy and undercover deputy were father and daughter or boss/secretary out for a late lunch. Licensee alleged entrapment, as well as hardship due to his recent stomach cancer surgery (resulting in extraordinary medical bills and debt from closure of the premises for a period of time).

Abstract: Even if licensee took payment for the beers from the deputy accompanying a minor decoy, the licensee still violated the law by serving a minor.

The use of decoys is a permissible method of enforcement of criminal law. The use of decoys only becomes invalid when badgering or importuning takes place to an extent and degree that it is likely to induce an otherwise law abiding person to commit a crime. No such evidence was presented in this case.

The Commission has previously concluded that inability to pay a fine set in the penalty schedule is not a persuasive reason to apply mitigation because the schedule already provides relief for the licensee of a low-profit business by allowing a choice between a fine or suspension.

Key Words/Phrases: minor decoy, hardship, inability to pay, entrapment

Case: *Thrifty Nifty Market*, OLCC-05-V-011, December 2005.

Facts: Licensee had prior sale to minor violations, and purchased AVE. Licensee's employee later sold to a minor on two occasions without verifying age. Licensee fired the employee immediately. Licensee argued for mitigation due to the termination and steps taken to prevent sales to minors.

Abstract: Licensee claimed mitigation for his continuing good faith efforts to prevent such violations. Following the analysis in *Circle K Store #468*, OLCC-03-V-107 (October 2003), Licensee is not entitled to mitigation for the upgrade in equipment. Licensee had received the benefit of OAR 845-009-0140(3) after the previous violation and is not entitled to additional mitigation for the more recent upgrade. No mitigation is provided based on the circumstance that Licensee's employee failed to follow Licensee's procedures. Finally, *Circle K Store #468, supra* states that mitigation is not appropriate for the termination of the employee who sold to the minor.

Key Words/Phrases: sale to minor, prior violation, AVE, termination of employee, mitigation

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 the minor if he was 21 and minor said yes, and that the minor's height and size made him appear 27-28. Decoy denied lying about his age.

Abstract: Given the OLCC's policy and the minor's training and instructions as an agency decoy, it is unlikely that, if asked, the minor 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.

Both in person and in the photograph taken on the date of the violation, the minor had youthful, unlined facial features. He was clean shaven, with short cropped dark hair. Although the minor was relatively large in stature (6'2"), a person's height and/or weight are not a reliable indicator of whether the person is at least 21 years old. See *Quincy Store*, OLCC-02-V-008/L-001, February 2003,) *aff'd Ban v. OLCC*, 196 Or App 545 (2004). Given the minor's youthful facial features, the Commission found that, on the date of the violation, he appeared his true age of 20. The subjective belief of the server and witnesses is not determinative. *Trails Inn Restaurant & Lounge* (OLCC, Final Order, 02-V-004, June 2004).

Licensee contended that because more than half of the 17 premises checked on the date of the violation at issue sold an alcoholic beverage to the minor, he reasonably appeared to be over 21 on that date. The fact that several clerks or servers failed to verify the minor's age during this compliance check does not necessarily mean that he looked age 26 or older on that day. These clerks or servers who sold to the minor may simply have been negligent in their duty to verify his age. Of the 31 licensed premises that the minor entered as an agency minor prior to his 21st birthday, two thirds asked to see his identification. The Commission was persuaded that the minor appeared his true age of 20 at the time in issue.

Key Words/Phrases: credibility determination, minor decoy, minor appearance

Case: *Quincy Store*, OLCC-02-V-008/L-001, February 2003, *affirmed, Ban v. OLCC*, 196 Or App 545, 102 P.3d 744 (2004).

Facts: Minor decoy took beer to the counter at Licensee's store. Licensee's nine-year-old daughter was at the register, told the decoy the price of the beer, pushed buttons on the register to ring up the sale, and gave the decoy change. Licensee was present when this occurred and told her daughter the price of the beer and helped recount the change given to the decoy.

Abstract: Where Applicant's nine-year-old daughter pushed the buttons on the cash register to ring up the sale, told

the minor decoy the price of the beer, accepted payment, counted the change from the register and placed the change on the counter, the daughter made the sale of the alcohol, notwithstanding the fact that her mother told her the price of the beer, recounted the change, and bagged the beer. The sale was completed without verifying age.

Key Words/Phrases: decoy, minor, age verification, sale by minor, sale to minor, interpreter at hearing, credibility, knowing, sale by others, definition of employee, license refusal, good cause exception

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: *Benjamin Soto Lopez*, OLCC-01-V-008, August 2001.

Abstract: Permittee's reliance on Licensee to check identification at the stairwell was not justifiable because Permittee knew Licensee had failed to do so in the past when distracted and knew that Licensee was distracted on this occasion by an arrest downstairs in another business owned by Licensee. There is here no basis for an exception to the OLCC's general practice of holding those who serve alcoholic drinks responsible for independently verifying the age of a patron of questionable age, regardless of whether co-workers should have already verified the patron's age. *See M & J Tavern*, OLCC-94-V-014, December 1994.

Case: *Teri's Town Tavern*, OLCC-00-V-018, November 2000.

Abstract: A trainee bartender trying out for a job, who had not yet been hired, was Licensee's servant agent, employee, or representative, for purpose of holding Licensee responsible under OAR 845-006-0025 for bartender's failure to verify the age of a minor.

Case: *Cheryl Nelson*, OLCC-00-V-010, July 2000.

Abstract: No OLCC policies provide that a failure to give written notice that a licensed business is going to be referred to the minor decoy program establishes a basis to nullify the violation that may result from an OLCC "sting".

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

Abstract: Where a bartender relied upon minor's statement that another bartender had checked her identification and upon the word of the minor's adult boyfriend that minor was 21, and did not independently verify minor's age, bartender violated OAR 845-006-0035(1)(a), (b), and (c).

Case: *Troy McNeil*, OLCC-99-V-106, April 2000.

Abstract: The Commission rejected Permittee's defense that he did not recheck minor patron's age identification, reasonably relying on the door checkers on duty to check the identification. The Commission concluded that OAR 845-006-0035(1) requires that licensees and permittees verify age identification before selling alcoholic beverages.

Case: *Tharwat Mart*, OLCC-99-V-076, February 2000.

Abstract: Licensee's daughter, who was not employed at the licensed premises, sold alcohol to a minor patron

without first verifying minor's age. The Commission concluded that Licensee was responsible for the violation pursuant to OAR 845-006-0025, as daughter acted as Licensee's agent or representative when she sold the alcohol, notwithstanding that she was acting contrary to the express instruction of the Licensee when she sold alcohol.

Case: *Brother's Market & Deli*, OLCC-99-V-044, February 2000.

Abstract: The Licensee's actions following the sale and the minor's departure from the store do not "undo" the lack of age verification before the sale or the resulting violation. Licensee's subsequent action to retrieve the alcoholic beverage and to refund the money should be considered in assessing a penalty, not in determining whether a violation occurred. The Commissioners determined that an appropriate penalty was a Letter of Reprimand.

Case: *777 Deli Market*, OLCC-99-V-014, August 1999.

Abstract: Where clerk mistakenly believed that minor was minor's older brother, known to be over 21 years of age, it was not a defense to charge of failing to check identification where at least 6 months had passed since clerk checked older brother's identification and the minor appeared youthful.

Case: *Stuart Anderson's Cattle Company*, OLCC-98-V-040 and OLCC-98-V-050, June 1999.

Abstract: The Commission's authority to sanction a licensee for a violation of OAR 845-006-0035(1) is found in ORS 471.315(1)(a)(A). OAR 845-006-0035(1) and ORS 471.315(a)(A) do not require proof of "knowledge" by the seller that the purchaser was a minor. On the other hand, ORS 471.410(2) and ORS 471.315(1)(a)(A) require that the seller have "knowledge" that the purchaser was a minor before a sanction can be imposed for the "knowing" sale of an alcoholic beverage 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.

OAR 845-006-0035(1) applies to licensees and to their employees. The Commission is persuaded that the rule applies to all sellers of alcoholic beverages, not just to licensees and permittees. However, only licensees and permittees can be charged with violating the rule. The Commission concluded that OAR 845-006-0035(1)(a),(b), and (c) apply to clerks who are employed by licensees as well as licensees and permittees and that a clerk's failure to verify the age of a customer who appears to be less than 26 years of age causes licensees to violate OAR 845-006-0035(1)(a).

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

Abstract: The Commission concluded that the language "verify the age of a person" in OAR 845-06-035(1) means that the licensee or permittee must verify that the person seeking to buy alcoholic beverages is at least 21 years of age. The Commissioners determined that merely asking for identification is not sufficient to satisfy the requirement of this rule. The seller must verify that the person is at least 21 years of age.

The Commission concluded that a violation of OAR 845-06-035(1) (age verification) occurred in spite of the fact that the licensee's clerk asked for identification and looked at the identification before making the sale.

Case: *OLCC Agency No. 155*, OLCC-97-RO-001, January 1998.

Abstract: The requirements of OAR 845-006-0035(1) apply to retail sales agents because of the incorporation of its requirements into the Retail Operations Manual. The Retail Operations Manual is incorporated into Paragraph (7)(b)

of the Retail Sales Agent Agreement by reference. Violation of OAR 845-006-0035(1) constitutes a violation of the Retail Sales Agent Agreement.

Case: *Mini Mart*, OLCC-97-V-006, June 1997.

Abstract: The Commission concluded that Licensees violated OAR 845-06-035(1)(a), (b), and (c) (failure to verify the age of a minor before selling alcoholic beverages to a minor) where the record showed that the Licensee sold beer to a minor and did not ask the minor his age or for any proof of identification before making the sale. The Licensee contended that the minor had previously purchased alcohol from him and had previously shown Licensee identification showing the minor to be 21 years of age. However, the Licensee was not able to prove that the minor showed him convincing false identification on previous occasions.

Case: *M & J Tavern*, OLCC-94-V-014, December 1994.

Facts: Employees of Licensee sold alcoholic beverage to a minor and permitted another to remain on premises where alcohol was sold. The minor snuck past the "door checkers" at the Licensee's premise, using the cover of a large group of patrons whose IDs had been checked and hands were stamped to remain unobserved. While inside the minor danced in a crowd and avoided eye contact with the bartenders, aware that he clearly looked under 21. Licensee argued that it shouldn't be held to the standard of checking IDs of patrons inside when it had security measures of "door checkers" and hand stamps reasonably calculated to keep minors out.

Abstract: Those who serve an alcoholic drink will usually be held responsible for independently verifying the age of a patron of questionable age regardless of whether co-workers should have already verified a patron's age. The particular facts of a case may justify an exception to this rule where a bartender may reasonably infer that the preceding bartender had verified a patron's age. A bartender was excused from not checking a minor's ID where the premises were not crowded, there was an over-lapping shift, the preceding shift's bartender was still at the bar finishing his duties, the patron in question was seated at the bar and drank beer in plain view of the preceding bartender who had served her, and the preceding bartender had received Alcohol Server Education training and was skilled in age identification.

Key Words/Phrases: minor, age verification, reasonably calculated, sufficient opportunity to observe, busy, permitting, should have known, large crowds, sneaking in, witness credibility, false/fake identification, questionable age, preventative/remedial steps, mitigation, penalty

Case: *Trapper's Lodge*, OLCC-90-V-066, January 1991.

Abstract: Licensee did not violate ORS 471.130(1) by failing to request valid identification before selling or serving alcoholic liquor to person of questionable age where evidence showed no sale or service was made to the minor. The beer was ordered by, served to, and paid for by another customer.

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

Abstract: Even assuming that a licensee had requested and had been shown reliable identification at an earlier date, if he did not remember at the time of a later sale that the minor had shown him reliable I.D. in the past, he could not use the earlier check of I.D. as a defense to failing to check the minor's I.D. at the later sale.

Case: *Murphy's Tavern*, OLCC-86-V-062, April 1987.

Abstract: Licensees and permittees must verify the age of any person of questionable age who is in an area of the licensed premises prohibited to minors.

C.1.a.5. Minor Employee/Contractor in Prohibited Area (OAR 845-006-0335 (3)(b), (4), (5), (6)) [(OAR 845-06-035(3)(b), (4), (5), (6))]

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

Case: *Silver Dollar Pizza*, OLCC-13-V-020, OLCC-13-L-005, November 2014.

Facts: Licensee permitted minors to operate a food (hot dog) cart on the sidewalk in front of the licensed premises. Minors used the licensed premises regularly including the kitchen, restrooms, safe for deposits, getting change, and socializing after hours. When Licensee decided to cancel the arrangement the minors got upset, and reported the liquor law violations to the OLCC. Licensee also had his minor son as an employee in the kitchen. When he got notice of violation, he argued that he should be permitted to have minor employees in the kitchen area. OLCC investigators informed him he must have a modification approved by the Commission, and until approval he could not have minors on the premises at any time.

Abstract: A #1 Minor Posting means no minors are permitted anywhere on the premises. Licensee did not establish any exceptions or defenses to this restriction.

Key Words/Phrases: minor, minor posting, permitted, premises, contractors, core business

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

Facts: Licensee with #1 minor posting and history of prior violations. During a compliance check inspectors found eight employees working as security with no DPSST certification, and two were minors. Licensee also had a band playing which included two minors.

Abstract: Violation was proven, and Licensee had not requested an exemption from its minor posting requirement to permit the minor band members. Due to aggravating circumstances (multiple violations involving multiple employees), a license suspension of 74 days or civil penalty of \$8,580 in lieu of 52 days suspension (22 days mandatory suspension) was appropriate.

Key Words/Phrases: minor posting, minor entertainer, exemption from minor posting

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 sisters 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: Violation was proven, and Licensee had not requested an exemption from the minor posting requirement to permit the minor dancer.

Key Words/Phrases: minor posting, minor entertainer, exemption from minor posting, nude dancing, credibility determination

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

Abstract: For the purpose of nonalcoholic liquor employment, a minor may be in an area prohibited to minors only for the purpose of performing. Minor dancers are performing only when actually dancing, and not when soliciting private dances from customers in areas prohibited to minors. Accordingly, licensees permitted four minor dancers to

be in an area prohibited to minors when the minor dancers were not dancing or moving directly to and from dancing.

Under the principles governing statutory construction, the more specific provisions of OAR 845-006-0335(6) relating to the conduct of minor entertainers control the conduct of minor dancers over the more general provisions of OAR 845-006-0335(5) relating to minor contractors generally. Minor entertainers are allowed to be in areas prohibited to minors only to the extent allowed by OAR 845-006-0335(6); they may not also claim exception under OAR 845-006-0335(5). The exception in OAR 845-006-0335(5) is intended to apply to visits by contractors such as plumbers, who are on the premises for short periods and for reasons not related to Licensee's core business. Further, Licensees did not establish that the dancers involved in the case were independent contractors - an individualized determination - for purposes of OAR 845-006-0335(5).

Case: *City Slickers*, OLCC-99-V-097, September 2000.

Abstract: Where restaurant portion of premises was closed when minor employee served drinks in the lounge portion with Number II minor posting, minor was not performing alcohol server duties in conjunction with food service. The Commission concluded that Licensee violated ORS 471.482 because Licensee's minor employee was serving and selling alcohol beverages in an area prohibited to minors. The Commission held Licensee responsible, notwithstanding his specific instructions to the minor employee to work in the dining room only.

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

Abstract: The Commission found a violation where 3 minor entertainers were in areas prohibited to minors for over 20 minutes. When they were not performing, they did not move to an area reserved for minor entertainers. The Commission did not find a defense to the charge when an agent for the dancers testified that he had checked the minors' identification and each had presented convincing false identification. The Commission distinguished the situation where the agent for the dancers checks their identification from the typical situation where a licensee uses independent contractors or volunteers to check identification, whose primary or sole task is age identification.

Case: *Beer Nutz*, OLCC-92-V-003, May 1992.

Abstract: The fact that a minor entertainer's wait in an area prohibited to minors was supervised and lasted far longer than the few moments originally anticipated provided no defense where the licensee had already designated to the Commission a dressing room as the area where minor entertainers would be required to wait when not actually performing.

Minor entertainer's presence in an area of the premises prohibited to minors fell within the OAR 845-06-035(4) "legitimate business purpose" exception where the visit was relatively brief and focused upon arranging the entertainer's hours of employment.

Case: *Sparkles Tavern*, OLCC-88-V-107, September 1989.

Abstract: OAR 845-06-035(3)(a) and (b) do not constitute a basis for finding a violation separate from OAR 845-06-035(2)(b). Rather, this section of the rule contains an explanation of exceptions to the conduct prohibited in OAR 845-06-035(2)(b).

Case: *Log Cabin Inn*, OLCC-87-V-042, January 1988.

Abstract: Licensees violated OAR 845-06-035(2)(b) where a minor employee mixed and served alcoholic beverages in portions of the premises that were prohibited to minors.

Case: *Red's Side Track*, September 1981.

Abstract: Licensees did not violate rules concerning minor employees being in a prohibited area of the licensed premises where the minor had shown the licensee a false Oregon driver's license or DMV identification card that convincingly showed her to be over 21 years of age.

C.1.a.6. Unlawful Service/Sale By Minor (ORS 471.480(1), ORS 471.482(1); OAR 845-006-0335(4)) [(ORS 472.215), ORS 471.482(1), OAR 845-06-035(4)]

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

Case: *Quincy Store*, OLCC-02-V-008/L-001, February 2003, affirmed in *Ban v. OLCC*, 196 Or App 545, 102 P.3d 744 (2004).

Facts: Minor decoy took beer to the counter at Licensee's store. Licensee's nine-year-old daughter was at the register, told the decoy the price of the beer, pushed buttons on the register to ring up the sale, and gave the decoy change. Licensee was present when this occurred and told her daughter the price of the beer and helped recount the change given to the decoy.

Abstract: Where Applicant's nine-year-old daughter pushed the buttons on the cash register to ring up the sale, told the minor decoy the price of the beer, accepted payment, counted the change from the register and placed the change on the counter, the daughter made the sale of the alcohol, notwithstanding the fact that her mother told her the price of the beer, recounted the change, and bagged the beer. Because Licensee permitted her daughter to make the sale as her agent, Licensee violated ORS 471.480(1).

Key Words/Phrases: decoy, minor, age verification, sale by minor, sale to minor, interpreter at hearing, credibility, knowing, sale by others, definition of employee, license refusal, good cause exception

Case: *Montero's Authentic Mexican Restaurant*, OLCC-92-V-018, July 1992.

Abstract: Licensee committed violation for unlawful service of alcohol by a minor where the licensee's 17-year old waitress served alcoholic beverages. See also *Hart's Grille & Bar*, June 1983.

C.1.a.7. Minor Decoy Operation Standards (ORS 471.346, OAR 845-009-0200)

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

Case: *Stone Cliff Inn*, OLCC-11-V-041, April 2012.

Facts: Minor decoy was served at the licensed premises. Licensee's bartender asked for ID, misread it and thought the minor had just turned 21, stating "you just made it." Licensee argued that the Commission did not comply with its uniform standards for minor decoy operations.

Abstract: When a minor decoy nodded affirmatively in response to the statement "You just made it," the minor did not misrepresent his age because the meaning of the statement was not clear.

Key Words/Phrases: minor decoy, verify, questionable age, minor decoy operation standards

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

Facts: Licensee ran a convenience store at 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 while Licensee was away the tenant noticed the store wasn't open as it should be, and the 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.

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: *Cozy Corner Tavern and Long, Thomas*, OLCC-05-V-028/029, December 2005.

Facts: Minor decoy was served on the licensed premises. Licensee/permittee argued that the minor was asked if he was 21 and he responded affirmatively. Licensee produced a patron as a witness who testified to seeing the minor nod affirmatively when asked if he was 21. Decoy denied lying about his age.

Abstract: Given the OLCC's policy and the minor's training and instructions as an agency decoy, it is unlikely that, if asked, the minor would falsely represent that he was 21 in lieu of presenting his identification.

Both in person and in the photograph taken on the date of the violation, the minor had youthful, unlined facial features. He was clean shaven, with short cropped dark hair. Although the minor was relatively large in stature (6'2"), a person's height and/or weight are not a reliable indicator of whether the person is at least 21 years old. *See Quincy*

Store, OLCC-02-V-008/L-001, February 2003, *aff'd Ban v. OLCC*, 196 Or App 545 (2004). Given the minor's youthful facial features, the Commission found that, on the date of the violation, he appeared his true age of 20.

Licensee contended that because more than half of the 17 premises checked on the date of the violation at issue sold an alcoholic beverage to the minor, he reasonably appeared to be over 21 on that date. The fact that several clerks or servers failed to verify the minor's age during this compliance check does not necessarily mean that he looked age 26 or older on that day. These clerks or servers who sold to the minor may simply have been negligent in their duty to verify his age. Of the 31 licensed premises that the minor entered as an agency minor prior to his 21st birthday, two thirds asked to see his identification. The Commission was persuaded that the minor appeared his true age of 20 at the time in issue.

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

Abstract: From the plain language and legislative history of ORS 471.346, as well as the simultaneous amendments to ORS 471.430 and ORS 165.805, minor decoy operations are clearly permissible in this state.

The provisions of ORS 471.346(3) do not apply to decoy operations in cities of populations of less than 20,000. Because Agent is located in a city with a population of less than 20,000, the statutory subsection does not apply in this case.

The distinction in treatment drawn in ORS 471.346(3), between requiring 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.

C.1.b. Violations Relating to Visibly Intoxicated Persons

C.1.b.1. Sale to Visibly Intoxicated Person (ORS 471.410(1), ORS 471.315(1)(a)(G)) [(ORS 471.315(1)(a)(G); ORS 471.410(1); [ORS 472.180(1)(h)]]

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Case: *Plaid Pantry #206*, OLCC-13-V-108, May 2014.

Facts: Employee/cashier of Licensee sold alcohol to an intoxicated customer. Cashier testified that he did not notice the customer being intoxicated until after the sale. Evidence presented included testimony that customer and his companion had just left a bar parking lot after driving into a planter (and were refused service there).

Abstract: The prima facie elements of a violation of ORS 471.410(1) are as follows: (1) the sale, service or making available alcoholic liquor; (2) by an on-duty licensee, permittee or agent of licensee; (3) to a person who was showing visible signs of intoxication before the service; (4) the licensee, permittee or agent knew the person was visibly intoxicated; and (5) the person was actually intoxicated. "A 'knowing' sale to a visibly intoxicated person is met where, prior to the sale or service of alcohol the patron demonstrated signs of visible intoxication, the server had the opportunity to observe the signs, and the server either actually observed the signs (i.e., interaction with patron while displaying signs) or knew of the presence of a circumstance from which knowledge could be inferred. After surveying many prior Orders, the Commission held that the Commission staff did not persuasively shown that the cashier "knew" the customer was intoxicated. The cashier credibly testified that he did not observe any signs of intoxication prior to the sale. Nor is there evidence that the cashier "turned a blind eye" to signs, so as to infer knowledge of the customer's intoxication. Finally, the evidence failed to demonstrate that the Licensee maintained conditions at the store that made compliance of the law difficult or impossible. Without a showing that the cashier knowingly sold to an intoxicated customer, the charged violation is dismissed.

Key Words/Phrases: visibly intoxicated, witness credibility, knowing, signs of intoxication, "flag factors," infer knowledge of intoxication, compliance

Case: *Casa Diablo*, OLCC-13-V-008/008A, July 2013.

Facts: Undercover OLCC inspectors asserted that Licensee's employees served visibly intoxicated patrons. One of the inspectors reported to the bartender that an intoxicated patron threatened him while in the men's room, and that the patrons displayed obvious signs of intoxication. The bartender reported the incident to security, who talked to the patrons about whether there was a "problem." The security guard determined the patrons did not pose a risk and told the inspectors he would keep "an eye" on them. The inspectors contacted Portland police. The inspectors wrote reports detailing their perception of events and the patrons' display of intoxication. The security footage did not support the inspectors' versions.

Abstract: The Commission failed to show that Licensee's employee knowingly sold or gave alcohol to visibly intoxicated patrons. Video footage did not support the OLCC inspectors' testimony and reports of signs of intoxication, and their statements regarding activities in the men's room wouldn't have been seen by the bartenders. Additionally, the police officers who interviewed the alleged intoxicated patrons did so more than 20 minutes after being served their last round. The Commission also failed to establish that Licensee's security guard knew one of the patrons threatened the inspector, and the security footage did not support the inspector's version of the threats.

Key Words/Phrases: visibly intoxicated, intoxication, signs, evict, knowing, over-serve, disorderly activity

Case: *Lisa Vedack*, OLCC-12-V-049, March 2013.

Facts: Permittee was a bartender for 15 years and worked at Denny's. Patron was a regular customer for "happy hour" at Denny's, with a lough and boisterous personality. On the night in question Permittee served the patron approximately 11 drinks. Permittee admitted using questionable judgment in serving patron that many drinks, but believed the patron was staying in the hotel next door and not driving. The patron got in a fight in the parking lot with one of her companions and police were called. Police told the patron she could not drive and she walked away from the parking lot, only to return a short time later and got in her vehicle. The patron was arrested for DUII. The patron later contacted the OLCC to report that Permittee had over-served her.

Abstract: Although Permittee denied observing visible signs of intoxication prior to serving the final shots to the patron, she also admitted that her belief the patron was staying in a hotel (i.e. not driving) factored into her decision to continue serving her. Given the totality of the circumstances, the evidence establishes that the Permittee more likely than not observed signs of intoxication.

Key Words/Phrases: signs of intoxication, visible signs, observe, permittee belief, regular patron

Case: *Julie Wong*, OLCC-10-V-062, July 2011.

Facts: See *Favorite Mistake*, OLCC-10-V-061, December 2011.

Abstract: No violation found.

Case: *GPS Market*, OLCC-10-V-042/042A, February 2011.

Facts: Licensee's clerk sold alcohol to visibly intoxicated customer because she was scared of him and wanted him to leave. The employee later denied she had seen signs of intoxication. Licensee asserted the defense (among others) of "choice of evils."

Abstract: There was no evidence that employee faced a threat of imminent injury, and therefore choice of evils defense found in ORS 161.200 does not apply.

Key Words/Phrases: visibly intoxicated, signs, witness credibility, threat of imminent in jury, choice of evils defense.

Case: *Dirty Bar & Grill*, OLCC-09-V-101, April 2010.

Facts: Licensee's employee/bartender served a patron who exhibited signs of being on meth. The patron was observed groping other female patrons in the bar. Undercover OLCC investigator and police officer witnessed the patron's conduct and employee's service, and arrested/cited both.

Abstract: A patron who exhibits signs of being under the influence of a stimulant or other drug are visibly intoxicated and should not be served.

Key Words/Phrases: intoxicated, signs of intoxication, under the influence, stimulant, meth, prior warning

Case: *Stockman's Bar*, OLCC-09-V-034, March 2010.

Facts: An intoxicated patron was cut off and asked to leave. Later another patron ordered drinks and attempted to pay with the cut-off patron's card. Bartender (one of Licensee's owners) said it was ok for the cut-off patron to pay for

others' drinks but he could not have any. While bartender wasn't looking the ordering patron handed a beer to the cut-off patron. OLCC inspectors were undercover and present but gave conflicting accounts of the events. Shortly thereafter a fight broke out between the cut-off patron and another patron.

Abstract: Licensee did not sell or serve a visibly intoxicated patron, and did not knowingly allow a visibly intoxicated patron to consume alcohol. Licensees do not violate these prohibitions when they reasonably believe a patron is purchasing alcohol for another customer.

Key Words/Phrases: visibly intoxicated, credibility determination, witness credibility

Case: *Pamela Shaw*, OLCC-09-V-086, March 2010.

Facts: Undercover OLCC investigators watched Permittee at the Triple Nickel Pub served a visibly intoxicated patron. Permittee disputed that she served the patron alcohol, testifying that she noticed the patron acting "wired" so served him juice. Investigators tested the drink and determined it was alcoholic.

Abstract: After a credibility determination, the Commission determined that the Permittee's testimony that she served juice was not credible. Violation established.

Key Words/Phrases: visibly intoxicated, knowingly allow, credibility determination, witness credibility

Case: *OLCC Agency No. 1158*, OLCC-09-RO-002, December 2009.

Facts: A chronic alcoholic and regular customer purchased alcohol from Agent's store. Police were notified that the customer was at the liquor store and contacted the store, where they were told it was "kinda hard to say" if customer was intoxicated. Police followed customer to her house, with lights on, and she did not stop until reaching her driveway. When police contacted the customer she exhibited many signs of intoxication.

Abstract: As the Commission determined in *OLCC Agency No. 17* (OLCC Final Order, 04-RO-002, July 2004), liquor agents and their employees are liable for either knowing or negligent sales of alcohol to visibly intoxicated persons. To establish a negligent sale of alcohol to a visibly intoxicated person, the preponderance of the evidence must show there were visible signs of intoxication which the seller had some opportunity to observe. Actual observation is not required. There must be visible signs of intoxication before a duty to prevent such a sale attaches. *OLCC Agency No. 60* (OLCC Final Order, 04-RO-005, December 2004).

A person is visibly intoxicated when his or her physical and mental control is diminished by alcohol or drug to a point where diminished control can be seen. Evidence that only 16 minutes after purchasing alcohol a customer was arrested for DUII and appeared disheveled, had overwhelming odor of alcohol on her breath and person, slurred speech and glassy eyes, suggests that the store clerk should have perceived her as intoxicated.

The defense of laches is not established when agent cannot show any disadvantageous change in position or any loss of evidence caused by the delay, such as the parties to the transaction or arresting officer not being available for hearing and subject to cross-examination.

Key Words/Phrases: Retail Sales Agent Agreement, intoxicated patron, negligent sale, laches, signs of intoxication

Case: *Duffy's Irish Pub*, OLCC-05-V-032, February 2006.

Facts: OLCC inspectors visited licensed premises undercover, and noticed an intoxicated patron being served by two employees over the course of hours. One of the employees went off shift and made a drink, later was served another,

and then assisted the on-duty bartender in taking a couple orders and mixing a drink. Neither Licensee was at the premises when it occurred and both employees were fired.

Abstract: When alleged over service involves a regular patron of the licensed premises, it is reasonable to conclude that employees were familiar with the patron's drinking patterns and alcohol tolerance.

The "open and notorious" factor is a flag factor of rare applicability and was not pertinent to these facts. An example of a factual circumstance appropriate for the use of this flag factor is found in *The Shack Restaurant and Sports Bar*, OLCC-00-V-049, Feb. 2001.

Even if the employee considered herself to be helping out, and did not clock back in or charge Licensees for services, she nevertheless put herself back on duty by changing out a keg and helping with orders and drinks, while she consumed an alcoholic beverage.

Key Words/Phrases: VIP, visibly intoxicated, drinking on duty, flag factors, termination of employees

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: The words "make available" were interpreted in *Justin Scriber*, (OLCC, Final Order, OLCC-04-V-050, August 2005) to relate to the time of the sale or initial possession of the drink by the VIP. This construction was considered to be consistent with the statute's purpose: to keep drinks from getting into the hands of visibly intoxicated persons. However, in *Scriber*, the Commission also found that the "knowingly" standard requires "a state of mind in which the server is aware or conscious of who will be consuming the purchased drink." In *Scriber*, the drink in question was purchased by a person who was not visibly intoxicated and handed to a person who was visibly intoxicated. The server was found not to have violated ORS 471.410(1) because he credibly testified that he did not know at the time of sale that the drink would be given to the visibly intoxicated person. Here, the situation is the reverse. Licensee handed the drink to a visibly intoxicated person, who subsequently handed the drink to another person. Licensee made the drink available to a visibly intoxicated person, but he reasonably believed that the drink was not for the intoxicated patron's consumption. Consequently, OLCC has not established a "knowing" violation of ORS 471.410(1).

Key Words/Phrases: VIP, visibility intoxicated, credibility determination, knowingly allow

Case: *Kay's Café & Lounge*, OLCC-05-V-006/006A/006B, October 2005.

Facts: OLCC regional manager visited the licensed premises undercover due to complaints of over service. She witnessed two servers serve and/or interact with a patron showing signs of intoxication. The servers stated that they saw some signs but the patron lived a block away, and was a friend of the Licensee so they didn't want to embarrass anyone by cutting him off.

Abstract: Commission failed to establish the server knowingly served an intoxicated patron. The evidence failed to demonstrate that the patron was displaying signs of visible intoxication within the server's view for a sufficient period of time before she served him. Even though the server acknowledged that at some point she became aware the patron was intoxicated, that does not establish that she knew he was intoxicated when she served him the drink. It did, however, show that the server allowed the patron to continue consuming alcohol after seeing signs of intoxication. The Commission has found that signs of visible intoxication include, but are not limited to: slurring, heavy odor of alcohol, difficulty in handling money or lighting cigarettes, staggering, swaying, stumbling or falling, bloodshot,

watery or glassy eyes, disruptive or loud behaviors, clumsiness, such as spilling drinks or bumping into things, argumentative behavior and extreme mood swings. *Jody's Restaurant & Lounge* (OLCC, Final Order, OLCC-97-V-015, August 1977). A visibly intoxicated person is one whose physical and mental control is diminished by alcohol or drugs to a point where such diminished control can be seen or observed. *Portland Civic Stadium* (OLCC, Final Order, OLCC-85-V-032, January 1986).

Key Words/Phrases: credibility determination, knowingly served, allowing a visibly intoxicated person to consume, intoxicated patron, flag factors

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: Permittee did not knowingly make alcohol available to an alleged VIP when another patron placed the order, paid for the drink, took the drink from Permittee, Permittee did not see the other patron hand the drink to the alleged VIP, and Permittee did not know that the drink was intended for him.

It is not a violation of ORS 471.410(1) when a permittee sells a drink to another patron, who gives it to the intoxicated patron when at the time of sale the permittee does not know it was intended for the VIP. "Available" means either "present and ready for use; at hand, accessible" or "capable of being gotten; obtainable." *The American Heritage College Dictionary* (Third Edition), Houghton Mifflin Company. From a temporal standpoint, the term is ambiguous because it can be construed either in the present tense as meaning "at hand" (i.e. "make available" means at the time of sale or initial possession of the drink by the VIP) or in the future tense as meaning "obtainable" (i.e. "make available" means whenever the VIP is known to have possession of a drink). Since the other active verbs in the statute, "sell" and "give" are both present tense, the Commission concludes that the use of the present tense is a significant indicator of the legislative intent and that "make available" should be construed to mean at the time of sale or initial possession of the drink by the VIP. See *Martin v. City of Albany*, 320 Or 175 (1994); *Managed Hlth. Northwest v. Dept. of Commerce*, 189 Or App 444 (2003).

In a case like this one, where the fact of visible intoxication is disputed by a Permittee who is observant, the persuasiveness of the inspectors' testimonies as to their observations was crucial. The legal conclusion to be drawn is not that the patron was "intoxicated," but that he was intoxicated to a degree where "physical and mental control" was diminished to a point where such diminished control can be seen or observed by the Permittee. Evidence of the classic signs of intoxication does not automatically equate to a finding or conclusion of "diminished control." Such a finding depends on what and how many signs were observed over what period of time, how obvious those signs were, and what other circumstances were shown by the evidence. Those circumstances would include any activities, interactions, and altercations by the alleged VIP and would tend to demonstrate (or not) diminished physical and mental control.

Key Words/Phrases: credibility determination, visibly intoxicated, VIP, purchase by another, disputed testimony

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: After credibility determination, the Commission finds that the inspectors' testimony of what they observed in the patron (spilling his drink, swaying, leaning and slouching) was not credible because it was contradicted by the

security video footage. There were inconsistencies in the inspectors' reports, and inspectors acknowledged that reports are written days after the incidents, notes are not taken while undercover, and few notes taken during interviews. Charges were dismissed.

Where the server knew the alleged VIP, had cut him off on previous occasions when she believed he was intoxicated, and where she did not identify signs of intoxication on the night in question, her testimony was credible as to whether she served a VIP. Patron had been coming to the premises about every two weeks for a year and the server had previously cut off patron when he had severely slurred speech, trouble standing at the bar, and could not recall that he had already ordered a beer.

The duration of time during which signs of intoxication were displayed is not a "flag factor" but is relevant to the server's opportunity to observe the signs, and is distinct from the "knowing" element of selling, giving, or making alcohol available to a VIP.

Key Words/Phrases: credibility determination, report delay

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: Signs of intoxication can be reasonably attributed to other causes. While Permittee/Licensee could attribute some aspects of a regular customer's behavior to his typical obnoxious, "over the top" persona, the staggering, swaying and slurred words were not accounted for and constitute signs of intoxication.

Interaction with the VIP while he is showing signs of visible intoxication is a knowing "flag factor." *Cheers to You; Kozy Korner Restaurant & Lounge*, OLCC-01-V-002, November 2001.

The Commission finds that observing a patron for 15-20 minutes and interacting with the patron while the patron is showing signs of visible intoxication constitutes a knowing "flag factor" and shows that the sale by the Permittee was a "knowing" sale. During this time, the Permittee was on his cell phone several feet away while he displayed signs of visible intoxication. However, Permittee also interacted with the VIP regarding an ice-cube throwing incident and thus had the opportunity to observe him.

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: *Synthia Smith [& Teresa Oakes]*, OLCC-03-V-012, October 2003.

Abstract: Where Permittee admitted to inspector on night of incident that the alleged VIP did not appear to be sober, a "knowing" flag factor was found to exist. The Commission found Permittee knowingly served alcohol to a visibly intoxicated person, in violation of ORS 471.410(1).

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 (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: *Kozy Korner*, OLCC-01-V-003, November 2001.

Abstract: Where VIP was showing many visible signs of intoxication at time of sale of final drink, Permittee knew, by virtue of her interaction with that patron ("knowing" flag factor), that the patron was visibly intoxicated at the time of sale, despite her assertion that she did not suspect the patron was intoxicated until after the sale.

Case: *Smart Buy Market*, OLCC-00-V-111, November 2001.

Abstract: Where police officer observed street drinker go inside a package store, observed that individual displaying signs of visible intoxication while interacting with the clerk to purchase the alcohol, and contacted the individual outside the store to confirm the signs were due to alcohol intoxication, the sale to the VIP was made knowingly. The clerk had the opportunity to observe the signs of visible intoxication displayed by the patron while interacting with him. Where signs of visible intoxication are displayed while a clerk or server is interacting with a patron and having the opportunity to closely observe the patron, a "knowing" flag factor exists and a knowing sale is demonstrated. See also *Cheers To You*, OLCC-00-V-070, October 2001.

Case: *TJ's Fireside Dining*, OLCC-00-V-74 & 01-V-006, October 2001. [Distinguished by *Stockman's Bar*, OLCC-09-V-034, March 2010.]

Abstract: The Commission announced its intention, in the future, to construe conditions under the control of the licensee, which interfere with compliance or the monitoring of compliance with Commission regulations or statutes (such as, for example, low lighting, under staffing, avoiding looking at patrons near closing time), as knowing "flag factors" under its analysis for violations of ORS 471.410(1), and, for purposes of ORS 471.412, as a presumption of observation. A licensee cannot escape the duty to comply with the liquor laws by turning a blind eye and not monitoring compliance, or by maintaining conditions which make effective monitoring of compliance difficult or impossible. When either is done, a licensee assumes the risk that violations will occur and may not claim those same conditions excuse liability for the foreseeable violations that do occur. Where there is conflict with convenient business practices and compliance, compliance has priority. See *Handy Pantry*, OLCC-86-V-005, April 1986; *The Silver Fox*, OLCC-89-V-050, September 1989.

OLCC has authority to penalize for selling alcoholic beverages to only one visibly intoxicated person, even though ORS 471.315(1)(a)(G) authorizes a penalty for selling alcohol to visibly intoxicated persons. ORS 174.110 provides that, as used in Oregon statutes, the singular may include the plural and the plural number, the singular.

In *Cheers To You*, OLCC-00-V-070, October 2001, the Commission clarified the analysis used in cases involving alleged violations of ORS 471.410(1). That same analysis does not strictly apply to alleged violations of ORS 471.412, as knowingly selling or serving alcoholic beverages to a VIP (for ORS 471.410(1)) does not necessarily require direct observation of the VIP, whereas knowingly allowing a person to consume after observing that the person is visibly intoxicated does (unless the failure to observe is due to conditions under the control of the permittee

or licensee, as announced in the same Final Order).

Case: *Cheers To You*, OLCC-00-V-070, October 2001.

Abstract: After surveying final orders involving over service of alcohol to visibly intoxicated persons issued since the higher “knowing” standard was first applied in *Aloha Station*, OLCC-99-V-034, August 1999, the Commission clarified the burden for proving a “knowing” sale to a visibly intoxicated person. The burden is met where, prior to the sale or service of alcohol, the patron demonstrated signs of visible intoxication, the server had the opportunity to observe the signs, and the server either actually observed the signs or knew of circumstances from which knowledge of visible intoxication could be properly inferred (knowing “flag factors”). The Commission noted it would consider such components as proximity, time, and obstruction of view when determining opportunity to observe. The Commission identified a non-inclusive list of flag factors from its post-*Aloha Station* orders: interaction with the patron while the patron is displaying signs of visible intoxication; knowledge of the patron from prior occasions, including drinking patterns and alcohol tolerance; the number of drinks served during an identifiable time frame; notification at the time of service that the patron is cut-off or has reached his or her maximum; contemporaneous statements by the server about the patron’s condition; admissions or stipulations by the server or patron that the patron was visibly intoxicated or should not have been served; or one or more signs of intoxication so open and notorious that it or they could not be reasonably missed.

Case: *Kelleen Maniscalco*, OLCC-99-V-105, June 2000.

Abstract: Permittee sold an alcoholic beverage to a visibly intoxicated person. She later removed the drink. Citing *Brother’s Market & Deli*, the Commission determined that the attempt to cut off the patron from consuming additional alcoholic beverages did not undo the violation of selling and serving the alcoholic beverage to the patron. The attempt could, however, be considered in mitigation of the penalty.

Case: *Steven Fedder*, OLCC-99-V-111, June 2000.

Abstract: Where Permittee twice refused to sell visibly intoxicated patron additional alcohol, but had unobstructed view of patron when patron subsequently consumed beer from the pitcher of another patron over 20 minutes, Permittee knowingly allowed the visibly intoxicated patron to consume alcohol, in violation of ORS 471.412.

Case: *The Stagecoach Saloon*, OLCC-99-V-084/-085, April 2000.

Abstract: Where Permittee sold an alcoholic drink to a visibly intoxicated patron and subsequently attempted to cut off the patron and remove the drink, the Commission concluded that the actions to cut off the patron did not undo the violation of serving alcohol to the visibly intoxicated patron. [Note: A good faith effort to remove the drink is a defense to the charge of allowing a visibly intoxicated person to consume alcoholic liquor in violation of ORS 471.412(1)]. The Commission considered Permittee’s efforts to cut off the patron to mitigate the penalty to a letter of Reprimand.

Case: *Aloha Station*, OLCC-99-V-034, August 1999.

Abstract: The Commission has determined that a “knowing” sale of alcoholic beverages to a minor or a visibly intoxicated person under ORS 471.315(1)(a)(G) is not synonymous with “should have known.” State of mind is a question for the trier of fact to be determined in view of all the circumstances as shown by the evidence. *Plaid Pantry No. 55*, OLCC-98-V-063, October 1998. ORS 471.412(1) provides that the violation of allowing a visibly intoxicated person to consume alcoholic beverages must also be done “knowingly.”

Case: *McPier’s Grocery*, OLCC-97-V-035, December 1997.

Abstract: The Commissioners found the Licensee's employee did not commit a violation where two police officers testified that the patron exhibited visible signs of intoxication prior to entering the store and exiting the store with beer, but the clerk denied the patron exhibited signs of intoxication and denied that a sale occurred. The Commissioners declined to infer that the patron exhibited signs of intoxication inside the store and declined to infer that a sale occurred.

Case: *Kelsey's Korner Market*, OLCC-97-V-009, October 1997.

Abstract: Where the Licensee denied that the customer exhibited signs of visible intoxication inside the store, but the record showed that two police officers observed the customer exhibit obvious signs of intoxication on the street before entering the store, and obvious signs of intoxication after exiting the store, the Commission concluded that it could infer that the customer exhibited signs of visible intoxication while he was inside the store from the fact that the customer exhibited signs of visible intoxication both before he entered the store and again when he came out of the store. The Commission also stated that it views persons who sell alcoholic liquor as having an affirmative duty to observe anyone who purchases alcoholic liquor from them to ensure that the purchaser is not visibly intoxicated or a minor. The Commission concluded that Licensees violated ORS 471.410(1) by selling alcoholic liquor to a visibly intoxicated person.

Where the Licensee denied that the customer exhibited signs of visible intoxication inside the store, but the record showed that two police officers observed the customer exhibit obvious signs of intoxication on the street before entering the store, and obvious signs of intoxication after exiting the store, the Commission concluded that the customer exhibited signs of visible intoxication while purchasing the beer inside the store and that, therefore, Licensees violated ORS 471.410(1) by selling alcoholic liquor to a visibly intoxicated person.

Case: *Jody's Restaurant & Lounge*, OLCC-97-V-015, August 1997.

Abstract: The symptoms of intoxication that the Commission recognize include, but are not limited to, the following:

- Slurred Speech
- Staggering, swaying, stumbling, falling
- Bloodshot, water, glassy eyes
- Loud, noisy speech
- Clumsy, spilling drinks, bumping into things
- Extreme mood swings, crying
- Argumentative behavior

The Commission concluded that Licensee committed a violation of selling alcoholic liquor to a visibly intoxicated person where the evidence showed that the customer exhibited signs of diminished physical control which included leaning against a cigarette machine and swaying back and forth, gesturing and talking to himself as people walked by, and where his eyes were half closed and droopy. ORS 471.410(1).

Case: *Scotts*, OLCC-96-V-059, April 1997.

Abstract: ORS 471.410(1). Violation of sale to a visibly intoxicated person was proved under following circumstances. Visibly intoxicated person exhibited signs of intoxication at the premises; licensee said he knew the customer and the customer always acts that way-- it is his normal behavior; the Regulatory staff contacted the customer later at his place of employment and established that his behavior was different (lacking in signs of intoxication) than it was at the time of the incident.

Case: *Headless Horseman*, OLCC-94-V-001, October 1995.

Abstract: The Commission overturned precedent and established a new standard which will be applied to all future cases involving visibly intoxicated persons. Under this new standard, the Commission will find a violation of sale or service to a visibly intoxicated person where the evidence establishes that the patron exhibited visible signs of intoxication. The Commission will no longer require proof that the patron consumed alcohol prior to exhibiting the signs of intoxication. The Commission concludes that it is not necessary for the server to have observed that the patron ingested alcohol in order to prove a violation. The burden will shift to the licensee to show that the signs of visible intoxication were not caused by alcohol consumption. If the patron displays symptoms of visible intoxication and the licensee fails to establish that the patron's behavior was attributable to a cause other than alcohol or drugs, the Commission will find a violation.

Case: *Manila Express*, OLCC-91-V-055, March 1992.

Abstract: The Commission has concluded that the alleged VIP must, in fact, be intoxicated before a violation can be proved. Where the customer's behavior (loud, slurred speech, swaying from side to side, unsteady on his feet, watery eyes, and some consumption of alcoholic liquor) which led the Inspector to conclude that the customer was intoxicated was really the result of the customer's attempt to clown and to be humorous, the Commission held there was no violation because the evidence failed to establish that the customer was visibly intoxicated when he was served alcoholic liquor by the permittee.

Case: *La Mesa*, OLCC-92-V-038, December 1992.

Abstract: Licensee committed a violation of knowingly allowing a visibly intoxicated person to consume where the customer exhibited signs of intoxication and licensee's bartender had opportunity to observe the behavior while the customer was seated at the bar for 15 to 20 minutes, and the bartender talked to the customer two times during this period of time.

Case: *Candy and Jeans*, OLCC-91-V-192, June 1992.

Abstract: Employee had reasonable grounds to believe customer was visibly intoxicated where customer was seated near bar where employee was working, she went to his table to take his first drink order, and she looked over at him when his friend ordered another drink for him.

Case: *Old Town Club*, OLCC-90-V-168, November 1991.

Abstract: Permittee's contention that she did not see the customer's signs of visible intoxication because he had been in the premises for only a short time and she was too busy was not a defense where the evidence showed the customer had been served two beers by the permittee earlier in the evening, left, and returned for another drink. Permittee had an opportunity to observe the customer when she took his drink order.

Case: *Chuck Wagon*, OLCC-90-V-101, March 1991.

Abstract: Where the server had reasonable grounds to believe that the customer's unusual walk and speech were due to physical and mental handicaps rather than alcohol consumption, the charge was dismissed.

Case: *The Silver Fox*, OLCC-89-V-039, September 1989.

Abstract: It is not a defense to the violation of serving a visibly intoxicated person that the permittee was preoccupied with serving other patrons.

Case: *Mark's Tavern*, OLCC-89-V-030, July 1989.

Abstract: Where the licensee contended that the signs of visible intoxication were due to emotional upset rather than intoxication, the Commission concluded that the person's loss of balance, slurred speech, and odor of alcoholic beverages, were more likely caused by intoxication rather than emotional upset.

Case: *The Frontier Room*, OLCC-88-V-074, January 1989.

Abstract: Permittee had reasonable grounds to know customer was visibly intoxicated because customer exhibited numerous signs of visible intoxication for over one hour prior to the sale that were in clear view of the permittee.

Case: *Sundown Station Restaurant & Lounge*, OLCC-88-V-102, February 1989.

Abstract: Charge for sale to a visibly intoxicated person was dismissed where evidence proved licensee had reasonable grounds to conclude patron's odd appearance and behavior was due to mental illness rather than intoxication, and evidence did not prove, in any case, that licensee had a reasonable opportunity to observe patron's diminished control.

Case: *Thomas Dearth*, OLCC-88-V-055, September 1988.

Abstract: It was not a defense to a charge for sale to a visibly intoxicated person that it was the permittee's first night on the job and he was relying on the other bartender to warn him of potential violations.

Case: *Robert Rabbie*, OLCC-88-V-024, August 1988.

Abstract: Permittee knowingly made alcohol available to a visibly intoxicated person where, after the permittee had reasonable grounds to believe that patrons were providing alcohol to a visibly intoxicated person, the permittee failed to take reasonable steps to prevent the patrons from providing further alcohol to the visibly intoxicated person.

Case: *Flight 99 Tavern*, OLCC-87-V-033, February 1988.

Abstract: A seller had reasonable grounds to know that a patron was visibly intoxicated where the seller had adequate opportunity to observe the patron's signs of diminished control showing intoxication, even where the seller did not actually see such diminished control.

Case: *Staffords on Broadway*, OLCC-87-V-039, January 1988.

Abstract: The permittee committed a violation of serving to a VIP where there were reasonable grounds for the permittee to believe that the customer was a visibly intoxicated person, the customer was in the permittee's plain view, and the permittee had the opportunity to observe the customer.

The Commission concluded that a customer who exhibited the following signs was a visibly intoxicated person: having difficulty walking, standing, and maintaining his balance; not playing pool with the level of skill normal for him; being argumentative; speaking alternately louder or softer than the circumstances warranted; and, after the incident, having a poor memory about what occurred on the night of the incident.

Case: *214 Tavern*, OLCC-87-V-031, November 1987.

Abstract: To show a violation, it must be proved that the server had actual knowledge that he was making alcoholic

liquor available to a visibly intoxicated person, or that there were reasonable grounds for the seller to know that the person was visibly intoxicated.

A permittee violated ORS 471.410(1) for knowingly making alcoholic liquor available to a visibly intoxicated person, where it was reasonable to infer that the permittee would have seen the patron's intoxicated behavior prior to service, because the patron was in plain view of the permittee.

Case: *The Meet Market*, OLCC-87-V-007, June 1987.

Abstract: The Commission dismissed the charge of selling to a visibly intoxicated person against a permittee who knew, that under normal circumstances, the customer's eyes are watery and glazed, and his speech is slow and deliberate. The Commission concluded that although the customer exhibited some traits that made him appear to be visibly intoxicated to someone who did not know him, the permittee did know him, and a reasonable person knowing what the permittee knew about the customer's appearance would not have reasonable grounds to believe that the customer was visibly intoxicated. The Commission concluded that the customer was not a visibly intoxicated person at the time of the sale.

Case: *Brenda Lee Lovell*, OLCC-87-V-006, June 1987.

Abstract: The Commission dismissed the charge of selling to a visibly intoxicated person against a permittee who knew, that under normal circumstances, the customer's eyes are watery and glazed, and his speech is slow and deliberate. The Commission concluded that although the customer exhibited some traits that made him appear to be visibly intoxicated to someone who did not know him, the permittee did know him, and a reasonable person knowing what the permittee knew about the customer's appearance would not have reasonable grounds to believe that the customer was visibly intoxicated. The Commission concluded that the customer was not a visibly intoxicated person at the time of the sale.

Case: *Three Brothers Market*, OLCC-86-V-016, December 1986.

Abstract: Charge for sale to a visibly intoxicated person was dismissed despite the fact that the subject had unclear speech, an odor of alcoholic beverages, and leaned against the counter for support, because the licensee reasonably believed that these signs were attributable to other causes or were normal actions of the alleged VIP. See also *Frenchie's Tavern*, OLCC-88-ES-001, June 1988; *Recreation Cafe & Hideaway Lounge*, OLCC-88-V-095, April 1989.

Case: *Charlie's Tavern*, OLCC-86-V-001, June 1986.

Abstract: Server had a reasonable opportunity to observe the signs of visible intoxication where the alleged visibly intoxicated person was in the bartender's plain view while exhibiting intoxicated behavior.

Case: *Mark Edward Hess*, OLCC-85-V-057, February 1986.

Abstract: There must be proof of visible intoxication prior to sale, not after, to find violation.

Case: *Portland Civic Stadium*, OLCC-85-V-032, January 1986.

Abstract: A person is visibly intoxicated whose physical and mental control is diminished by alcohol or a drug to a point where such diminished control can be seen or observed. Examples of diminished physical and mental control are slurred speech, swaying and staggered walking, talking loudly, spilling beer.

Where permittee was out of earshot and did not observe any unusual behavior of alleged visibly intoxicated person, permittee did not have knowledge or reasonable grounds to believe that purchaser was visibly intoxicated.

Case: *Clide's Frolic Inn*, OLCC-84-V-041, March 1985.

Abstract: A sale of alcoholic beverage was completed when the beverage was delivered to the purchaser, although the purchaser paid for the beverage at an earlier time.

Evidence of visible intoxication was strong where customer's face was flushed, his head drooped, he drooled, and he spilled beer out of the corners of his mouth.

Case: *7-Eleven Store, No. 20806*, OLCC-84-V-022, November 1984.

Abstract: Odor of alcohol alone insufficient to prove visible intoxication, but should alert licensee to evaluate condition of buyer more carefully.

Regardless of whether licensee charged with violation of ORS 471.410 or 471.315(1)(g), the sale must be knowing.

Case: *The Outrigger*, June 1984.

Abstract: Charges for sale to visibly intoxicated person were dismissed, despite the subject's high blood alcohol reading shortly after leaving the licensed premises, because there was no reliable eyewitness testimony that the subject was visibly intoxicated in the licensed premises and the subject was likely under the influence of stimulant drugs capable of wholly masking visible intoxication.

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

Abstract: Words "visibly intoxicated" are not too vague to inform licensees of what is meant, and do not require experts to define or interpret them.

**C.1.b.2. Allowing Visibly Intoxicated Person to Consume (ORS 471.412);
ORS 471.315(1)(a)(G) [(ORS 471.412, ORS 471.315(1)(a)(G), [ORS
472.180(1)(h)]]]**

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

Case: *Favorite Mistake*, OLCC-10-V-061, December 2011.

Facts: Licensee owned three adjoining licensed premises, each with their own staff and license. The manager of one (the bowling alley) was having a drink at the other premises (bar), off duty, when a disturbance between patrons started. The manager instructed one patron to leave and later told OLCC investigators that he had authority to do so. The other patron was intoxicated.

Abstract: OLCC staff did not establish that the bartender should have known the patron was intoxicated because he vomited. Although vomiting is not on OLCC's *50 Signs of Visible Intoxication*, common sense suggests that a person may vomit if he has drunk too much. But a person could vomit for other reasons. Moreover, it is not enough that OLCC inspectors were able to point to parts of the video as showing signs of intoxication that [the bartender] could or should have seen. The standard is not whether one or more signs of intoxication were present and that the permittee "should have known" the customer was visibly intoxicated. The issue is the permittee's state of mind; that is, whether the permittee "knowingly" allowed the customer to consume alcoholic liquor after actually seeing signs of intoxication. *Justin Scriber* (OLCC, Final Order, 04-V-050, August 2005).

Key Words/Phrases: signs of intoxication, vomit, knowingly, permittee's state of mind

Case: *Stockman's Bar*, OLCC-09-V-034, March 2010.

Facts: Intoxicated patron was cut off and asked to leave. Later another patron ordered drinks and attempted to pay with the cut-off patron's card. The bartender (one of Licensee's owners) said it was ok for the cut-off patron to pay for others' drinks but he could not have any. While the bartender wasn't looking the ordering patron handed a beer to the cut-off patron. OLCC inspectors were undercover and present but gave conflicting accounts of the events. Shortly thereafter a fight broke out between the cut-off patron and another patron.

Abstract: The rule announced in *TJ's Fireside Dining*, OLCC, Final Order 00-V-074 and 01-V-006, October 2001, as applied to an alleged violation of ORS 471.412, is not applicable in this case. *TJ's Fireside Dining* did not extend the use of flag factors to the statutory element that the licensee acted "knowingly" for purposes of ORS 471.412. Nor would the use of such factors be appropriate. Where, as in this case, the evidence established that a licensee did not know that a visibly intoxicated person was consuming alcohol, there is no violation of ORS 471.412(1)

Key Words/Phrases: visibly intoxicated, credibility determination, witness credibility, knowingly allow

Case: *Kay's Caf  & Lounge*, OLCC-05-V-006/006A/006B, October 2005.

Facts: OLCC regional manager visited the licensed premises undercover due to complaints of over service. She witnessed two servers serve and/or interact with a patron showing signs of intoxication. The servers stated that they saw some signs but the patron lived a block away, and was a friend of the Licensee so they didn't want to embarrass anyone by cutting him off.

Abstract: The Commission failed to establish that the server knowingly served an intoxicated patron. The evidence failed to demonstrate that the patron was displaying signs of visible intoxication within the server's view for a sufficient period of time before she served him. Even though the server acknowledged that at some point she became aware the patron was intoxicated, that does not establish that she knew he was intoxicated when she served him the

drink. It did, however, show that the server allowed the patron to continue consuming alcohol after seeing signs of intoxication.

The Commission has found that signs of visible intoxication include, but are not limited to: slurring, heavy odor of alcohol, difficulty in handling money or lighting cigarettes, staggering, swaying, stumbling or falling, bloodshot, watery or glassy eyes, disruptive or loud behaviors, clumsiness, such as spilling drinks or bumping into things, argumentative behavior and extreme mood swings. *Jody's Restaurant & Lounge* (OLCC, Final Order, OLCC-97-V-015, August 1977). A visibly intoxicated person is one whose physical and mental control is diminished by alcohol or drugs to a point where such diminished control can be seen or observed. *Portland Civic Stadium* (OLCC, Final Order, OLCC-85-V-032, January 1986).

Key Words/Phrases: credibility determination, knowingly served, allowing a visibly intoxicated person to consume, intoxicated patron, flag factors

Case: *Cabana Club Café & Grill*, OLCC-04-V-066/066A, October 2005.

Facts: Undercover inspectors witnessed a visibly intoxicated patron being served by Licensee. When Licensee spoke to an OLCC inspector during the VIP interview, Licensee acknowledged that the patron appeared intoxicated. Further, Licensee's rating of the patron's intoxication as a "5" on a scale of 1 to 10 and his assertion that the patron had been "cut-off" suggest that he observed signs of intoxication on the patron while the patron drank his beer. Licensee also acknowledged that the club was understaffed that night, so the crowd could not be adequately monitored. Licensee later denied seeing signs of intoxication prior to serving the patron.

Abstract: For the charge of allowing a VIP to consume, The Commission has held that a violation of this section requires direct observation of the visibly intoxicated person, unless the failure to observe is due to conditions under the licensee's or permittee's control. The Commission will presume that the licensee or permittee observed the visibly intoxicated person where certain conditions are found to exist, such as low lighting, too few staff to monitor patrons while performing duties, and the deliberate avoidance of looking at patrons near closing time.

Under these circumstances, i.e., Licensee's direct interactions with the patron, his unobstructed view of the patron while the patron was consuming an alcoholic beverage and exhibiting visible signs of intoxication, and his later admission that the patron was visibly intoxicated, the record establishes that Licensee knowingly allowed a visibly intoxicated person to consume an alcoholic beverage in violation of ORS 471.412.

Key Words/Phrases: VIP, visibility intoxicated, credibility determination, knowingly allow

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: When determining whether Permittee knowingly allowed the alleged VIP to drink, the issue is Permittee's state of mind as opposed to the state of mind of the inspectors. The ALJ weighed whether the signs of intoxication were so obvious that Permittee could not be found credible, and found in this case Permittee's testimony was credible.

The Commission has applied generally the same precedents for allowing VIPs to consume and selling to VIPs, but it has not applied the "knowing flag factors" identified in the analysis of ORS 471.410(1) violations to ORS 471.412. Furthermore, it is not enough to show one or more signs of intoxication were present and that Permittee had the opportunity to observe these signs. The evidence of intoxication must prove, more likely than not, a diminished physical and mental control that is perceptible to the server. In this case there were signs of intoxication present,

Permittee credibly testified that he did not observe the patron to be visibly intoxicated and the testimonies of the inspectors were not persuasive enough to impeach Permittee's credibility.

Key Words/Phrases: credibility determination, visibly intoxicated, VIP, purchase by another, disputed testimony

Case: *Cabana Club*, OLCC-01-V-065, March 2002.

Abstract: Inspectors reported observing a VIP drink from a bottle of beer three times in two locations in the bar. Two of these occurred in an area of the bar serviced by a cocktail server who was not cited. The bartender, who was cited, did not observe the VIP or the consumption in that area. The third consumption was alleged to have occurred at the bar, near the bartender. The videotape recording which captured the VIP at the bar and the bartender's testimony that she served the VIP water negated that the VIP was consuming from a bottle of beer. No violation of ORS 471.412 was proven.

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 (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: *TJ's Fireside Dining*, OLCC-00-V-74 & 01-V-006, October 2001. [Distinguished by *Stockman's Bar*, OLCC-09-V-034, March 2010.]

Abstract: In *Cheers To You*, OLCC-00-V-070, October 2001, the Commission clarified the analysis used in cases involving alleged violations of ORS 471.410(1). That same analysis does not strictly apply to alleged violations of ORS 471.412, as knowingly selling or serving alcoholic beverages to a VIP (for ORS 471.410(1)) does not necessarily require direct observation of the VIP, whereas knowingly allowing a person to consume after observing that the person is visibly intoxicated does (unless the failure to observe is due to conditions under the control of the permittee or licensee, as announced in the same Final Order).

The Commission announced its intention, in the future, to construe conditions under the control of the licensee, which interfere with compliance or the monitoring of compliance with Commission regulations or statutes (such as, for example, low lighting, under staffing, avoiding looking at patrons near closing time), as knowing "flag factors" under its analysis for violations of ORS 471.410(1), and, for purposes of ORS 471.412, as a presumption of observation. A licensee cannot escape the duty to comply with the liquor laws by turning a blind eye and not monitoring compliance, or by maintaining conditions which make effective monitoring of compliance difficult or impossible. When either is done, a licensee assumes the risk that violations will occur and may not claim those same conditions excuse liability for the foreseeable violations that do occur. Where there is conflict with convenient business practices and compliance, compliance has priority. See also *Handy Pantry*, OLCC-86-V-005, April 1986; *The Silver Fox*, OLCC-89-V-050/039, September 1989.

Case: *Aloha Station*, OLCC-99-V-034, August 1999.

Abstract: The Commission has determined that a "knowing" sale of alcoholic beverages to a minor or a visibly

intoxicated person under ORS 471.315(1)(a)(G) is not synonymous with “should have known.” State of mind is a question for the trier of fact to be determined in view of all the circumstances as shown by the evidence. *Plaid Pantry No. 55*, OLCC-98-V-063, October 1998. ORS 471.412(1) provides that the violation of allowing a visibly intoxicated person to consume alcoholic beverages must also be done “knowingly.”

Case: *Candlelight Cafe & Bar*, OLCC-93-V-025, October 1993.

Abstract: Charge of allowing a visibly intoxicated person to consume was dismissed against permittee where customer was visibly intoxicated, but permittee did not have the opportunity to observe customer's signs of visible intoxication. Permittee was cooking food in the kitchen and serving other customers.

Case: *La Mesa*, OLCC-92-V-038, December 1992.

Abstract: Licensee had a defense to the charge of permitting a visibly intoxicated person to consume where licensee made a good-faith effort to remove the drink by putting his hand on the bottle of beer and trying to remove it, but the customer would not let go of the beer. The charge was dismissed.

Case: *Whiskey Gulch Gang*, OLCC-91-V-128, May 1992.

Abstract: The Commission determined that the licensees did not establish the defense set out in ORS 471.412(2) where one and one-half hours passed between the time the patron first displayed signs of intoxication and the time the alcoholic drink was removed. The time period was too long to establish a "good-faith effort" to remove the alcoholic drink.

Case: *Rimrock Restaurant & Lounge*, OLCC-91-V-019, September 1991.

Abstract: ORS 471.412(4) provides that the penalty for the first three violations within two years of knowingly allowing a visibly intoxicated person to consume alcoholic beverages is a Letter of Reprimand. The Commission infers that this penalty applies to the same prohibition in ORS 472.180(8).

Case: *Grand Stark Tavern*, OLCC-90-V-136, March 1991.

Abstract: The Commission found that a permittee allowed a visibly intoxicated person to consume alcoholic beverages where: 1. the patron showed signs of diminished physical or mental control; 2. the server had actual knowledge or reasonable grounds to believe the person was visibly intoxicated because the server had a reasonable opportunity to observe the signs of diminished control showing intoxication; and 3. the server had an opportunity to discover that the person was consuming alcoholic beverages.

C.1.c. Employee Without Service Permit (ORS 471.360, ORS 471.375(1); OAR 845-009-0010) [(ORS 471.360, ORS 471.375(1))]

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

Case: *Lotsa Luck Bar & Grill*, OLCC-13-V-015/015A, February 2014.

Facts: Licensee's managing member was working as a bartender with an expired server's permit.

Abstract: Aggravation is warranted when a licensee personally commits the violation.

Key Words/Phrases: server's permit, expired, licensee involvement, aggravation

Case: *Relax Sports Pub*, OLCC-13-V-001/001A/001B, December 2013.

Facts: Licensee's son worked as a part-time manager and was involved in hiring employees. Licensee hired a fill-in bartender and the son inquired about her service permit. The bartender said she'd taken the test online and claimed to have paperwork, but did not produce it or a valid permit. An OLCC investigator responded to the premises when a highly intoxicated patron fell in the premises' parking lot, and discovered the bartender did not have a permit. The following day she took the online server education course. Licensee's son signed a former manager's name to the bartender's application, in an effort to conceal the violation. Licensee also received a violation for an employee failing to verify the age of a minor patron (18) before serving her. Shortly before the hearing, the license expired.

Abstract: The Commission employs two tests to determine whether a licensee "permitted" the prohibited activity. A licensee may acquiesce by failing to prevent the employee from working without a permit. See *Cal Sport* (OLCC Final Order, 02-V-021, April 2003) (licensee failed for several months to verify whether an employee had a permit). The Commission has also used a knowledge attribution analysis to find that a licensee permitted certain conduct. In this regard, "permitting" involves two elements: knowledge and the failure to take reasonable steps to prevent or control the prohibited activity. With respect to the knowledge element, the Commission imputes an employee's knowledge to the licensee. In short, if a licensee fails to take reasonable steps to verify the existence of a permit or prevent the employee from serving without one, the licensee has violated ORS 471.360(1)(b). *Cal Sport*, Final Order at 5; see also *Tony's Tavern* (OLCC Final Order, 06-V-012, August 2006).

An employee's or agent's attempts to conceal a violation are not attributable to the licensee as a basis for aggravating a sanction. See *H20 Martini Bar & Restaurant* (OLCC Final Order, 06-V-014, December 2006).

The proper sanction is 40 day suspension or civil fine, but because the license expired before hearing the sanction is a Letter of Reprimand.

Key Words/Phrases: service permit, valid permit, minor, expired license, conceal violation, aggravation, sanction, letter of reprimand

Case: *JB's Deli and The Galley Sports Bar*, OLCC-13-V-002, September 2013.

Facts: Licensee held licenses for adjoining premises. Licensee's corporate principal held a service permit and was responsible for most oversight operational duties. Licensee also employed her father-in-law who oversaw the lottery and cigarette sales (the more significant part of Licensee's business). When questioned about the father-in-law's duties by an OLCC investigator, Licensee described him as semi-retired, and that he had worked on the premises 4-5 hours a day for the past 12 years doing various things. The father-in-law was listed as a manager with the Lottery

Commission as Licensee's manager/key person for lottery business. He did not have a service permit. The OLCC alleged Licensee permitted her father-in-law to supervise other employees without a valid service permit, or alternatively that Licensee failed to verify that he had a service permit.

Abstract: Under OAR 845-009-0010(1)(c), any employee who "directly supervises" any employee who mixes, sells or serves alcoholic beverages for consumption on licensed premises is required to have a service permit. OAR 845-009-0015 sets out a licensee's responsibility for verifying that any employee who is required to have a service permit has such a service permit.

Here, the Commission has failed to establish that the father-in-law participated in any manner in the mixing, selling or service of alcoholic liquor. See *The Raven Inn* (OLCC Final Order, 07-V-021, -026, November 2007) (corporate principal who identified herself as the premises manager, but who only performed activities related to hiring and firing and business finances and not the ordering of alcohol or supervising the day-to-day activities of the premises did not directly supervise employees who mix, sell or serve alcoholic beverages and was not required by law to have a service permit). Commission staff cited *Cabaret Lounge* (OLCC Final Order, 08-V-061, October 2009) for the proposition that a manager is required to have a service permit even if the manager's specific managerial duties are not identified in the record. *Cabaret Lounge* is factually distinguishable from this case. In that case, the manager at issue was working the floor when contacted and interviewed by the inspectors. He identified himself as "the manager on duty." He admitted to managing the licensee's other location; he admitted to going behind the bar or into the kitchen in connection with his managerial duties; and he admitted to supervising employees, including those who mixed, sold or served alcoholic beverages. Here, there is no evidence Licensee's father-in-law was an on-duty manager at the licensed premises. He did not manage employees, he did not work the floor and he had nothing to do with alcohol sales at the licensed premises.

Key Words/Phrases: supervise, manager, service permit, managerial duties, manager on duty, oversee

Case: *Bing's Restaurant*, OLCC-11-V-054, June 2012.

Facts: Licensee's employee was bartending with an expired permit. The employee believed it was still valid and was surprised it was expired when OLCC inspector asked to see it. She stated she normally only worked as a waitress, but that day she happened to be filling in as bartender because the regular one was out sick. The employee did not mix, sell or serve alcoholic beverages the day the inspector was present but acknowledged that was part of her duties.

Abstract: A licensee has a continuing duty to verify that an employee passes a Server Education course and receives a service permit. A licensee violated OAR 845-009-0015 when the licensee took no steps to verify whether his employee's service permit had expired or to ensure that a new application was submitted.

Proof that a server served alcohol on the day of an OLCC inspection was not required. When an employee is expected to mix, serve or sell alcohol as part of her job duties, the Commission infers that the employee does so. See also *Sunseri Dutch Mill*, OLCC-07-V-024, December 2007.

Lack of knowledge that a service permit is expired is no defense. Service permits are valid for five years and clearly state an expiration date. Because the employee had worked for the licensed premises for 15 years, licensee must have known that the permit would expire at some point.

Key Words: service permit, expired, job duties, mix, serve, sell, infer, inference

Case: *Illusion Sports Bar*, OLCC-11-V-037, May 2012.

Facts: Licensee agreed to restrictions – based on history of serious and persistent problems at the premises when operated by prior licensee - including having security staff and timing on last drinks and shots. The Commission also

required Licensee's managing member to take and pass a law orientation self-test, which informed licensees of the legal requirements to operate and requirements regarding service permits and DPSST certification. On subsequent bar checks, violations including invalid service permits, inadequate/non-DPSST certified security, and serving of alcohol after restricted hours were discovered.

Abstract: In previous cases, the Commission has applied a "knowledge attribution approach" to determine that a licensee permitted prohibited activity. Applying this approach, the Commission has found that a licensee has violated ORS 471.360(1)(b) where the licensee's employee knows that he or she does not have a valid service permit and the licensee fails to take reasonable steps to prevent that employee from mixing, selling or serving alcoholic beverages. *Tony's Tavern* (OLCC, Final Order, 06-V-012, August 2006); *see also Lung Fung Restaurant* (OLCC, Final Order, 92-V-013, February 1993). The OLCC will impute an employee's knowledge to the licensee. *Cal-Sport* (OLCC, Final Order, 02-V-021, April 2003). Notwithstanding Licensee's attempts to ensure that his employee had a valid service permit, and the action Licensee took to discharge her when he learned that she had not completed the test, the employee's knowledge that she lacked a valid service permit must be imputed to Licensee under the approach set forth in *Cal-Sport*, OLCC, 02-V-021, April 2003.

It would have been reasonable for Licensee to simply confirm with the Commission that his employee had passed the alcohol server education course and been issued a permit before scheduling her to work as a bartender. Licensee's failure to prevent its employee from mixing, selling or serving alcoholic beverages without a valid service permit establishes a violation of ORS 471.360(1)(b).

Key Words/Phrases: License restriction, service permit, knowledge attribution, impute

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

Facts: Licensee had a server working for a year with an expired temporary permit. Server claimed she believed she had a permit because she took the server education course, but never received it because she had moved several times.

Abstract: The Commission employs two tests to determine whether a licensee "permitted" the prohibited activity. A licensee may acquiesce by failing to prevent the employee from working without a permit. *See, e.g., Cal Sport* (OLCC, Final Order, 02-V-021, April 2003). In that case, the licensee failed for 16 months to verify whether an employee had a service permit. The Commission has also used a knowledge attribution analysis to find that a licensee permitted certain conduct. In this context, "permitting" involves two elements: knowledge and the failure to take reasonable steps to prevent or control the prohibited activity. With respect to the knowledge element, the Commission imputes an employee's knowledge to the licensee. If the licensee fails to take reasonable steps to verify the existence of a permit or prevent the employee from serving without one, the licensee has violated ORS 471.360(1)(b). *Cal Sport*, Final Order at 5; *see also Tony's Tavern* (OLCC, Final Order, 06-V-012, August 2006).

Case: *US Deli & Pub, LLC*, OLCC-09-V-044/04A/044B, June 2010.

Facts: Licensee's employee was working without a service permit. The employee was cited, and later informed OLCC inspectors that Licensee's managing member had contacted him and requested that he give a statement stating that he had shown Licensee a false permit. Licensee's managing member denied asking the employee to lie. OLCC inspectors videotaped a statement from the employee regarding these allegations and it was used as evidence to support staff's contention that Licensee encouraged concealment or alteration of evidence.

Abstract: Applying the Commission's model for evaluating whether hearsay evidence is sufficiently reliable to be substantial evidence (*see Rainbow Market* (OLCC-08-V-124, October 2009), the hearsay statement of Licensee's employee was not sufficiently reliable.

Key Words/Phrases: valid service permit, conceal or alter potential evidence

Case: *The Old Spaghetti Warehouse*, OLCC-09-V-063, November 2009.

Facts: Licensee's employee served a minor decoy. When the officer asked for the employee's service permit she stated she didn't have it on her. Later the OLCC confirmed that the employee had never had a service permit, and had never taken the alcohol education course. Licensee claimed he was duped or conned by the employee because she repeatedly advised the premises manager that she had a permit.

Abstract: Licensees have a duty to verify service permits, not just take their employees words for it that they have one. Violation proven. Aggravation was warranted due to the amount of time the employee was allowed to serve/sell alcohol (approximately 7 months).

Key Words/Phrases: service permit, permitted, duty to verify, aggravation

Case: *Cabaret Lounge*, OLCC-08-061, October 2009. [Distinguished by *JB's Deli* and *The Galley Sports Bar*, OLCC-13-V-002, September 2013.]

Facts: Licensee has several employees without valid service permits and DPSST certification as required. Licensee's employees engaged in fights with patrons being ejected, and one employee was charged with prostitution for engaging in sexual contact on the premises. Licensee witnessed the sexual contact and fired the employee immediately.

Abstract: It is a violation of ORS 471.360 if a manager supervises those who mix, sell or serve alcoholic beverages without a valid service permit. Although the statute does not explicitly say "supervise," OAR 845-009-0010(1)(b) does require managers who supervise alcohol servers to have a service permit and therefore the Commission may charge a licensee under the statute. An employee who has managerial responsibilities over bar staff needs a service permit. Testimony that the employee only managed the dancers was not credible.

Key Words/Phrases: permitting unlawful activity, DPSST, service permit, management duties, prostitution

Case: *Hot Seat Sports Bar*, OLCC-07-V-052, July 2008.

Facts: Licensee's server did not have a valid permit because the check for the fee was returned by the bank. OLCC inspectors notified licensee, who told the employee to "fix it." The inspector kept checking records to see if a paid application was submitted and it was not, but confirmed the employee continued to work serving and selling alcohol.

Abstract: When an employee does not have a service permit or pending application, it is the licensee's responsibility to immediately transmit to the Commission a completed application and appropriate fee. Reliance on the permittee or other employees to do this is not sufficient, as it is licensee's duty to verify that a person obtains a permit.

Key Words/Phrases: service permit, expired, reliance on permittee, duty of licensee to immediately transmit

Case: *Oregon Beverage Services*, OLCC-07-V0037/037A/037B, April 2008.

Facts: Licensee would hire servers for various events and sometimes pay the application fee. In one instance Licensee had returned the application to an employee to mail, and employee did not do so. The second application was not mailed immediately and had the wrong fee. The Commission determined that Licensee permitted an employee to work without a valid service permit by failing to adhere to OLCC's application process which required Licensee to transmit the application immediately, as well as the appropriate fee after receiving notice that it was insufficient.

Abstract: Licensee is responsible for immediately transmitting the application to the Commission. Returning the application to the server to send in is not sufficient. It is unlikely an application was mailed "immediately" within the

state when it took two weeks to reach its destination. It is reasonable to conclude it was not mailed “immediately” by Licensee.

It is reasonable to conclude that the employee served or sold when Licensee asked her about the status of her service permit, had her fill out a second application, and did not testify that employee did not serve or sell. No direct evidence is necessary when there is no assertion that employee did not serve or sell alcoholic beverages.

Licensee’s argument that the application was complete once an inspector saw the completed application and check is not a defense. The OLCC had instructed the server by letter to stop serving because the application was incomplete, due to the insufficient fee payment. The inspector was not obligated to repeat these instructions when he saw the service, nor was he obligated to take the fee and application as a representative of the OLCC. The application and fee needed to be mailed before the temporary permit was valid.

Key Words/Phrases: service permit, incomplete application, incorrect fee amount, transmit immediately

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: When alterations on a service permit card are clearly visible, Licensee should have known to inquire further and would have discovered it had expired. Therefore the theory of attribution applies even in cases of fraudulent alteration when the alterations were discernable.

If an employee is expected to have a service permit to perform his/her duties, it is reasonable to infer that he/she has served alcoholic beverages without a valid service permit. Direct evidence in the record of selling or serving alcoholic beverages is not required to establish a violation.

Key Words/Phrases: service permit, expired, altered

Case: *The Raven Inn*, OLCC-07-V-021 and OLCC-07-V-026, November 2007.

Facts: Licensee’s corporate principal was the “owner” of the business, but she hired others to perform most day-to-day duties. Corporate principal had an expired service permit, and when she submitted a renewal she mistakenly checked the wrong box for getting a replacement card. Corporate principal did not mix, serve or sell drinks and had a “head bartender” who oversaw all staff and operations.

Abstract: A corporate principal, who is responsible for hiring and firing employees but does not train or supervise employees on a daily basis, does not “supervise” or “directly supervise” employees for purposes of ORS 471.360(1)(b). Designation as a “manager” or otherwise does not necessarily trigger the requirement of needing a service permit in all cases; it is the job duties that determine whether they must have a service permit under the law.

Statutory construction is guided by *PGE v. BOLI*, 317 Or 606 (1993), where the Court articulated a three-level analytical framework for statutory interpretation. The task is to discern the intent of the legislature. To do that, the court examines both the text and context of the statute. In the first level of analysis, the text of the statutory provision itself is the starting point for interpretation and is the best evidence of the legislature’s intent. Words of common usage should be given their plain, natural, and ordinary meaning. The court also examines the context of the statute and other related statutes. If the intent is clear from the text and context of the statute that ends the analysis.

When an agency's interpretation or application of a provision of law is at issue, the standard of review depends upon whether the phrase is an exact term, an inexact term, or a delegative term. *Coast Security Mortgage Corp. v. Real*

Estate Agency, 331 Or 348 (2000); *Springfield Education Assn. v. School Dist.*, 290 Or 217 (1980). The words “mix, sell or serve” are exact terms and therefore, only fact finding is needed.

“Directly” is defined as “without any intervening space or time; next in order; * * * without any intervening agency or instrumentality or determining influence * * *.” *Webster’s Third New International Dictionary* 641 (2002).

Key Words/Phrases: service permit, directly supervise, corporate principal, statutory construction

Case: *H2O Martini Bar & Restaurant*, OLCC-06-V-014/014A, December 2006, *affirmed without opinion*, 213 Or App 240 (2007).

Facts: Licensee had several employees working without valid service permits, each with different circumstances. One employee told Licensee and the inspector that he had one, and gave Licensee a forged one. Licensee argued there was no evidence either employee actually served, sold or mixed alcoholic drinks.

Abstract: Even an employee who only occasionally mixes or serves alcoholic beverages is required to have a service permit. *Downtown Deli & Greek Cuisina* (OLCC, Final Order, 04-V-022, August 2005).

Citing to the *Black’s Law Dictionary* definition of “permit,” the Commission reasoned that the licensee “acquiesced by failure to prevent” the employee from serving alcoholic beverages without a permit. *Cal Sport* (OLCC, Final Order, 02-V-021, April 2003).

Key Words/Phrases: service permit, imputed to licensee, concealment of a violation, mitigation, individual acts, monetary penalty in lieu of suspension, nature of the penalty

Case: *McPeets Portland Pub*, OLCC-06-V-026/026A/026B, November 2006.

Facts: Licensee’s employee’s service permit expired. Licensee filled out a new application and mailed it and a check in to the OLCC. When Licensee noticed the check did not clear on the next month’s bank statement, she called the number on a card from an OLCC inspector and left several messages. The OLCC employee had changed jobs and extensions and did not receive the messages. Later an inspector conducted a premises check and asked to see service permits. The employee provided his temporary copy, and the inspector determined that no permit application was on file with the OLCC.

Abstract: Under either test to determine whether a licensee “permitted” an employee to work without a service permit, no violation is shown in this particular case. Licensee took the required steps to have employee receive his service permit. Under the timing and circumstances, neither employee nor Licensee had reason to believe the temporary permit was not valid.

Licensee’s obligation to verify the service permit had yet to ripen because the 45 days between when the OLCC receives the application and the end of time for the alcohol server education had not passed; therefore there was no violation yet. In this case neither the employee nor the Licensee knew that the employee’s service permit application had not arrived at OLCC and Licensee had made several inquiries about its status.

Key Words/Phrases: temporary service permit, validity, good faith belief

Case: *Tony’s Tavern*, OLCC-06-V-012, August 2006.

Facts: Licensee hired a bartender who previously had a service permit. Bartender submitted an application and intended to take the alcohol server education course, but neglected to do so within 45 days due to his work schedule. Licensees traveled to Greece for an extended period of time, and was unaware that the employee had failed to

complete the server education course. Licensees believed the employee had a valid permit until being notified by an OLCC inspector that he did not. Employee was not working at that time due to a broken wrist, and Licensees did not permit him to return to work until he reapplied and took the required server course.

Abstract: Failing to verify that an employee had a valid service permit for several months is “permitting” the employee to serve without a valid permit. See *Cal Sport* (OLCC, Final Order, 02-V-021, April 2003). The Commission’s “knowledge attribution” analysis involves two elements for determining whether a Licensee “permitted” an employee to serve without a valid permit. The first is that the licensee has knowledge of the prohibited activity. The second is that the licensee failed to take reasonable steps to prevent or control the prohibited activity. With respect to “knowledge,” the Commission imputes an employee’s knowledge to a licensee. That is, if the employee knows that he does not have a service permit, the Commission holds the licensee to know this as well through the employee’s knowledge. See *Taylor’s Coffee Shop v. Oregon Liquor Control Commission*, 28 Or App 701, 560 P. 2d 693 (1977); *Casa del Rio*, OLCC, Final Order, OLCC-88-V-033, August 1988; *Lung Fung Restaurant*, OLCC, Final Order, OLCC-92-V-013, February 1993.

Key Words/Phrases: service permit, alcohol server education, denial of permit application, 45 days, knowledge attribution, permitting, imputed knowledge, mitigation

Case: *Rick’s White Horse Restaurant & Lounge*, OLCC-04-V-036, April 2005. [Distinguished by *Oregon Beverage Service*, OLCC-07-V-037, April 2008.]

Facts: Licensee gave prospective employees money for the permit application, and told them they were responsible for sending in the applications. One of the servers did not send her application in until after an OLCC compliance check showed she couldn’t find a copy of her application.

Abstract: Violation proven despite conflicting testimony about when applicant started working and filled out her service permit application. The length of time she was allowed to work without a permit (over six months) warranted aggravation. Prior history of compliance warranted mitigation, but no mitigation due to the error being negligent, rather than intentional.

The fact that Licensee received a letter of recommendation from a local police department official and that Licensee’s employee attended and completed server education while failing to obtain the server permit are not relevant to the issue of mitigation.

Key Words/Phrases: service permit, application, date of application, working without permit, aggravation for length of time, new agency rule regarding aggravation for lack of service permit

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: *Giovanni’s Mountain Pizza*, OLCC-03-V-013/018, February 2004.

Facts: Licensees’ cashier (with no service permit) took drink orders and payment from minor decoys. Licensee’s server delivered the drinks, checked IDs but misread the dates. Licensees argued that the cashier didn’t sell alcohol because the sale was not complete until the drinks were delivered.

Abstract: Where a cashier takes order for alcohol to be consumed on the premises and simultaneously takes payment for it, the sale of alcohol to the patron is complete, notwithstanding another employee will serve the alcohol. The cashier is required to have a service permit (as well as the server).

The essential components of a sale are an agreement to sell/purchase coupled with the exchange of valuable consideration. Ordinarily, following an order for an alcoholic beverage for on-premises consumption, the sale is complete upon the tender and acceptance of payment, entitling the buyer to receive the beverage. Here, the cashier took the order for the beer and simultaneously accepted payment; in doing so, she sold the beer to the minors.

In the instances where alcohol is ordered and served for consumption on the premises without simultaneous payment and there is an open tab or bill, the Commission considers as a separate sale each new entry to the tab.

Licensees' argument that the sale is not complete until the alcohol is delivered (served) runs contrary to the express language of the statute. ORS 471.360(1)(b) prohibits a licensee from allowing anyone to mix, sell or serve alcoholic liquor for on-premises consumption without a service permit. The legislature expressly distinguished between selling and serving and prohibited both without a service permit. If sale and service were the same (accomplished when the alcohol is delivered), then inclusion of the service language would be superfluous.

Key Words/Phrases: service permit, sale, cashier, terms of a sale

Case: *City Slickers* OLCC-99-V-097, September 2000.

Abstract: The Commission found that the preponderance of the evidence failed to prove that a service permit application had been mailed a week before the alleged violation, when the application did not reach the Commission until several days after the violation and where applicant could not produce the retained yellow copy on the night of the violation.

Case: *McAnulty & Barry's*, OLCC-99-V-006, August 2000.

Abstract: The Commissioners reversed the ALJ and found that there was no violation of ORS 471.360(1) and OAR 845-009-0010 where the Regulatory Program failed to prove the date the denial letter was issued and the server could have had an application that was still in effect.

Case: *Blue Willow*, OLCC-99-V-051, January 2000.

Abstract: There was no violation of ORS 471.360(1)(b) where the Licensee, who was a corporate principal, lacked a service permit, but the evidence proved that he did not mix, sell, or serve any alcoholic beverages.

Case: *The Royal Esquire*, OLCC-97-V-045, December 1997.

Abstract: The Commission concluded that the licensee violated ORS 471.360(1)(b) (permitted employee to serve without a valid service permit,) where the licensee had knowledge that the employee was selling and serving alcoholic liquor and the licensee had previously been warned about service permit requirements in connection with another employee who was working without a service permit.

Case: *Punjab Tavern*, OLCC-92-V-088, June 1993.

Abstract: Licensee committed a violation of permitting an employee to serve without a valid service permit under the following circumstances: On the employee's first night of work, the employee was unable to produce a goldenrod copy to show OLCC inspectors; licensee subsequently mailed an application but failed to include the required fee;

licensee made a second mailing with the appropriate fee which was received by the Commission ten days after the inspectors had seen the employee serving alcohol. The Commission concluded that licensee's good-faith efforts were a basis to mitigate the penalty.

Case: *Silver Palace*, OLCC-91-V-189, July 1992.

Abstract: In order for an applicant to serve alcoholic beverages before he or she receives a service permit, under ORS 471.375, the applicant must complete an application and the employing licensee must immediately send the application and fee to the Commission. A licensee's failure to ensure that both steps are completed may result in a violation of ORS 471.360(1)(b).

Case: *Tumble Inn*, OLCC-90-V-170/031, December 1991.

Abstract: Licensee failed to immediately transmit service permit applications where there was anywhere from one and one-half months to three months between the time the applicants signed the application and the time that the applications were received by the Commission. See also *The Hide Out*, OLCC-89-V-062/061, October 1989; *New Max's Tavern*, OLCC-91-V-087, December 1991.

Case: *New Max's Tavern*, OLCC-91-V-087, December 1991.

Abstract: The clear language of ORS 471.375(1) provides that it is the licensee, not the applicant, who is responsible for transmitting the application to the Commission. It is not a defense to the charge that the licensee told the employee to pay the fee and mail the service permit application.

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

Abstract: The charge that licensee violated ORS 471.360(1)(b) was dismissed where the notice of violation ticket was issued by mistake because the inspector believed that the permittee had not applied for a permit and had not complied with ASE requirements, when in fact, the permittee had complied with ASE requirements.

Case: *Spigot Tavern*, OLCC-89-V-022, September 1989.

Abstract: Principals of licensed corporations are required to have service permits in order to sell or serve alcoholic beverages, even though the principal may be a licensee under OAR 845-06-120.

Licensee permitted employees without service permits to mix, sell, or serve alcoholic liquor for consumption on the licensed premises in violation of ORS 471.360(1)(b). The Commission infers that the employees knew they were serving alcoholic beverages and the knowledge of the employees is imputed to licensee.

Case: *Casa Del Rio*, OLCC-88-V-033, August 1988.

Abstract: Licensee permitted his employee to sell alcoholic beverages without a service permit where it would have been evident to persons working in the premises that the employee was selling alcohol and licensee failed to take reasonable steps to prevent the employee from selling before a service permit application was submitted.

Case: *Don Juan's*, OLCC-88-V-003, May 1988.

Abstract: A licensee violated ORS 471.360(1)(b) where the licensee relied on his employee to send in a service permit application and the employee failed to do so for two months.

Case: *Sportsman Club*, OLCC-86-V-023, March 1987.

Abstract: Licensee violated ORS 471.360 where bartender sold and served alcoholic beverages without a service permit and without having completed a service permit application.

C.1.c.1. Failure to Make Service Permit Available (ORS 471.360(1)(c))

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

Case: *Michael Reese*, OLCC-06-V-067, December 2007.

Facts: Permittee served a minor decoy without asking for ID. When inspectors contacted Permittee he became belligerent, and an argument and scuffle ensued. Permittee's employer joined the discussion and was asked to provide all service permits. After looking for them on the premises the employer determined that some may be in his home office. Inspectors typically ask permittees who doesn't have their permit on them for a name and DOB so they can just verify the permit through OLCC dispatch. Because of the heated exchange with Permittee the inspectors decided not to do this in this instance. The employer's wife went home to retrieve the remaining service permits, including Permittee's. In addition to the minor sale charge, OLCC charged Permittee with failure to make service permit available for immediate inspection.

Abstract: Because it took almost 90 minutes before inspectors had Permittee's permit in hand, Permittee violated ORS 471.360(1)(c) (failure to make permit available for immediate inspection).

The statutory obligation to make the service permit available for immediate inspection while the permittee is on duty rests with the permittee. If a permittee surrenders his or her service permit to the employer, the permittee has assumed the risk that he or she will not be able to comply with their personal obligation to make the permit immediately available for inspection.

Permittee's failure to make his service permit available for immediate inspection is not mitigated by the decision of the inspectors to not contact OLCC dispatch and verify whether he had a permit using his name and date of birth.

Key Words/Phrases: credibility determination, service permit, available for immediate inspection

C.1.d. Drinking on Duty (OAR 845-006-0345(1)) [(OAR 845-06-045(1)(a))]

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

Case: *The Red Carpet*, OLCC-14-V-008/008A, March 2015.

Facts: A police officer responding to a tip that Licensee's employee was drinking on duty. The officer noted the employee having dexterity issues, slow/slurred speech, and the odor of alcohol on his breath. The officer administered an HGN test and discovered six possible clues of intoxication. The employee admitted to having a few drinks on duty, and wrote Licensee a note admitting the drinking on duty. Video did not clearly show any signs of intoxication. Licensee reported the violation to the OLCC after terminating his employee. Licensee provided training to all employees on liquor laws and house rules for the sale and service of alcohol, and notified employees he would terminate them if they failed to comply.

Abstract: Licensee's employee was under the influence of intoxicants while on duty at the licensed premises in violation of OAR 845-006-0345(1). The alternate violation for drinking on duty should be dismissed. The appropriate sanction for the violation of OAR 845-006-0345(1) in this case is a 26-day suspension.

While the video was not definitive, the testimony of the officer was persuasive evidence that the employee was under the influence of intoxicants. The officer is a trained observer, and he administered an HGN test that showed clues of intoxication. The results of the officer's observations and testing cannot be overlooked.

The termination of an employee is not a basis for mitigation. Licensee is entitled to mitigation based on prompt reporting and cooperation with the OLCC, and good faith efforts to avoid violations by providing employee training.

The standard penalty for a first Category II violation is a mandatory 30-day suspension. There is no authority to mitigate the penalty down to the equivalent of a Category III violation, as Licensee suggests. The appropriate sanction is the suspension, reduced by 4 days due to mitigating factors described above.

The ALJ erroneously construed *US Market #145* (OLCC Final Order, 11-V-009, February 2012) as a basis for reducing the sanction of a suspension to the option a fine in lieu of suspension. Contrary to the ALJ's interpretation, however, *US Market #145* does not stand for the general proposition that mitigating factors warrant reduction of a sanction by a full level on the penalty schedule. Prior agency precedent has made clear that where the standard penalty is suspension only, mitigating factors are not applied to reduce the penalty to a fine in lieu of a suspension.

Key Words/Phrases: drinking on duty, under the influence, officer, trained observer, HGN test, signs of intoxication, aggravation, mitigation, terminated employee, penalty schedule, Category II, suspension in lieu of fine

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. *Undeclared 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: *Undeclared Sports Bar & Grill*, OLCC-14-V-13/13A, August 2014.

Facts: Licensee worked as bartender until about 8 pm when another employee came on duty. Only one employee was scheduled to work because Licensee did not expect it to be busy. Licensee began playing cards with friends/other patrons at 9 pm, and consumed alcohol while playing cards. At 10 pm approximately 30-40 other patrons came into the bar for a birthday party. Three of the patrons were minors. The party got out of hand. Licensee attempted to call for a security service, and then instructed his employee to shut the party down. The employee did not immediately do so, and Portland Gang Enforcement Team arrived on a tip that known gang members were present. They recognized one of the minors and arrested him for a probation violation. Police ordered the premises shut down and contacted the OLCC, who came to the premises and detected signs of intoxication in the Licensee. The employee claimed she had checked the ID of every patron in the bar, which was approximately 50-60 patrons when police arrived.

Abstract: Managing member of Licensee was "on duty" when he began making calls for security and instructed his employee to shut the party down. These were attempts to control conduct on the licensed premises, undertaken in the capacity as Licensee's managing member.

Key Words/Phrases: drinking on duty, intoxication, signs, control conduct

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: Corporate principal of Licensee placed himself on duty when he stood in the doorway and informing police that "everything's fine" and attempting to delay their entrance into the premises.

Key Words: witness credibility, credibility determination, police officers as observers, delay entrance, bar fight, brawl, drinking on duty

Case: *Duffy's Irish Pub*, OLCC-V-068, June 2012.

Facts: Licensee's corporate owner was at the licensed premises as a patron, consumed alcohol, and got into an

argument with another patron. Licensee's security determined the other patron was getting unruly, and called 911 for assistance ejecting him. Licensee's security told police that the owner had been helping deal with problem patrons throughout the night. Licensee's owner stated that he only told his bouncers to "check the front or the back" and he did not believe that placed him on duty.

Abstract: A corporate principal has the inherent authority to control the premises. When a corporate principal takes actions that amount to exercising control over the premises, it is immaterial whether the patrons of the premises know the corporate principal's status. Here, the act of placing his arm on a patron's shoulder and directing him to leave the premises constitutes an action taken for the benefit of the licensee's business.

As a matter of public policy, the Commission's rule against placing oneself on duty while under the influence of intoxicants is intended to prevent individuals with impaired judgment from making decisions about the sale or service of alcohol, the age of a patron, or from intervening in an altercation or taking other actions required to control the premises. The facts of this case illustrate the wisdom of that public policy.

Key Words/Phrases: drinking on duty, inherent authority, corporate principal, licensee's owner, control the

Case: *Favorite Mistake*, OLCC-10-V-061, December 2011.

Facts: Licensee owned three adjoining licensed premises, each with its own staff and license. The manager of one (the bowling alley) was having a drink at the other premises (bar), off duty, when a disturbance between patrons started. The manager instructed one patron to leave and later told OLCC investigators that he had authority to do so.

Abstract: A manager who worked at a neighboring premises owned by the same corporate principal did not have authority to place himself on duty, because his employment contract did not give him authority to do so at the premises in question and there was insufficient evidence to show an intent to disregard the terms of the contract.

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

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: The term "agent" has been defined by Commission precedent to be inclusive and address the substance and not the technical form of the relationship between licensees and persons who perform services on their behalf. After surveying case precedent, the Commission concludes that the "Jack Daniels Girls" were Licensee's agents, and therefore Licensee was responsible for their drinking on duty.

For purposes of determining whether a person is acting as an agent or employee of a licensee under OAR 845-006-0345(1) and OAR 845-006-0362, consent is not determinative. It is the function that the individual or entity is performing on the licensee's behalf that is the relevant inquiry.

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

Case: *Exotica International Club for Men*, OLCC-08-V-077/077A, April 2010.

Facts: Undercover investigators observed Licensee's employees serve more than one drink per patron and fail to wand all patrons in violation of license restrictions, offer a drink special after 12 a.m., and have a server under the influence of alcohol on duty.

Abstract: Under former OAR 845-006-0345(1), licensees cannot offer temporary price reductions on alcohol after midnight.

Key Words/Phrases: under the influence on duty, license restriction, one drink restriction, restriction interpretation, cancellation, *Oceanside* factors

Case: *Spot 79*, OLCC-08-V-045, January 2010.

Facts: Licensee's corporate principal clocked out and started drinking with his wife and another patron. OLCC undercover investigators were present. Later in the evening the ATM ran out of cash and the corporate principal filled it. Later an intoxicated patron tried to engage the corporate principal in an argument regarding an employee of Licensee not being paid for some work. Corporate principal then told the on-duty bartender to pay the employee for her hours.

Abstract: After surveying and discussing the factual nature of past case precedent, the Commission concludes that the facts present a close case. The Commission determines that filling the ATM machine was not closely enough related to the sale or service of alcoholic beverages or controlling the conduct on the premises to find a violation. While it is possible that filling the ATM machine could indirectly assist the business by facilitating sales of alcoholic beverages, the connection is not close enough to warrant finding a violation based on that act alone. The decision to resolve a dispute with an unruly, intoxicated patron by instructing the bartender to pay an employee is distinguishable from the routine business administration act of refilling an ATM machine. The decision to instruct a subordinate to pay an employee came in direct response to the demands of an unruly customer. It is this interaction that provides the connection to controlling conduct on the premises.

Key Words/Phrases: drinking on duty, controlling conduct on the premises, facilitating sales of alcohol
Section: drinking on duty

Case: *Sherry Scott*, OLCC-09-V-069, January 2010.

Facts: Permittee finished her shift at Mohock Tavern, returned later and drank a couple of beers. A couple of hours later police responded to a disturbance at the Tavern. Permittee told police she was the manager and wanted to know why they were in the bar. Officers noticed she was intoxicated, and told her to step away. Permittee refused and said the officers were not welcome in the bar. Permittee continued harassing the police and was arrested.

Abstract: In this case, the evidence establishes that as the premises' manager, Permittee had the authority to put herself on duty. When she stopped an officer, advised him that she was the manager and demanded to know what he and the other officers were doing inside her bar, she was acting on the licensee's behalf. Considering the definition of "on duty" includes controlling conduct on the premises, the Commission is persuaded that Permittee put herself on duty when the officers responded to the licensed premises. Permittee exerted control of the premises by contacting the officer, representing herself as the premises manager, demanding to know why the police were there and directing them to leave.

Key Words/Phrases: drinking on duty, authority, control of the premises, intoxicated, permittee, harassment

Case: *R Palate Restaurant & Bar*, OLCC-09-V-018/A/B/C, September 2009.

Facts: Police observed a fight outside the licensed premises, and contacted one of the participants who was under 21 and intoxicated. He had been allowed into the licensed premises and served using a fake ID. Officers contacted the door security employee and Licensee's corporate principal, both of whom were obviously intoxicated. The door employee acknowledged allowing the minor in with a fake ID. Licensee did not appear for hearing.

Abstract: The OLCC has demonstrated a prima facie case supporting the violations of drinking on duty and service of a minor. Aggravation was appropriate because both the door employee and an unnamed bartender failed to verify age of the minor, and Licensee’s corporate principal was personally involved in the drinking on duty violation.

Key Words/Phrases: drinking on duty, minor sale, permitting a minor on licensed premises, multiple employees involved in the violation, corporate principal personal involvement, aggravation, letter of reprimand

Case: *Chan's Steakery*, OLCC 07-V-057, August 2008.

Facts: Licensee had multiple servers working without valid permits. The OLCC received an anonymous complaint about employees drinking on duty and discussed with Licensee’s manager, who stated she was having a problem with one bartender doing that. Later undercover inspectors witnessed the bartender make alcoholic drinks for two employees, who consumed them while working.

Abstract: Licensee is responsible for immediately transmitting service permit applications to the Commission. The Commission does not distinguish between “tasting” and “drinking.” The OLCC prohibits all consumption of alcoholic beverages while on duty.

Licensee’s contention that a drinking employee was only hired to bus and wash dishes is unpersuasive, given the evidence that she performed duties related to alcohol by serving alcoholic beverages.

Aggravation was warranted due to the violations being repeated and involving multiple employees.

It is not a mitigating circumstance that licensee is unable to pay the fine, nor that it is the first violation. Moreover, Licensee had not been licensed long enough to qualify for mitigation on the basis of a lengthy history of good compliance. The Commission has determined that a history of four years without a violation is a mitigating circumstance. *Beehive Grocery & Deli* (OLCC, Final Order, 86-V-064, April 1987). Because Licensees have only been licensed 18 months, they are not eligible for mitigation on this basis. [NOTE: prior history of compliance is no longer a mitigating factor].

Key Words/Phrases: drinking on duty, tasting, service permit, mitigation, aggravation, inability to pay, compliance history

Case: *Voodoo Lounge Bar & Grill*, OLCC-06-V-041 and *Leanne Swigart*, OLCC-06-V-053, February 2007.

Facts: Licensee’s bartender/Permittee had gastrointestinal medical issues. One night a deputy contacted Permittee about an MIP citation given to her daughter earlier that day, and Permittee told the deputy to come to the licensed premises to talk about it. The deputy became concerned Permittee was intoxicated because of several visible signs, and sought a witness to confirm his suspicions. Upon questioning Permittee she admitted she drank several shots before her shift and one during. Permittee later denied these admissions and stated that her gastrointestinal issues had caused many of the symptoms the deputy saw as signs of intoxication.

Abstract: After considering the evidence, the Commission is persuaded that, although the bartender may have experienced abdominal pain and gastrointestinal symptoms during her shift, she was also under the influence of intoxicants while on duty. While the odor of alcoholic beverages on her person may be attributable to having spilled whiskey on her shirt prior to the deputy's visit, the other signs and symptoms of intoxication noted are not as easily explained away. Slurred speech, poor enunciation and swaying balance are not symptoms commonly associated with epigastric pain and a gastrointestinal hemorrhage, the conditions for which she sought treatment the next day

Key Words/Phrases: drinking on duty, under the influence on duty, signs of intoxication

Case: *Duffy's Irish Pub*, OLCC-05-V-032, February 2006.

Facts: OLCC inspectors visited the licensed premises undercover, and noticed an intoxicated patron being served by two employees over the course of hours. One of the employees went off shift and made a drink, later was served another, and then assisted the on-duty bartender in taking a couple orders and mixing a drink. Neither Licensee was at the premises when it occurred and both employees were fired.

Abstract: Even if the employee considered herself to be helping out, and did not clock back in or charge Licensees for services, she nevertheless put herself back on duty by changing out a keg and helping with orders and drinks while she consumed an alcoholic beverage.

There is nothing to suggest that the permittee lacked the authority to put herself back on duty. The acts that the permittee performed involved the mixing, sale, or service of alcoholic beverages, and were done on the licensee's behalf. Even if the permittee considered herself to be helping out, and did not clock back in or charge licensees for these services, she nevertheless put herself back on duty while she consumed an alcoholic beverage. Licensee was responsible for permittee's actions in putting herself back on duty.

Key Words/Phrases: VIP, visibly intoxicated, drinking on duty, flag factors, termination of employees

Case: *The Foghorn Sports Pub & Grill*, OLCC-05-V-027, February 2006.

Facts: Licensee was off duty drinking a beer, and periodically would get up to assist his bartender in making a drink for other patrons. License claimed that he was not actually drinking while he was performing those duties, but rather would perform the duties and then return to his seat to drink his beer, and therefore was not drinking on duty per OAR 845-006-0345(1).

Abstract: Where, as here, a licensee or off duty employee drinks an alcoholic beverage on the premises and then voluntarily performs services that put him or her back on duty, it is not necessary that the person continue to drink the alcoholic beverage during the performance of those duties. In this context, the determinative factor for purposes of OAR 845-006-0345(1) is whether the person was drinking an alcoholic beverage (or was under the influence of intoxicants) *at the time* he or she returned to duty. *See, e.g., Mac Club* (OLCC, Final Order, 99-V-110, December 2000) (by deciding the cost of a drink and overruling the bartender's decision not to serve a patron a double serving of wine in a beer glass, the licensee put himself on duty after he began drinking alcoholic beverages at the licensed premises). Consequently, under either approach, the violation has been proven.

"Choice of evils" defense does not negate a violation. If proven, the circumstances may warrant mitigation of the penalty.

Key Words/Phrases: drinking on duty, voluntarily performs services, choice of evils defense, mitigation

Case: *Cactus Bar & Grill*, OLCC-03-V-014, June 2004.

Abstract: Licensee placed himself on duty when monitoring the bartender and helping him break up a fight, and by escorting and/or ejecting three patrons. Licensee was under the influence of intoxicating liquor when he placed himself on duty, based on the number of drinks he had that night (five mixed drinks), the obvious signs of intoxication observed by the police officers (slow, deliberate movements; staggering; red/watery eyes; slurred speech; distinct odor of alcohol on breath; loud and animated actions; dazed state of mind); and his admission he was feeling the effects of alcohol.

The Commission could find no precedent for establishing the defense of "choice of evils" to excuse putting oneself on

duty while intoxicated in order to control the premises. Were there such a defense, licensee has not established the necessity for putting himself on duty to control the premises as the bartender and off-duty bouncer had the conflict under control before the licensee interceded.

Case: *Cascade West Grub & Ale House*, OLCC-01-V-071/-076, February 2002.

Abstract: Permittee went off duty, clocked out, and began drinking beer at the premises. When the crowd picked up, permittee resumed checking identification. The bartender did not recheck identification when permittee resumed this function. Permittee did not clock back in and considered herself merely to be “helping out.” The Commission concluded that permittee was back on duty. The definition of “on duty” does not require payment for the time. Permittee had the authority to put herself back on duty because she did so and the on-duty bartender did nothing to prevent her from checking identification again. Also, she was in effect put back on duty by the on-duty bartender when the bartender allowed her to perform service activities on behalf of the licensee.

Case: *Mac Club*, OLCC-99-V-110, December 2000.

Abstract: Licensee placed himself back on duty, while consuming alcohol, by overruling the bartender’s decision not to serve a patron a large quantity of wine in a beer glass. Licensee’s acts of going behind the bar to adjust the thermostat and signaling the bartender that a customer was waiting for service were not, themselves, acts sufficient to place the Licensee back on duty.

Case: *7-Eleven Food Store No. 29526*, OLCC-96-V-034, March 1997.

Abstract: Licensee violated OAR 845-06-045(1)(a) because his clerk drank alcoholic liquor and was under the influence of intoxicants when he was on duty in the store. [As the result of this same incident, licensee also violated ORS 471.260(1) which prohibits consumption on the premises of a package store.]

Case: *Edi's Fireside Cantina*, OLCC-93-V-063, May 1994.

Abstract: By allowing the off-duty service permittee to voluntarily perform server activities on behalf of the licensee, the on-duty Bartender, in effect, put permittee on duty.

To determine whether an employee is "on-duty" for purposes of OAR 845-06-045(1)(a), the Commission has concluded that the basic questions to decide are whether the person has the authority to put himself or herself on duty and whether the acts which were performed were on behalf of the licensee. (See *The Sportsman Club*, OLCC-87-V-002, June 1987; *Mark's Tavern*, OLCC-89-V-030, July 1989.) If the answers are yes, then one must decide whether the acts involved the mixing, sale, or service of alcoholic beverages and whether permittee was consuming or under the influence of alcohol when performing those acts which voluntarily placed permittee on duty. (See *The Sportsman Club*, *supra*, at 10; *Trocadero Inn*, OLCC-88-V-058, December 1988.)

Case: *Mark's Tavern*, OLCC-89-V-030, July 1989.

Abstract: Where the service permittee was not performing the function of a scheduled "on duty" employee, had no authority to put herself on duty at will, and was not acting for licensee, the Commission concluded that the service permittee was not on duty. Employees cannot create the authority to act on behalf of an employer where the employer has expressly prohibited it and the employee is not furthering the interest of the employer.

Case: *Trocadero Inn*, OLCC-88-V-058, December 1988.

Abstract: Evidence failed to prove that licensee was drinking or under the influence of alcoholic beverages while on duty where the evidence showed only that licensee, who was playing in the band and drinking beer, served one order

of alcoholic beverages that evening.

Case: *Bill's Place*, OLCC-88-V-001, July 1988.

Abstract: A person is "under the influence of intoxicating liquor" when that person displays not only 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, and which tends to deprive one of that clearness of intellect and control of himself which he would otherwise possess.

Case: *Frenchie's Tavern*, OLCC-88-ES-001, June 1988.

Abstract: Whether or not a permittee was scheduled to be on duty, he was on duty within the meaning of OAR 845-06-045(1) where he served beer to himself and two other patrons.

Case: *Eagle's Nest*, OLCC-85-V-052, February 1986.

Abstract: Alcohol on bartender's breath and bartender's state of intoxication was persuasive evidence that bartender was drinking while on duty.

**C.1.e. Open Container Carried Out of Premises (OAR 845-006-0345(5))
[(OAR 845-06-045(5))]**

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

Case: *Slim's Restaurant & Lounge*, 14-V-006/041, November 2014.

Facts: The OLCC alleged that Licensees' employee permitted patrons to take open containers of alcohol from the premises' licensed outdoor seating area. The agency proposed a sanction and revocation of Licensee's outdoor area under *former* OAR 845-005-0331(1) and (4) (effective until June 1, 2014). The license had been issued in 2008 following submission of a Control Plan outlining Licensee's efforts to control the outdoor café area. In 2012 Licensees were cited for patrons being outside the outdoor area and lack of monitoring by Licensees' staff. Subsequent inspections noted additional violations and lack of monitoring, despite multiple efforts to counsel Licensees. After receiving the warning notices and revocation notice, Licensees implemented new policies to control the outdoor area and installed surveillance cameras to monitor the outside area.

Abstract: To find that Licensees permitted patrons to take open containers of alcohol from the licensed premises, the evidence must prove knowledge of the proscribed activity and the failure to take reasonable steps to prevent or control the proscribed activity. *See, e.g., Don Juan's* (OLCC Final Order, 88-V-003, May 1988). The Commission found that Licensees' employee permitted patrons to take open containers of alcoholic beverages from the licensed premises, in violation of OAR 845-006-0345(5).

Grounds for aggravation of the penalty include: a prior warning about compliance problems; repeated failure to comply with laws; and the violation involved more than one patron or employee. The latter factor applied here, and the appropriate sanction is a nine day suspension or a civil penalty of \$1,485 in lieu of suspension.

Key Words/Phrases: outdoor area, open container, adequate supervision, revocation, control plan, good cause, multiple incidents, aggravation

Case: *Cougar Lane Lodge*, OLCC-01-V-066, February 2002.

Abstract: To "permit" as used in OAR 845-006-0345(5), requires that the licensee or permittee be aware of the prohibited activity.

C.1.f. False Statements (ORS 471.315(1)(a)(B))[ORS 471.425(1), ORS 472.180(1)(b)]]

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

Case: *9th Street Grocery*, OLCC-13-V-058, May 2014.

Facts: Licensee was selling "spice" (a synthetic form of cannabinoids) at the licensed premises. Undercover police purchased spice from Licensee on two occasions before making an arrest. When interviewed Licensee told officers different stories about whether she knew spice was illegal and whether she had recently sold it. When filling out her license renewal application, Licensee remembered being arrested for the spice selling, but did not list it on the application. Licensee later pled guilty to two felonies related to the spice sales.

Abstract: Licensee knew of an arrest when she failed to include it on her renewal application, making it a false representation.

Intentionality is only one of the factors to determine whether an omission or false representation was material. In this case it was material, given that it involved a misdemeanor on the licensed premises which could have been a basis to deny the license. The Commission is not required to ignore or reduce sanctions based upon economic hardship. There being no mitigating factors, the sanction of either a 40-day suspension, or a 30-day suspension plus fine was appropriate. The penalty was the combination of the standard penalties for the two proven violations.

Key Words/Phrases: misdemeanor on premises, false statement, spice, undercover, renewal application, suspension, economic hardship

Case: *Rico's Groceries*, OLCC-13-V-045, April 2014.

Facts: In July 2011, Licensee's business and residence were searched by CODE for meth and evidence of drug dealing. Licensee Antonio and one accomplice were arrested and charged with felonies/misdemeanors including sales of meth at the licensed premises. In August 2011, Licensees signed a License Renewal Application, and Licensee Antonio did not answer the questions about recent arrest/charges. Licensee Oliva does not speak or write English, but Antonio read it to her and she was aware of the recent arrest when she signed the form. Subsequently Licensee Antonio pled guilty to one felony, served 8 months in prison. In April 2013, OLCC inspectors went to the licensed premises to talk with Licensees. Only an employee who did not speak any English was present. The inspector later met with Licensees about the renewal application. Licensees said they did not answer the question about arrests/charges because at the time they did not know what the charges from the July 2011 arrest would be, as an attorney was negotiating with the DA. Both knew of the arrest when they signed the Application for Renewal.

Abstract: Being unaware of what charges may come from an arrest is no excuse for not disclosing an arrest on an Application Renewal form. Because the subject of the arrest was possession/delivery of controlled substances, it was material. Licensees can be responsible for the conduct of others, when they sign an application knowing it contains a false statement.

Key Words/Phrases: license renewal application, failure to disclose, meth, English, felony conviction

Case: *Silver Dollar Pizza*, OLCC-13-V-020, OLCC-13-L-005, November 2014.

Facts: Licensee permitted minors to operate a food (hot dog) cart on the sidewalk in front of the licensed premises. Minors used the licensed premises regularly including the kitchen, restrooms, safe for deposits, getting change, and socializing after hours. Licensee also had his minor son as an employee in the kitchen, and later operating the hot dog cart on the sidewalk. When questioned by OLCC inspectors, Licensee's minor son made false statements that he had

not been inside the licensed premises. The OLCC inspectors witnessed the minor inside and the minor admitted he was untruthful.

Abstract: The fact that the minor employee corrected the statement when confronted with contrary evidence (that the inspectors witnessed him on the premises) does not obviate the violation.

With regard to the assertion that the employee didn't know he was lying to an OLCC inspector, the inspectors were wearing OLCC badges at the time they spoke to the minor, and it was obvious to the minor that the person he had authority to enforce liquor laws.

There was no evidence that the minor was outside the scope of his employment when he made the false statements. There is no evidence that the minor employee was entrapped into making a false statement.

Key Words/Phrases: minor, permitted, premises, contractors, core business, entrapment, false statement

Case: *Camas Close Winery*, OLCC-11-V-066, June 2012.

Facts: Licensee submitted five Special Events Winery (SEB) license applications, and represented he had sufficient LLI coverage on each. Licensee was approved for two of them, and was advised that the applications for the others were incomplete for several reasons. OLCC inspectors visited one of the Farmers' Market locations where Licensee had applied for but not granted an SEB, and was discovered to be selling alcohol contrary to his license. Licensee did not have LLI coverage as he believed he did.

Abstract: Prior Commission cases have held that a false statement to the Commission need not be intentional, but must be material. See *Shan Creek Café* (OLCC, Final Order, 05-L-005, February 2006); *H2O Martini Bar & Restaurant* (OLCC, Final Order, 05-V-012, December 2005). A false statement is material if the subject of the false statement is a basis for the Commission to refuse, cancel or suspend a license. *Trocaadero Inn* (OLCC, Final Order, 90-V-055, February 1991). Material false statements are those which inhibit the Commission's ability to investigate a person's eligibility for a license. *Punjab Tavern* (OLCC, Final Order, 91-L-015, April 1992). The Commission has also held that a false statement is material if it was made intentionally. *AM/PM Market No. 756* (OLCC, Final Order, 95-L-031, July 1996). A false statement is intentional when the person making the statement intended to mislead the Commission. *Thomas Creek Steak and Seafood* (OLCC, Final Order, 00-L-008, April 2001).

Key Words: SEB license, LLI, approval, incomplete application, false statements, material, intentional

Case: *Capital Market*, OLCC-11-V-030-R, February 2012.

Facts: Licensees submitted a renewal application and wrote "none" in response to the question to list any arrests/convictions. One of the Licensees had previously pled guilty to Endangering the Welfare of a Minor for selling tobacco to a minor decoy, and also for Attempted Theft for keeping a winning lottery ticket.

Abstract: Similar to *City Center Food Mart*, OLCC, Final Order, 08-V-070 September 2009, writing "none" on a liquor license renewal application is a material false statement because it inhibits the Commission's ability to investigate the licensee's license eligibility. Further, writing "none" undermines the argument that Licensee "forgot" to list the convictions.

Co-licensees are jointly and severally liable for a false statement violation. OAR 845-006-0301(1), OAR 845-006-0301(3), see also *Lava Lanes of Medford* (OLCC, Final Order, 04-V-007, February 2005); *Jiffy Mart* (OLCC, Final Order, 04-V-027, February 2005) (noting that individuals who are licensees under a single license have equal responsibility for violations committed by any licensee holding the license.)

Key Words: false statement, misleading, material, forgot, “none”, “N/A”, conviction, jointly and severally liable, co-licensees

Case: *Santorini West and Kelen Tzakis*, OLCC-08-V-036/036A/036B, OLCC-09-V-026, June 2010.

Facts: Licensee with prior history of warnings and violations started holding Friday night “hip hop” events on the licensed premises. Permittee was Licensee’s wife and server at the licensed business. A series of serious disturbances began shortly after the hip hop events started. Licensee terminated the hip hop event promoter, and Licensee/Permittee informed police that they planned some changes to the format and business to address the reoccurring problems. Permittee also wrote two NSF checks for beer/wine purchases on behalf of Licensee. Licensee also had two gaps in LLI coverage. Licensee moved to suppress Permittee’s alleged false statements to OLCC investigator because her *Miranda* warnings were not given prior to an interview. Licensee cited Section 300.D of the OLCC Compliance Manual as authority, which requires investigators to give *Miranda* warnings when the peace officer interrogates a person in a custodial setting

Abstract: The OLCC Compliance Manual does not govern admissibility of evidence in a contested case proceeding. By its own terms, the constitutional right against self-incrimination applies only in the context of *a criminal prosecution*. When Inspector Wellman interviewed Permittee he was not conducting a criminal investigation. Although the liquor laws require that licensees maintain liquor liability insurance, a violation of OAR 845-005-0400(1) is not a criminal offense. Therefore, Article I, section 12 was not implicated and *Miranda* warnings were not required. Further, despite Permittee’s assertions to the contrary, she was not in custody or facing compelling circumstances.

Key Words/Phrases: history of serious and persistent problems, lewd or unlawful activities, LLI, liquor liability insurance, false statement, NSF check, *Miranda* warning

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 for ID. Licensee disputed that the sale ever occurred, that Licensee ever operated the cash register, and accused the decoy of stealing the alcohol. Licensee called 911 to report that the decoy had stolen and that inspectors were accusing Licensees of selling the alcohol.

Abstract: Licensee’s denial of selling alcohol to a minor decoy, and denial of working behind the cash register, were determined false, material, and made to induce or prevent action by the OLCC.

Key Words/Phrases: minor decoy, knowing sale, false statement, credibility determination, witness credibility

Case: *Lucky Jade Chinese Restaurant*, OLCC-09-V-055/055A, April 2010. See also *Jialin Chan*, OLCC-09-V-056, February 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 after he could see and hear people in the premises drinking. 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, the employee told them they could not enter without a warrant and officers had to physically move him out of the way to enter. Licensee’s employee gave false statements to OLCC investigators when they interviewed him about the events. On a subsequent occasion, Licensee’s corporate principal served a minor in the presence of OLCC inspectors.

Abstract: Licensee was responsible for violations of employee for false statement, permitting the sale/service of alcohol during prohibited hours, and refusal to admit a police officer. Violation of permitting a minor to be in a

prohibited area was also proven. See *Lava Lanes of Medford* (OLCC, Final Order, 04-V-007, February 2005) (the Commission held that the rule prohibiting minors does not include a requirement that the minor drink alcoholic beverages or mingle with persons who had consumed alcoholic beverages).

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

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.

Abstract: Permittee made series of false statements when he continually told officers and investigators different versions of events. False statements were intentional and material and warranted suspension of service permit.

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

Case: *Shell Food Mart*, OLCC-080V-060/060A/060B, March 2010.

Facts: Licensees had history of tobacco-related arrests and conviction they failed to disclose on application/renewal application. Following a secret indictment for additional tobacco-related charges, Licensees again submitted a renewal application and stated that felony charges were “pending” but did not identify the nature of the charges. The following year Licensees submitted another renewal application which listed one corporate principal’s misdemeanor conviction, but did not list the other principal’s felony conviction. A criminal lawyer had advised the principal that listing the conviction would jeopardize their liquor license and suggested that the application not list that principal or his conviction. While investigating another violation (sale to a minor) the discrepancies in the consecutive renewal applications was discovered by OLCC staff.

Abstract: A licensee’s misconduct with regard to the sale of tobacco and cigarettes bears a relationship to the licensee’s fitness to exercise the liquor license. See, e.g., *City Center Food Mart* (OLCC Final Order, 08-V-070, September 2009) (felony conviction for engaging in business as a tobacco products distributor without a license); *7-Eleven Store #2363-14504A* (OLCC Final Order, 08-V-107, April 2009.) (Misdemeanor convictions for failure to maintain tobacco product records and failing to maintain cigarette transaction records); and *7-Eleven Store #2363-16155F* (OLCC Final Order, 08-V-109, June 2009) (same).

The failure to disclose the conviction for tobacco-related offenses was material because the subject of the false statement is a basis for the Commission to refuse, cancel or suspend the license.

As in the recent case of *City Center Food Mart*, if not for intervening circumstances (a failure to verify age violation and false statements), the passage of time between the commission of the crimes and application would have been grounds to mitigate the penalty. But, intervening circumstances since the commission of the crime and the intentional nature of the omission on the renewal license offsets these mitigating factors. Cancellation is appropriate.

Key Words/Phrases: false statement, omission of convictions/arrests, intervening circumstances, passage of time,

failure to disclose

Case: *Tommy's Too*, OLCC-09-V-024, October 2009.

Facts: OLCC inspectors contacted a person at the door of the licensed premises who appeared to be an employee. The individual denied being an employee, stating he was just helping the bartender out for no compensation. He gave the inspectors a false name. When inspectors went inside to talk to the bartender the individual left the premises. Both the bartender and Licensee's corporate principal confirmed the individual was an employee. Inspectors later contacted him and he stated he lied because he was afraid of getting in trouble for not having DPSST certification. At hearing Licensee did not dispute the false information, but claimed it was not material because the employee did not need to be DPSST certified, and therefore nothing he lied about would have prevented any Commission action.

Abstract: Licensee's employee, who was responsible for checking IDs and ensuring patrons were 21, was performing "private security services" and required DPSST certification. The limited exception provided in the statute for persons who are employed by a licensee to verify age only applies if part of an "organized event." The exemption, by its terms, does not apply to normal day-to-day business activities. By so limiting the exemption, the statutory context appears to presume that a person performing age verification may, under some circumstances, come within the requirement to carry a DPSST certification.

Licensee's argument, that the employee's statements did not prevent Commission action because the Commission's practice is to give a warning for a first offense of lacking DPSST certification, is not persuasive. While the warning may not have any immediate impact, it is an "action" by the Commission that can have legal consequences because the Commission may consider warnings when imposing discipline for future violations, and may be used as an aggravating factor in some circumstances.

The fact that the corporate principal of Licensee was truthful with inspectors and did not attempt to conceal information does not rise to the level of extraordinary cooperation; this basic compliance is expected of all licensees. As a result, mitigation of the penalty for this circumstance is not warranted.

Key Words/Phrases: false statement, material, preventing commission action, prior warning, extraordinary cooperation, mitigation

Case: *City Center Food Mart*, OLCC-08-V-070/070A, September 2009.

Facts: Licensee with prior violations was secretly indicted for tobacco-related felonies, and was subsequently arrested and released. In filling out his renewal application he wrote "N/A" to the question regarding arrests or convictions. Shortly after being renewed Licensee requested a change of ownership, making Licensee a corporation and himself the individual corporate principal, because he knew he was facing criminal charges and wanted to protect his business. Corporate principal later pled guilty to a felony related to distributing tobacco products without a license.

Abstract: Licensee's claim that he didn't understand the word "arrest" is not persuasive. Licensee knew how to fill out other parts of the renewal form, knew how to indicate a change in ownership, and had just recently been arrested and arraigned. It seems more likely than not that the omission of the felony arrest was intentional.

If not for the corporate principal's false representation to the Commission in the renewal application, the Commission would agree that the passage of time since the underlying criminal conduct (more than five years ago) and his successful completion of the terms of his probation provide grounds to mitigate the penalty for the violation of ORS 471.315(1)(a)(I). But, intervening circumstances since the commission of the crime, specifically the violation of ORS 471.425(1) and the intentional nature of the omission on the renewal license, offset these mitigating factors. Therefore, it is appropriate to impose the standard sanction for the Category I violation, cancellation of the license.

Similarly, the intervening circumstance of a false statement on the renewal application negates any good cause due to the passage of time between the underlying misconduct giving rise to the felony conviction. The Commission is entitled to refuse to renew the license. *See also Center Market*, OLCC-08-V-104, October 2009.

Key Words/Phrases: false statement, conviction, felony, English, change of ownership, liability of individual corporate principal, mitigation

Case: *Mac Club*, OLCC-04-V-065/065A, July 2005.

Facts: Licensees had a restriction prohibiting one Licensee from drinking on the licensed premises. OLCC inspectors conducted an undercover inspection and observed the restricted Licensee carrying a bucket into the premises, and then drinking what appeared to be a beer inside. The inspectors left and later returned, contacting the restricted Licensee in his vehicle outside. Licensee claimed he had been drinking a non-alcoholic beer on the premises, and smelled of alcohol because he had 2 beers earlier in the day. He later changed his story to having left the premises to go to a friends' house to have beers. He then let inspectors see the inside of his vehicle, where they found bottles of beer in the bucket. Licensee admitted that he would go to his vehicle to drink, because of the restriction forbidding him from consuming alcohol in the licensed premises.

Abstract: OAR 845-006-0347(6) prohibits a licensee from permitting anyone to drink alcohol in any parking lot that the licensee controls that is associated with the licensed business unless the Commission has approved the sale or service of alcoholic beverages in the area. In this case, Licensees concede that Licensee's actions of taking beers from the licensed premises and consuming them in his vehicle in the parking lot that Licensees controlled violated this provision.

Licensees' contention that they did not violate the statute because Licensee later admitted that he had lied and corrected his false statements was not persuasive. Licensee tried to mislead the inspectors initially because he knew that he was prohibited from drinking in the premises. The fact that he corrected his false statements when an OLCC inspector confronted him with other contrary evidence does not obviate the earlier violation.

Key Words/Phrases: restriction violation, consuming in parking lot, licensee control of premises, false statement, admission to lying, mitigation

Case: *H2O Martini Bar & Restaurant*, OLCC-05-V-012, December 2005, *affirmed without opinion*, *Capital Asset Holdings, Inc., et al v. OLCC*, 213 Or App 240 (2007).

Facts: Licensee had a #1 minor posting. Licensee's minor sister was observed at the premises by OLCC inspectors, and receipts showing the sister had "comped" food and drink orders on other occasions was found. The OLCC also performed a minor decoy operation due to complaints of minors entering the premises, and Licensee's employees permitted the decoy to enter and be served. Licensee had prior violations for serving a minor and paying for alcohol with NSF checks. Since the violations Licensee installed an electronic ID scanner and hired DPSST certified security.

Abstract: Licensee made multiple intentional and material false statements about his sister's presence on the licensed premises. ORS 471.425 does not require that a misrepresentation be intentional. All that is required is that the misrepresentation be made "in order to induce or prevent action by the commission." As the court explained in *Von Weidlein/NW Bottling v. OLCC*, 16 Or App 81, 95 (1973) the evil aimed at by the statute is the possibility that the Commission may be misinformed. It is not required that the inspectors actually believe the erroneous information, and the statute is not circumscribed by the elements of common law fraud. Intent to deceive is not an implicit requirement of the statute. In this case, Licensee denied having any minors on the premises that night, yet his minor sister had been there for approximately two hours at a family gathering. Licensee was aware that minors are prohibited from the licensed premises, and his false statement was made to prevent the Commission from charging him with a violation of OAR 845-006-0335(3)(b).

Key Words/Phrases: credibility determination, make available to minor, “comped”, false statement

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

Abstract: In applications to renew, where Licensee referred to the corporate entity as “Couch Street Fish and Steakhouse,” rather than “Couch Street Fish House, the actual corporate entity, the statements were false, but not material. Based on the context, OLCC knew Licensees were referring to Couch Street Fish House. Citing *Von Weidlin/N.W. Bottling v. OLCC*, 16 Or App 81 (1973), holding that OLCC need not prove that a material false statement was made intentionally to sanction a licensee, the Commission sanctioned Licensee for two misrepresentations about a material fact (change in ownership) without regard to intent.

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

Facts: Licensee challenged the Commission’s 1996 decision on *AM/PM Market No. 756*, which adopted an additional test of materiality, concluding that an intentional false statement was a material false statement because the Commission must be able to rely on the honesty of licensees in dealing with the Commission and enforcing alcoholic liquor laws and rules. Licensee argued that the decision in *AM/PM Market No. 756* effectively eliminated the materiality requirement which is imperative to ensure the licensee’s rights are preserved, and constituted unlawful rulemaking.

Prior to final approval of the license application, Licensee filed plans with OLCC to do minor remodeling of the premises at a cost of \$5,000. After approval, Licensee did major remodeling, including the building of three stages, at a cost of approximately \$40,000. The Commission concluded that the plan submitted by Licensee was true when made. Licensee subsequently was convinced, for economic reasons, to accelerate the plan to move to nude dancing, and to begin more extensive remodeling, including building stages. The Commission further concluded that Licensee was not required under OLCC rules to seek approval for remodeling changes of the type made here (stages).

Licensee received a confirmation letter for a loan for funding from the bank which stated the loan was to be secured by a Certificate of Deposit. Licensee requested a second letter from the bank which stated only that the loan was to be secured in order to provide to the seller of the business a copy of the second letter to OLCC. Licensee submitted a copy of the second letter to OLCC. The Commission found that there was no evidence to show that Licensee provided the second version of the letter to OLCC in an attempt to conceal that his loan was to be secured by a Certificate of Deposit so as to withhold that the true source of funding was to be the third party holding the Certificate of Deposit, given, particularly, that the third party was known to be licensable.

Abstract: Spending more money than proposed for remodeling, absent proof of specific impropriety or violation of any rule, does not constitute a false or misleading statement. The change in plans was made after license approval.

Licensee did not intentionally withhold information that Licensee had obtained a different funding source from the bank where: (1) The bank loan commitment letter Licensee provided to Regulatory staff stated the loan would be secured; (2) attorney for Licensee attempted to negotiate with the bank to use the collateral for the loan intended by Licensee (Certificate of Deposit of third party), and, when the bank refused, advised his client to borrow the money directly from the third party and withdraw the loan application; (3) conditional approval of the license had already been given by OLCC; (4) the third party was known to be licensable; and (5) Licensee didn’t intentionally withhold the information, but relied on agent to send the information to OLCC and agent delayed sending the information until the deal closed.

The ultimate intent of the parties does not control whether Licensee made false statements or allowed parties to obtain interests in the licensed business without prior approval. The express terms or legal effect of the documents which

make up the transactions of acquisition and transference of part ownership must also be considered when deciding whether Licensee provided false statements or allowed parties to obtain unapproved interests in the licensed business.

Licensee did not provide a false statement to OLCC when, in explanation for why he didn't go through with the bank loan, Licensee stated that the bank had changed its terms for the loan. The bank refused to accept a third party Certificate of Deposit to secure the loan, when it was Licensee's intention from the beginning to submit a third party Certificate of Deposit, and not a personal Certificate of Deposit

Licensee did not make a false statement to staff that he would not change the operation where he subsequently did not change the business operation to one more dependent on alcohol sales and on entertainment.

Licensee did not make a false representation or statement about the type of entertainment he intended to present when, at the time of making the statement, Licensee intended to have live bands and subsequent to OLCC final approval he changed his mind regarding the form of entertainment, providing nude dancing instead. No rule or statute requires a licensee who has been approved to have entertainment to get OLCC approval if he or she wishes to change the type of entertainment that they intend to offer.

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.

Licensee did not make false representations or statements to staff throughout the application process as part of an ongoing scheme to mislead the staff about the "true intended ownership," management and financing of Stars Cabaret & Steak House. The concept of "true intended ownership" is not a concept that has been defined in OLCC statutes, rules, or prior cases and the Commission declined to adopt or define the concept, relying, instead, on existing laws, rules and case law. OAR 845-006-0020 and OAR 845-006-0120 define owners and individuals who have an interest in a licensed business. Licensee was not engaged in a sham application process. Licensee was engaged in and intended two separate legal transactions, each subject to OLCC approval. Moreover, factually, Licensee was not found to have engaged in misrepresentations during the application process.

Therefore, the preponderance of the evidence did not show that Licensee provided an intentional and material false representation by not telling the OLCC that his loan application had been withdrawn from the bank and that he had obtained funding from a third party instead.

Case: *H-Market No. 2*, OLCC-96-V-008, December 1997.

Abstract: The evidence failed to establish that licensee made a false statement to the Commission.

Case: *W.M. Costless*, OLCC-96-V-063ES, March 1997. [*Costless2*]

Abstract: The Commission cancelled the license where licensee committed multiple violations of making false statements on his application form which included: failure to list other names used; false social security number; failure to disclose a previous criminal conviction; failure to disclose that he was formerly a licensee; failure to disclose that he had a prior violation history.

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

Abstract: The Commission has concluded that a false statement must be material to be a basis for a violation. The

Commission determined that it will consider as material those false statements which inhibit the Commission's ability to conduct an investigation into a person's eligibility for a license. (In this case licensee failed to disclose that he had used another name.)

Case: *Harry's Stagecoach Inn*, OLCC-91-V-102, February 1992.

Abstract: Statements about financial interests in the licensed premises are material to the determinations the Commission must make under ORS 472.160(h) (undisclosed interests) and ORS 471.757 (statements of financial interest).

Case: OLCC-90-S-002, March 1991.

Abstract: The Commission concluded that applicant's failure to list a DUII arrest was not a material false statement because an arrest is not a conviction, and therefore is not a basis to refuse a license, and at the time applicant filled out the application, he had not been convicted of the charge.

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

Abstract: Intentional false statements are a basis to aggravate the penalty to cancellation of the license. *Sparkles Tavern*, OLCC-88-V-107, September 1989; *Lori Scott*, OLCC-89-V-166, March 1990. Where licensee told the Commission that the money she used to purchase the tavern was money she earned working as a waitress, but in fact she obtained the money from another person, the Commission cancelled the license because licensee's false statement was intentionally made.

A false statement is material if the subject of the false statement is a basis for refusal, cancellation, or suspension of a license by the Commission.

The Commission concluded the licensee's false statements were material because the false statements were about the source of the funds licensee used to purchase the business. The Commission has the right to know the source of a licensee's financial resources. OAR 845-05-011. The licensee must be able to demonstrate financial responsibility sufficient to adequately meet the requirements of the business proposed to be licensed. ORS 471.295(4)(i).

Case: *Sparkles Tavern*, OLCC-88-V-107, September 1989.

Abstract: False statement must be material to be basis for violation. A false statement is material if it has a logical connection to whether the licensee committed a violation. *Jiggles*, OLCC-85-V-016, February 1987; *Frenchie's Tavern*, OLCC-88-ES-001, June 1988. Licensee's false statement that his son was 21 when in fact he was under 21 was material because it had a logical connection to whether licensees committed a violation of having a minor on the premises.

Case: OLCC-88-SP-002, September 1988.

Abstract: The Commission concluded that applicant's failure to list three felonies was a material omission because the failure to list a violation for which there is a separate statutory basis for license refusal is a material omission. There is a separate statutory basis for license refusal if a person has been convicted of a felony.

Case: OLCC-86-SP-019, March 1987.

Abstract: The Commission concluded that an applicant's failure to list two gambling-related misdemeanors and five traffic-related misdemeanors were not material omissions because there is no Commission rule or statute which makes convictions of these misdemeanors a basis for denial of a license.

Case: *Fast Stop Market No. 2*, OLCC-86-V-065, September 1987.

Abstract: False statement that hidden owner had no interest in the premises other than as an employee manager was material because it prevented staff from investigating and discovering a hidden ownership interest.

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 (1991).

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.

Case: *Maynard's Place*, OLCC-85-V-018, November 1985.

Abstract: Unlike licensing cases, a false statement may constitute a violation even if it was not intended to mislead the Commission.

Case: *American Legion LaPine Post No. 45*, OLCC-84-V-023, February 1985.

Abstract: A false statement must be material, but need not be intentional, to constitute a violation of ORS 472.180(2).

Case: *Theresa Lee Gerber*, OLCC-84-V-031, January 1985.

Abstract: False statement made by service permittee three years earlier on permit application may be mitigated by permittee's subsequent good record in following Commission's rules and regulations.

Case: *Smith v. OLCC*, 31 Or App 167, 570 P2d 90 (1977).

Abstract: The Commission, as the trier of fact, decides the weight to be given to the applicant's explanation of the reason for the false statements.

Case: *Hart v. OLCC*, 181 Or 406, 409, 182 P2d 364 (1947); *Von Weidlein/N.W. Bottling v. OLCC*, 16 Or App 81, 95, 517 P2d 295 (1973).

Abstract: Under ORS 471.315(1)(b), which authorizes the Commission to cancel or suspend a license for a false statement made in order to induce or prevent Commission action, the false statement must be material but need not be intentional.

C.1.g. Hidden Ownership (ORS 471.757, OAR 845-005-0311(4))
[(ORS 471.757, OAR 845-05-011(4))]

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

C.1.g.1. Receipt of Profits (OAR 845-005-0311(3)(a)) [(ORS 471.757, OAR 845-05-011(3)(a); [OAR 845-06-010(3)(a)]]

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

Case: *La Gran Cantina*, OLCC-00-V-024/-L-009/-L-010, June 2002.

Abstract: Licensee's son obtained an interest in the business pursuant to OAR 845-005-0011(3)(a) (receipt of profits) where he was entitled to profits to be collected from the cover charge, as "entertainment consultant," over and above his entitlement to profits as a 5% shareholder. As "entertainment consultant," the son performed management or ownership functions which included hiring and firing employees, making decisions about premises' trade name and type of entertainment, conducting weekly employee meetings, supervising premises' managers, receiving all money collected at the premises, determining employee salaries, and incurring and paying the expenses of the business. The son performed more duties, had greater authority, and exercised greater control than someone with the status of a 5% shareholder would be entitled to exercise. His role at the business was much more consistent with that of a sole or majority owner. The Commission concluded the son had an interest in the business because he received or was entitled to receive profits for his management and control of the licensed premises over and above his entitlement to profits as a 5% shareholder. His entitlement to 5% of the profits as a shareholder was based on his investment of property and equipment, and was exclusive of any work performed on behalf of the business.

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

Abstract: Licensee was charged with allowing persons to obtain an unapproved interest as defined in OAR 845-005-011(3)(a), (c), (d), and (e), in his transaction with a limited liability corporation (LLC), giving the LLC an option to acquire Licensee. The Commission concluded that the LLC had not acquired an unapproved interest in the licensed business when the exercise of the option was conditioned on approval of the change of ownership by OLCC; the Investment and Indemnity Agreement, Promissory note and Loan and Security Agreement did not create present interests in Licensee; the loan was bona fide, entitling the lender to a return of only the principal and interest; the LLC was not entitled to receive profits of Licensee, directly or indirectly; individuals managing Licensee were not members of the LLC, but contract employees of Licensee; and the LLC was not a contract purchaser of Licensee unless or until OLCC gave approval.

Case: *H-Market No. 2*, OLCC-96-V-008, December 1997.

Abstract: The evidence failed to establish that two other persons received or were entitled to receive profits from the business because the evidence failed to establish what the profits from the business were. Profits are the excess of the selling price of goods over their cost.

Case: *Buff'N'Brew*, OLCC-94-L-019, July 1995.

Abstract: A landlord does not have a financial interest in the licensed premises solely by virtue of being an applicant's landlord.

Case: *Bill's Place*, OLCC-91-L-024, September 1992.

Abstract: The Commission concluded that ORS 471.757 and OAR 845-05-011(4) which regulate persons who have a financial interest in the business, and apply to persons who invest in or manage property on behalf of or "for" a licensed business. The statute does not apply to persons who rent or loan property or money "to" the licensed business and do not share in the profits or management of the business.

Case: *Bandon's Old City Hall*, OLCC-89-V-191, October 1990.

Abstract: The Commission found that a negligent violation (for failure to obtain prior Commission approval before allowing a former manager to purchase inventory and receive profits) was a mitigating factor. The record did not show willful hidden ownership.

Case: *Sunset Tavern*, OLCC-89-V-142, December 1989.

Abstract: Violation for unapproved interest as a result of receipt of profits was not mitigated where the unapproved owner's interest in the licensed premises was partial rather than total.

Case: *Columbia Cafe & 3 C's Club*, OLCC-86-V-034, January 1987.

Abstract: Persons who were not paid wages but were allowed to keep all monies in excess of expenses, were entitled to profits and, thus, had a prohibited undisclosed interest in the business under OAR 845-06-010(3)(a).

Case: *Old Town Eatery*, OLCC-86-V-042, December 1986.

Abstract: Licensee violated OAR 845-06-010(4) who allowed another person to be entitled to receive profits from the licensed business.

**C.1.g.3. Contract to Manage (OAR 845-005-0311(3)(c))
[(OAR 845-05-011(3)(c))]**

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

Case: *El Mariachi Mexican Restaurant*, OLCC-11-V-035, December 2011.

Facts: Licensee checked “no” on renewal application asking if there had been a change in ownership, when a new manager had been solely running the business. The manager stated that he was considering purchasing the business and had a “deal” with Licensee to operate it for approx. 6 months. Licensee had told the manager that the liquor license needed to be changed to reflect the manager running the business, but the manager told the Licensee that wasn’t necessary.

Abstract: When a Licensee and manager had a “deal” to operate the licensed business, manager was the only individual performing management and operational duties (including hiring, firing, payroll, and day to day decisions), and Licensee was not present at the licensed premises during that time, a contract to manage existed.

Key Words/Phrases: contract to manage, receipt of profits, management duties, operational duties, interest in the business.

Case: *Margaritas*, OLCC 10-V-025/025A, November 2010.

Facts: Licensee’s domestic partner helped out in most management aspects of the business. Licensee did not disclose her partner’s role in the business on her application or renewal application.

Abstract: An individual who was an authorized signer on the Licensee’s bank account, signed checks to vendors, supervised Licensee’s employees and held himself out to be an owner of the business had a contract to manage and/or operate the licensed business and, therefore, had an unapproved interest in the business pursuant to OAR 845-005-0311(3)(c).

Key Words/Phrases: interest in licensed business, valid service permit, compensation out of the ordinary

Case: *CS Convenience Store*, OLCC09-V-059, June 2010.

Facts: Licensee’s brother was unlicensable and restricted from the premises. The licensed premises was in the same building as another business owned by Licensee. Licensee’s brother managed both businesses and was on the licensed premises contrary to licensing restrictions.

Abstract: A person who contracts to manage or operate any part of the licensed premises other than as an employee shall be deemed to have an interest in the licensed business. There is no requirement that the contract be written. *See e.g., Woahink Landing* (OLCC Final Order, 86-V-052, January 1987). Where the licensee agrees to have another manage the premises, and management agreement gives them control over the daily operation and supervision of the premises but makes no provision for salary or other employment terms, it is an interest in the business under this rule. *See also Ski Bowl Beer Stube* (OLCC Final Order, 85-V-024, August 1985).

Key Words/Phrases: unauthorized interest in a business, compensation out of the ordinary, contract to manage, investment, hearsay evidence, license restriction, *Oceanside* factors

Case: *La Gran Cantina*, OLCC-00-V-024/-L-009/-L-010, June 2002.

Abstract: The requirement that there be evidence of an agreement or contract does not necessarily require a written

contract. (See, e.g., *Woahink Landing*, OLCC-86-V-052, January 1987; *Columbia Café & 3C's Club*, OLCC-86-V-034, January 1987.)

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

Abstract: Licensee was charged with allowing persons to obtain an unapproved interest as defined in OAR 845-005-011(3)(a), (c), (d), and (e), in his transaction with a limited liability corporation (LLC), giving the LLC an option to acquire Licensee. The Commission concluded that the LLC had not acquired an unapproved interest in the licensed business when the exercise of the option was conditioned on approval of the change of ownership by OLCC; the Investment and Indemnity Agreement, Promissory note and Loan and Security Agreement did not create present interests in Licensee; the loan was bona fide, entitling the lender to a return of only the principal and interest; the LLC was not entitled to receive profits of Licensee, directly or indirectly; individuals managing Licensee were not members of the LLC, but contract employees of Licensee; and the LLC was not a contract purchaser of Licensee unless or until OLCC gave approval.

Case: *Junction Inn*, OLCC-86-V-073, May 1987.

Abstract: An owner who managed a licensed business did not have an interest under OAR 845-06-010(3)(c) where the owner received profits, rather than a salary that would be considered an expense of the business, and where the owner's management was not pursuant to any contract.

Case: *Columbia Cafe & 3 C's Club*, OLCC-86-V-034, January 1987.

Abstract: People contracted to operate a business other than as employees, creating a prohibited undisclosed interest under OAR 845-06-010(3)(c), where they were in complete control of the day-to-day operation of the premises, they made hiring and wage decisions, and they determined how the expenses of the business were to be paid.

Case: *Woahink Landing*, OLCC-86-V-052, January 1987.

Abstract: A person has a contract to operate a business and, thus, a prohibited undisclosed interest in a business under OAR 845-06-010(3)(c) where control is exercised by the contractor over the daily operation of the business. All decisions concerning operation and management were made by that person and the licensee exercised no supervision or control over the operation and management of the premises.

Case: *Town Eatery*, OLCC-86-V-042, December 1986.

Abstract: Licensee violated OAR 845-06-010(4) who: contracted with other person to operate or manage the licensed premises as a "full-time working partner," which is other than as an employee. OAR 845-06-010(3)(c).

Case: *Ski Bowl Beer Stube*, OLCC-85-V-024, August 1985.

Abstract: Entity had contract to manage other than as an employee (under OAR 845-06-010(3)(a),(c)) where it had control over the daily operation and supervision of the premises, there was no provision for salary or terms of employment and where the licensee did not routinely supervise its operation of the premises.

**C.1.g.2. Compensation Out of the Ordinary (OAR 845-005-0311(3)(b))
[(OAR 845-05-011(3)(b))]**

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

Case: *Margaritas*, OLCC 10-V-025, November 2010.

Facts: Licensee's domestic partner helped out in most management-aspects of the business. Licensee did not disclose her partner's role in the business on her application or renewal application.

Abstract: An individual performed numerous duties on behalf of the licensed business without pay, including participating in the business' bookkeeping, supervising employees, working shifts and signing checks to vendors on behalf of the business. The individual's lack of compensation for the services he rendered was "out of the ordinary" and gave him an unapproved interest in the business pursuant to OAR-845-005-0311(3)(b).

Key Words/Phrases: interest in licensed business, valid service permit, compensation out of the ordinary

Case: *CS Convenience Store*, OLCC09-V-059, June 2010.

Facts: Licensee's brother was unlicensable and restricted from the premises. The licensed premises was in the same building as another business owned by Licensee. Licensee's brother managed both businesses and was on the licensed premises contrary to licensing restrictions.

Abstract: The evidence establishes that, contrary to terms of the restriction, [licensee's brother] participated in the management or operation of the business. "Participate" means to take part in something (as an enterprise or activity) or to have a part or share in something. *Webster's Third New Int'l Dictionary* at 1646 (2002 ed.). "Management" means the act or art of managing: the conducting or supervising of something (as a business). *Id.* at 1372. And the definition of "operation" includes a doing or performing especially of action, an exertion of power or influence and/or the quality or state of being functional. *Id.* at 1581.

As set out in OAR 845-005-0311(3)(b), compensation "out of the ordinary" includes both over and under compensations. See *H-Market No. 2* (OLCC Final Order, 96-V-008, December 1997). Because licensee's brother was not compensated for services he provided to the licensed business, this lack of compensation was "out of the ordinary" for such services, giving him an unapproved interest in the business pursuant to OAR 845-005-0311(3)(b).

Key Words/Phrases: unauthorized interest in a business, compensation out of the ordinary, contract to manage, investment, hearsay evidence, license restriction, *Oceanside* factors

Case: *H-Market No. 2*, OLCC-96-V-008, December 1997.

Abstract: The Commission concluded that licensee violated OAR 845-05-011(3)(b) by allowing other persons to obtain an unapproved interest in the business where the individuals wanted to purchase the business and worked nine hours a day, seven days a week, for a five month period at the premises and did not receive any payment for their work. The Commission concluded that this was under compensation and compensation that was out of the ordinary.

Case: *7455 Incorporated, Jiggles*, OLCC-85-V-016, January 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 would be insufficient to prove an interest under OAR 845-06-035(3)(b) for receiving compensation out of the ordinary for services rendered if the evidence did not show what level of compensation is ordinary for the services in question.

An interest was not shown under OAR 845-06-010(3)(b) where money paid to a person from a licensed business was a distribution of profits to a part-owner.

**C.1.g.4. Investment in Licensed Business (OAR 845-005-0311(3)(d))
[(OAR 845-05-011(3)(d))]**

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

Case: *Margaritas*, OLCC 10-V-025/025A, November 2010.

Facts: Licensee's domestic partner helped out in most management aspects of the business. Licensee did not disclose her partner's role in the business on her application or renewal application.

Abstract: A person who participated in the business bookkeeping, hired, fired, scheduled and supervised employees, worked shifts, signed checks to vendors and on behalf of the business for no compensation had an unapproved interest in the business pursuant to OAR 845-005-0311(3)(b). Same individual was deemed to have a contract to manage and investment in the licensed business.

Key Words/Phrases: interest in licensed business, valid service permit, compensation out of the ordinary

Case: *CS Convenience Store*, OLCC09-V-059, June 2010.

Facts: Licensee's brother was unlicensable and restricted from the premises. The licensed premises was in the same building as another business owned by Licensee. Licensee's brother managed both businesses and was on the licensed premises contrary to licensing restrictions.

Abstract: A person who spends time and money in maintaining the licensed premises, providing property to repair or replace equipment, and paying workers' comp insurance for employees is investing money in the licensed business. See also *Harry's Stagecoach Inn* (OLCC Final Order, 91-V-102, January 1992).

Key Words/Phrases: unauthorized interest in a business, compensation out of the ordinary, contract to manage, investment, hearsay evidence, license restriction, *Oceanside* factors

Case: *La Gran Cantina*, OLCC-00-V-024/-L-009/-L-010, June 2002.

Abstract: Where son of primary licensee invested equipment and property in order to become a 5% stockholder in the corporation holding the liquor license at the licensed business, he did not obtain an interest in the business which requires prior Commission approval.

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

Abstract: Licensee was charged with allowing persons to obtain an unapproved interest as defined in OAR 845-005-011(3)(a), (c), (d), and (e), in his transaction with a limited liability corporation (LLC), giving the LLC an option to acquire Licensee. The Commission concluded that the LLC had not acquired an unapproved interest in the licensed business when the exercise of the option was conditioned on approval of the change of ownership by OLCC; the Investment and Indemnity Agreement, Promissory note and Loan and Security Agreement did not create present interests in Licensee; the loan was bona fide, entitling the lender to a return of only the principal and interest; the LLC was not entitled to receive profits of Licensee, directly or indirectly; individuals managing Licensee were not members of the LLC, but contract employees of Licensee; and the LLC was not a contract purchaser of Licensee unless or until OLCC gave approval.

Case: *H-Market No. 2*, OLCC-96-V-008, December 1997.

Abstract: OAR 845-05-011(3)(d). Licensee committed a violation by allowing other persons to obtain an interest in the business without prior approval of the Commission. The two persons paid approximately \$45,000 to licensee to purchase the business, paid \$4,000 toward the purchase of a surveillance camera and \$3,000 for a beer cooler for the premises.

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

Abstract: The evidence failed to establish that the money loaned to licensee by a friend was an investment in the business. The money was a bona fide loan because, although there was no written documentation of the loan, this type of loan was a normal practice between licensee and her friend, licensee was expecting to receive money from an insurance settlement and when she did she began repaying the amount she had borrowed, and the parties intended the money to be a loan.

Case: *Pastime Tavern*, OLCC-88-V-089, March 1989.

Abstract: Money given by a friend to licensee was a bona fide loan rather than a prohibited investment when, although the loan had no specific terms, the circumstances, including that the money was paid back within one month, indicated that the parties intended the transaction to be a loan.

Case: *Seven Star Market*, OLCC-88-L-003, July 1988.

Abstract: A person had a prohibited investment in a licensed business rather than a bona fide loan to the business where the terms of repayment were nonexistent or unclear at best.

Case: *Fast Stop Market No. 2*, OLCC-86-V-065, September 1987.

Abstract: A person had a prohibited investment in a licensed business rather than a bona fide loan to the business where the terms of repayment were nonexistent or unclear at best.

Case: *Columbia Cafe & 3 C's Club*, OLCC-86-V-034, January 1987.

Abstract: Licensee's explanation that he thought the purchaser of the business informed the Commission of the change of ownership was not credible. It is licensee's responsibility as a reasonable owner to insure that the Commission remain informed of who owned and was running the premises.

An investment under OAR 845-06-010(3)(d) exists where a person puts money or property into the business and intends to share in the increase in equity that results.

Case: *Old Town Eatery*, OLCC-86-V-042, December 1986.

Abstract: Licensee violated OAR 845-06-010(4) who: allowed other person to obtain an interest in the business by paying licensee \$6,600 for a 50 percent interest in all assets of the licensed premises. OAR 845-06-010(3)(d).

Case: *Northwoods Inn*, OLCC-85-V-075, June 1986.

Abstract: Licensee violated OAR 845-06-010(4) where licensee sold food and liquor inventory of licensed premises to another party. Ownership of inventory goes beyond role as employee. Purchase of inventory constituted an investment in the business.

**C.1.g.5. Contract Purchaser (OAR 845-005-0311(3)(e)) [(
OAR 845-05-011(3)(e))]**

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

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

Abstract: Licensee was charged with allowing persons to obtain an unapproved interest as defined in OAR 845-005-011(3)(a), (c), (d), and (e), in his transaction with a limited liability corporation (LLC), giving the LLC an option to acquire Licensee. The Commission concluded that the LLC had not acquired an unapproved interest in the licensed business when the exercise of the option was conditioned on approval of the change of ownership by OLCC; the Investment and Indemnity Agreement, Promissory note and Loan and Security Agreement did not create present interests in Licensee; the loan was bona fide, entitling the lender to a return of only the principal and interest; the LLC was not entitled to receive profits of Licensee, directly or indirectly; individuals managing Licensee were not members of the LLC, but contract employees of Licensee; and the LLC was not a contract purchaser of Licensee unless or until OLCC gave approval.

Case: *Yet Chip*, OLCC-91-V-033, October 1991.

Abstract: Licensee violated OAR 845-06-010(3)(e) where other persons entered into a contract to purchase the licensed premises and paid licensee a portion of the contract price prior to Commission approval. The Commission determined that mitigation of the penalty was appropriate where the violation was negligent and where the persons with the unapproved interest were licensable by the Commission.

Case: *Fast Stop Market No. 2*, OLCC-86-V-065, September 1987.

Abstract: Contract purchaser of a licensed premises is someone who has entered into an agreement to purchase a licensed premises. OAR 845-06-010(3)(e) prohibits a contract purchaser from making a payment of money to other than an escrow account prior to Commission approval.

Violation was mitigated where the hidden ownership was negligent rather than willful. The licensee had always intended to obtain Commission approval of the sale.

Case: *Your Inn Tavern*, September 1983.

Abstract: Aggravated violation found because applicant had knowledge of hidden ownership rule and took affirmative steps to conceal sale of business from Commission.

C.1.g.6. Waiver of Prior Approval (OAR 845-005-0311(5)) [(OAR 845-05-011(5))]

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

Case: *Yet Chip*, OLCC-91-V-033, October 1991.

Abstract: Where the record did not indicate there were any unusual circumstances and licensee did not argue any circumstances that would constitute good cause for the Commission to waive the requirement of obtaining prior approval, the Commission concluded there was no good cause to waive the requirement.

Case: *Bandon's Old City Hall*, OLCC-89-V-191, October 1990.

Abstract: The Commission has concluded that a licensee's lack of business experience and misunderstanding of the Commission's requirements do not provide good cause to waive the requirement of prior Commission approval.

Case: *Sunset Tavern*, OLCC-89-V-142, December 1989.

Abstract: The record did not set forth a basis for waiver of the prior approval requirement where an application was not submitted for an unapproved owner until ten months after the owner's interest was created and the record did not set forth any reasonable explanation for the delay.

Case: *The Embers Supper Club*, OLCC-88-V-075, March 1989.

Abstract: OAR 845-06-010(5) provides that a licensee may show good cause to waive requirement of obtaining prior Commission approval before a person obtains an interest in the business.

OAR 845-06-010(5) provides that the Commission may waive requirement that licensee obtain prior approval of a person's interest in business when there are unusual or extraordinary circumstances. Commission found good cause to waive requirement of obtaining prior approval when person's interest was disclosed to Commission at all relevant times, licensee intended to apply for change of ownership, but was slow to apply due to uncertainties caused by pending bankruptcy.

Case: *Whaler Restaurant & Lounge*, OLCC-88-V-119, March 1989.

Abstract: The Commission did not waive the requirement of obtaining prior Commission approval under OAR 845-06-010(4) when the record did not show good cause for a waiver. A one-year delay provided ample time to submit an application and there was no reasonable explanation for licensee's failure to do so.

**C.1.h. Habit of Using Alcohol or Controlled Substances to Excess
(ORS 471.315(1)(a)(F)) [(ORS 471.315(1)(a)(F),
[ORS 472.180(1)(g)]] Note: See cases under B.1.b.8.**

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Case: *Deborah Standley*, OLCC-99-V-020, December 1999.

Abstract: Permittee had four convictions for DUII during the period of a year. Three of the four incidents occurred within a week and one-half. The Commission concluded that at the time of the convictions, permittee had a habit of using alcohol to excess pursuant to ORS 471.315(1)(a)(F). Where there was no evidence that permittee had consumed alcohol to excess within the two years preceding the hearing, the Commission concluded that permittee's habit was not current and that permittee was entitled to mitigation.

Case: *Gatehouse Pizza*, OLCC-95-V-019, July 1996.

Abstract: Given a permittee's commitment to abstinence and the fact that she was not in denial that she has a problem with alcohol and her present abstinence, the Commission concluded that restrictions prohibiting her from serving, selling, or managing the sale or service of alcohol were more appropriate than cancellation of the service permit and were more in keeping with the legal requirements of the Americans with Disabilities Act (ADA).

Case: *The Homestead*, OLCC-94-V-074/63, August 1996.

Abstract: The Commission concluded that even though a former licensee no longer held a license, the Commission could conclude that the former licensee had a violation for being in the habit of using alcohol to excess where the former licensee had that habit when licensed. The habit need not be current at the time of the charge or hearing as long as it was current during the time that the former licensee held a license.

Case: *Becky Williamson*, OLCC-96-V-009, June 1996.

Abstract: The Commission concluded that there was a basis to cancel the service permit under ORS 471.315(1)(a)(F) for a habit of using alcoholic liquor to excess where the permittee had seven documented incidents of drinking alcoholic liquor to excess over a span of approximately 14 years, and she continued to consume alcoholic liquor while on probation, in spite of the fact that she had been ordered by the court to abstain from consuming while she was on probation.

Case: *Paula Gustafson*, OLCC-90-V-158, July 1991.

Abstract: The Commission concluded that the permit should be cancelled because the permittee has a current habit of using alcoholic liquor to excess. Although the permittee's record of compliance of 34 years without a violation weighed in favor of mitigation, the permittee's continued consumption of alcoholic liquor in violation of the conditions on her DA license showed that she would be a poor risk for compliance with alcoholic liquor laws.

C.1.i. Conviction of Felony, Liquor Laws or Violation on Licensed Premises (ORS 471.385(1)(b), ORS 471.315(1)(a)(I), ORS 670.280)[(ORS 471.315(1)(a)(I), ORS 471.385(1)(b), [ORS 472.180(1)(j)], ORS 670.280] Note: See cases under B.1.b.7.

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Case: *9th Street Grocery*, OLCC-13-V-058, May 2014.

Facts: Licensee was selling "spice" (synthetic form of cannabinoids) at her premises. In 2011 undercover police purchased spice from Licensee on two occasions before making an arrest. When interviewed Licensee told officers two different stories about whether she knew spice was illegal and whether she had recently sold it. When filling out her 2012 License Renewal Application, Licensee remembered being arrested for the spice selling, but did not list it on the application. Licensee later pled guilty to a Class C felony and Attempt to Commit Class B felony.

Abstract: The Commission is not required to ignore or reduce sanctions based upon economic hardship. There being no mitigating factors, the sanction of either a 40-day suspension, or a 30-day suspension plus fine was appropriate. The penalty was the combination of the standard penalties for the two proven violations.

Key Words/Phrases: misdemeanor on premises, false statement, spice, undercover, renewal application, suspension, economic hardship

Case: *Fajitas Mexican Restaurant*, OLCC-12-V-007/007A, August 2013.

Facts: Licensee held licenses at Fajitas Mexican Restaurant, which was operated by an individual. That individual also was controlling member of JA Meza, Inc., which owned three 7-Eleven licensed premises. The controlling member pled guilty to felony Coercion stemming from sexual contact with a female employee at one of the 7-Eleven stores. Controlling member's daughter signed a promissory note to purchase all of controlling member's shares in Juan Meza, Inc. in order to remove him from any role in the company. The OLCC approved the corporation's change in membership with restrictions prohibiting controlling member from being on the premises or participating in any operation or management of the business, based on the financial interest the controlling member would be receiving from the sale of stock to his daughter. Licensees did not context the restrictions. When renewing the 7-Eleven licenses for JA Meza, Inc., individual controlling member disclosed his conviction. When renewing the Fajitas Mexican Restaurant license, controlling member's daughter wrote "none" regarding convictions. Licensee argued that the conviction of coercion was not related to the fitness to hold a license, and that controlling member did not have a financial interest in the company. The Commission concluded that the issue of financial interest had already been decided in the prior licensing action, and that under the facts controlling member's conviction was related to his fitness to hold a license.

Abstract: In this case, a felony conviction of coercion was determined to be related to a licensee's fitness to hold a liquor license. Because it occurred on a licensed premises and involved subjecting an employee to offensive and unwanted physical contact, the facts supporting the conviction were related to the licensee's fitness as a liquor licensee. *See, e.g., Kingston Saloon* (OLCC Final Order 89-V-088, December 1989) (the commission of a crime on a licensed premises reflects adversely on a person's fitness to work in the alcoholic beverage industry).

Collateral estoppel/issue preclusion may be applied in administrative proceedings. Whether an administrative decision has a preclusive effect depends on: (1) whether the administrative forum maintains procedures that are sufficiently formal and comprehensive; (2) whether the proceedings are trustworthy; (3) whether the application of issue

preclusion would facilitate prompt, orderly and fair problem resolution; and (4) whether the same quality of proceedings and the opportunity to litigate is present in both proceedings. Issue preclusion may apply to findings of fact as well as conclusions of law. If the following requirements are met, a tribunal's determination on an issue may preclude re-litigation of the issue in another 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 a court will give preclusive effect.

Key Words/Phrases: felony conviction, related, coercion, collateral estoppel, issue preclusion, false statement, false representation, material, intentional, financial interest

Case: *Center Market*, OLCC-08-V-104, October 2009

Facts: Licensee was convicted of two felonies related to unlawful tobacco sales. Licensee had multiple premises, and Commission sought to cancel the licenses of all. Licensee argued that 1) the convictions weren't related to his fitness to sell alcohol; and 2) the relevant time period for considering "intervening circumstances" is between the date of criminal activity (not date of conviction) and agency action.

Abstract: Although the convictions in this case did not directly involve the sale or distribution of alcohol, the nature of the conviction does bear a relationship to Licensee's fitness to exercise his licenses. In a recent case, the Commission held that misdemeanor convictions for violating laws related to the handling of tobacco and cigarettes were related to a licensee's handling of alcohol and that such misconduct with regard to the sale of tobacco and cigarettes demonstrated a lack of fitness to exercise a liquor license. (Citing *7-Eleven Store #2363-14504A* (OLCC, Final Order, 08-V-107, April 2009).)

The Commission will generally require at least one and a half years from the date of one conviction, and as long as three years in the case of multiple convictions, for the Commission to conclude that the licensee has reformed and is not a poor risk for future compliance. See *Swan Mart; Applicant J.R., Applicant G.B., Thomas Creek Steak & Seafood; Garcia's Gas & Mini Mart*.

Where a substantial period of time has elapsed between the criminal conduct and the conviction, the Commission also considers the passage of time between the acts and the conviction. Passage of time without adverse intervening circumstances begins when the crime is committed and is a factor that constitutes good cause to overcome license refusal basis for a felony conviction.

Key Words/Phrases: conviction, felony, intervening circumstances, factor, criminal conduct, criminal act, passage of time, tobacco, poor risk, future compliance, multiple premises

Case: *City Center Food Mart*, OLCC-08-V-070/070A, September 2009.

Facts: Licensee with prior violations was secretly indicted for tobacco-related felonies, and was subsequently arrested and released. In filling out his renewal application he wrote "N/A" on question regarding arrests or convictions. Shortly after being renewed Licensee requested a change of ownership, making Licensee a corporation and himself the individual corporate principal because he knew he was facing criminal charges and wanted to protect

his business. Corporate principal later pled guilty to a felony related to distributing tobacco products without a license.

Abstract: Licensee's claim that he didn't understand the word "arrest" is not persuasive. Licensee knew how to fill out other parts of the renewal form, knew how to indicate a change in ownership, and had just recently been arrested and arraigned. It seems more likely than not that the omission of the felony arrest was intentional.

If not for the corporate principal's false representation to the Commission in the renewal application, the Commission would agree that the passage of time since the underlying criminal conduct (more than five years ago) and his successful completion of the terms of his probation provide grounds to mitigate the penalty for the violation of ORS 471.315(1)(a)(1). But, intervening circumstances since the commission of the crime, specifically the violation of ORS 471.425(1) and the intentional nature of the omission on the renewal license, offset these mitigating factors. Therefore, it is appropriate to impose the standard sanction for the Category I violation, cancellation of the license.

Similarly, the intervening circumstance of a false statement on the renewal application negates any good cause due to the passage of time between the underlying misconduct giving rise to the felony conviction. The Commission is entitled to refuse to renew the license. *See also Center Market*, OLCC-08-V-104, October 2009.

Key Words/Phrases: false statement, conviction, felony, English, change of ownership, liability of individual corporate principal, mitigation

Case: *7-Eleven #2363-14504A*, OLCC-08-V-107, April 2009.

Facts: Licensee pled no contest to two misdemeanors committed on the licensed premises. During the violation hearing Licensee argued that she did not commit those crimes and would not have pled no contest if she had known the consequences to her license.

Abstract: An administrative hearing such as this is not the place to relitigate the convictions at issue. The Commission has previously concluded that it will not question or retry the underlying facts involved in a conviction. *See also Kimmel's Little Giant*, OLCC-95-V-28, June 1996.

Conviction of crimes related to failure to properly maintain tobacco records is related to Licensee's fitness to exercise a liquor license.

The convictions at issue, although similar in nature, were for violating two different and distinct records laws. Therefore aggravation for multiple incidents was appropriate.

Key Words/Phrases: conviction, committed on licensed premises, relitigate, tobacco records

Case: *7-Eleven Store #2363-16155F*, OLCC-08-V-109, June 2009.

Abstract: Conviction of a misdemeanor crime that involves failure to properly maintain tobacco and cigarettes (a legal controlled substance, subject to regulation) on the licensed premises shows lack of fitness to exercise the liquor license.

Case: *Lebanon Day-N-Night Market*, OLCC-03-V-029/029A, January 2004.

Facts: Licensee was convicted of Misprison of a Felony (knowledge of a felony being committed) for unlawful distribution of pseudoephedrine that would be used to make meth.

Abstract: Licensee conviction of a felony in violation of ORS 471.315(a)(I) is a Category I violation. Aggravation was appropriate because the licensee personally committed the violation.

Case: *Best Buys Food Market, et al*, OLCC-00-V-077, January 2001.

Abstract: As a matter of law, the Commission cannot sanction a licensee for a violation of OAR 845-006-0047(3)(a) (permitted an unlawful activity) when the alleged unlawful activity was a crime that was committed on the licensed premises and there has been no conviction (at the time of the motion to dismiss, Licensees had been cited criminally and were pending trial). This is because where the unlawful activity is commission of a crime on the licensed premises, the authority for sanctioning licensees is ORS 471.315(1)(a)(I), not ORS 471.315(1)(a)(A). Upon a motion for a legal ruling, the charging documents were dismissed without prejudice, pending disposition of the criminal prosecution.

Case: *In re Yacob*, 318 Or 10, 860 P2d 811 (1993).

Abstract: In Oregon, the result of a plea of "no contest" is a conviction of a crime. See ORS 135.345.

Case: *Parker's Place*, OLCC-88-V-035, October 1988.

Abstract: The legal effect of a plea of no contest is a conviction of the offense to which the plea is entered. ORS 135.345. Therefore, the licensee's plea of no contest was a conviction for purposes of ORS 472.180(10).

Case: *State v. Dintelman*, 112 Or App 350, 829 P2d 719 (1992).

Abstract: "Convicted of a felony" means not only a determination of guilt but also an entry of judgment.

Case: *A.J.'s Homestead Restaurant*, OLCC-90-V-021, December 1990.

Abstract: The Commission concluded that the permittee's felony conviction should be treated as a conviction until such time as it is reversed or set aside. This followed the decision in *Sportservice Corp. v. OLCC*, 15 Or App 226, 229, 515 P2d 731 (1973) where the court concluded that the Commission properly treated licensee as convicted, even though licensee had appealed the conviction, reasoning that the conviction is a conviction until such time as it is reversed or set aside.

The Commission has authority to sanction a corporate licensee pursuant to ORS 472.180(1) for a felony committed by a corporate principal.

Case: *Corvallis Tool Co. v. Employment Div.*, 102 Or App 463, 469, 795 P2d 576 (1990).

Abstract: Until a conviction has been reversed, vacated or set aside, the statute (ORS 657.176(3)) mandates that if the same act results in employment dismissal and "conviction," unemployment compensation benefits shall be cancelled regardless of a pending appeal.

Case: *Kingston Saloon*, OLCC-89-V-080, December 1989.

Abstract: The Commission has authority to sanction a corporate licensee pursuant to ORS 472.180(1) for a felony committed by a corporate principal.

The Commission treated a licensee's conviction as a felony, even though the court indicated that it would reduce the classification of the offense to a misdemeanor after 18 months if the licensee successfully completed his probation, where the 18-month period had not yet elapsed and the conviction had not yet been reduced.

A licensee's felony conviction was related to the licensee's fitness as a liquor licensee where the licensee committed the offense under the influence of alcohol, the licensee committed the offense on a licensed premises, and the offense was violent and resulted in physical injury to another person.

Case: *Spigot Tavern*, OLCC-89-V-022, September 1989.

Abstract: In order to prove that a licensee "permitted" criminal activity (OAR 845-06-045(3)) by someone other than the licensee or one of the licensee's employees, the licensee must have had knowledge of the criminal activity and must have failed to take reasonable steps to prevent the activity. Licensee's failure to bar former shareholder in licensee corporation from the premises in the face of strong indications that former shareholder was engaged in criminal activities at the premises was unreasonable.

Case: *Tacoma Cafe*, OLCC-86-V-036, August 1987.

Abstract: In order to prove that a licensee "permitted" criminal activity (OAR 845-06-045(3)) by someone other than the licensee or one of the licensee's employees, the licensee must have had knowledge of the criminal activity and must have failed to take reasonable steps to prevent the activity. Licensee's failure to bar former shareholder in licensee corporation from the premises in the face of strong indications that former shareholder was engaged in criminal activities at the premises was unreasonable.

Case: *John Myshak*, OLCC-88-V-002, May 1988.

Abstract: The Commission received legal advice from its attorney on June 4, 1987, that ORS 670.280 is applicable to situations where the conviction of a crime is the basis for agency action. Therefore, the Commission must show a relationship between a permittee's felony conviction and the ability of the permittee to dispense alcoholic liquor in proving a violation of ORS 471.385(1)(b). See also *Cynthia Carpenter*, OLCC-88-V-097, March 1989.

The Commission concluded that a permittee's felony convictions for delivery and conspiracy to deliver a controlled substance are related to his fitness to dispense alcoholic liquor. The Commission reasoned that because cocaine and alcoholic liquor are both controlled substances, the fact that the permittee violated controlled substance laws with regard to cocaine indicates that he might also exercise poor judgment with regard to alcoholic liquor laws. See also *Swan Mart*, OLCC-05-L-008, October 2006, improper distribution of legal, but controlled substance is related to the exercise of the OLCC licensed privilege.

In deciding whether service permit cancellation is appropriate, the Commission should consider whether the person has reformed and is not likely to be a poor risk for compliance with the alcoholic beverage laws. One important factor is how much time has passed since the felony conviction. The greater the length of time without other problems, the more persuasive the evidence the person has reformed.

Case: *Tony's Tavern*, OLCC-86-V-003, February 1987.

Abstract: Where conviction of a crime is the basis for agency action, ORS 670.280 applies and the Commission must show the relationship between the conviction and the person's fitness to sell or serve alcoholic liquor. ORS 670.280.

Where one co-licensee convicted of a felony, license cancelled as to that co-licensee, and continued in the name of the

remaining licensee, subject to the conditions that the convicted felon divest himself of any interest in the licensed premises, and, that a Letter of Reprimand be issued.

Case: *The Frontier*, OLCC-86-V-032, December 1986.

Abstract: License cancellation was not appropriate against a corporate licensee whose officer had committed a felony on the licensed premises, because the officer had completely divested himself of any interest in the licensed premises, and management control now rested with other corporate officers. A fine or suspension was appropriate instead of cancellation.

Case: OLCC-84-SP-008, January 1985.

Abstract: The Commission cancelled the service permit of a permittee who was convicted of a second felony, where the permittee had a prior felony conviction at the time he received his permit, and the Commission had cautioned him against further convictions.

Case: *Sportservice Corp. v. OLCC*, 15 Or App 226, 515 P2d 731 (1973).

Abstract: Trial court felony conviction is sufficient ground on which to base license cancellation conviction, regardless of fact conviction was on appeal at the time of license cancellation.

C.1.j. Noisy Activities (ORS 471.425(2), OAR 845-006-0347(1)(b), (2)(a)) [(ORS 471.425(2), OAR 845-06-047(1)(c), (2)(a))]

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Case: *EJ's*, OLCC-00-V-083, May 2001.

Abstract: Licensee's manager turned down the volume of music in response to direction of an OLCC inspector, given after the inspector visited the apartment of a neighbor whose sleep was disturbed by the volume of the music. When the volume was again raised within minutes of the inspector's visit, Licensee permitted noisy activities, in violation of OAR 845-006-0047(1)(c), knowing, as the manager did, that the increased volume was interfering with someone's normal living activities.

Case: *Italian Riviera Restaurant*, OLCC-00-V-059, April 2001.

Abstract: The standard for excessive noise in ORS 471.329(1)(a) (exceeds local noise ordinance) does not apply to alleged violations of ORS 471.425(2) (maintain noisy establishment) and/or OAR 845-006-0047(2)(a) (permit noisy activities). When the 1999 Oregon legislature promulgated ORS 471.329(1)(a), it specifically set the standard for excessive noise under ORS 471.315(1)(c) and ORS 471.313(5). Rules of statutory construction do not allow judicial expansion of ORS 471.329 to extend its definition/standard to ORS 471.425(2) and OAR 845-006-0047(2)(a).

Bass music vibrations that are "felt" rather than "heard" are covered by the prohibition against noisy activities under OAR 845-006-0047(1)(c).

Case: *Yun's Garden*, OLCC-98-V-034, February 1999.

Abstract: Licensee did not "permit" noisy activity on the night in question because licensee and her employees did not have actual knowledge that the recorded music played at the licensed premises was disturbing a neighbor until after the recorded music was finished. The Commission declined to infer such knowledge from prior noise interventions where prior complaints by neighbors misidentified the premises from which the noise emanated; licensee's employees made efforts to find the source of the disturbing music noise, soundproofed the building, and monitored the noise level in patrolling the parking lot; licensee's employees immediately took action to stop escaping music noise by soundproofing the air vents when they discovered air vents had been left open during repair work. Because licensee and her employees did not know that the recorded music was disturbing a neighbor that evening, they could not take additional steps to prevent or control the activity.

Case: *Punjab Tavern*, OLCC-92-V-088, June 1993.

Abstract: Licensee permitted noisy activities where loud music prevented a neighbor from going to sleep and where OLCC inspectors had talked with licensee or licensee's employees on three occasions prior to this incident regarding loud music.

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

Abstract: In order to show that licensee "maintained" a noisy establishment, the evidence must prove that licensees "permitted" noisy activities in a sufficient number of instances to show a continuity of such activities. One incident of noise was not sufficient to prove a violation.

Licensees maintained a noisy establishment where licensees had knowledge that the music was loud enough to interfere with neighbor's normal living activities because the volume of music was such that it would have been evident to persons working in the establishment, and where licensees failed to take reasonable steps to control the

music noise. Even though licensees were in the process of remodeling to reduce sound, music from the premises interfered with a neighbor's sleep.

Case: *Don Juan's*, OLCC-88-V-003, May 1988.

Abstract: A licensee had knowledge of noisy activities in his parking lot and, therefore, permitted the noisy activities where neighbors had complained to licensee about such noise during the previous two years and where the noise was loud enough that it should have been evident to licensee's employee.

Licensee's violation for permitting noisy activities was not mitigated by the fact that the premises was located in a dense residential neighborhood. Licensee had responsibility to prevent activity that would be noisy to that neighborhood.

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.

Licensee maintained a noisy establishment where noise from music at the licensed premises interfered with sleep, drowned out normal TV volume sound and was loud enough to be disturbing to nearby residents in their homes.

Case: *Mediterranean Tavern*, January 1984.

Abstract: Licensee maintained noisy establishment when music noise regularly disturbed residents of hotel located in same building as licensee, regardless of fact that licensee's lessor refused to install noise insulation.

C.1.k. Lewd Activities (ORS 471.425(2), (2)(a)) [(ORS 471.425(2), OAR 845-06-047(1)(b), (2)(a)), OAR 845-006-0347(1)(b)]

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

Case: *State v. Ciancanelli*, 339 Or 282, 121 P3d 613 (2005).

Abstract: Oregon law which makes it a crime to direct, manage, finance, or present a live public show in which participants engage in sexual conduct violates the free expression rights guaranteed by Article I, section 8, of the Oregon Constitution and does not fall under a well-established historical exception to the constitutional prohibition on enactment of such laws.

Case: *City of Nyssa v. Dufloth*, 339 Or 330, 121 P3d 639 (2005).

Abstract: A law is unconstitutional on its face if it is directed, by its terms and its actual focus, on restraining a particular variety of expression and does not fall within a well-established historical exception to the prohibition against such laws in Article I, section 8 of the Oregon Constitution. The court will continue to use the *Robertson* framework to analyze restrictions on expression. The city ordinance that was struck down in this case prohibited nude dancers from being within four feet of patrons.

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: *State ex rel Roberts v. Acropolis McLoughlin Inc.*, 150 Or App 180, 945 P2d 647 (1997).

Abstract: The Court of Appeals held that dancers were not employees, as defined in wage and hour laws.

Case: *The Bank, Division Branch*, OLCC-94-V-046, April 1995.

Abstract: It is not necessary that the dancers be the licensee's employees, agents, or representatives for a violation of permitting lewd activities to be proved. A violation can be proved regardless of the dancer's employment status, for example, even if the dancers are independent contractors.

Case: *Sparkles Tavern*, OLCC-88-V-107, September 1989.

Abstract: The licensee permitted lewd activities where the dancers who were engaged in the lewd activities were licensee's employees. The employees had knowledge of the lewd activities because they were the persons engaged in the conduct. The knowledge of these employees is imputed by law to the licensee.

Activities were lewd where patrons touched the dancer's genital areas, dancers massaged their own genital areas, and a dancer sat in a male patron's lap.

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: Male patrons' touching of female dancers' genitals, and the dancers massaging their own genitals, was lewd.

There was sufficient continuity to prove that licensee "maintained" a lewd establishment where lewd activity occurred on two different dates that were two months apart.

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

Cases: *Korgan v. OLCC*, 72 Or App 31, 695 P2d 81 (1985); *LaMar's Enterprises, Inc. v. OLCC*, 18 Or App 77, 524 P2d 336 (1974); *Palm Gardens, Inc. v. OLCC*, 15 Or App 20, 514 P2d 888 (1973).

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

Case: *Korgan v. OLCC*, 72 Or App 31431, 695 P2d 81 (1985).

Abstract: OLCC may interpret the statutory term "lewd" either by rulemaking or in contested case order.

Case: *The Chase Restaurant & Lounge*, June 1983.

Abstract: Lewd means lustful, indecent, lascivious or lecherous. Licensees maintained a lewd establishment where female patrons touched or caressed the buttocks or genital area of male dancers and the licensee made comments of a sexual nature to the audience.

Cases: *Taylor's Coffee Shop v. OLCC*, 28 Or App 701, 560 P2d 693 (1977); *Palm Gardens, Inc. v. OLCC*, 15 Or App 20, 514 P2d 888 (1973); *Neptune's Restaurant v. OLCC*, 15 Or App 16, 514 P2d 900 (1973); *Starview, Inc. v. OLCC*, 15 Or App 11, 514 P2d 898 (1973).

Abstract: There must be proof of more than a single incident to establish that lewd establishment is being "maintained."

C.1.1. Disorderly Activities (ORS 471.425(2), (OAR 845-006-0347 (1)(a), (2)(a)) [(ORS 471.425(2), (OAR 845-06-047(1)(a), (2)(a))]

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

Case: *Lotsa Luck Bar & Grill*, OLCC-13-V-015/015A, February 2014.

Facts: A man and woman came in to licensed premises arguing. A bartender overheard the man say he was going to "beat your ass" to the woman. The man left and the woman stayed behind for a few minutes, then exited the bar. The man pulled out a handgun while in his vehicle in the parking lot and fired one shot in the air. At that point the woman came out of the bar, got in the vehicle and the couple drove off. The OLCC contended the Licensee permitted disorderly activities on the premises.

Abstract: To prove that a licensee "permitted" disorderly activities on the premises, the OLCC must show that the disorderly activities occurred, that the licensee or agent of licensee had knowledge of them, and did not take reasonable steps to prevent the disorderly activities. In this case, the gunshot in the parking lot was clearly a disorderly activity, but there was no evidence the bartender was aware of the gun, or had warning that an assault would occur. A nonviolent verbal disagreement is not a disorderly activity sufficient to sanction licensee, and OLCC staff is overreaching to say that the bartender should have intervened. An argument between patrons, especially when it is handled civilly and at normal voice levels, is not disorderly activity.

Key Words/Phrases: disorderly activities, violence, gun, verbal disagreement, argument, voice levels

Cases: *Daniel Gruska*, OLCC-12-V-025, January 2013; *Gabriel Burton*, OLCC-12-V-023, January 2013.

Facts: Two service permittees' licenses suspended for permitting disorderly activities on licensed premises. Two groups of patrons initially started yelling and chest bumping, and permittees intervened and told them to "calm down" and "break it up." The patrons did so and permittees went back to the bar, only to have a large fight with pool sticks and balls break out seconds later. Neither permittee took steps to intervene or break up the fight, and did not call the police because another patron said the police were on their way.

Abstract: To show a violation of OAR 845-006-0347, the Commission must show that disorderly activities occurred, that the permittees had knowledge of the conditions that resulted in the disorderly activities, and that the permittees did not take reasonable steps to prevent the disorderly activities. *Corral Pastime* (OLCC Final Order, 89-V-165, May 1991); *The Old Hitch'en Post Restaurant & Lounge* (OLCC Final Order, 93-V-038, March 1994).

In this case permittees "permit" disorderly conduct when they do not intervene in a fight or call the police (surveying prior cases). While the Commission does not expect a licensee or permittee to put himself or herself at risk by intervening in a physical altercation, it does expect the licensee or permittee to take steps to prevent or minimize disorder, such as immediately calling the police for assistance, and announcing the police are on the way. Also, under the circumstances, it was not reasonable for the permittees to rely on a patron's comment that the police were on their way.

Key Words/Phrases: disorderly conduct, permit, intervene, serious injury, aggravation

Case: *The Crown Room*, OLCC-11-V-071/071A/071B/071C, October 2012.

Facts: After an ejected patron kicked over a metal barricade, Licensee's security guards chased an unruly patron down the street, using a Taser and pepper spray to subdue him. Police determined the patron had not committed any crime and the security guards used excessive force. OLCC contended that this constituted permitting disorderly activities on the licensed premises or areas the Licensee controls that are adjacent to or outside the premises. Licensee

contended that the security employees were acting in self-defense, and that the activity did not occur on the licensed premises and/or areas adjacent to or under Licensee's control.

Abstract: As the court recently noted in *DK Entertainment, LLC v. OLCC*, 249 Or App 659, 663 (2012), the fact that a licensee's employee engaged in disorderly or unlawful activity is sufficient to prove that the licensee failed to take reasonable steps to prevent the disorderly or unlawful activity. See also *Jiffy Mart* (OLCC Final Order, 04-V-027, February 2005). Similarly, when it is an employee who has engaged in the activity, the employee's knowledge of the conditions that resulted in the disorderly activities will be attributed to the licensee. See *Dekum Food Mart* (OLCC, Final Order, 03-V-002, June 2003).

Disorderly activities are those that "harass, threaten or physically harm another person." OAR 845-006-0347(1)(a). In *Casa Colonial* (OLCC Final Order, 09-V-084, April 2010), the Commission held that actions that harass, threaten or physically harm another person amount to disorderly activities under the rule even if the actions do not rise to the level of a criminal offense. The definition of harm includes "to cause hurt or damage to: injure." *Webster's Third New Int'l Dictionary* 1034 (2002 ed.). Pepper spraying and using a Taser caused the patron injury, and therefore are disorderly activities as defined by the Commission's rule.

Because Licensee's security staff's conduct went beyond reasonable self-defense or defense of others, this case is akin to *Cabaret Lounge* (OLCC Final Order, 08-V-061, October 2009) where a violation of OAR 845-006-0347(2) was established, and distinguishable from other cases, such as *Cactus Bar & Grill* (OLCC Final Order, 03-V-014, June 2004), where the Commission concluded that the licensee did not permit disorderly activities, but was acting in self-defense.

Where licensed premises maintained control over portions of the sidewalk with the use of metal barricades, the security staff's disorderly activities (specifically, pepper-spraying and tasing Haynes) took place on the sidewalk, halfway down the block from the premises entry and still adjacent to the premises' building.

Key Words/Phrases: disorderly activity, excessive force, security guards, pepper spray, Taser, maintain control, adjacent premises

Case: *Silver Lace Club, fka Stables Bar & Grill*, OLCC-10-L-001, February 2011.

Facts: Bartender/employee of Licensee excluded patrons from the premises; one returned to attempt to talk their way back in. When the discussion between the patron and employee got heated, the patron cocked his arm back as if he was going to hit the employee. The employee blocked the punch and pushed the patron back.

Abstract: The circumstances show the employee was not the aggressor, and did nothing other than defend himself from a patron's punch. Because his conduct was defensive there is no violation.

Key Words/Phrases: disorderly activities, self-defense, aggressor

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: After making a credibility determination, found that 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: *Cabaret Lounge*, OLCC-08-061, October 2009. [Distinguished in *JB's Deli and The Galley Sports Bar*, OLCC-13-V-002, September 2013.]

Facts: Licensee has several employees without valid service permits and DPSST certification as required. Licensee's employees engaged in fights with patrons being ejected, and one employee was charged with prostitution for engaging in sexual contact on the premises. Licensee fired the employee who was engaged in prostitution immediately upon seeing the contact.

Abstract: Licensees are responsible for the acts of their employees, including unlawful acts committed unbeknownst to the licensee. See *Jiffy Mart* (OLCC, Final Order, 04-V-027, February 2005). Under the *Jiffy Mart* standard, even if the licensee is unaware of the misconduct at the time it occurred and not in a position to prevent or control it, the Commission will hold a licensee liable for the wrongful activity because it will impute both the employee's knowledge and the employee's conduct to the licensee in determining whether the activity was permitted.

The Commission has found that disorderly activities occur when there is a threat of physical harm or where actual physical harm occurs. Here, the employee's conduct went beyond self-defense or defense of others, and the circumstances establish that he engaged in disorderly activities near the licensed premises.

Key Words/Phrases: permitting unlawful activity, DPSST certification, service permit, management duties, prostitution

Case: *Cactus Bar & Grill*, OLCC-03-V-014, June 2004. [Distinguished in *The Crown Room*, OLCC-11-V-071/071A/071B/071C, October 2012.]

Abstract: Based on one patron's specific warning to the bartender about the activity of a second patron, the bartender had knowledge that the second patron posed a threat of engaging in disorderly activity, but did not take effective steps to avoid the disorderly activity. The bartender therefore permitted the disorderly activity of the second patron which followed.

Case: *Trail's Inn Restaurant & Lounge*, OLCC-00-V-033, November 2000.

Abstract: The Licensees violated both OAR 845-006-0047(2)(a)(permitting disorderly activities) and ORS 471.425(2)(maintaining a disorderly establishment.) The corporate principal assaulted his girlfriend in the restroom of the licensed premises. In addition, there were four previous incidents in which the Licensee and his girlfriend fought inside the licensed premises.

Case: *Vera's*, OLCC-99-V-089, October 2000.

Abstract: The Licensee did not permit disorderly activities where the manager was not on duty at the time of a brief fight between patrons, the bartender took action to stop the brief fight, and there was no evidence that a later assault on another patron occurred in the licensed premises or in areas the Licensee controlled or that the on-duty employee had any knowledge of the later assault.

Case: *Watertrough Saloon*, OLCC-94-V-030, December 1994.

Abstract: A licensee's responsibility for not permitting disorderly activities under this rule does not extend to an area that is down the street, around the corner, and further down a cross street.

Case: *The Old Hitch'en Post Restaurant & Lounge*, OLCC-93-V-043, March 1994.

Abstract: The server did not permit disorderly activities where he intervened directly in a fight between patrons. The server did not permit disorderly activities where there was no warning that an assault would occur.

Case: *Portsmouth Club*, OLCC-93-V-034, October 1993.

Abstract: Permittee did not commit a violation of permitting disorderly activities under the following circumstances: permittee did not have reason to know that a fight was about to occur; when a fight started outside the premises he remained inside to help customers get out safely because he had reason to believe that his co-bartender was in control of the fight outside.

Case: *Central Desert Inn*, OLCC-92-V-059, July 1993.

Abstract: Licensees permitted disorderly activities where an off-duty licensee threatened an inspector and did nothing to prevent patrons from threatening the inspector. The on-duty licensee did not permit disorderly activities because she intervened when a patron attempted to harm the inspector.

Case: *Corral Pastime*, OLCC-89-V-165, June 1990.

Abstract: Licensee permitted disorderly activities where there was a threat of physical harm or actual physical harm occurred; licensee had knowledge of the conditions that resulted in the disorderly activities, and licensee did not take reasonable steps to prevent the disorderly activities.

Case: *Reston Red's Tavern*, OLCC-89-V-155, April 1990.

Abstract: Licensee permitted disorderly activities where police officers were approached in a threatening and hostile manner by licensee and licensee's customers.

Case: *Beaver's Inn*, OLCC-89-V-055, August 1989.

Abstract: Licensee did not permit disorderly activities where the record was insufficient to show that the bartender had knowledge of the conditions that resulted in a fight between two patrons. The bartender was waiting on customers and she was not aware that there was a problem between the two patrons. When she became aware of the problem, she immediately took steps to do something about it, but she was too late.

Case: *Reston Red's Tavern*, OLCC-89-V-058, August 1989.

Abstract: Permittee did not permit disorderly activities where, during a brief fight, permittee intervened directly in the fight rather than calling the police.

Case: *Vickie Shafer*, OLCC-88-V-133, May 1989.

Abstract: Permittee was not relieved of her responsibility to take reasonable steps to control disorderly activity when the doorman took steps to prevent an actual fight but did not take steps to prevent threatening behavior.

Case: *Red Garter Family Pizza*, OLCC-88-V-057, January 1989.

Abstract: Licensee permitted disorderly activities where, during a short altercation, licensee failed to at least state to fighters that licensee would phone the police if fight did not stop.

Case: *Dublin Pub*, OLCC-88-V-068, December 1988.

Abstract: Licensee did not permit disorderly activities where a fight occurred when licensee's employees were removing a patron from the premises.

Case: *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. [Citing] *Hughes v. Adult & Family Services*, 58 Or App 478, 484, 648 P2d 1324 (1982).

Case: *Frenchie's Tavern*, OLCC-88-ES-001, June 1988.

Abstract: A bartender shouting to patrons to encourage them to interfere with a Commission inspector was a disorderly activity.

An argument that involved two patrons shouting at each other angrily, with their fists clenched and raised, was disorderly activity.

Case: *Don Juan's*, OLCC-88-V-003, May 1988.

Abstract: A licensee did not permit disorderly activities where a patron began firing a gun without any prior warning and the licensee's employees did not fail to take reasonable steps to prevent or stop the gun firing.

A licensee permitted disorderly activities where the licensee had reasonable grounds to believe that patrons would be disorderly because the patrons had been disorderly in the premises before.

Cases: *214 Tavern*, OLCC-87-V-045, December 1987; *Tacoma Cafe*, OLCC-86-ES-001, October 1986.

Abstract: A charge for the violation of ORS 471.315(1)(d) (maintained disorderly establishment) is not separate or discreet from the violation of OAR 845-06-045(2) (permitted disorderly activities) and OAR 845-06-045(3) (permitted criminal activities), because the two rules interpret the statute.

Case: *Lloyd's Cafe*, OLCC-86-V-041, January 1987.

Abstract: Licensee and permittee permitted and tolerated disorderly activity by serving a drink to a patron and failing to eject him after he had been fighting.

Case: *Trail's End Lounge & Cafe*, OLCC-86-V-055, January 1987.

Abstract: Licensee participated in offensive physical contact on the licensed premises by pushing and shoving his co-licensee, by yanking the phone out of her hand so that she was struck in the temple by the receiver, and by pushing a customer in order to take a phone from her.

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

Abstract: To not be able to control a premises, and the patrons who enter, is to permit and tolerate the activity proscribed by OAR 845-06-045(2) and (4).

ORS 471.315(1)(d) (maintaining a disorderly establishment) is not unconstitutionally vague nor violated 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: *Town & Country Tavern*, OLCC-85-V-047, April 1986.

Abstract: Licensee permitted threatening or disorderly conduct by grabbing inspector's arm in attempt to wrest evidence from him, failing to stop employee from also grabbing inspector's arm, and by failing to take steps to stop threats made to the inspector outside the premises.

Case: *Porterhouse*, October 1983.

Abstract: By serving alcohol to individuals who had just assaulted another patron, bartender indicated permission and tolerance of physical assault.

Case: *Ollison v. Weinberg Racing Assoc.*, 69 Or App 653, 688 P2d 847, (1984).

Abstract: When licensee sells drinks at greatly reduced price, dangerous conduct by patrons is foreseeable.

Case: *Shamrock Tavern*, January 1983.

Abstract: "Permit" means to expressly assent to or to agree to something. "Disorderly conduct" requires a showing of more than merely strong or even angry words.

Cases: *Taylor's Coffee Shop v. OLCC*, 28 Or App 701, 560 P2d 693 (1977); *Palm Gardens, Inc. v. OLCC*, 15 Or App 20, 514 P2d 888 (1973); *Starview, Inc. v. OLCC*, 15 Or App 11, 514 P2d 898 (1973).

Abstract: In order to show licensee "maintained" lewd or disorderly establishment, OLCC must prove more than one incident.

**C.1.m. Unlawful Activity at Licensed Premises (OAR 845-006-0347(3))
[(OAR 845-06-047(3), [OAR 845-06-045(3))]**

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Case: *Bradley's Bar & Grill #40*, OLCC-13-V-007 (007A-007-E), December 2013.

Facts: Patron of Licensee delivered meth to a confidential reliable informant. Licensee's employee also permitted a minor to be on the licensed premises. Licensed premises was in Lottery Row, and Licensee held licenses at dozens of premises in Oregon. Previously Licensee and OLCC inspector had difficult interactions and Licensee's attorney sent the inspector a "nasty and character defaming" letter requesting that he remove himself from all investigations. Opinion outlines specific instances of drug deals made between a Portland police confidential reliable informants on the licensed premises, and one instance of a minor being present for approximately 9 minutes before Portland police located her. The bartender employees were distracted from noticing the minor due to attempts to remove another patron for having inadequate ID.

Abstract: OLCC staff did not establish that Licensee permitted unlawful activity on the premises because Licensee's employee had no knowledge of the drug purchases made by Portland police informants. It is simply not reasonable to expect Licensee's employees to monitor private conversations between patrons or to listen to a patron's phone conversation as a means of preventing unlawful activity. Under the circumstances the activity was surreptitious and subtle and knowledge of its occurrence cannot be inferred to Licensee.

After surveying several prior cases regarding "sufficient opportunity to detect a minor's presence," the Commission determined that the case of *Lucky Jade Chinese Restaurant*, OLCC Final Order, 09-V-055, April 2010 is distinguishable because there was evidence the licensee knew of the minor's presence and that she was in fact a minor. Here, the evidence was that Licensee's attention was focused on getting another patron to leave the premises during the nine minutes of the minor's presence. Under the circumstances, Licensee's employees did not have sufficient opportunity to detect the minor's presence and determine that she was a minor.

Key Words/Phrases: unlawful activity, meth, deliver, confidential reliable informant, minor, permitted, Lottery Row, opportunity to detect, observe

Case: *Aroma Restaurant*, OLCC-12-V-072/072A/072B, June 2013.

Facts: Licensee permitted security personnel without DPSST certification to provide security services. Licensee hired its security through a Craigslist ad, and contended that he didn't know the individual hired wasn't licensed. OLCC presented witnesses with contrary testimony.

Abstract: ORS 181.991(1)(b) makes it a Class A violation to provide security services without certification by DPSST, thus constituting unlawful activity under OAR 845-006-0347. The OLCC must show that the Licensee was aware of the unlicensed status when the individual provided security.

Key Words/Phrases: unlawful activity, DPSST certification, security services, witness credibility, falsify records, discredit witness

Case: *Illusion Sports Bar*, OLCC-11-V-037, May 2012.

Facts: Licensee agreed to restrictions – based on history of serious and persistent problems at the premises when operated by prior licensee - including having security staff and timing on last drinks and shots. Commission also required Licensee's managing member to take and pass a law orientation self-test, which informed licensees of the

legal requirements to operate and requirements regarding service permits and DPSST certification. On subsequent bar checks, violations including invalid service permits, inadequate/non-DPSST certified security, and serving of alcohol after restricted hours were discovered.

Abstract: A licensee permits unlawful activity when a licensee knows of the proscribed activity but fails to take reasonable steps to prevent or control the proscribed activity. See *Interstate Bar & Grill* (OLCC, Final Order, 09-V-027, September 2009). Here, the licensee knew he needed to have DPSST-certified security, and failure to have private security that is DPSST-certified is a Class A violation. Therefore Licensee’s hiring non-certified DPSST security constituted permitting unlawful activity on the licensed premises.

Key Words/Phrases: License restriction, violation, DPSST-certified, security, permit unlawful activity

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: “Private security professional” is defined in ORS 181.871(6) and means an individual who performs, as a primary responsibility, private security services for consideration. “Private security services” is also defined. Having valid DPSST certification means having a DPSST PSID card, and not other forms of DPSST certification when providing private security services.

A licensee “permits” unlawful activity when the licensee personally engages in the criminal conduct. See *Jiggles* (OLCC Final Order, 88-V-004, August 1988). Forging a service permit application when asked to see a service permit is permitting unlawful activity.

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: *La Torta Express*, OLCC-09-V-136/005, May 2010.

Facts: Licensee let his brother who did not read or understand English proficiently run the licensed premises. Licensee had changed his mailing address to a P.O. Box for his LLI. Licensee’s LLI carrier sent notices of cancelation and ultimately canceled the policy for non-payment. The OLCC was notified by the insurer of the lapse, and when the agency contacted Licensee he denied knowing it was cancelled. Licensee also hired a non-DPSST certified security employee.

Abstract: Licensee was aware of the need for security personnel to be DPSST-certified, and therefore was responsible for permitting unlawful activity on the premises.

Key Words/Phrases: LLI, liquor liability insurance, cancellation, DPSST, permitting unlawful activity

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. The Commission does not require a conviction to establish a violation for permitting unlawful activity under OAR 845-006-0347(3)(a).

Permitting unlawful activity requires a licensee's knowledge of the activity and the licensee's failure to take reasonable steps to prevent or control the proscribed activity. *Don Juan's* (OLCC, Final Order, 88-V-003, May 1988); *Casa del Rio* (OLCC, Final Order, 88-V-033, August 1988). When an employee fails to take those reasonable steps, the licensee is responsible. *Don Juan's* (OLCC, Final Order, 88-V-003, May 1988). As to the employees' own action, the Commission has held that it need not consider whether an employee took steps to prevent their own wrongful act, when the licensee's employee is engaged in criminal conduct. *Jiggles* (OLCC, Final Order, 88-V-004, August 1988). Here, licensee knew that the employees needed to be DPSST certified based on OLCC inspector's correspondence to licensee prior to the violation.

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.

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

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: When a licensee's employee who engaged in criminal conduct was not on duty or otherwise acting on behalf of the licensee, the licensee is not responsible for the off-duty employee's criminal act. See also *Reston Red's Tavern* (OLCC, Final Order, 89-V-058, August, 1989). In this case, the Commission concludes that an employee was not acting on behalf of the licensee or on duty when he was found at 2 a.m. (well after hours) outside the licensed premises with controlled substances, particularly given the lack of reliable evidence that would link the controlled substance to the licensed premises. When the only direct evidence to support the charge is not a substantial hearsay statement; a statement not believed by the police officer; and where circumstantial evidence does not support the charge, the Commission determined the evidence did not support the violation.

Key Words/Phrases: permitting unlawful activity, controlled substances, reliable evidence, hearsay, acting on behalf of a licensee, on duty

Case: *Cabaret Lounge*, OLCC-08-061, October 2009. [Distinguished in *JB's Deli* and *The Galley Sports Bar*, OLCC-13-V-002, September 2013.]

Facts: Licensee has several employees without valid service permits and DPSST certification as required. Licensee's employees engaged in fights with patrons being ejected, and one employee was charged with prostitution for engaging in sexual contact on the premises. Licensee fired the employee who was engaged in prostitution immediately upon seeing the contact.

Abstract: Licensee's dancers were subject to Licensee's control, including being booked, setting rules, and firing for inappropriate contact with patrons. Therefore, Licensee's dancers were servants, agents or employees.

Because Licensee is responsible for the acts of its servants, agents or employees, Licensee permitted unlawful activity when an employee engaged in prostitution on the premises. Although after the dance and exchange of money

Licensee intervened and ejected the patron from the premises and fired the dancer for violating Licensee's policy, his response to the situation does not mitigate against a finding that Licensee permitted the unlawful activity.

Key Words/Phrases: permitting unlawful activity, DPSST certification, service permit, management duties, prostitution

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: The Commission has held that the mere fact that there are differences in how cases are prosecuted does not of itself constitute prohibited discrimination. See *The Blue Parrot* (OLCC, Final Order, 03-V-043, June 2004). 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:

Laches has three elements: (1) the plaintiff must delay asserting his claim for an unreasonable length of time (2) with full knowledge of all relevant facts, (3) resulting in such substantial prejudice to the defendant that it would be inequitable for the court to grant relief.

In another case involving a claim of laches, the Commission held that it was not barred from terminating an agency agreement because agent submitted late deposits, the last of which occurred two years prior to the hearing. The agent had not taken any significant disadvantageous change in position since the Commission could have first asserted the late deposits as a termination ground. Further, the passage of time since the violations had not been shown to result in the loss of any critical evidence. See *Carl Shoemaker, OLCC Agency No. 169* (OLCC, Final Order, 86-RO-003, March 1987).

Licensee argued that the three non-DPSST certified individuals were not employees but independent contractors, because Licensee had hired one person to perform security services, and that person turned around to hire others. The Commission held that Licensee cannot insulate itself from liability for unlawful activity just because it may have hired a third party to provide security services. Substance rather than form determines whether an independent contractor relationship or an employment relationship exists.

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.

The fact that security personnel later obtained the required DPSST certification does not mitigate the penalty. An action taken by a licensee to prevent future violations is not mitigation when the action taken is simply what is required to comply with law. See *Tony's Tavern* (OLCC, Final Order, 06-V-012, August 2006).

Aggravation is appropriate given Licensee's prior warnings regarding the same compliance problems as the violations proven.

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: *Interstate Bar & Grill*, OLCC-09-V-027/027A, September 2009.

Facts: Licensee had been warned previously of the need for DPSST-certified security personnel, both at this premises and another he had an interest in. Licensee failed to have his employee complete the certification process for almost a year despite the prior warning. Licensee raised defense of estoppel, because he had discussed being in the process of getting the certification completed just days before receiving a violation ticket, and believed the inspector had given him more time to complete the DPSST process.

Abstract: Violation for permitting unlawful activity (failure to have DPSST-certified private security) was proven. Aggravation was appropriate because Licensee's employee continued to perform security work without certification for more than six months after Licensee first became aware of the requirement.

Equitable estoppel, or estoppel by conduct, has several elements. The theory of equitable estoppel requires proof of a false representation, (1) of which the other party was ignorant, (2) made with the knowledge of the facts, (3) made with the intention that it would induce action by the other party, and (4) that induced the other party to act upon it. *Wilkinson v. PERB*, 188 OR App 97 (2003). Here, there is no evidence that a representation was made, true or false, regarding giving Licensee additional time to complete the DPSST certification. Licensee testified that the inspector never responded to his request one way or the other, making Licensee's reliance on that unreasonable.

Key Words/Phrases: DPSST certification, estoppel, permitting unlawful activity, reliance

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. 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: To establish permitting unlawful activity, OLCC must show that the licensee had knowledge of the proscribed activity, which may be inferred where the nature of the activity was such that it would have been evident to persons working in the establishment. The OLCC may impute to the licensee the knowledge of its employees. To impute the employee's knowledge of the unlawful activities to Licensee, there must be evidence that Licensee's employee had knowledge of the activities. Second, the OLCC must prove licensee failed to take reasonable steps to prevent or control the proscribed activity. The Commission has concluded that it is not necessary to prove that licensees had actual knowledge of the unlawful activity to prove a violation of permitting unlawful activity.

Regarding the Due Process argument, a liquor license is a "purely personal privilege" and does not constitute "property." ORS 471.292(1)(a) and (g). Licensee has been afforded due process protections in the contested case hearing, as required by the APA, and have not demonstrated a constitutional due process violation.

Regarding the "nexus" argument, the Commission has repeatedly concluded that it is reasonable to infer that because the applicant/licensee had engaged in illegal acts involving one controlled substance, the applicant/licensee would be a poor risk for complying with the laws concerning another controlled substance, *i.e.*, alcoholic liquor.

Cancellation is appropriate because of aggravating factors: number of violations, and that licensee was arrested for possession of prescription meds in another's name, and therefore personally committed a violation.

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).

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

Case: *Dekum Market*, OLCC-03-V-002, August 2003.

Abstract: Between August 2002 and October 2002, the following unlawful activities occurred inside or immediately outside the licensed premises: Four sales of marijuana (3 sales by an on-duty employee; 1 sale by a non-employee who obtained the marijuana from inside the premises, and transacted the sale in the presence of an employee); Marijuana and cocaine were confiscated from inside the premises, admitted to be that of an employee, and under the employee's constructive possession. The Commission concluded Licensees permitted these five unlawful activities.

The sidewalk immediately outside and adjacent to the licensed premises was an area controlled by Licensees. Licensees exercised control over the area by undertaking to keep the sidewalk free of loiterers. Licensees had a history of monitoring the sidewalk area outside the Dekum Market store, which also could be observed from inside the premises by way of plate glass windows.

Cancellation of the license is the appropriate penalty for Licensees' permitting unlawful activities associated with the sale or possession of drugs within a 2-month period, particularly where Licensees know drug sales occurring just outside the premises and drug paraphernalia was being sold at the premises. Licensees were not vigilant in making efforts to prevent or control illegal activity in or around their store.

Case: *Best Buys Food Market, et al*, OLCC-00-V-077, January 2001.

Abstract: As a matter of law, the Commission cannot sanction a licensee for a violation of OAR 845-006-0047(3)(a) (permitted an unlawful activity) when the alleged unlawful activity was a crime that was committed on the licensed premises and there has been no conviction (at the time of the motion to dismiss, Licensees had been cited criminally and were pending trial). This is because where the unlawful activity is commission of a crime on the licensed premises, the authority for sanctioning licensees is ORS 471.315(1)(a)(I), not ORS 471.315(1)(a)(A). Upon a motion for a legal ruling, the charging documents were dismissed without prejudice, pending disposition of the criminal prosecution.

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

Abstract: License restrictions were inadequate to control unlawful activity where a co-licensee conducted numerous illegal drug sales on the licensed premises.

Case: *Capital Market*, OLCC-92-L-003, May 1993.

Abstract: The Commission concluded that licensees committed a violation of permitting unlawful activities when an incident of someone drinking in the parking lot occurred. The Commission concluded licensees had reasonable grounds to know about persons drinking in the parking lot from the prior warnings they had received about others drinking in their parking lot.

It is not necessary to prove that licensees had actual knowledge of the unlawful activity to prove a violation of

permitting unlawful activities. *El Mirador Mexican Restaurant*, OLCC-91-V-150, May 1992. The Commission has concluded that there is the requisite knowledge where the licensee has reasonable grounds to know of the unlawful activity and failed to take steps to prevent or control it.

Case: *El Mirador Mexican Restaurant*, OLCC-91-V-150, May 1992.

Abstract: Generally, a licensee's knowledge of an illegal activity is proved by showing that the licensee or on-duty employee knew of the specific illegal activity charged. Nevertheless, where there is an on-going criminal enterprise in the licensed premises, the Commission has found the licensee had knowledge of the illegal activity where the licensee knew about the ongoing criminal enterprise by a specific person, but did not know about the specific illegal act charged.

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

Abstract: Licensee permitted unlawful activities on the premises where she had actual knowledge of the unlawful drug sale and did nothing to prevent it.

Case: *Trapper's Lodge*, OLCC-90-V-066, January 1991.

Abstract: The Commission concluded licensee did not permit criminal activities on the premises where: a) the employee who committed the drug sale was not on duty; b) there was no charge that any on-duty employees permitted the activity; and c) licensee did not have any knowledge of the drug sale.

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

Abstract: A licensee's statement that he would not tolerate a repeat of criminal activity on the premises did not constitute a reasonable effort to control the activity.

A licensee permitted criminal activity when two of his employees knowingly used methamphetamine on the premises while they were on duty serving alcoholic beverages.

A licensee permitted criminal activity when an employee, who served alcohol and who was on duty, observed a cook use marijuana on the premises and did not take any action to control the activity.

Case: *Samuel Waller*, OLCC-89-V-069, November 1989.

Abstract: The Commission imposed a lesser penalty than cancellation on a permittee who engaged in illegal drug activity on a licensed premises, where the permittee did not engage in the sale of the illegal drug to others on the premises. However, the Commission noted it may reconsider this policy in future cases.

Case: *Spigot Tavern*, OLCC-89-V-022, September 1989.

Abstract: Licensee failed to take reasonable steps to prevent or control a patron's criminal activities at the licensed premises. Even though the licensee informed the district attorney and the Commission of the patron's activities and the licensee told the patron to take the patrons criminal activities outside, the licensee allowed the patron to continue the activities in the premises' parking lot for over one year and took no steps to bar the patron.

Case: *Reston Red's Tavern*, OLCC-89-V-058, August 1989.

Abstract: When the licensee's employee who engaged in criminal conduct was not on duty or otherwise acting on behalf of the licensee, the licensee was not responsible for the off-duty employee's criminal act.

Case: *Jiggles*, OLCC-88-V-004, August 1988.

Abstract: Where the licensee's employee is engaged in the criminal conduct, the Commission need not consider whether the wrongdoer took steps to prevent their own wrongful act.

Case: *Tacoma Cafe*, OLCC-86-ES-001, October 1986; *Don Juan's*, OLCC-88-V-003, May 1988.

Abstract: "Permitting" involves two elements. First the evidence must prove that the licensee had knowledge of the proscribed activity. The Commission may infer knowledge where the nature of the proscribed activity was such that it would have been evident to persons working in the establishment. The Commission may impute to the licensee the knowledge of the licensee's employees. *Taylor's Coffee Shop v. OLCC*, 28 OR App 701, 706, 560 P2d 693 (1977). Second, the evidence must prove that the licensee failed to take reasonable steps to prevent or control the proscribed activity.

Case: *State v. Strance*, 95 Or App 488, 769 P2d 793 (1989).

Abstract: ORS 471.770 confers automatic immunity from subsequent criminal prosecutions for witnesses who testify pursuant to an OLCC subpoena on a matter that is the subject of the criminal prosecution.

Case: *Satyricon*, OLCC-88-V-060, December 1988.

Abstract: Licensee did not permit criminal activity where someone other than licensee's employee committed the criminal activity and neither licensee nor his employees had knowledge of the activity.

Case: *Parker's Place*, OLCC-88-V-035, October 1988.

Abstract: The charge that licensee committed criminal activity on the licensed premises was dismissed where the activity took place in the office of the premises. The clear language of the statute provides that "licensed premises" refers only to the area where refreshments or food are served. The licensee's office is not an area where refreshments or food are served.

The Commission has amended and renumbered its criminal activity rule several times. [OAR 845-06-045(2)(c) effective July 1, 1986 to March 31, 1987; OAR 845-06-045(3) effective April 1, 1987, to current.] The correct version of the rule for the violation charged is the version of the rule that was in effect on the date of the incident charged.

Case: *G.L. v. Kaiser Foundation Hospitals, Inc.*, 306 Or 54, 757 P2d 1347 (1988).

Abstract: The most common limitation on employer liability under the doctrine of *respondeat superior* is that the intentional act must have been undertaken with the intent of furthering the business purposes of the employer, however misguided that intent might seem. Court did not impose tort liability on a hospital for the criminal conduct of an employee outside the scope of employment.

Cases: *Gold Hill Tavern & Restaurant*, OLCC-87-V-050, February 1988; *Sportsman Tavern*, OLCC-87-V-051, March 1988.

Abstract: Licensee permitted criminal activity on the licensed premises where the licensee was convicted of Promoting Gambling in the Second Degree on the licensed premises. The "knowingly" element of the criminal offense established that the licensee "permitted" the criminal activity.

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

Abstract: Neither ORS 472.180(5), OAR 845-06-045(2), (3), which proscribe lewd activity and criminal activity, nor any other provision of the Liquor Control Act, forbids or allows nude dancing or nudity in establishments that serve liquor. Thus, Portland City Ordinances proscribing such activity are not superseded or repealed by virtue of the Act or regulations.

Case: *Red's Side Track*, September 1981.

Abstract: Licensees permitted criminal conduct to occur on the licensed premises where, over the course of an evening, licensees' employee committed numerous violations of a criminal statute prohibiting sexual conduct in a live public show.

C.1.n. Operating During Prohibited Hours (OAR 845-006-0425) [(OAR 845-06-030)]

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

Case: *Jammers*, OLCC-10-V-016, July 2011.

Facts: OLCC inspectors performed a premises check on New Years' Eve on a tip that the premises was allowing patrons to stay after the 2:30 a.m. cut off. Inspectors discovered one patron with one bottle of beer after the cut off, and he admitted hiding it in his jacket. Licensee's employees claimed they regularly walked through the customers before the cut off to remove all alcoholic beverages from them.

Abstract: The violation of OAR 845-006-0425(1) was proven despite the Licensee showing that the employees were not reasonably aware a patron was drinking after the 2:30 a.m. cutoff. The Rule does not include an element of "permitting." In *McAnulty and Barry's* (OLCC Final Order, 93-V-048, October 1993), the Commission held that licensees are held responsible for violations of OAR 845-006-0425(1) whether or not they permitted the act. Also, in *Balzer's Pub and Grill* (OLCC Final Order, 99-V-019, March 2001), the Commission held that "allowing" an act need not be proven in order to hold a licensee responsible for the violation of alcohol consumption after hours. Willful or negligent violations are not elements or defense either.

Key Words/Phrases: permitting, within licensee's control, 2:30 cut off, after hours

Case: *Lucky Jade Chinese Restaurant*, OLCC-09-V-055/055A, April 2010. See also *Jialin Chan*, OLCC-09-V-056, February 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 could see and hear people in the premises drinking and banged on the door. Licensee's employee saw the officer and did not come to the door until the other people had left out the back. Licensee's employee 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. Licensee's employee gave false statements to OLCC investigators when they interviewed him about the events. On a subsequent occasion, Licensee's corporate principal served a minor in the presence of OLCC inspectors.

Abstract: Licensee was responsible for violations of employee for false statement, permitting the sale/service of alcohol during prohibited hours, and refusal to admit a police officer. Violation of permitting a minor to be in a prohibited area was also proven. See *Lava Lanes of Medford* (OLCC, Final Order, 04-V-007, February 2005) (the Commission held that the rule prohibiting minors does not include a requirement that the minor drink alcoholic beverages or mingle with persons who had consumed alcoholic beverages).

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

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 left 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.

Abstract: Selling to employees or friends rather than the general public is not a defense to the charge of operating during prohibited hours. See also *Amber Inn* (OLCC, Final Order, 85-V-014, July 1985).

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

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

Abstract: OAR 845-006-0030(1) does not include “permitting” as an element of the violation. A violation of OAR 845-006-0030(1) occurs when alcoholic beverages are dispensed, served, or consumed on a licensed premises by anyone after authorized hours. Licensees are held responsible for violations of this rule whether or not they “permitted” the act. See *McAnulty & Barry’s*, OLCC-93-V-048, October 1993. Similarly, “allowing” the act need not be proven in order to hold Licensee responsible for the violation.

Case: *Coot’s Blue Tin Tavern*, OLCC-88-V-029, November 1988.

Abstract: Evidence was insufficient to show patrons were served or consumed alcoholic beverages after 2:30 a.m. where at 2:45 a.m. the juke box was on, there were four dirty glasses on a corner counter, and there were four persons in the back bar area. Service permittee did violate this provision by consuming beer behind the bar after 2:30 a.m.

Case: *The Pink Elephant*, OLCC-88-V-054, November 1988.

Abstract: Licensee violated OAR 845-06-030(1) where its employee stole beer and removed the beer from the premises after 2:30 a.m.

Case: *The Peacock Tavern*, OLCC-88-V-048, October 1988.

Abstract: Licensee did not violate OAR 845-06-030(1) as a result of licensee's employee consuming alcohol in an upstairs office area after 2:30 a.m., where the office was not open to the public, was not part of a hotel, and food and refreshments were not served to the public in that area.

Case: *River Road House*, OLCC-88-V-018, June 1988.

Abstract: A customer, who was sitting at the bar with a cold can of beer and a glass of beer in front of him at 2:50 a.m., consumed beer after 2:30 a.m. because it is unlikely that he would not have consumed some beer after hours.

Permittee dispensed and served herself a beer after 2:30 a.m. because at 2:50 a.m., her beer was almost completely full and was cold to the touch, and she admitted that she had opened a can of beer to drink while cleaning up. The evidence was not sufficient to prove that the permittee served the customer after hours where, at 2:50 a.m., the customer's beer was two-thirds empty, indicating that customer may have been served his beer prior to 2:30 a.m.

Case: *The Amber Inn*, OLCC-85-V-014, July 1985.

Abstract: Licensee's argument that alcoholic beverages were sold between 2:30 a.m. and 7:00 a.m. to employees and friends, rather than the general public, was not a defense to charges of operating during prohibited hours.

C.1.o. Hinderling Investigation

C.1.o.1. Failure to Phone Police (OAR 845-006-0345(2)) [(OAR 845-06-045(2), [OAR 845-06-045(4))]]

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

Case: *Bill's Place*, OLCC-88-V-001, July 1988.

Abstract: The licensee violated OAR 845-06-045(4) where there was no reason why he could not have called the police immediately. Licensee called within a few minutes of the request.

Case: *Trapper's Lodge*, OLCC-90-V-068, December 1990.

Abstract: The evidence failed to establish a violation of failure to call the police where the record showed the employee did not hear the inspector's first request that she call the police; and, the employee did call the police after hearing the inspector's second request.

C.1.o.2. Destruction of, or Refusal to Provide, Evidence
(OAR 845-006-0345(3)) [(OAR 845-06-045(3), [OAR 845-06-045(5))]]
([return to index](#))

Case: *Town & Country Tavern*, OLCC-85-V-047, April 1986.

Abstract: Licensee's attempt to grab evidence from inspector's hand constituted an attempt to destroy, damage, alter, remove or conceal potential evidence.

Case: *Hoehne v. OLCC*, 37 Or App 621, 588 P2d 87 (1978).

Abstract: RMB licensee hindered OLCC investigation by pouring unauthorized liquor into sink.

**C.1.o.3. Failure to Admit Inspector/Police Officer (OAR 845-006-0345(4))
[(OAR 845-06-045(4), [OAR 845-06-045(6))]**

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

Case: *Cinnabar*, OLCC-11-V-060, August 2012.

Facts: Licensee's corporate principal was at the licensed premises to see his son, a disc 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: The Commission determined that this case was distinguishable from *Lucky Jade Chinese Restaurant* (OLCC Final Order, 09-V-055, February 2010). Unlike *Lucky Jade*, the police officer sought to enter the premises to conduct a reasonable search to ensure compliance with alcoholic beverage law during *regular business hours*. Thus, the question is not whether Stafford "refused or failed to promptly admit" the officer under OAR 845-006-0345(4)(b), but rather whether Stafford "denied" Officer Peterson entrance to the licensed premises under the provisions of OAR 845-006-0345(4)(a). Because of the difference in wording between subsections (4)(a) and (4)(b), Staff's reliance on the Commission's determination in *Lucky Jade* is somewhat misplaced.

Key Words: witness credibility, deny entrance, delay entrance, bar fight, brawl, drinking on duty

Case: *Lucky Jade Chinese Restaurant* (OLCC Final Order, 09-V-055, February 2010. [Distinguished in *Cinnabar*, OLCC-11-V-060, August 2012.] See also *Jialin Chan*, OLCC-09-V-056, February 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 could see and hear people in the premises drinking and banged on the door. Licensee's employee saw the officer and did not come to the door until the other people had left out the back. Licensee's employee 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. Licensee's employee gave false statements to OLCC investigators when they interviewed him about the events. On a subsequent occasion, Licensee's corporate principal served a minor in the presence of OLCC inspectors.

Abstract: Licensee was responsible for violations of employee for false statement, permitting the sale/service of alcohol during prohibited hours, and refusal to admit a police officer. Violation of permitting a minor to be in a prohibited area was also proven. See *Lava Lanes of Medford* (OLCC, Final Order, 04-V-007, February 2005) (the Commission held that the rule prohibiting minors does not include a requirement that the minor drink alcoholic beverages or mingle with persons who had consumed alcoholic beverages).

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

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 left 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.

Abstract: Police officers were clearly identified, asked to enter to conduct a reasonable search to ensure compliance with alcoholic beverage laws, and had to physically move permittee out of the way to enter the premises. Therefore permittee refused to admit officers onto the licensed premises.

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

Case: *Bing's Restaurant*, OLCC-08-V-057/A/B/C/D, April 2009.

Facts: Police responded after hours to licensed premises on report of a fight. Police observed a known minor enter the premises. Police observed multiple people inside the premises who refused to allow police to enter. Several hours later a fire started at the premises. Licensee's corporate principal acknowledged that a private Christmas party had been going on and that he refused police request to enter the premises.

Abstract: The standard of "reason to believe" is essentially the same as "probable cause" or "reasonable grounds." There is extensive case law describing that standard. Probable cause is the same quantum of evidence as reasonable grounds, *Thorp v. MVD*, 4 Or App 552 (1971), and arises if there is a substantial objective basis for believing it more likely than not that the person has committed an offense. In addition, the officer must have a subjective belief that the person has committed an offense. *State v. Owens*, 302 Or 196 (1986); and *State v. Hayes*, 99 Or App 322 (1989). The determination of probable cause is a legal, not a factual, conclusion. Probable cause does not require certainty. *State v. Herbert*, 302 Or 237 (1986). The courts have consistently applied a low threshold of evidence to arguments that there were inadequate "reasonable grounds" to believe an offense has occurred.

Key Words/Phrases: refuse to admit police, reason to believe, probable cause

Case: *Three Seven Market*, OLCC-99-V-099, September 2000.

Abstract: The Commission found that Licensee did not commit a violation of ORS 845-006-0045(4)(a) (access to premises) when Licensee told enforcement officers to leave the premises while officers were citing Licensee's wife. This section of the rule prohibits a licensee from asking an officer to leave before the officer has had an opportunity to conduct a reasonable search to ensure compliance with the alcoholic beverage laws. The Commission concluded that this section of the rule was not violated where no search was being contemplated or conducted.

Case: *A & Q Distributing Company, Inc., A & Q Distributing Company*, January 1984.

Abstract: Violation for refusing investigator request to examine business records was mitigated where licensee was under the sincere, albeit incorrect, belief that the Commission was required to give 72 hours' notice before examining records and where licensee's intent was simply to have the investigator wait to look at the records until the licensee arrived. The licensee was expected to arrive momentarily.

Case: *Petticoat Junction*, July 1983.

Abstract: It was not a violation of OAR 845-06-045(6) (requirement to promptly admit OLCC personnel) to refuse to admit OLCC until police arrived, where licensee had been burglarized several times and the police arrived five minutes after inspectors demanded entry.

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

Abstract: ORS 472.170 (authorizing Commission inspectors to examine at any time the books and premises of a licensee) is not unconstitutional as a warrantless search.

C.1.o.4. Physical Interference (ORS 471.675)

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Case: *Central Desert Inn*, OLCC-92-V-059, July 1993.

Abstract: The licensee did not physically interfere with the investigation where the licensee grabbed the inspector's arm to get his attention and ask for identification. The record did not show that the licensee intended to interfere with the investigation.

Case: *Candy Store Tavern*, OLCC-86-V-053, February 1987.

Abstract: Licensee's attempt to grab a beer glass from inspector's hand was not excused by licensee's desire to prevent inspector from carrying open container outside, where inspector had identified himself and said that he was seizing the glass as evidence.

Case: *Town & Country Tavern*, OLCC-85-V-047, April 1986.

Abstract: Licensee's grabbing of inspector to attempt to stop him from leaving tavern and to attempt to grab evidence from inspector was a violation of ORS 471.675.

C.1.p. Improper Food Service (OAR 845-006-0460, -0461, -0462, -0463, -0464, -0465, -0466, -0467, -0468, -0469) [OAR 845-06-032; [OAR 845-08-015(2), (3), (4), and (6)]]

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

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: The rules regarding minimum food service requirements are consistent with the legislative direction concerning licensing and regulating commercial establishments, and are within the Commission's statutory authority to adopt and enforce. The Oregon Supreme Court has upheld prior food service rules against a challenge to the Commission's statutory authority to adopt and enforce food service rules. The Oregon Supreme Court held, in *Van Ripper v. Oregon Liquor Control Commission*, 228 Or 581 (1960), that the Commission's rule requiring that food sales amount to not less than 25% of total food and alcoholic liquor sales was within the Commission's statutory authority. Notwithstanding the changes in the Oregon Liquor Control Act since *Van Ripper*, the Commission concludes that the Legislative Assembly has adequately delegated to the Commission the authority to adopt rules that clarify the definition of a commercial establishment "where food is cooked and served".

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

Case: *Linda Lee Estes*, OLCC-02-V-006 & 007, August 2002.

Abstract: While the food services requirement of OAR 845-006-0460(3) is directed to "businesses," licensees with Full On-Premises sales licenses violate the rule when, as a business, they do not make available at least five different substantial minimum food items prepared on the licensed premises. Because a service permittee can be sanctioned for any act which would constitute a violation if performed or permitted by a licensee, (ORS 471.385(1)(c)), a permittee may also be cited for a violation of this rule, especially, as in this case, where such food items were made available by the Licensee, but not offered by Permittee.

Because ORS 471.385(1)(c) authorizes penalizing for any act that would be a violation if performed or permitted by a licensee, a permittee may also be cited for a violation of OAR 845-006-0466(3) (requiring Full On-Premises Sales licensees to make food service menus available to patrons), especially where, as in this case, Licensee made menus available but they were not offered by the Permittee.

Case: *Union Club*, OLCC-88-V-113, May 1989.

Abstract: There is no requirement in OAR 845-08-015 that regular meals be served in any particular place. When the dining room was not open, but the evidence failed to prove that meals were not available in the bar area, the Commission did not find a violation.

"Discouraging" meal service means that the employee hindered the patron from ordering regular meals by attempting

to dissuade him from ordering regular meals.

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

Abstract: Failure to operate as proposed under OAR 845-08-015(6) refers specifically to food service. Evidence that the doors to the restaurant were locked, without evidence of what food service was available elsewhere inside the premises, was not sufficient to prove a violation of OAR 845-08-015(6).

OAR 845-08-015(6) requires that a licensee provide the number of meals, hours of meal service, and type of cuisine last approved. However, the rule does not require that meal service be provided in any particular portion of the premises. Evidence that the dining room was closed was not proof, by itself, of a violation of this provision where licensee may have been providing approved meal service in other portions of the premises.

Case: *The Frontier*, OLCC-87-V-052, March 1988.

Abstract: Licensee violated OAR 845-08-015(6) when licensee proposed that it would be open and serving lunch from noon until 3 p.m., but failed on four occasions to be open and serving lunch at times between noon and 3 p.m.

Case: *J.B.'s Paradise Room*, OLCC-87-V-005, July 1987.

Abstract: Licensee violated OAR 845-08-015(3)(a) because licensee had only one hot dish available to patrons. The fact that licensee had sufficient food supplies on hand to meet minimum food service requirements was not sufficient to overcome the violation because the employee on duty failed to offer the food to the patron or tell the patron that the food was available. The fact that licensee had sufficient food supplies on hand and intended to provide minimum food service was a basis for mitigation.

Case: *Miller's Cave*, OLCC-86-V-069, February 1987.

Abstract: It is not a defense that the licensee had food available on the licensed premises that would have met the minimum requirements of OAR 845-08-015(3)(a), where the licensee's employee failed to tell undercover officers about the food. The employee's actions rendered the food items unavailable.

Cases: *Patty Jean's*, OLCC-85-V-037, January 1986; *Pink Pearl Restaurant & Lounge*, OLCC-85-V-026, September 1985.

Abstract: Although licensee had instructed employee to provide regular meals, the licensee was guilty of failure to provide regular meals where licensee did not have sufficient employees on duty to prepare the meals.

Case: *Fred's Good Times*, OLCC-85-V-001, OLCC-85-V-002, April 1985.

Abstract: A hamburger basket and chicken basket do not constitute a "variety of regular meals" because hamburgers are not regular meals as defined under OAR 845-08-015(2)(b) and one regular meal alone is not a variety of regular meals.

Case: *Annah's Corner*, February 1984.

Abstract: Tacos are not "regular meals" as defined in OAR 845-08-015(3). Tacos are in the nature of a sandwich rather than a complete meal.

Case: *Haviland Hotels v. OLCC*, 20 Or App 105, 108, 530 P2d 1257 (1975).

Abstract: Service of unpalatable food and preparation of food in a microwave oven not a violation of minimum food service rule.

"Stewart sandwich" held not to constitute providing "regular meals."

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: *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.

**C.1.q. Failure to Maintain or Produce Records (OAR 845-006-0435)
[(OAR 845-06-071 [OAR 845-08-010])]**

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Case: *La Casa De Vin*, OLCC-87-V-004, July 1987.

Abstract: Licensee's failure to provide monthly privilege tax reports violated ORS 473.070. The sanctions provided in ORS Chapter 473 for violation of the privilege tax reporting requirements do not provide for a suspension of licensee's winery license or a fine. ORS 473.080 allows the Commission to impose a tax on unpaid privilege taxes, and ORS 473.990 provides criminal sanctions for failure to comply with the privilege tax reporting requirements.

Licensee's failure to provide monthly privilege tax reports was not a violation of OAR 845-10-170(4) because the reporting requirements of that rule do not relate to the privilege tax reporting requirements of ORS 473.070.

Case: *Maynard's Place*, OLCC-85-V-018, November 1985.

Abstract: Licensees failed to maintain records where records were kept so haphazardly as to fail to reliably report food sales.

Case: *Davila's Mexican Food Restaurant*, August 1984.

Abstract: OAR 845-08-005 requires licensees to maintain records and have records available for inspection. The Commission found the licensee in violation despite the fact that the licensee maintained the records, because the licensee failed to reasonably communicate to the Commission inspector where the records could be found.

Case: *A & Q Distributing Company, Inc., A & Q Distributing Company*, January 1984.

Abstract: Violation for refusing investigator's request to examine business records was mitigated where licensee was under the sincere, albeit incorrect, belief that the Commission was required to give 72 hours' notice before examining records on a licensed premises and the licensee's intent was simply to have the investigator wait to look at the records until the licensee arrived. The licensee was expected to arrive momentarily.

Case: *Copper Still Eating and Gathering Place*, October 1983.

Abstract: Commission's staff recommended that an application be refused because applicant neglected or refused to provide a written lease. The Commission concluded that, as there was no written lease, applicant could not be said to have neglected or refused to provide one.

Case: *Al C. Giusti Wine Company*, February 1983.

Abstract: "Depletion allowance reports," a will, a trust document, invoices, and a notification to the OLCC of a change in corporate officers do not come within the requirement of OAR 845-10-170(5) pertaining to maintenance and production of records.

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

Abstract: ORS 472.170 (authorizing Commission inspectors to examine at any time the books and premises of a licensee) is not unconstitutional as a warrantless search.

C.1.r. Failure to Reopen Premises (OAR 845-006-0481) (OAR 845-06-105)

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

Case: *The Towne House*, March 1984.

Abstract: The Commission found mitigation where the licensee's failure to reopen or submit a written request for further closure was due more to oversight or negligence than an attempt to disregard the Commission's requirement that closures of dispenser outlets be authorized.

Case: Love's Enterprises, Inc., *Love's*, November 1983.

Abstract: Licensee's failure to reopen by Commission deadline, after a six-month closure, constituted a failure to reopen.

C.1.s. Unapproved Change in Operation (OAR 845-006-0480) [(OAR 845-06-100, OAR 845-08-015(6))]

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

Case: *Dad's Restaurant & Lounge*, OLCC-06-V-029/A/B/C/D, December 2007.

Facts: Licensee purchased Dad's without knowing of problems between previous owner and the OLCC. Licensee proposed an extensive Chinese food menu, which was a large factor in the OLCC granting the license. Licensee was granted with several restrictions including sizes of drinks and no doubles. Subsequently Licensee substantially reduced the menu without notifying the OLCC. Licensee's employee also sold doubles, larger mixed drinks and stacked drinks in violation of the license restrictions. Licensee argued she was unaware this occurred, and terminated the employee when she learned of his actions.

Abstract: Failure to notify OLCC of menu changes is an on-going violation that continues as long as the menu changes are in effect. Difficulties in completing a kitchen remodel or business decisions is no defense to failing to notify the OLCC of changes or substantial reduction in food items. OAR 845-006-0480(3)(c).

Setbacks in the process of remodeling did not impact or prevent notification of the substantial reduction of food service to the Commission, and therefore does not warrant mitigation.

Key Words/Phrases: credibility determination, termination of employee, cancellation, Oceanside factors, reduction in menu, selective enforcement, intervention meetings, settlements, mitigation factors

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 violation and failure to notify OLCC of changes in food service do not need a separate penalty where the license is cancelled on other grounds, but it does provide additional grounds to cancel or not renew the license.

Case: *Yen Ha Coast*, OLCC-99-L-005, May 2000.

Facts: The subject licensed premises consisted of a lounge (Number II minor posting) separated from a restaurant (Number III minor posting) by a waiting room and hallway. Licensee removed four booths and constructed a parquet floor in a portion of the restaurant without OLCC approval. Subsequently, Licensee submitted a revised Operating Data Questionnaire, with the request to hold all age dancing with live bands on weekends in the restaurant area of the premises (after restaurant closed). Following OLCC's formal denial of permission to hold all-age dances, Licensee honored a contractual commitment and held two within days of the denial.

Abstract: Licensee was charged, in the alternate, with a violation of ORS 471.405(1), sale in manner other than the license permits and OAR 845-006-0100(2)(b), changing the principal use of any room or area without prior OLCC permission. Because there was no proof that alcoholic beverages were sold or offered for sale at the dances, a necessary element, the Commission concluded that Licensee did not violate ORS 471.405(1). The Commission

concluded that Licensee violated OAR 845-006-0100(2)(b) by changing the principal use of her dining room to hold two all-age dances on two dates, after approval from the OLCC had been denied.

Case: *The Frontier*, OLCC-87-V-052, March 1988.

Abstract: The Commission has concluded that a premises failed to operate as proposed where the premises was not open and not serving lunch on four occasions during hours approved by the Commission.

Case: *Willey's Restaurant and Dance Hall*, February 1984.

Abstract: A licensee who originally represented a certain banquet room capacity is not required to continually have that number of tables and chairs set up in the banquet room when banquets are not taking place. As long as the licensee is able to seat the number of banquet guests originally represented and has the room available for banquet use, the licensee meets the requirements of OAR 845-06-100(5).

C.1.t. Connections between Wholesalers and Retailers

C.1.t.1. Tied-House (ORS 471.394(2), ORS 471.396(2)(a)) [(ORS 471.455); ORS 471.394(2); ORS 471.396(2)(a)]

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

Abstract: A tied-house violation exists where a wholesaler loans, or sells on credit, a cooler to a retailer.

C.1.t.2. Financial Assistance (ORS 471.398, ORS 471.400(3), OAR 845-006-0365, OAR 845-013-0020 and other rules) [(OR 471.465), OAR 845-06-065 [OAR 845-10-121 through 10-131 Renumbered - See Rules], OAR 845-13-020]

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

Case: *Savannah Restaurant & Catering*, OLCC-04-V-058, March 2005.

Facts: Licensees issued checks to three different liquor agencies on six separate occasions and those checks were returned NSF.

Abstract: OAR 845-006-0365, which implements ORS 471.398 (prohibiting financial assistance by wholesalers to retailers), is a valid exercise of the Commission's authority.

By the plain language of OAR 845-006-0365(4), each time Licensees issued an NSF check, they violated the rule. The Commission therefore concludes Licensees violated OAR 845-006-0365(4) six times. The Commission found that a three-day license suspension or \$495 fine for violation of OAR 845-006-0365(4) would be the standard penalty for a first Category V violation, and a Letter of Reprimand was appropriate in this case because the license had already expired.

Licensees issued three NSF checks to a wine wholesaler and three NSF checks to malt beverage wholesalers on the dates alleged by OLCC. Each time Licensees issued an NSF check, they violated OAR 845-006-0365(1).

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

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

Abstract: A financial assistance violation occurs where a wholesaler loans or sells on credit a cooler to a retailer.

The financial assistance statutes and regulations apply to non-alcoholic products that a wholesaler provides a retailer.

Case: *Hoyt's Boulevard Cafe*, OLCC-85-V-054, February 1986.

Abstract: Licensee violated OAR 845-06-065(1) where he refused to honor a check he issued to wholesale licensee in payment for malt beverage and wine.

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

Abstract: The Commission's price-posting rule (OAR 845-10-210) advances the anti-discriminatory thrust of Article 1, Section 39(2), of the Oregon Constitution, by ensuring that beer and wine prices will be the same for all retailers.

C.1.u. Wholesaler Delivery to Unlicensed Premises (ORS 471.235)

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Case: *Potter Distilleries, Inc.*, OLCC-84-V-042, March 1985.

Abstract: ORS 471.235 lists the exclusive privileges of a wholesale malt beverage and wine license. The salvage sale of more than 55 gallons of wine to a non-licensee is not listed as a type of sale allowed under ORS 471.235 and thus was a sale in a manner other than the license permits.

Case: *Miller Brewing Company*, May 1984.

Abstract: The Commission concluded that delivery of beer by a market research company to homes of participants is not an illegal delivery to an unlicensed premises by a wholesaler because the market research company was not an agent of the wholesaler or manufacturer.

Case: *Miller Brands, Inc.*, November 1983.

Abstract: Wholesaler delivery to unlicensed premises not excused, despite fact that retailer's employee said at time of delivery that license was current, where wholesaler failed to check retailer's license certificate.

C.1.v. Private Club Sale to Nonmember (OAR 845-008-0045 (2) [(OAR 845-08-045(2))]

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Case: *Elks Club, No. 1869*, May 1984.

Abstract: DB licensee's sale of alcohol to person who is not a member or guest held to be sale to person other than license permits, in violation of ORS 472.310(1).

Case: *Corvallis Lodge No. 1411 v. OLCC*, 67 Or App 15, 667 P2d 76 (1984).

Abstract: There is a general and valid prohibition against private clubs serving alcohol to nonmembers.

Case: *Elks Club*, April 1983.

Abstract: Licensee was charged with allowing a person other than a member or a guest to purchase and consume distilled spirits on the licensed premises. Although the Commission concluded that a violation had occurred, the violation was excused because the only person served who was not a member or guest was an OLCC inspector who had indicated to the Elks employees that he was there to attend a party.

C.1.w. Prohibited Advertising (OAR 845-007-005(3) and OAR 845-007-0020(2)) [(OAR 845-07-005), and OAR 845-007-0020(2)]

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Case: *Johnny's Bar & Grill*, OLCC-08-V-098/098A, July 2009.

Facts: OLCC inspector saw an advertisement in the newspaper for “ladies night,” “college night,” and “OLCC appreciation night.” The inspector visited the premises and was told that those specials included reduction in prices for drinks. The inspector informed the Licensee that this was unlawful advertisement of temporary price reductions and that the ads should cease. When Licensee continued to run the ads the inspector cited Licensee. The Commission found no violation.

Abstract: Only one prior case discusses the issue of licensee advertisement related to representations of reduced prices for alcoholic beverages. See *Murphy's Oyster Bar & Grill*, (OLCC, Final Order, 87-V-008, July 1987) (holding that the term “happy hour” promoted misuse of alcoholic beverages, which is the purpose for which the phrases is prohibited under the current rule). With all deference to the holding in *Murphy's*, a finding that the licensed premises actually had temporary alcoholic beverage price reductions in effect does not, by itself, prove that the advertisement contained “references” to price reductions. The advertisement must stand on its own. If the advertisement, by its own terms, contains a reference to temporary price reductions for alcoholic beverages, then it violates the rule. However, if the advertisement does not refer or imply price reductions on alcoholic beverages, there is no violation, even if the premises in fact offered temporary price reductions. Nothing in the rule prohibits temporary price reductions, only their advertisement outside the premises.

Normally, an agency’s interpretation of its own rule is entitled to deference. *Don't Waste Oregon Com. V. Energy Facility Siting*, 320 Or 132 (1994). However, to the extent that OLCC’s interpretation of this rule is that a determination of whether an advertisement contains a “reference to temporary price reductions” depends on whether the premises actually has temporary price reductions, that interpretation is inconsistent with the wording of the rule and its context. See *Downtown Delicatessen v. OLCC*, 213 Or App 369 (2007) (finding OLCC’s interpretation of its own rule not plausible). Therefore, OLCC’s interpretation of “references to temporary price reductions” is not entitled to deference in this proceeding.

Key Words/Phrases: prohibited advertisement, price reduction, ladies night, agency rule interpretation, deference

Case: *Murphy's Oyster Bar & Grill*, OLCC-87-V-008, July 1987.

Abstract: Two of the Commission's purposes in regulating advertising of alcoholic beverages are to minimize misuse and encourage moderation in the use of alcoholic beverages. OAR 845-07-005(1)(a) and (b). Licensee violated OAR 845-07-020 by using the phrase "happy hour" in a newspaper advertisement where the evidence showed that both food and alcoholic beverages were sold at reduced prices during the advertised period. The Commission concluded that the advertisement promoted misuse and discouraged moderation.

C.1.x. Unauthorized Alcoholic Beverages Sold or Offered for Sale in a Manner other than the License Permits Licensee to Sell (ORS 471.405, OAR 845-006-0345 (6)) [(ORS 471.405, [ORS 472.310(1)], OAR 845-06-045(6), [OAR 845-06-045(8)]]]

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Case: *Camas Close Winery*, OLCC-11-V-066, June 2012.

Facts: Licensee submitted five Special Events Winery (SEW) licenses, and represented that he had sufficient LLI coverage on each. Licensee was approved for two of them, and was advised that the applications for the others were incomplete for several reasons. OLCC inspectors visited one of the Farmers' Market locations where Licensee had applied for a SEW but did not provide the follow up information needed to complete the application, and was discovered to be selling alcohol. Licensee did not have LLI coverage as he believed he did.

Abstract: Oregon Winery licensees, such as Licensee in this case, are required to obtain Special Event Winery licenses to sell wine, cider, and malt beverages for drinking on special event licensed premises or in sealed containers for off premises consumption. The process for obtaining a SEW license is set out in OAR 845-005-0415(5). Under the rule, the Commission may refuse to process any application that is not complete or not accompanied by documents or disclosures required by the form. Here, the evidence establishes that the Commission received Licensee's SEW application but refused to process it because it was incomplete. By letter the Commission notified Licensee that the application was incomplete and had not been processed. Licensee received this notice on or before August 9, 2011 and knew that he had not been issued a SEW license for the August 10, 2011 farmers market. Licensee nevertheless offered and sold wine at that event. Consequently, Licensee offered and sold wine at the special event without a SEW license, which is contrary to the permissions of his Winery license. A violation of ORS 471.405(1) was proven.

Key Words: SEW license, LLI, approval, incomplete application, Licensee's belief, financial responsibility

Case: *Cedars Restaurant & Lounge*, OLCC-08-V-009/009A, October 2009.

Facts: Licensee applied for a TUAL for the 2008 Lazy Lizard bike event in Detroit, and the city denied the application. Licensee's spouse then purchased alcohol for the event which was moved outside of Detroit city limits. Licensee's spouse worked for Licensee at the licensed premises. Licensee was told not to sell alcohol at the event, and Licensee claimed that his spouse bought the alcohol and gave it away.

Abstract: By making alcoholic beverages available at an unlicensed location for indirect financial consideration, Licensee sold or offered for sale alcoholic beverages in a manner other than the license permits. Given that this was Licensee's second Cat I violation, with a Cat III violation as well, cancellation was warranted.

Corporate principal's spouse was acting a licensee's agent when she paid for the alcohol with a personal check, when it was ordered using Licensee's account with the distributor, and the corporate principal took possession of the remaining tapped kegs per agreement with the distributor.

A registration fee entitling payees to consume alcohol constitutes indirect financial consideration for purposes of a "sale."

Evidence that the OLCC inspectors and police warned licensee not to provide alcohol at the event less than 24 hours

before it started shows intentional conduct when the alcohol was provided, warranting aggravation.

Key Words/Phrases: alcohol service outside permitted manner by license, TUAL, intentional, indirect financial consideration, sale, registration fee, aggravation, cancellation

Case: *Bettie Ford's*, OLCC-06-V-021, OLCC-06-L-006, August 2007. (Amended Final Order on Reconsideration)

Facts: OLCC inspectors conducted undercover compliance checks of licensed premises on three occasions. On each occasion different permittees served over-sized and double shots of alcohol in violation of licensee's restrictions.

Abstract: A licensee's failure to comply with a restriction on the license pertaining to the sale or service of alcoholic beverages may be considered a sale in a manner other than the license permits, in violation of ORS 471.405(1). See *9 Ball Sports Bar*, OLCC-05-V-020, June 2006.

Key Words/Phrases: credibility determination, license restriction, over-service, doubles, multiple employees, cancellation, Oceanside factors, inspector intent to consume

Case: *9 Ball Sports Bar*, OLCC-05-V-020, June 2006.

Facts: Licensee had multiple restrictions including a requirement of police contact when any physical altercations occurred on the premises. Licensee held monthly meetings with employees and advised them of the restrictions. A physical fight occurred on the premises and licensee's employee did not notify police, but noted it in an incident log.

Abstract: A licensee's failure to comply with a restriction on the license pertaining to the sale or service of alcoholic beverages may be considered a sale in a manner other than the license permits, in violation of ORS 471.405(1). In a case of first impression, the Commission determines that for a violation of ORS 471.405(1) to arise out of licensee's failure to comply with a restriction on the license, the prohibited conduct must involve selling alcoholic beverages in a manner other than the licensee is permitted to sell. In this case, Licensees' failure to immediately report the fight to the police violated a restriction on the license, but it did not violate the language of ORS 471.405(1). Therefore, cancellation is not appropriate.

By finding that any substantial failure to comply with restrictions on the license is a violation of ORS 471.405(1), the Commission has broadly interpreted the phrase "sell[ing] or offer[ing] for sale any alcoholic beverage in a manner other than the license permits the license to sell" to mean "*operating* in a manner other than the license permits." Notwithstanding the Commission's broad interpretation of this provision, ORS 471.405(1) cannot reasonably be read to regulate business operations or activities on the licensed premises other than the sale or offering for sale of alcoholic beverages. For a violation of ORS 471.405(1) to arise out of licensee's failure to comply with a restriction on the license, the prohibited conduct must involve selling alcoholic beverages in a manner other than the licensee is permitted to sell. Licensee's failure to contact the police in the event of a fight on the premises or licensee's failure to have the requisite number of managers or security personnel at a particular time does not necessarily mean that licensee sold or offered for sale alcoholic beverages in a manner other than the license permits.

Key Words/Phrases: cancellation, restriction violation, nexus between violation and selling alcohol

Case: *Mac Club*, OLCC-04-V-065/065A, July 2005.

Facts: Licensees had restriction against one licensee drinking on the licensed premises. OLCC inspectors conducted an undercover inspection and observed the restricted licensee carrying a bucket into the premises, and then drinking

what appeared to be a beer inside. The inspectors left and later returned, contacting the restricted licensee in his vehicle outside. Licensee claimed he had been drinking a non-alcoholic beer on the premises, and smelled of alcohol because he had 2 beers earlier in the day. He later changed his story to having left the premises to go to a friends' house to have beers. He then let inspectors see the inside of his vehicle, where they found bottles of beer in the bucket. Licensee admitted that he would go to his vehicle to drink, because of the restriction forbidding him from consuming alcohol in the licensed premises.

Abstract: OAR 845-006-0347(6) prohibits a licensee from permitting anyone to drink alcohol in any parking lot that the licensee controls that is associated with the licensed business unless the Commission has approved the sale or service of alcoholic beverages in the area. In this case, Licensees concede that Licensee's actions of taking beers from the licensed premises and consuming them in his vehicle in the parking lot that Licensees controlled violated this provision.

Key Words/Phrases: restriction violation, consuming in parking lot, licensee control of premises, false statement, admission to lying, mitigation

Case: *La Macarena*, OLCC-00-V-116, August 2002.

Abstract Where Licensee breached two terms of his settlement agreement in substantial fashion, Licensee has violated ORS 471.405(1). The terms of the settlement agreement, including utilizing a minimum number of security personnel and ensuring employees had service permits, were conditions placed on the license.

The four *Oceanside* factors are considered in evaluating whether a breach or breaches of a condition or restriction is/are substantial, such that cancellation is warranted. The fourth factor - whether the hardship the restriction causes a licensee outweighs the importance the restrictions has in ensuring licensee's compliance with alcoholic liquor laws - requires an analysis of the condition or restriction imposed on the license. This factor weighs in favor of cancellation where the breach strikes at the very heart of the condition placed on the license, as the licensee would not be a good risk for compliance with alcoholic beverage law without the condition.

Case: *Cisco & Pancho's*, OLCC-99-V-080ES, September 2000.

Abstract Where violation of dancing restriction was not substantial, no violation of ORS 471.405(1) occurred.

Case: *Yen Ha Coast*, OLCC-99-L-005, May 2000.

Abstract: The subject licensed premises consisted of a lounge (Number II minor posting) separated from a restaurant (Number III minor posting) by a waiting room and hallway. Licensee removed four booths and constructed a parquet floor in a portion of the restaurant without OLCC approval. Subsequently, Licensee submitted a revised Operating Data Questionnaire, with the request to hold all age dancing with live bands on weekends in the restaurant area of the premises (after restaurant closed). Following OLCC's formal denial of permission to hold all-age dances, Licensee honored a contractual commitment and held two within days of the denial.

Licensee was charged, in the alternate, with a violation of ORS 471.405(1), sale in manner other than the license permits and OAR 845-006-0100(2)(b), changing the principal use of any room or area without prior OLCC permission. Because there was no proof that alcoholic beverages were sold or offered for sale at the dances, a necessary element, the Commission concluded that Licensee did not violate ORS 471.405(1). The Commission concluded that Licensee violated OAR 845-006-0100(2)(b) by changing the principal use of her dining room to hold two all-age dances on two dates, after approval from the OLCC had been denied.

Case: *A Taste of Thai*, OLCC-99-V-015, February 2000.

Abstract Licensee violated a restriction prohibiting her from allowing her former husband to work in the licensed business, when husband was observed performing tasks on the licensed premises on 8 occasions in 2 months. The Commission concluded that mitigation of penalty short of cancellation was appropriate as Licensee did not want her former husband working on the premises and asked him not to do so, but did not press the matter because of fear of assault by him; former husband did not commit any violations of liquor laws during the time he worked; Licensee has had no previous violations during the six years she has been licensed at the premises; following the events constituting the violation, Licensee obtained a restraining order against her former husband; and Licensee has since enforced the restraining order and her former husband was jailed.

Case: *Crabtrees Pub & Deli*, OLCC-96-V-037, March 1997.

Abstract Licensees committed a violation of ORS 471.405(1) because Mr. Crabtree drank alcoholic liquor on the premises when there was a restriction on the license prohibiting him from drinking on the premises.

Case: *Idle Hour Tavern*, OLCC-94-V-085, January 1996.

Abstract ORS 471.405(1). The Commission canceled the license where the licensee drank alcoholic liquor on multiple occasions in violation of a restriction on his license that he not consume alcoholic liquor. The Commission concluded that by drinking in violation of the restriction on the license, the licensee sold alcoholic liquor in a manner other than the license permits.

Case: *John E. Schuberg*, OLCC-94-V-064, April 1995.

Abstract: The Commission canceled the permit of a permittee who drank alcoholic liquor in violation of a restriction prohibiting him from consuming, in spite of significant good cause factors which included two years of abstinence and recommendations from his alcohol treatment counselor, employer, and probation officer. In making the decision to cancel the permit, the commission concluded that the violation was substantial because the service permit would not have been granted to permittee in the first place without the restriction that he abstain from consuming alcoholic liquor and that the requirement of abstinence went to the heart of the restriction. The Commission also considered the fact that persons were injured by permittee in a traffic accident that resulted when permittee drove after drinking the alcoholic liquor.

A permittee who consumes alcoholic liquor in violation of a restriction on his permit that he not consume commits a violation of ORS 471.405(1) for selling alcoholic liquor in a manner other than the license permits.

Case: *Lung Fung*, OLCC-92-V-012, February 1993.

Abstract: Licensee violated ORS 472.310(1), selling alcoholic liquor other than as authorized, when he violated a license restriction. The restriction required him or an approved manager to be on the licensed premises during the hours the premises were open to the public.

Case: *Donn's Den*, OLCC-89-V-099, December 1989.

Abstract: The Commission has concluded that a licensee's failure to comply with a restriction on the license may be considered a sale in a manner other than the license permits, in violation of ORS 471.405(1). *Strawberry Fields*, OLCC-85-L-022, December 1985. The Commission concluded licensee violated ORS 471.405(1) because licensee

had only one employee on duty instead of two as required by a restriction on his license.

Case: *Union Gap Tavern*, OLCC-89-V-005, April 1989.

Abstract: Licensee's failure to comply with a license restriction that she will not consume alcoholic beverages on the licensed premises violated ORS 471.405(1). Licensee sold or offered for sale alcoholic liquor in a manner other than the license permits because at a time the premises was open for business, licensee was performing an act prohibited by the restriction.

Case: *Howard's Northwest Deli*, OLCC-88-V-101, February 1989.

Abstract: Neither package store nor restaurant licenses allow the sale of 15-gallon kegs for off-premises consumption.

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

Abstract: Licensee did not sell wine only for consumption on his premises where licensee failed to take reasonable steps to ensure customers would not take wine from the premises to consume.

Case: *Pub Tavern*, OLCC-87-V-016, November 1987.

Abstract: RMB licensee committed violation for unauthorized alcoholic beverages on the licensed premises where there was distilled liquor on the premises.

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

Abstract: Winery licensee violated ORS 471.405 where she had signs inside the premises and an advertisement in a local newspaper promoting the sale of beer at the premises.

Winery licensee violated OAR 845-06-045(6) [Now (8)] because she had beer on the premises in a reach-in cooler.

C.1.y. Violation of Restrictions on License (OAR 845-005-0355(5))

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Case: *Liquid Club & Lounge*, OLCC-12-V-078/078A, October 2013.

Facts: Licensed premises had a recent history of serious and persistent problems under previous licensee. Previous licensee maintained a financial interest in the business, and the OLCC added several restrictions to Licensee's temporary authority to operate. Restrictions included limited number of beverages a patron could possess at one time, amount of alcohol in a contained, and requirement that security personnel patrol the parking lot. Licensee did not speak English well had had an interpreter explain the restrictions, as well as an inspector. Licensee indicated he understood the restrictions and did not contest them. Subsequently an inspector visited the premises on several occasions and noted multiple violations of the restrictions.

Abstract: A Category I violation is a one that makes the licensee ineligible for a license. Under the Commission's guidelines, the standard penalty for a first Category I violation is cancellation of the license. In restriction violation cases, however, the Commission will consider the factors described in *Oceanside Restaurant & Lounge* (OLCC Final Order, 88-V-123, August 1989) to determine whether restriction violations are substantial and warrant cancellation. As the Commission noted in *Betty Ford's* (OLCC Final Order, 06-V-021/06-L-006, August 2007), the *Oceanside* factors are "not required elements but are examined as factors weighing in favor of or against a determination that a restriction violation is substantial enough to warrant the presumed penalty of cancellation." The *Oceanside* factors are as follows:

- (a) the timing of the violation, with breaches early in the contract considered more likely to be substantial;
- (b) whether the violation was willful;
- (c) the number of violations;
- (d) whether the hardship on the licensee outweighs the importance of the conditions in ensuring compliance with the license condition.

Applying the *Oceanside* factors in this case demonstrates that Licensee's violations were substantial - (a) **Timing:** the 5 violations were within the first 7 months of Licensee operating. (b) **Willfulness:** Licensee's employees and management were well aware of the restrictions. (c) **Number:** the violations were multiple and repetitive of specific restrictions. (d) **Hardship:** Commission had previously determined that without these restrictions, Licensee would not be a good risk for compliance. See also *Lotsa Luck* (OLCC Final Order, 08-V-054, April 2009) (timing factor weighed against the licensee where the violation occurred approximately six months after the restriction was placed on the license); *Dad's Restaurant & Lounge* (OLCC Final Order, 06-V-029, December 2007) (multiple repeated violations of the same restriction so early in the operation of the business weigh against the licensee).

Key Words/Phrases: restriction violation, cancellation, recent history of serious and persistent violations, Category I violation, timing of violation, willful, number of violations, hardship, subsequent licensee, *Oceanside* factors

Case: *US Market #130*, OLCC-12-V-017/017A/017B, July 2013.

Facts: The OLCC charged Licensee with violating license restrictions that 1) prohibited an individual from taking part of the operation or management of the licensed business, and 2) required the Licensee to provide copies of all contracts each February to show that a certain individual had no involvement with the premises. The required documentation was produced shortly before hearing, and showed no involvement by that individual in the licensed business. Licensee agreed it failed to produce the required documentation, but argued that this did not relate to the sale of alcohol or exercise of license providence, and therefore the OLCC cannot establish a violation of ORS

471.405(1) and OAR 845-005-0355(5).

Abstract: A violation of OAR 845-005-0355(5) does not require that the restrictions involved be directly related to the sale of alcoholic beverages or the exercise of license privileges. See *Illusion Sports Bar* (OLCC Final Order, 11-V-037, May 2012) (involving violation of a restriction requiring DPSST-certified security); *Foster Waterhole* (OLCC Final Order, 11-V-014, April 2012) (involving violation of a restriction that prohibited licensee's spouse from being on the premises); *Exotica International Club for Men* (OLCC Final Order, 08-V-077, April 2010); *CS Convenient Services* (OLCC Final Order, 09-V-059, June 2010) (a violation of OAR 845-005-0355(5) occurred when Licensee violated a license restriction prohibiting a specific individual from being on the licensed premises at all times). Compliance with any restrictions on the license is a condition precedent to exercising license privileges. There is no requirement in OAR 845-005-0355(5), either explicit or implicit, that the restrictions be directly related to the exercise of the license privileges. As such, the OLCC may establish a violation of OAR 845-005-0355(5) against a licensee for *any violation* of a license restriction.

The fact that the individual's name was on contracts executed before February 1, 2012, which continued to be in effect after that date, did not violate the restriction on the certain individual's role in operation or management of the licensed business. Nor did USME's employee signing on behalf of the licensed business violate the restriction, because that individual had transferred all his interest in that business to his wife. Because USME was not a licensee, the Commission declined to apply the OLCC's licensing standards to the laws governing limited liability corporations.

Key Words/Phrases: restriction violation, cancellation, unlicensable, license privileges, limited liability corporations, transfer of interest

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. The employee pled guilty to violation of furnishing alcohol to minors. Licensee had previously opted to install AVE equipment in lieu of paying a penalty for a 2007 sale to a minor. The same employee was again cited in June 2012 for selling alcohol to a minor, and on that occasion attempted to use the AVE equipment. OLCC staff initially charged that Licensee violated its restriction for failing to use AVE equipment, and later amended the Notice of Violation to allege that Licensee violated the restriction when it "failed to require" its employee to use the AVE equipment. Licensee was unable to show evidence that its employee had been trained or required to use the AVE.

Abstract: Licensee's restriction required that all individual employees be required to use the AVE equipment. Licensee's managing member's testimony that he trained his employee to use it is not credible. The preponderance of the credible evidence shows that Licensee's employee did not use the AVE and was not trained to do so.

The Oregon Court of Appeals holdings in *US Market #109 v. OLCC*, 250 Or App 335 (2012), and *US Market #180, LLC v. OLCC*, 249 Or App 666 (2012), are distinguishable in this case. In the present case there was a failure to train appropriately, and as a consequence, a failure to require the employee to use the AVE to verify the age of the patron who appeared under the age of 26 years.

Utilizing the *Oceanside* factors, the violation was substantial. However, the combined weight of the *Oceanside* factors in this case may not by itself merit cancellation. Where, as here, only two of the four *Oceanside* factors are present, the presence of other aggravating or mitigating circumstances can be considered in determining whether or not a penalty of cancellation is warranted.

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

Case: *US Market #109*, OLCC-08-V-112, October 2012. (Final Order on Remand)

Facts: Licensee appealed the sanction imposed in prior licensing action and the Oregon Court of Appeals reversed and remanded the final order for reconsideration of the sanctions imposed. *US Market #109 v. OLCC*, 250 Or App 335 (2012).

Abstract: Licensee violated his licensing restriction because he did not train his employees on the use of AVE when the scanner function was not working.

Key Words/Phrases: license restriction, failure to verify, AVE, key pad, scanner, license cancellation, *Oceanside*

Case: *US Market #180*, OLCC-08-V-043, October 2012. (Final Order on Remand).

Facts: Opinion following reversal and remand by Oregon Court of Appeals.

Abstract: While the charging document references OAR 845-006-0335(1)(a), (b), and (c), the violation found herein is of OAR 845-006-0335(1)(a). Subsection (1)(a) contains the operative, overarching general age verification mandate. Subsection (1)(b) addresses the procedure that must be followed to comply with subsection (1)(a). Subsection (1)(c) places a freestanding requirement on licensees to supplement the general, independent age-verification requirement under subsection (1)(a) by compelling licensees to clearly instruct their employees to comply with the age-verification requirement. The requirement of subsection (1)(c) was not implicated in this case and subsection (1)(b) is procedural. *See US Market #180*, 249 Or App at 669-71.

Therefore, the Commission concludes, consistent with the Court of Appeal’s opinion, “that the license restriction, by its terms, imposes an obligation on [L]icensee only to require that [L]icensee’s employees use age-verification equipment when the employee, during a sale of alcoholic beverages, is fulfilling his or her freestanding age-verification obligation under OAR 845-006-0335(1)(a).” *US Market #180*, 249 Or App at 673 (emphasis removed). Accordingly, Licensee did not violate the restriction when it required its employees to use age verification equipment to verify age, where the employee did use the equipment, but did not successfully verify the age of the purchaser through its use. The alleged violation of OAR 845-005-0355(5) is dismissed.

The Commission determined that in the license renewal context it will only consider the history of the particular premises and we do not take a different position here. *US Market #145*, OLCC 11-V-009, 11-V-009A, 11-V-009B (February 2012).

Key Words/Phrases: minor, decoy, AVE, restriction, Court of Appeals, use age verification equipment, violation, successfully verify

Case: *Illusion Sports Bar*, OLCC-11-V-037, May 2012.

Facts: Licensee agreed to restrictions – based on history of serious and persistent problems at the premises when operated by prior licensee - including having security staff and timing on last drinks and shots. Commission also required Licensee’s managing member to take and pass a law orientation self-test, which informed licensees of the legal requirements to operate and requirements regarding service permits and DPSST certification. On subsequent bar checks, violations including invalid service permits, inadequate/non-DPSST certified security, and serving of alcohol after restricted hours were discovered.

Abstract: Licensee suggests that contract law is appropriate to analyze the factors set forth in *Oceanside*, and as such, contends that the Commission should consider that Licensee’s negligent, rather than willful, conduct led to the violations. The Commission respectfully disagrees. As noted above, the record does not show that, more likely than

not, Licensee's restriction violations were negligent, and, even assuming that it did, the Commission does not use contract law to analyze the *Oceanside* factors. See *Full Moon Bar & Grill* (OLCC Final Order, 10-V-047, April 2011); *The Vault Bistro & Lounge* (OLCC Final Order, 10-V-006, December 2010).

Key Words/Phrases: License restriction, violation, willful, negligent, *Oceanside* factors

Case: *Foster Waterhole*, OLCC-11-V-014/014A, April 2012.

Facts: Licensee's husband was prohibited from being on the premises during business hours and participating in management of the business. The restriction was due to husband's felony conviction for marijuana (as a person with a financial interest). OLCC inspectors were notified by police that the husband was at the business almost every day, which was later confirmed by an inspection. Licensee claimed her husband was only there to fix an ice machine.

Abstract: Licensee violated the restriction by permitting her husband on the premises to consume a soft drink and fix an ice machine, and using the *Oceanside* factors cancellation would be appropriate but for the fact that licensee gave up the license before hearing. Letter of Reprimand is appropriate.

Key Words/Phrases: License restriction, violation of restriction, spouse, on premises, Letter of Reprimand in lieu of cancellation, *Oceanside* factors

Case: *US Market #145*, OLCC-11-V-009, February 2012.

Facts: Based on the record of violations for selling alcohol to minors at other premises owned by Licensee's managing member, Licensee was required to install AVE and train all employees to use it for every person attempting to purchase alcohol who reasonably appeared under the age of 26. Employee of licensee sold to a minor decoy without asking for ID in violation of the restriction.

Abstract: A period of two years and eight months after the restriction was imposed is a significant period of time without a violation, which weighs against a finding that the violation was substantial. See, e.g., *New Star* (OLCC Final Order, 01-L-007/01-V-075, June 2002) (holding that one year is a sufficient amount of time without a violation for a licensee to show good cause to have a restriction removed).

Where a licensee's employee is aware of restrictions on the license and voluntarily sells an alcoholic beverage in a manner contrary to the license restriction, the violation was committed willfully. See, e.g., *US Market #109* (OLCC Final Order, 08-V-112, January 2010) (violation was willful where employee voluntarily sold alcohol to a minor without using the age verification equipment).

Licensee argues that the Commission should look to the law of contracts in analyzing this and the other *Oceanside* factors, and should regard a licensee's or employee's willful breach as more substantial than one due to negligence. However, as the Commission recognized in *Full Moon Bar & Grill* (OLCC Final Order, 10-V-047, April 2011) and *The Vault Bistro & Lounge* (OLCC Final Order, 10-V-006, December 2010), where it has defined a term or established a rule through case precedent (such as what constitutes a willful restriction violation), the case precedent dictates the result and common law definitions and standards do not govern.

A restriction requiring the use of age verification equipment for persons appearing under the age of 26 who attempt to purchase alcoholic beverages is not onerous and is easily followed. *US Market #109*, Final Order at 9; *US Market #180*, Final Order at 9; *South Salem Food & Gas* (OLCC Final Order, 10-V-030, March 2011.)

When only two of the four *Oceanside* factors are present, the presence of other aggravating or mitigating circumstances can be considered in determining whether or not a penalty of cancellation is warranted.

With the exception of *A Taste of Thai Restaurant* (OLCC Final Order, 98-L-003, August 1998), the Commission's recent case precedent in the license renewal context considers the licensee's compliance record only at the premises being renewed when determining whether the licensee has a poor record of compliance

A Category I violation, together with a Category III violation is a poor record of compliance. Thus, in this case, Licensee has a poor record of compliance at this location.

Key Words/Phrases: license restriction, AVE, minor decoy, *Oceanside* factors, good cause, willful, substantial, compliance record, license renewal, record of compliance.

Case: *Garcia's Gas & Mini Mart*, OLCC-11-V-005, August 2011.

Facts: Family of Licensees with history of licenses, violations and cancellations. Instant license had restrictions that prohibited two members from being on the premises or participating in the operation or management of the business. OLCC inspector found one of the restricted persons on the premises during an inspection. A neighboring business confirmed that the restricted person was at the licensed premises daily. Licensee surrendered license before hearing.

Abstract: OLCC established that Licensee violated the restriction of having a restricted person on the premises, but did not present evidence to establish, more likely than not, that the restricted person was participating in the operation or management of the business.

Key Words/Phrases: license, restriction, unlicensable, surrender, premises, operation or management

Case: *South Salem Food & Gas*, OLCC-10-V-030, March 2011.

Facts: Licensee and Licensee's employees failed to comply with several licensing restrictions, including sales to minors, failure to use AVE equipment, and permitting restricted employees to sell alcohol.

Abstract: The violations were proven and the *Oceanside* factors establish that cancellation is warranted. Reduced sanction under the Responsible Vendor Program was not warranted because Licensee did not show he trained his employees in alcohol sales.

Key Words/Phrases: licensing restriction, AVE, restricted employees, minor, decoy, training, reduced sanction

Case: *CS Convenience Store*, OLCC09-V-059, June 2010.

Facts: Licensee's brother was unlicensable and restricted from the premises. The licensed premises was in the same building as another business owned by Licensee. Licensee's brother managed both businesses and was on the licensed premises contrary to licensing restrictions.

Abstract: The evidence establishes that, contrary to terms of the restriction, [licensee's brother] participated in the management or operation of the business. "Participate" means to take part in something (as an enterprise or activity) or to have a part or share in something. *Webster's Third New Int'l Dictionary* at 1646 (2002 ed.). "Management" means the act or art of managing: the conducting or supervising of something (as a business). *Id.* at 1372. And the definition of "operation" includes a doing or performing especially of action, an exertion of power or influence and/or the quality or state of being functional. *Id.* at 1581.

Key Words/Phrases: unauthorized interest in a business, compensation out of the ordinary, contract to manage, investment, hearsay evidence, license restriction, *Oceanside* factors

Case: *Exotica International Club for Men*, OLCC-08-V-077/077A, April 2010.

Facts: Undercover investigators observed Licensee's employees serve more than one drink per patron and fail to wand all patrons in violation of a license restriction, offer a drink special after 12 a.m., and have a server under the influence of alcohol on duty.

Abstract: Example of license cancellation for violation of licensing restrictions.

Key Words/Phrases: under the influence on duty, license restriction, one drink restriction, restriction interpretation, cancellation, *Oceanside* factors

Case: *Lotsa Luck*, OLCC-08-V-054/054A/054B, April 2009.

Facts: Licensees are husband and wife, and husband had a history of drinking to excess; a restriction requiring him to sustain from alcohol was imposed and not contested. The husband had little involvement with the business, which was primarily run by the wife. Six months after the restriction was imposed an OLCC inspector received an anonymous tip that the husband was drinking on the licensed premises, which the inspector later confirmed. The husband resigned from the corporate licensee prior to hearing and has abstained from alcohol since the violation.

Abstract: Violation of a restriction is proven, and warranted cancellation due to Licensee's corporate principal committing the violation. Even though he resigned his position prior to hearing, and the incident may have been isolated, it was a willful and substantial breach of the restriction. For the same reason as cancellation, the Commission may refuse to renew the license as well.

Key Words/Phrases: restriction violation, drinking to excess, cancellation, willful and substantial breach, violation by licensee, *Oceanside* factors

Case: *Dad's Restaurant & Lounge*, OLCC-06-V-029/A/B/C/D, December 2007.

Facts: Licensee purchased Dad's without knowing of problems between previous owner and the OLCC. License proposed an extensive Chinese food menu, which was a large factor in the OLCC granting the license. License was granted with several restrictions including sizes of drinks and no doubles. Subsequently Licensee substantially reduced the menu without notifying the OLCC. Licensee's employee also sold doubles, larger mixed drinks and stacked drinks in violation of the license restrictions. Licensee argued she was unaware this occurred, and terminated the employee when she learned of his actions.

Abstract: Where there are two separate violations charged, *Oceanside* factors must be applied to each violation because the substantiality of the separate restriction violation directly impacts the penalty to be imposed.

In evaluating the *Oceanside* factors, the Commission determined the following in this case:

Timing: Since the violations occurred within the first year of operation, this factor weighs against Licensee. *See, e.g., New Star* (OLCC, Final Order, 01-L-007, 01-V-075, June 2002)

Willfulness: Willful is defined as "voluntary and intentional, but not necessarily malicious." *Black's Law Dictionary* 1630 (8th ed. 2004). Voluntarily free pouring drinks without insuring adherence to the 1.0 ounce limit for distilled spirits constitutes a willful violation of the restriction by the bartender. *Bettie Ford's*, OLCC-06-V-021, OLCC-06-L-006, August 2007. (Amended Final Order on Reconsideration). Further some violations occurred after Licensee had received notice from the Commission for the previous violations of the same restriction, a circumstance that goes toward demonstrating willfulness. *Garcia's Gas & Mini Mart* (OLCC Final Order, 04-V-005) October 2004.

Number of Violations: Licensee's employee violated the restriction 10 times in front of inspectors. This weighs against Licensee.

Hardship/Importance of Conditions: The Commission is persuaded that any hardship on the licensee does not

outweigh the importance of the restrictions in ensuring compliance with alcoholic liquor laws. This factor weighs against Licensee where, as here, the breach strikes at the very heart of the restriction or condition placed on the license, as the licensee would not be a good risk for compliance with alcoholic beverage laws without the restriction. *La Macarena* (OLCC Final Order, 00-V-116) August 2002.

Breaches of a restriction or condition on the license are not easily mitigated, as certain licenses, such as the license herein, would not have been granted but for restrictions or conditions being placed on the license. These restrictions or conditions are necessary to address specific problems or concerns relating to the license. The objective of elevating a standard requirement of law to a mandatory requirement of the license privilege, through either license restrictions or a settlement agreement, is to provide for strict accountability by imposing the sanction of license cancellation.

Licensee's employee was aware of the restrictions and voluntarily and intentionally stacked drinks in at least one instance by serving a couple with three drinks. In another instance, Licensee's employee served a second drink to an undercover inspector who already possessed a can of beer, without checking whether the beer had been consumed. Voluntarily serving the second drink without insuring adherence to the anti-stacking restriction constitutes a willful violation of the restriction by the bartender. Finally, voluntarily free pouring drinks without insuring adherence to the 1.0 ounce limit for distilled spirits constitutes a willful violation of the restriction by the bartender. See *Bettie Ford's* (OLCC-06-V-021, OLCC-06-L-006, August 2007). Further, these violations occurred after Licensee had received notice from the Commission for the previous violations of the same restriction, a circumstance that goes toward demonstrating willfulness. See *Garcia's Gas & Mini Mart* (OLCC Final Order, 04-V-005) October 2004.

Key Words/Phrases: credibility determination, termination of employee, cancellation, *Oceanside* factors, reduction in menu, selective enforcement, intervention meetings, settlements, mitigation factors

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

Facts: Applicant was new owner of convenience store, which had a restricted off-premises license. The restrictions included no sales of singles and items with higher alcohol content. Applicant was issued a 90-day temporary license, but inspectors found her selling restricted items multiple times. Inspectors tried to identify and address the restricted items, but the sales continued.

Abstract: The Commission found that the number of violations within the temporary license period in violation of restrictions warranted refusal to issue a permanent license.

Where restrictions prohibited license applicant from selling certain products and licensee removed those products from the cooler and shelves but left them in boxes on the floor and customers were allowed to take them out of the boxes and purchase them license applicant made the products available for purchase. Keeping the items in the store was a willful act as was making them available for sale. While license applicant did not intentionally and knowingly sell the products in violation of the restriction, she willfully failed to prohibit those sales from taking place. The violation of the restriction was then willful in the analysis of factors described in *Oceanside Restaurant & Lounge*, OLCC-87-L-014, February 1988.

Distributors may deliver items to a premises even if restrictions forbid their sale. Licensees are responsible for knowing and ordering only those items they can legally sell under the terms of the license.

Key Words/Phrases: temporary license, restriction violations, singles, alcohol content, *Oceanside* factors

Case: *Bettie Ford's*, OLCC-06-V-021, OLCC-06-L-006, August 2007. (Amended Final Order on Reconsideration)

Facts: OLCC inspectors conducted undercover compliance checks of licensed premises on three occasions. On each occasion different permittees served over-sized and double shots of alcohol in violation of licensee's restrictions.

Abstract: In restriction violation cases, the Commission considers the factors described in *Oceanside Restaurant & Lounge* when determining whether the restriction violation was substantial and therefore warrants cancellation. The factors are:

- The timing of the violation, with breaches early in the agreement considered more likely to be substantial;
- Whether the violation was willful;
- The number of violations; and
- Whether the hardship on the licensee outweighs the importance of the conditions in ensuring completion of the agreement.

The *Oceanside* factors are not required elements but are examined as factors weighing in favor of or against a determination that a restriction violation is substantial enough to warrant the presumed penalty of cancellation.

In applying the *Oceanside* factors to determine whether a violation is substantial, the violation of restrictions, even if they were the result of negligence rather than willful conduct, would still weigh against licensee and cancellation would be the appropriate penalty. Here the violation occurred after licensee received notice of prior violations which goes towards willfulness.

Key Words/Phrases: credibility determination, license restriction, over-service, doubles, multiple employees, cancellation, *Oceanside* factors, inspector intent to consume

Case: *9 Ball Sports Bar*, OLCC-05-V-020, June 2006.

Facts: Licensee had multiple restrictions including a requirement of police contact when any physical altercations occurred on the premises. Licensee held monthly meetings with employees and advised them of the restrictions. A physical fight occurred on the premises and Licensee's employee did not notify police, but noted it in an incident log.

Abstract: A licensee's failure to comply with a restriction on the license pertaining to the sale or service of alcoholic beverages may be considered a sale in a manner other than the license permits, in violation of ORS 471.405(1). In a case of first impression, the Commission determines that for a violation of ORS 471.405(1) to arise out of licensee's failure to comply with a restriction on the license, the prohibited conduct must involve selling alcoholic beverages in a manner other than the licensee is permitted to sell. In this case, Licensees' failure to immediately report the fight to the police violated a restriction on the license, but it did not violate the language of ORS 471.405(1). Therefore, cancellation is not appropriate.

By finding that any substantial failure to comply with restrictions on the license is a violation of ORS 471.405(1), the Commission has broadly interpreted the phrase "sell[ing] or offer[ing] for sale any alcoholic beverage in a manner other than the license permits" to mean "*operating* in a manner other than the license permits." Notwithstanding the Commission's broad interpretation of this provision, ORS 471.405(1) cannot reasonably be read to regulate business operations or activities on the licensed premises other than the sale or offering for sale of alcoholic beverages. For a violation of ORS 471.405(1) to arise out of licensee's failure to comply with a restriction on the license, the prohibited conduct must involve selling alcoholic beverages in a manner other than the licensee is permitted to sell. Licensee's failure to contact the police in the event of a fight on the premises or licensee's failure to have the requisite number of managers or security personnel at a particular time does not necessarily mean that licensee sold or offered for sale alcoholic beverages in a manner other than the license permits.

Key Words/Phrases: cancellation, restriction violation, nexus between violation and selling alcohol

Case: *La Macarena*, OLCC-00-V-116, August 2002. [Distinguished] in *Liquid Club & Lounge*, OLCC-12-V-078/078A, October 2013.]

Abstract: Describing the factor as "whether the hardship the restriction causes a licensee outweighs the importance

the restriction has in ensuring licensee's compliance with alcoholic liquor laws.

C.1.z. Failure to Maintain Bond or Insurance (ORS 471.155, ORS 471.168; OAR 845-005-0400) [Failure to Maintain Bond (ORS 471.210(1) and (2)) Failure to Maintain Insurance (OAR 845-05-100(1) and (2))]

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Case: *Camas Close Winery*, OLCC-11-V-066, June 2012.

Facts: Licensee submitted five Special Events Winery (SEW) licenses, and represented that he had sufficient LLI coverage on each. Licensee was approved for two of them, and was advised that the applications for the others were incomplete for several reasons. OLCC inspectors visited one of the Farmers' Market locations where Licensee had applied for a SEW but did not provide the follow up information needed to complete the application, and was discovered to be selling alcohol. Licensee did not have LLI coverage as he believed he did.

Abstract: Licensee's belief regarding whether he carried LLI is not material to the violation of failing to carry LLI. Further, the "possibility" that a Licensee may have been covered under a policy is insufficient to satisfy the statutory requirement. Pursuant to OAR 845-005-0400(1), a licensee is required to demonstrate financial responsibility sufficient to adequately meet the licensee's liability for damages to third parties caused by persons served in the licensed premises. Under OAR 845-005-0400(3), demonstrating proof of liquor liability insurance requires naming the Commission as a Certificate Holder on the policy, and providing the Commission with a copy of the certificate.

Key Words: SEW license, LLI, approval, incomplete application, Licensee's belief, financial responsibility

Case: *La Torta Express*, OLCC-09-V-136/005, May 2010.

Facts: Licensee let his brother who did not read or understand English proficiently run the licensed premises. Licensee had changed his mailing address to a P.O. Box for his LLI. Licensee's LLI carrier sent notices of cancelation and ultimately canceled the policy for non-payment. The OLCC was notified by the insurer of the lapse, and when the agency contacted Licensee he denied knowing it was cancelled. Licensee also hired a non-DPSST certified security employee.

Abstract: Licensee was without the requisite liquor liability coverage for approximately 35 days, and even if attributable to the negligence of licensee's brother was still the responsibility of Licensee.

Key Words/Phrases: LLI, liquor liability insurance, cancellation, DPSST, permitting unlawful activity

Case: *Santorini West and Kelen Tzakis*, OLCC-08-V-036/036A/036B, OLCC-09-V-026, June 2010.

Facts: Licensee with prior history of warnings and violations started holding Friday night "hip hop" events on the licensed premises. A series of serious disturbances began shortly thereafter. Licensee's wife was a server (Permittee Tzakis) for the licensed business. Licensee terminated the hip hop event promoter, and Licensee/Permittee informed police that they planned some changes to the format and business to address the reoccurring problems. Permittee also wrote two NSF checks for beer/wine purchases on behalf of Licensee. Licensee also had two gaps in LLI coverage.

Abstract: Although Licensee was able to retroactively reinstate the policy after it was cancelled for nonpayment, it did not comply with the statutory requirement to "maintain" liquor liability insurance or a bond. "Maintain" means to keep in an existing state (as of repair, efficiency, or validity), to preserve, carry on or keep up, or to continue. *Webster's Third New International Dictionary* at 1362 (2002 ed.). Licensee did not do so. *See Jonicole Vineyards* (OLCC Final Order, 89-V-068 and 065, September 1989) (the fact that the licensee obtained a bond that was

retroactive and covered the five week period when it was not bonded is not a defense to the violation).

Key Words/Phrases: history of serious and persistent problems, lewd or unlawful activities, LLI, liquor liability insurance, false statement, NSF check, *Miranda* warning

Case: *Maestro Wines*, OLCC-06-V-024 and OLCC-06-V-081, March 2007.

Facts: WMBW licensee failed to submit monthly reports of sales and pay privilege taxes. The OLCC sent licensee letters and notices of violations, and ultimately collected unpaid privilege taxes on licensee's bond. Licensee's bond was subsequently cancelled.

Abstract: Licensee has operated his business for six months without a bond in violation of Commission statutes and rules. Further, Licensee did not provide a reason or excuse for his failure to submit records and he has not responded to the Commission's repeated attempts to assist him in fulfilling this obligation. On this record, the Commission concludes cancellation of the license is an appropriate penalty.

Key Words/Phrases: WMBW license, bond, cancellation, monthly sales reports, privilege taxes

Case: *Evil Sister Saloon*, OLCC-97-V-012, October 1997.

Abstract: No Liquor Liability Insurance. Licensees committed a violation of OAR 845-05-100(1) and (2) because they failed to have liquor liability insurance for an approximate six-month period. The record showed that Licensees had insurance, but their insurance policy was canceled by their insurance company, and Licensees did not obtain new insurance companies until six months later. The Commission concluded that mitigation of the penalty was appropriate because Licensees made good faith efforts to comply because they had obtained the required insurance coverage before the violation, the policy was canceled against their wishes by the insurance company, and Licensees attempted to obtain coverage after their policy was canceled but were not able to find coverage for six months. The Commission concluded that this was a basis to mitigate the penalty from cancellation to a suspension or fine.

Case: *Jonicole Vineyards*, OLCC-89-V-065, September 1989.

Abstract: It is not a defense to the violation of failing to maintain a bond where licensee's bond ended on September 22, 1988, and licensee obtained a new bond on October 31, 1988, that was retroactive to September 22, 1988, because licensees failed to keep the bond in existence. However, the fact that the bond was retroactive was a basis for mitigation.

Case: *Century Home Wines*, OLCC-88-V-105, May 1989.

Abstract: Licensees violated ORS 471.210(1) because when licensees' Assignment of Cash Certificate expired, licensee did not make another deposit for the next license year.

Case: *Nehalem Bay Wine Co.*, OLCC-88-V-081, December 1988.

Abstract: Licensee failed to maintain its bond where it neither held the required \$1,000 bond nor obtained an acceptable equivalent.

C.1.aa. Unauthorized Exercise of License Privileges (OAR 845-05-060)

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Case: *Alpine Restaurant & Deli*, OLCC-88-V-139, May 1989.

Abstract: Licensees violated OAR 845-05-060 when licensees' license expired and licensees continued to serve alcoholic beverages during a two-week period before they submitted a renewal application.

**C.1.bb. History of Serious and Persistent Problems (ORS 471.315(1)(c));
[ORS 472.180(1)(k)]**

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Case: *Don's Dugout*, OLCC-12-V-065/065A/065B, May 2013.

Facts: Licensed premises originally operated quietly for approximately 10 years, and then had at least 12 documented disturbances over a 9 month period of time including shots fired, assault, theft, patron fights, noise complaints, a bartender being arrested for a warrant, and other issues. Licensee was warned twice of a potential for a history of serious and persistent problems violation, and attempted to create a control plan and change operating practices with little to no reduction in problems. The City of Portland issued Licensee a time, place and manner violation and asked for a liquor license suspension, and lottery was shut down at the licensed premises.

Abstract: In interpreting ORS 471.315(1)(c), the Commission has found that a history of serious and persistent problems is based on the nature and circumstances of the incidents in each case. Incidents inside the licensed premises count, whether or not they are related to the licensee's sale of alcohol. Incidents outside do not count unless the incident is related to the licensee's sale or service of alcohol. The Commission gives significant weight to severe crimes, such as those involving drugs, violence or the threat of violence to a patron or licensee, unless the incident was isolated and happenstance. Less severe crimes, such as shoplifting, will be given little weight, unless the crime is shown to be related to alcohol. *Handy Food Mart* (OLCC Amended Final Order, 91-L-020, March 1994). A licensee may overcome the history by showing that the problems are not serious or persistent or by demonstrating a willingness and ability to adequately control the premises and patrons' behavior. See also *La Brisa*, OLCC-91-L-037, December 1992.; *Headless Horseman* (OLCC, Final Order, 92-L-016, June 1993), *Balzer's Pub & Grill* (OLCC, Final Order, 99-V-019, March 2001), *The Hydrant* (OLCC, Amended Final Order, 00-L-006, October 2001), *Dr. Feelgood's Pub* (OLCC Final Order, 08-V-052 and 08-V-074, June 2009), *Big Shots Bar & Broiler* (OLCC Final Order, 09-V-077, April 2010).

The documented disturbances constituted a history of serious and persistent problems. However, Licensee showed a subsequent willingness and ability to adequately control the premises, and a reduction in problems had already occurred due to removal of certain liquors, the dress code, Licensee's presence, and removal of lottery from the premises. These resulted in reduced capacity and smaller crowd enabling licensee to better control the premises and patrons' behavior. See also *Downtown Deli & Greek Cusina*, OLCC-08-V-028, August 2009.

Commission staff argued that a four month break in serious incidents is not sufficient to show the problems were not persistent, citing to *Finest Mexican & Seafood Restaurant* (OLCC Final Order, 06-V-016, February 2007). This case, however, presents different circumstances because the circumstances changed since the last incident, and unlike *Felipe's*, where the licensee's serious problems began only 14 months after the premises opened for business, Licensee here operated for years without a violation and had relatively few calls for police service prior to late December 2011. Additionally, in *Felipe's* the licensee did not adhere to the terms of its compliance plan. Therefore, *Felipe's* is not controlling.

Key Words/Phrases: disturbances, noise, complaints, assault, shots fired, theft, security, willingness and ability, lottery, city of Portland, control plan, compliance plan, time place and manner violation

Case: *Shenanigan's Irish Pub/Shenanigan's Bar & Grill*, OLCC-11-V-065, December 2012.

Facts: Licensee originally was a smaller venue (approx. 120 capacity), but grew over time to include several separate bars, a dance club and patio area. In total the premises grew to have capacity for 600 persons. Due to multiple disturbances, the OLLC issued a Notice of intent to put restrictions on the license. Licensee challenged the restrictions

as unreasonable. Disturbances continued and following an OLCC inspection that found multiple restriction violations, the Licensee shut down most of the portions of the licensed premises. Licensee continued to operate the Irish Pub, back patio area and dance club. Before hearing Licensee closed his business entirely and surrendered his license.

Abstract: In interpreting ORS 471.315(1)(c), the Commission has found that a history of serious and persistent problems is based on the nature and circumstances of the incidents in each case. Incidents inside the licensed premises count, whether or not they are related to the licensee's sale of alcohol. Incidents outside do not count unless the incident is related to the licensee's sale or service of alcohol. The Commission gives significant weight to severe crimes, such as those involving drugs, violence or the threat of violence to a patron or licensee, unless the incident was isolated and happenstance. Less severe crimes, such as shoplifting, will be given little weight, unless the crime is shown to be related to alcohol. *Handy Food Mart* (OLCC Amended Final Order, 91-L-020, March 1994). A licensee may overcome the history by showing that the problems are not serious or persistent or by demonstrating a willingness and ability to adequately control the premises and patrons' behavior.

30 documented disturbances involving violence or threat of violence inside the premises, and more than 20 documented disturbances in the immediate vicinity involving patrons, as several instances of unlawful activity in or related to the premises is a history of serious and persistent problems.

Although the Commission considers problems involving public drunkenness and public urination as "less serious" than those involving violence or threat of violence, such incidents nevertheless count in determining whether a licensee has a history of serious and persistent problems. *Girtle's Restaurant & Lounge* (OLCC Final Order, 08-V-079, December 2009); *DiMarco's Restaurant* (OLCC Final Order, 04-V-043/04-V-062, October 2005).

Key Words/Phrases: history of serious and persistent problems, violence, documented disturbances, business expansion, voluntary closure, continued disturbances after restriction, Letter of Reprimand

Case: *Gossip Restaurant & Bar*, OLCC-12-V-007, December 2012.

Facts: Multiple disturbances at licensed premises including noise complaints, fights, intoxicated patrons, patrons refusing to leave, assaults, and other instances over a period of approximately 19 months. Licensee closed the business and surrendered the license before hearing, and therefore Letter of Reprimand was appropriate.

Abstract: 25 documented disturbances of violence or the threat of violence, many involving intoxicated patrons, plus at least two instances of excessive noise complaints, constitutes a history of serious and persistent problems.

Key Words/Phrases: noise complaint, karaoke, history of serious and persistent problems, documented disturbances, violence, threats of violence, Letter of Reprimand

Case: *The Rainbow Market*, OLCC-09-V-122, February 2011.

Facts: Long history of unconfirmed disturbances around or associated with the licensed premises, which was located next to an abandoned Shell gas station and Warm Springs reservation.

Abstract: Unlike on-premises establishments, there is no rebuttable presumption that persons coming to an off-premises establishment do so because the establishment has a liquor license.

Where the Commission has not proven that persons causing serious problems were patrons who purchased or obtained their alcoholic beverages from an off-premises licensee, the incidents caused by those persons cannot be included in a history of serious and persistent problems at that license. Here, the record failed to establish that Licensee had a history of serious and persistent problems at the licensed premises. Although the Commission alleges

79 problem incidents at or in the vicinity of the licensed premises, at least 33 of those had insufficient evidence to establish a problem occurred because the police did not respond to the call or, upon responding to the area, were unable to locate the persons involved or unable to confirm what (if anything) had happened and there was no other corroborating evidence of the incident. Furthermore, for another nine alleged problems cited in the Amended Notice, the evidence shows that the reported incident was either unfounded or completely unrelated to Licensee's sale of alcohol under the license privilege.

Proximity alone does not create a relationship between these violent incidents and Licensee's sale of alcohol. *See Girtle's Restaurant & Lounge* (OLCC Final Order, 08-V-079, December 2009) at 15 (excluding a fight that occurred in the area of the licensed premises where the police did not investigate which, if any, establishments the combatants had patronized and there was no evidence linking the disturbance to the licensee's sale or service of alcohol.); *see also La Brisa* (OLCC, Final Order, 91-L-037, December 1992 (recognizing that the mere proximity of problems to the licensed premises is not enough; there must be some showing that the persons causing the problems were either going to or coming from the licensed premises when the incident occurred)). In the absence of demonstrating any link between these fights and assaults in the vicinity of the market and Licensee's alcohol sales, most of these violent disturbances should not count as relevant incidents.

Case: *Silver Lace Club, fka Stables Bar & Grill*, OLCC-10-L-001, February 2011.

Facts: Premises in historically high crime area in Springfield changed to gentlemen's club with nude female dancers. Licensee also failed to list her son's arrest on renewal application because she didn't believe he had a financial interest in the business.

Abstract: Nine documented violent/threat of violence disturbances over a 14 month period establishes a history of serious and persistent problems, but licensee demonstrated a willingness and ability to adequately control the premises and patrons' behavior. The Commission will consider a licensee's security efforts, including taking appropriate steps in dealing with problem persons by refusing service and/or by removing them from the premises in evaluating the willingness and ability to control the problems associated with the licensed premises. *Downtown Deli & Greek Cusina*, Amended Final Order at 24, n. 11; *Girtle's Restaurant & Lounge* Final Order at 19, n. 8; *Cabana Club*, Final Order at 21.

Key Words/Phrases: history of serious and persistent problems, willingness and ability to control, high crime area, nude dancing, arrest, disclose, false statement

Case: *Last Frontier*, OLCC-10-V-040, December 2010.

Facts: Licensed premises had 127 problem incidents over a period of time. Approximately 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, although theoretically hearsay, can be sufficiently reliable for inclusion in a list of documented serious incidents. The Commission considers the reliability of incident logs in light of the fact that the Oregon Evidence Code does not consider logs as hearsay. ORS40.450(4)(b) (hearsay exception for business records kept in the ordinary course of business).

A record of 79 disturbances over 27 months constitutes a history of serious and persistent problems.

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: *Santorini West and Kelen Tzakis*, OLCC-08-V-036/036A/036B, OLCC-09-V-026, June 2010.

Facts: Licensee with prior history of warnings and violations started holding Friday night “hip hop” events on the licensed premises. A series of serious disturbances began shortly thereafter. Licensee’s wife was a server (Permittee Tzakis) for the licensed business. Licensee terminated the hip hop event promoter, and Licensee/Permittee informed police that they planned some changes to the format and business to address the reoccurring problems. Permittee also wrote two NSF checks for beer/wine purchases on behalf of Licensee. Licensee also had two gaps in LLI coverage.

Abstract: 13 disturbances involving violence or threats of violence over 18 month period is a history of serious and persistent problems.

Key Words/Phrases: history of serious and persistent problems, lewd or unlawful activities, LLI, liquor liability insurance, false statement, NSF check, *Miranda* warning

Case: *Big Shots Bar & Broiler*, OLCC-09-V-068/077, April 2010.

Facts: Commission alleged 50 serious incidents inside or in the immediate vicinity of the premises over 24 months, at least 20 involving violence or threats of violence. Licensee argued that 1) DUII arrests should not be counted unless OLCC could show they were the result of over-service; 2) the Commission should not count a DUII or other unlawful activity as a serious problem in the absence a finding that the licensee “permitted” the unlawful activity; and 3) for an instance of public drunkenness or visible intoxication to count against a licensee as a serious problem, there must be evidence that the licensee made alcohol available to the patron after the patron was visibly intoxicated.

Abstract: An intoxicated driver in the immediate vicinity of the licensed premises may be counted among incidents comprising a history of serious and persistent problems if the unlawful activity is related to the licensee’s sale or service of alcohol under the exercise of the license privilege. *Girtle’s Restaurant & Lounge*, Final Order at 15-16.

It is not necessary to establish that the licensee “permitted” the unlawful activity for it to count as a serious problem or incident. *See, e.g., The Hydrant*, Amended Final Order at 31 (“Incidents occurring at a licensed premises need not have been ‘permitted’ in order to have existed and to comprise part of the history at that premises.”)

It is not necessary to have evidence that licensee made alcohol available to a patron after the patron was visibly intoxicated to have an instance of public drunkenness or visible intoxication count against a licensee as a serious problem. *Cisco & Panchos*, (OLCC Final Order, 99-V-080ES, September 2000).

Where serious problems persistently recur even after the licensee takes measures to control the premises, the Commission has held that the licensee did not demonstrate both the willingness *and* ability to adequately control the premises. *See, e.g., Mak’s Old City Hall Lounge* (OLCC Final Order, 08-V-114, December 2009) (serious problems continued at the licensed premises despite measures taken by the licensee, such as installing video cameras, adding security staff and increasing employee training); *Dr. Feelgood’s Pub*, Final Order at 16-17 (the licensee did not demonstrate a consistent willingness and ability to control the premises, even though there were fewer serious incidents after the violation notice issued; licensee’s employees also did not consistently adhere to the compliance plan requirements); *see also Helena’s Place* (OLCC, Final Order OLCC-04-V-024, June 2005) (licensee did not establish a willingness and ability to adequately control the premises where it had not consistently adhered to its compliance plan’s requirements).

Key Words/Phrases: history of serious and persistent problems, willingness and ability to control, drinking in parking lot, lewd behavior, DUII, public drunkenness, visible intoxication

Case: *Maks Old City Hall*, OLCC-V-114/114A/114B, December 2009.

Facts: Licensed premises with a series of disturbances and incidents over a 17 month period of time. Licensee also charged with permitting disorderly activities, drinking on duty and permitting a minor to buy or be served alcohol, or permitted to be on the licensed premises.

Abstract: 39 documented disturbances involving violence or threats of violence over a 17 month period is a history of serious and persistent problems. There were also at least 30 other instances of public drunkenness, public urination, criminal mischief or theft related to Licensees' sale or service of alcohol. Cancellation is appropriate because licensee did not show a willingness and ability to control the premises/patrons' conduct.

Licensee's argument that less than 1% of the total patrons have created the problems at issue is not persuasive. The measures taken by Licensees (installing video cameras, adding security staff, having a medically trained staff person on the premises on weekends, more training for the security employees, etc.) may indeed show some willingness on their part to control the premises. However, this record shows that the measures have not succeeded in Licensees' ability to adequately control the premises. Even after the measures were undertaken, and after the last serious problem leading to the history of serious problem violation ticket, incidents continued to occur right up to the time of the hearing

Licensee's argument that the Commission is estopped from using an incident that resulted in a warning as evidence of serious/persistent problems is not persuasive. It is entirely appropriate for the Commission to include all the problems occurring at the licensed premises in considering whether there has been a history of serious and persistent problems. The Notice of Warning did not include any sanction, and no litigation or settlement occurred regarding the incidents cited in the Notice of Warning.

Key Words/Phrases: history of serious and persistent problems, estoppel, police calls, willingness and ability, cancellation, lack of good cause

Case: *Downtown Deli & Greek Cusina*, OLCC-08-V-028/028A/028B, October 2009. (Amended order).

Facts: Downtown Portland premises had multiple floors for dancing, night club, bar, restaurant and special events. Premises had operated for decades with very few problems, but started having significant number of issues once the second and third floors were opened. The OLCC had issued numerous warnings in the past.

Abstract: 27 documented disturbances involving violence or threat of violence over 15 months creates a history of serious and persistent problems.

In interpreting ORS 471.315(1)(c), the Commission has found that a history of serious and persistent problems is based on the nature and circumstances of the incidents in each case. Incidents inside the licensed premises count, whether related to sale of alcohol or not. Incidents outside do not count unless the incident is related to the licensee's sale or service of alcohol. The Commission gives significant weight to severe crimes, such as those involving drugs, violence or the threat of violence to a patron or licensee, unless the incident was isolated and happenstance. Less severe crimes, such as shoplifting, will be given little weight, unless the crime is shown to be related to alcohol. *Handy Food Mart* (OLCC, Amended Final Order, 91-L-020, March 1994).

Upon consideration of prior Commission cases where a history of serious and persistent problems has been found to exist and the standard penalty of cancellation mitigated, the Commission observes that the pattern of mitigating so much as to give the option of paying a civil penalty in lieu of any suspension period is insufficient to deter violations of this magnitude or to encourage rapid resolution of the underlying problems. The number and nature of incidents

giving rise to a history of serious and persistent problems impact the surrounding community and disproportionately strain law enforcement resources. In the future, the Commission intends to impose some appropriate period of mandatory suspension (not less than one day and not to exceed 30 days), with or without the option of paying a civil penalty in lieu of a portion of the suspension period, as a penalty in cases of this type.

Key Words/Phrases: History of serious and persistent problems, restrictions, suspension versus cancellation, mitigation of Category I violation

Case: *Girtles Restaurant & Lounge*, 08-V-079, October 2009.

Facts: Licensees of established premises began experiencing a number of fights. An OLCC inspector met with Licensees to warn of the possible violation for serious and persistent problems, and offered to help create a control plan. Licensees declined and instead submitted a written statement that they would be remodeling to increase their dining area into the lounge area, and closing earlier on weekends to avoid the “late tavern crowd.” Licensees did close early for about 3 weeks, then went back to being open until 2:30 a.m., and problems continued.

Abstract: 10 disturbances involving violence or threat of violence, 4 instances of unlawful activity by patrons on the premises related to Licensee’s sale or service of alcohol, and 6 less serious incidents involving public drunkenness and/or public urination related to Licensee’s sale or service of alcohol, in 28 month period is a history of serious and persistent problems.

Driving under the influence of intoxicants is an unlawful activity. ORS 813.010. Under the plain language of ORS 471.315(1)(c), “unlawful activities” involving patrons of the establishment in the immediate vicinity of the premises count towards a history of serious and persistent problems if those unlawful activities in the immediate vicinity of the premises are related to the sale or service of alcohol under the exercise of the license privilege. Therefore, an intoxicated driver in the immediate vicinity of the licensed premises can provide grounds for cancellation or suspension under this provision if the unlawful activity is related to the licensee’s sale or service of alcohol under the exercise of the license privilege.

Although the Commission considers problems involving public drunkenness and public urination as “less serious” than those involving violence or threat of violence, such incidents nevertheless count in determining whether a licensee has a history of serious and persistent problems.

The Commission has, in the past, mitigated the penalty from cancellation to a suspension or fine where the licensee demonstrates a willingness and ability to adequately control the premises. *See, e.g., New Copper Penny Restaurant* (OLCC, Final Order, 04-V-040, October 2005) (mitigation was appropriate because, subsequent to having a history of serious and persistent problems, the licensee made significant changes in operation and demonstrated the willingness and ability to control the premises).

Because Licensee demonstrates a willingness and ability to control patrons/premises, mitigation to less than cancellation is warranted. Based on the Commission’s recent pronouncement and reasoning in *Downtown Deli & Greek Cusina*, a mandatory suspension plus fine is appropriate in this case. *Downtown Deli & Greek Cusina*, OLCC-08-V-028, August 2009.

Similarly, despite Licensee’s history of violations and serious problems, Licensee should be renewed due to evidence that Licensee has been better at controlling the premises and patrons’ behavior and is implementing new measures designed to reduce the number and frequency of serious problems.

Key Words/Phrases: history of serious and persistent problems, willingness and ability to control, DUII, unlawful activity, mitigation, mandatory suspension period, less serious incidents, deny renewal, risk for future compliance

Case: *Dr. Feelgood's Pub*, OLCC-08-V-52 and 74, June 2009.

Facts: Licensed premises had a series of disturbances over approximately 13 months. In one instance a fight among patrons started and Licensee's security ejected the patrons, who continued to fight in the parking lot. No employee called the police and did not intervene in the altercation until after police arrived.

Abstract: 11 disturbances involving violence or threats of violence over 13 months in addition to six other instances of less serious issues, is a history of serious and persistent problems.

Licensee did not demonstrate a willingness and ability to control the premises given that Licensee had already agreed to a compliance plan involving certain house rules to control alcohol consumption in an effort to alleviate the disturbances, and did not consistently adhere to the plan. Licensee's security also did not act appropriately to keep disputes from escalating in several instances, did not call the police, or did not report serious aspects of concerns to police, placing many in great jeopardy. Following the instances at issue, other than instituting a policy of terminating employees who did not follow the compliance plan, Licensee did not do anything else demonstrating other measure or policies being implemented to prevent serious problems in the future.

Key Words/Phrases: permitting disorderly activities, history of serious and persistent problems, willingness and ability to control, license cancelation, control plan

Case: *Felipe's Finest Mexican & Seafood Restaurant*, OLCC-06-V-016, February 2007. [Distinguished in *Don's Dugout*, OLCC-12-V-065, May 2013.]

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. 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 OLCC proposed to cancel the license, Licensee argued that OLCC 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: The Commission has not provided a formula to determine whether a history of serious and persistent problems has been established. Here, 28 problem incidents over a two year period constitutes a persistent problem. Moreover, the 23 incidents involving violence or the threat of violence constitutes a serious problem. 10 incidents involving violence or the threat of violence between June 2004 and April 2005, when an intervention meeting occurred. There were no problem incidents between April 2005 and August 2005. However, between August 2005 and June 2006, there were 17 incidents of which 13 involved violence or the threat of violence. The Commission concludes that the four months without problem incidents is insufficient to prove that the problems were not persistent over the two-year period.

Licensee has failed to demonstrate a willingness to control the premises. Some of the items in the compliance plan were not followed, and Licensee took no additional steps to address the problems that continued unabated. Licensee failed to propose to make any significant changes to the manner in which his business is run. Licensee has been unable to control for any significant period patrons' behavior in the premises and he has not proposed any activities that would be likely to ensure compliance with OLCC laws and rules.

While Licensee clearly believes that he has been treated differently than other licensees, he has not shown by a preponderance of the evidence that the treatment he received was different from the treatment of other similarly situated licensees who were not Mexican American. The testimonial evidence established that circumstances at other premises,

while similar in nature, were not the same. There was no true comparative evidence showing how many incidents, the type of incidents, the period of time involved and the efforts to prevent such incidents by the licensees of other premises when compared to Licensee.

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

Case: *DiMarco's Restaurant aka Club Miami*, OLCC-04-V-043, OLCC-04V-062, October 2005.

Facts: Restaurant and night club received numerous noise complaints from one neighbor, as well has had history of fights.

Abstract: 11 instances of excessive noise over 10 months, and nine disturbances involving violence or threats of violence over 13 months, is a history of serious and persistent problems.

Obtrusive or excessive noise is a specific example of a "serious" problem that can give rise to a violation of ORS 471.315(1)(c). In this case, noise from inside the licensed premises violated ordinances of the City of Salem as excessive noise on eleven occasions. Pursuant to ORS 471.329(1)(a), these eleven instances of excessive noise within a 10-month period are to be counted among those comprising a history of serious and persistent problems.

The Commission proved a licensed premises had a history of serious and persistent problems where the record established 11 excessive noise violations at the licensed premises over the course of 10 months, nine disturbances involving violence or the threat of violence in 13 months, and at least three other instances of unlawful activity, including interfering with police officers inside the premises on two occasions and public drunkenness linked to Licensees' establishment.

Licensees' on-duty security personnel were involved in five of the nine disturbances at the licensed premises. Although security staff may have acted appropriately in seeking to eject disruptive patrons from the licensed premises, they did not act appropriately by beating and injuring patrons in the course of doing so. These incidents show that Licensees' security staff tended to escalate problematic situations rather than diffuse them. They do not demonstrate an ability to control problems at the premises during the time period in issue.

Case: *New Copper Penny Restaurant*, OLCC-04-V-040/040A, October 2005.

Facts: Licensee and premises have been licensed to sell alcohol since 1973. Licensee had a long history of prior compliance with liquor laws. Licensed premises started having a series of serious incidents including a security employee placing a patron in a choke hold that resulted in the patron's death. Licensee also added an individual as secretary to the corporation and didn't notify the OLCC.

Abstract: 8 incidents involving violence or threats of violence over a 6 month period is a history of serious and persistent problems.

Fights, altercations and public drunkenness are specific examples of "serious" problems set out in ORS 471.315(1)(c).

Licensee's willingness and ability to control the problems is reflected in (1) the relative number of problem incidents constituting the history of serious and persistent problems herein that arose from Licensee's appropriate steps to deal with problem persons; (2) the steps licensee has taken since taken since April 1, 2004, to control future problems of the types identified herein; and (3) Licensee's compliance history as it evidences the willingness and ability to control problems at the premises.

With respect to the number and nature of problem incidents, the proportion of incidents attributable to appropriate

security efforts, and the remedial steps taken by Licensee to control the premises, the facts herein are most similar to those in *Balzer's Pub & Grill*.

The death of a patron at the hands of Licensee's security during one of the problem incidents warrants aggravation.

Licensee is entitled to mitigation of the standard penalty for a history of serious and persistent problems because it has demonstrated an ability and willingness to control the premises. Licensee's willingness and ability to control the problems is reflected in: (1) the relative number of problem incidents constituting the history of serious and persistent problems herein that arose from Licensee's appropriate steps to deal with problem persons; four of the eight incidents comprising the history of serious and persistent problems arose from Licensee's security staff taking appropriate steps to deal with problem persons by denying them entry or reentry into the licensed premises or to prevent escalation of a brewing problem; (2) the steps licensee has taken since the last incident to control future problems of the types identified herein; licensee changed its radio advertising practice, discontinued live music events, modified its hours on weekends, and developed a new late-night food menu to offer more food during the late night hours; and (3) Licensee's 24-year compliance history shows evidence of Licensee's willingness and ability to control problems at the premises.

In addition to continuation of existing security practices (dress code, security camera/surveillance system, recording of all persons entering the premises, photographing of the identification cards of all patrons, searches of patrons upon entry, employment of DPSST certified security staff, clearly identifiable security personnel), Licensee made significant changes to its operation after the last incident. Licensee changed its radio advertising practice, discontinued live music events, modified its hours on weekends, and developed a new late-night food menu to offer more food during the late night hours.

Key Words/Phrases: history of serious and persistent problems, incidents attributable to security efforts, fights, homicide, death, compliance history, violence, security practices, change in corporate structure

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: 9 serious incidents and one less serious incident, over a 6 ½ month period, is a history of serious and persistent problems.

OLCC has not required proof that the individuals causing the serious problem actually had drunk alcohol at the premises because it has concluded that serious problems include fights among those attempting to enter the premises or those being denied service. OLCC is given considerable discretion in interpreting what are "serious and persistent problems" and "related to the sale or service of alcohol under the exercise of the license privilege" because these terms are delegative, ones in which the legislature has not completely expressed its intent and delegates to OLCC the authority to complete. *Springfield Education Assn. v. School Dist.*, 290 Or 621, 622-628 (1980). OLCC may complete these expressions by rule or by adopting a policy of general applicability when issuing an order in a contested case. *Trebesch v. Employment Div.*, 300 Or 264 (1985). OLCC has considerable authority to interpret its law to protect the public. ORS 471.030; ORS 471.730(5) ("To adopt such regulations as are necessary for carrying out the provisions of this chapter . . ."). Within this authority, OLCC has properly concluded that it need not prove that individuals who caused the serious problems were actually served alcoholic beverages by Licensee. Foreseeability is irrelevant to determination of serious and persistent problems and a history thereof.

'Persistent' is defined to mean continuing to exist in spite of interference or treatment. Webster's Ninth New Collegiate Dictionary (1985)."

In determining whether a licensee can establish a willingness and ability to control conduct of the premises and patrons, the Commission must also consider whether a Licensee who requires 21 restrictions to demonstrate a willingness and ability is a good compliance risk and whether it is practical and feasible to monitor such restrictions.

Key Words/Phrases: serious and persistent problems, hearsay, double hearsay, authority to interpret, foreseeability, restrictions, persistent defined

Case: *Formosa Café*, OLCC-02-V-016, October 2002.

Abstract: A history of serious and persistent problems was found to exist at Licensees' premises. Licensees then sought to demonstrate a willingness and ability to control the premises. The Commission concluded that where Licensees had previously agreed in writing to implement three successive compliance plans over three years, but had not implemented many parts of the plans, Licensees were found to be unwilling to control the premises if allowed to reopen following an emergency suspension. Licensees had also not established an ability to control the problems. The license was cancelled.

Case: *La Macarena*, OLCC-00-V-116, August 2002.

Abstract: The Commission concluded that the nature and number of problems demonstrated a history of serious and persistent problems where, in addition to 13 incidents or violations between 1991 - 1999 established in a settlement agreement, there were an additional eight serious incidents in a ten-month period in 2000. Counted among the eight serious incidents are violations charged separately in the instant charge letter and proven at the same hearing.

Case: *The Hydrant*, OLCC-00-L-006, Amended Final Order, October 2001.

Abstract: The Commission further disavowed the rationale in *La Linda's*, OLCC-95-L-021ES, June 1996, to the extent the rationale relies upon precedent (i.e., *Dublin Pub*, OLCC-88-V-068, December 1988) related to the compliance violation of permitting disorderly activities, to determine which incidents should be counted to establish a history of serious and persistent problems.

The Commission resolved, for the future, conflicts in precedent regarding the treatment of those incidents resulting from a licensee's appropriate steps to deal with problem persons by refusing them service and/or by removing them from the licensed premises, when assessing a history of serious and persistent problems. The Commission adopted the approach taken by it in *Cisco & Pancho's*, OLCC-99-V-080ES, September 2000; and overruled *La Linda's*, OLCC-95-L-021ES, June 1996, *La Brisa*, OLCC-95-L-018/-V-009, December 1996, and any progeny of either, to the extent inconsistent with the *Cisco & Pancho's* approach. Consistent with the *Cisco & Pancho's* approach, the Commission intends to count all incidents resulting from a licensee's appropriate steps to deal with problem persons (by refusing them service and/or by removing them from the premises) among those incidents comprising a history of serious and persistent problems. Each incident will be weighed according to its seriousness, as determined by the presence or absence of violence or the threat of violence directed toward persons (serious) or property (less serious). These security efforts will be considered in evaluating willingness and ability to control the problems associated with the licensed premises.

Case: *300 Club*, OLCC-99-V-060, April 2001.

Abstract: Where, in a violation case based on a history of serious and persistent problems (Category I), Licensee's willingness and ability to adequately control the premises (mitigation) and the extensive nature and degree of efforts

to prevent violations were noted, the Commission mitigated the penalty from cancellation to a \$975 fine or a license suspension of 15 days.

Approximately 20 incidents occurred over a 12 month period. Of these, 14 involved violence or the threat of violence. In these 14 serious incidents, 5 injuries occurred. There were approximately 4 additional incidents that were not of a serious nature. This record of incidents is sufficient to establish a history of serious and persistent problems at the licensed premises.

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.

The Commission concluded there was a history of serious and persistent problems where the record showed five incidents within six months, including two fights outside the licensed premises, an assault on a security guard and the display of a gun by a patron denied entry to the premises, an assault and robbery upon a waitress by patrons inside the premises, and a visibly intoxicated patron on the street outside the premises. The two fights outside the premises and the assaults on Licensees’ staff by patrons distinguished this history from a series of less serious incidents. The Commission concluded that the number and severity of incidents at Balzer’s established a history of serious and persistent problems pursuant to ORS 471.315(1)(c).

Case: *Cisco & Pancho's*, OLCC-99-V-080ES, September 2000.

Abstract: There was a history of serious and persistent problems when the record showed that 18 incidents, including 10 serious incidents, occurred inside the licensed premises or involved patrons in the immediate vicinity within 15 months. Eight of the 18 incidents were serious in that they involved violence or the threat of violence, including a homicide inside the premises. Two of the ten were serious because they involved minors. Eight less serious incidents occurred during the same time frame, involving visibly intoxicated persons in the vicinity who drank at the premises (5), property damage, theft, and a patron throwing food at Licensee. Licensees did not show they had the willingness and ability to control the premises and patrons’ behavior in the immediate vicinity and that mitigation was warranted. Licensee’s efforts to control the premises prior to the emergency suspension were ineffective. Serious incidents persisted. Following the emergency suspension, Licensee made certain changes to the business in an attempt to draw a different clientele; none, however, were adequate to address the serious security problems involving physical violence and the threat of violence which occurred within the licensed premises.

Incidents of visibly intoxicated patrons in the vicinity of the premises should be counted among serious and persistent incidents, but given little or lesser weights because of lack of certain causal links between public drunkenness and Licensee’s establishment.

Under ORS 471.315(1)(c), “unlawful activities” may be counted for determining whether serious and persistent problems exist, independent of whether a licensee “permitted” the unlawful activity. The Commission will consider whether a licensee Apermitted: the unlawful activities found for purposes of ORS 471.315(1)(c) in determining willingness and ability to control the premises.

Case: *Tequila Peppers Bar & Grill and Pepita Express*, OLCC-99-V-011-ES & OLCC-99-L-012, December 1999.

Abstract: During an 18-day period, ten sales of cocaine or heroin were made by patrons on the licensed premises of Tequila Peppers to other patrons. The manager observed one of these transactions and another employee observed two of these transactions. They were thus aware that drug trafficking was occurring on the premises. Licensee and employees of the premises did not take any effectual action to reduce or halt the drug sales. The record established

that heroin and cocaine use presents a serious danger to the public health and safety. The Commission concluded that the number of unlawful activities involving sales of cocaine and heroin establishes that the premises has a history of serious and persistent problems involving drug sales, in violation of ORS 471.315(1)(c).

The Commission issued a letter of reprimand to a former licensee due to a history of serious and persistent problems with illegal drug sales.

Ten drug sales by patrons on the licensed premises to undercover police officers or informants during an 18-day period is sufficient to constitute a “history” of unlawful activities. The Commission concluded that no definition of the terms “history” or “a history” refers to a defined period of time. The Commission determined that persistence of the unlawful activities over 18 days is a sufficient period of time to constitute “a history.”

Case: *Mulligan’s*, OLCC-99-V-045, August 1999.

Abstract: There was a history of serious and persistent problems when the record showed that eleven incidents, including ten fights, occurred inside the licensed premises or involved patrons in the immediate vicinity within 10 months. The incidents were severe because several patrons were injured and because in one incident gun shots were fired inside the licensed premises when patrons and employees were present. Licensees did not show they had the willingness and ability to control the premises and patrons’ behavior in the immediate vicinity and that mitigation was warranted. Licensee’s compliance efforts were not effective and licensee failed to follow through on key elements of the compliance plan. Extremely serious incidents continued to occur, including a person leaving and reentering the premises with a gun and shooting into a crowd. On two occasions when police were investigating serious crimes at the premises, groups of patrons were hostile to the police officers and refused to leave the area as the officers had requested.

Case: *Trail Creek Tavern*, OLCC-94-V-003, August 1994.

Abstract: The Commission concluded that the premises had a history of serious and persistent problems where there were 20 noise-related incidents within a nine-month period.

Case: *Ace’s Yellow Rose Saloon*, OLCC-91-V-051, September 1991.

Abstract: In examining whether problems under ORS 471.315(3) are no longer serious and persistent, the Commission looked at activity during the time the license privileges were exercised, rather than what occurred when the licensed premises was closed.

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

Abstract: The Commission concluded the premises had a history of serious and persistent problems pursuant to ORS 471.315(3) and canceled the license where there were unlawful drug sales and violent incidents involving physical harm and threats of physical harm. The Commission found that the licensee had not shown good cause to outweigh the denial criteria because she had committed crimes on the licensed premises.

C.1.cc. Failure to Pay State Taxes (ORS 305.385(4)(c) and (d))

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

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: In construing the meaning of ORS 473.050(1), a judge’s task is to ascertain the intent of the enacting legislature by examination of the statute’s text and context, along with any relevant legislative history, and if necessary, by resort to relevant canons of statutory construction. *State v. Gaines*, 346 Or 160, 171-73 (2009); *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-611 (1993). Words of common usage that are not defined in the statute should be given their plain, natural and ordinary meanings. *PGE*, 317 Or at 611.

Pursuant to ORS 473.030, OLCC imposes a per gallon tax “upon the privilege of engaging in business as a manufacturer or as an importing distributor of wines.” There are, however, specific circumstances when the privilege tax will not be imposed. ORS 473.050. The OLCC’s interpretation “production” to mean completion of fermentation or removal from the fermenter was the most plausible. Because Licensee reported producing zero wine by fermentation during the year, Licensee was ineligible for the exemption of ORS 473.050(5).

Key Words/Phrases: privilege tax, statutory interpretation

Case: *Primo's Place*, OLCC-92-V-058, September 1992.

Abstract: Where the licensees did not file income tax returns, pay taxes due, or file appeals, the Commission suspended the licensees' RMB license under ORS 305.385(4)(c) and (d).

C.1.dd. Service of Alcohol without Food [(472.100(4)(b))]

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

Case: *San Jang*, OLCC-97-V-033, September 1997.

Abstract: No Food Service. The Commission concluded that Licensee violated ORS 472.100(4)(b) (served alcoholic beverages without food service) where the record showed that, on two occasions, Licensees' employees served alcoholic liquor to customers without also serving them food.

C.1.ee. Failure to Read / Sign and/or Retain Training Brochure (845-009-0130) (OAR 845-006-0026(2), (5)(6))]

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

Case: *CS Convenience Store*, OLCC09-V-059, June 2010.

Facts: Licensee's brother was unlicensable and restricted from the premises. The licensed premises was in the same building as another business owned by Licensee. Licensee's brother managed both businesses and was on the licensed premises contrary to licensing restrictions.

Abstract: Pursuant to OAR 845-009-0130(2), an off-premises sales licensee must have an employee read, sign and date the Commission-provided brochure, *What Every Store Clerk Needs to Know About Selling Alcohol*, before allowing the employee to sell alcoholic beverages. The licensee is required to maintain the employee-signed brochure as long as the employee is employed by the licensee. OAR 845-009-0130(6).

Key Words/Phrases: unauthorized interest in a business, compensation out of the ordinary, contract to manage, investment, hearsay evidence, license restriction, Oceanside factors

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

Abstract: Licensees failed to have employees who sell alcoholic liquor read and sign a training brochure. That OLCC inspector offered to deliver copies of brochure as a favor to Licensees on an earlier occasion did not excuse Licensees' failure to procure them on their own and use them.

C.1.ff. Operating While Suspended ([OAR 845-006-0361])

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

Case: *Shanghai Restaurant*, OLCC-01-V-074, April 2002.

Abstract: To “permit” the service of alcoholic liquor during the period of time that the license is under suspension for purposes of OAR 845-006-0361, requires that licensee be aware of the activity.

Where licensee did not notify all employees of the license suspension, beer was available for sale on the premises during the suspension period, and the beer sign was lit, licensee did not do what a reasonable person would do to make sure the sale of alcoholic liquor was stopped, he permitted the sale and service of alcoholic liquor during the period of license suspension.

C.1.gg. Failure to Maintain Records (OAR 845-010-0170)

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

Case: *Maestro Wines*, OLCC-06-V-024 and OLCC-06-V-081, March 2007.

Facts: WMBW licensee failed to submit monthly reports of sales and pay privilege taxes. The OLCC sent licensee letters and notices of violations, and ultimately collected unpaid privilege taxes on licensee's bond. Licensee's bond was subsequently cancelled.

Abstract: Licensee has operated his business for six months without a bond in violation of Commission statutes and rules. Further, Licensee did not provide a reason or excuse for his failure to submit records and he has not responded to the Commission's repeated attempts to assist him in fulfilling this obligation. On this record, the Commission concludes cancellation of the license is an appropriate penalty.

Key Words/Phrases: WMBW license, bond, cancellation, monthly sales reports, privilege taxes

C.1.hh. Change in Corporate Structure without Notice (OAR 845-006-0475)

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

Case: *New Copper Penny Restaurant*, OLCC-04-V-040/040A, October 2005.

Facts: Licensee and premises have been licensed to sell alcohol since 1973. Licensee had a long history of prior compliance with liquor laws. Licensed premises started having a series of serious incidents including a security employee placing a patron in a choke hold that resulted in the patron's death. Licensee also added an individual as secretary to the corporation and didn't notify the OLCC.

Abstract: The addition of a person to a corporation's management is a "change in an officer or director" for purposes of notice requirement. The term "change" means "different from what it is or from what it would be if left alone" and/or "to become altered or modified." It also means, to transform or to replace with another. *Webster's Unabridged Dictionary* (1996) at 344. Licensee altered or changed its corporate structure when it added a secretary, a principal officer. Licensee therefore violated the Commission's regulations by failing to immediately notify the Commission in writing of this change.

Key Words/Phrases: history of serious and persistent problems, incidents attributable to security efforts, fights, homicide, death, compliance history, violence, security practices, change in corporate structure

C.2. Defenses

C.2.a. Estoppel

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

Case: *Silver Dollar Pizza*, OLCC-13-V-020, OLCC-13-L-005, November 2014.

Facts: Licensee permitted minors (age 19) to operate a food (hot dog) cart on the sidewalk in front of the licensed premises. Minors used the licensed premises regularly including the kitchen, restrooms, safe for deposits, getting change, and socializing after hours. When Licensee decided to cancel the arrangement the minors got upset, and reported the liquor law violations to the OLCC. Licensee also had his minor son as an employee in the kitchen. When he got notice of violation, he argued that he should be permitted to have minor employees in the kitchen area. OLCC investigators informed him he must have a modification approved by the Commission, and until approval he could not have minors on the premises at any time. Licensee claimed he was misled by inspectors who, he said, did not make it clear to him that he could not have minors working on the premises.

Abstract: The theory of equitable estoppel requires proof of a false representation, (1) of which the other party was ignorant, (2) made with knowledge of the facts, (3) made with the intention that it would induce action by the other party, and (4) that induced the other party to act upon it. While the circumstances are rare, equitable estoppel may apply to government agencies. But, at a minimum, it must be shown that the agency knowingly made a false or misleading statement on which an individual justifiably and detrimentally relied. There must also be a showing that the representations made by the state agency were within its lawful power to make.

Key Words/Phrases: minor, permitted, premises, contractors, core business, estoppel, false/misleading statement

Case: *Maks Old City Hall*, OLCC-V-114/114A/114B, December 2009.

Facts: Licensed premises with a series of disturbances and incidents over a 17 month period of time. Licensee also charged with permitting disorderly activities, drinking on duty and permitting a minor to buy or be served alcohol, or permitted to be on the licensed premises.

Abstract: Licensee's argument that the Commission is estopped from using an incident that resulted in a warning as evidence of serious/persistent problems is not persuasive. It is entirely appropriate for the Commission to include all the problems occurring at the licensed premises in considering whether there has been a history of serious and persistent problems. The Notice of Warning did not include any sanction, and no litigation or settlement occurred regarding the incidents cited in the Notice of Warning.

Key Words/Phrases: history of serious and persistent problems, estoppel, police calls, willingness and ability, cancellation, lack of good cause

Case: *Interstate Bar & Grill*, OLCC-09-V-027/027A, September 2009.

Facts: Licensee had been warned previously of the need for DPSST-certified security personnel, both at this premises and another he had an interest in. Licensee failed to have his employee complete the certification process for almost a year despite the prior warning. Licensee raised defense of estoppel, because he had discussed being in the process of getting the certification completed just days before receiving a violation ticket, and believed the inspector had given him more time to complete the DPSST process.

Abstract: Equitable estoppel, or estoppel by conduct, has several elements. The theory of equitable estoppel requires

proof of a false representation, (1) of which the other party was ignorant, (2) made with the knowledge of the facts, (3) made with the intention that it would induce action by the other party, and (4) that induced the other party to act upon it. *Wilkinson v. PERB*, 188 OR App 97 (2003). Here, there is no evidence that a representation was made, true or false, regarding giving Licensee additional time to complete the DPSST certification. Licensee testified that the inspector never responded to his request one way or the other, making Licensee's reliance on that unreasonable.

Key Words/Phrases: DPSST certification, estoppel, permitting unlawful activity, reliance

Case: *Italian Riviera Restaurant*, OLCC-00-V-059, April 2001.

Abstract: Licensees provided live music entertainment at their licensed premises. Between fall 1998 and September 1999, a number of complaints of loud music noise were received by OLCC and the local sheriff. In October 1999, a notice was issued by OLCC, alleging that Licensee maintained a noisy premises in violation of ORS 417.425, or, in the alternative, that Licensees permitted noisy activities in violation of OAR 845-006-0047. A settlement agreement was entered into, based upon a draft OLCC policy on noisy premises (approved by the Commission in May 1999) which identified noise issues as a local concern subject to local noise ordinances. A second pending violation for noise was not pursued. The draft policy was subsequently adopted formally by the Commission in April 2000.

Sometime later, OLCC determined that its policy on noisy premises would only apply to cases in which OLCC was seeking license cancellation due to a history of serious and persistent problems with noise under ORS 471.315(1)(c), and that it would not be used to regulate all noise; that it would still use the noise standard in OAR 845-006-0047(1)(c) for enforcement of that rule and ORS 471.425(2). Licensees again received a citation for excessive noise in May 2000. Among other defenses, Licensees asserted that OLCC was equitably estopped from finding a violation based on a definition of noise different from that in the settlement agreement, relied upon by Licensees to their detriment.

The Commission concluded that because Licensees were misled by the agency into believing the standard for excessive noise for all noise violations would be that of exceeding the local noise ordinance, and Licensees relied on good faith on that standard to their detriment, the Commission is equitably estopped from imposing a violation of OAR 845-006-0047(1)(c) based on the lower standard, until the Licensees receive clear written direction that OLCC is no longer defining noise, for all purposes, as a violation of the local ordinance, as stated in the settlement agreement.

Case: *Blue Bird Tavern*, OLCC-96-V-045, January 1997.

Abstract: Where licensee relies upon faulty information provided by agency staff, but does not make a material change in his position because of that information, estoppel does not apply and the agency is not estopped from asserting the proposed penalty in the matter.

Detrimental reliance for purposes of equitable estoppel requires a material change in position. It can include reliance on misleading information that results in the loss of a benefit. *Simons v. City of Portland*, 132 Or App 74, 84, 887 P2d 824 (1994). To prove estoppel, there must be evidence that the party asserting estoppel acted on the representations made and changed his or her position to his or her detriment by reason of the conduct of the party to be estopped.

Case: *Swift & McCormick Metal Processors v. Durbin*, 117 Or App 605, 845 P2d 931 (1993).

Abstract: Proof of intent to mislead is not a prerequisite to estoppel. Affirmative misconduct is not a prerequisite to the application of estoppel. The doctrine may be applied when conduct is misleading, even if it is innocent. It may be applied where an agency's action was not intended to be misleading, but was ambiguous enough to mislead a reasonable person.

Case: *Breivogel et al. v. Washington County, et al.*, 117 Or App 195, 843 P2d 982 (1992).

Abstract: County is not estopped from enforcing a procedural requirement by its failure to advise petitioner of the requirement, which is set forth in an ordinance.

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

Abstract: The Commission was not estopped from revoking a license where the letter of authority to operate was issued in error. Estoppel did not apply because the element of knowledge of the facts was not present since the letter was issued by mistake.

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

Abstract: Licensee was estopped from arguing that her settlement agreement with the Commission was not valid because her husband had signed the agreement for her, where she acted as though she had signed the agreement and operated under the agreement.

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

Abstract: The Commission's temporary PS license approval was not a final approval, and the applicant should not have relied on that approval, or the opinion of a liquor investigator, before making improvements to the marina. Consequently, the Commission would not be estopped from denying the application if it found that license refusal was appropriate.

Case: *Harsh Investment Corp. v. State Housing Authority*, 88 Or App 151, 744 P2d 588 (1987), *rev. den.*, 305 Or. 273 (1988).

Abstract: A state agency may not be estopped from renegeing on a commitment to take a certain action, where that action violated the agency's own rules.

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

Abstract: Equitable estoppel did not apply as a defense where the Commission advised a licensee that its practices were illegal as soon as the Commission discovered the licensee was committing the practices.

Licensee's dismissal of a lawsuit without prejudice in reliance on Commission representation did not give rise to estoppel defense. The licensee's action was not detrimental, because the licensee had the opportunity to refile the lawsuit.

Case: *Employment Div. v. Western Graphics Corp.*, 76 Or App 608, 710 P2d 788 (1985).

Abstract: Equitable estoppel will be applied against a state agency only if the person asserting it detrimentally relied on the agency's misleading conduct.

Case: *Crab Pot*, OLCC-85-L-003, June 1985.

Abstract: The Commission is not estopped from disapproving a change in hours, even where the licensee has operated with the unapproved hours for two years and the Commission has renewed the license since the unapproved hours took effect, where there is no evidence that the Commission was specifically aware of, considered and approved the change in hours.

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

Abstract: Ethics Commission not estopped by advice given by employee of another state agency to appellant, where statute provided procedure by which appellant could have requested an advisory opinion from the Ethics Commission.

Cases: *Family Zoo Tavern*, August 1984; *Family Zoo Tavern*, July 1984.

Abstract: Commission is not estopped from denying application of individual on grounds of past convictions, a list of which was submitted to License Division five years previously, even though applicant's license had been routinely renewed each year since the record was submitted.

Case: *B & R Mercantile*, June 1984.

Abstract: Commission is not estopped to apply its rules even though staff member orally advised licensee to act in way that would be a rule violation. Licensee cannot reasonably rely on such an oral statement when rules, which licensees are imputed to know, state otherwise.

Case: *Thrift v. Adult & Family Services Div.*, 58 Or App 13, 646 P2d 1358 (1982).

Abstract: While equitable estoppel is applicable to governmental entities, it only applies to persons who, due to agency action, lose a benefit to which they otherwise would have been entitled.

Case: *Shiloh Youth Revival Center v. Emp. Div.*, 44 Or App 81, 605 P2d 704 (1980).

Abstract: The grounds for equitable estoppel are generally as follows: (1) there must be a false representation; (2) it must be made with knowledge of the facts; (3) the other party must have been ignorant of the truth; (4) it must have been made with the intention that it should be acted upon by the other party; (5) the other party must have been induced to act upon it.

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

Abstract: OLCC is not estopped to revoke a license for violations of liquor laws merely because it renewed the license several days after the violations occurred. Licensee had no right to rely on license renewal to defeat enforcement of liquor laws.

C.2.b. Laches

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

Case: *Silver Dollar Pizza*, OLCC-13-V-020, OLCC-13-L-005, November 2014.

Facts: Licensee permitted minors (age 19) to operate a food (hot dog) cart on the sidewalk in front of the licensed premises. Minors used the licensed premises regularly including the kitchen, restrooms, safe for deposits, getting change, and socializing after hours. When Licensee decided to cancel the arrangement the minors got upset, and reported the liquor law violations to the OLCC. Licensee also had his minor son as an employee in the kitchen. When he got notice of violation, he argued that he should be permitted to have minor employees in the kitchen area. OLCC investigators informed him he must have a modification approved by the Commission, and until approval he could not have minors on the premises at any time.

Abstract: Charges may be dismissed where there was a substantial delay in the matter and witnesses crucial to a full and fair record are no longer available. Despite delay in convening the hearing (15 months after first violation was charged), the crucial witnesses to the violation were still available and licensee did not show that the OLCC delayed in asserting a claim for an unreasonable length of time. Licensee also did not show substantial prejudice, such as disadvantageous change in position or loss of critical evidence. Consequently the doctrine of laches is inapplicable.

Key Words/Phrases: minor, permitted, premises, contractors, core business, estoppel, false/misleading statement

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. Licensee raised defenses of lack of reasonable notice and laches because four months expired between the violation and notice of violation.

Abstract: Although the Commission will dismiss a charge where there has been a substantial delay in the matter and witnesses crucial to a full and fair record are no longer available, this is not such a case (four months between violation and notice). Licensee had constructive notice of the minor decoy operation and potential violation within about 2 weeks of the sale, and had formal notice about 4 ½ months after. Licensee has not shown any disadvantageous change in position or loss of evidence due to the interval.

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

Case: *OLCC Agency No. 1158*, OLCC-09-RO-002, December 2009.

Facts: Chronic alcoholic and regular customer purchased alcohol from Agent's store. Police were notified that customer was at the liquor store and contacted the store, where they were told it was "kinda hard to say" if customer was intoxicated. Police followed customer to her house, with lights on, and she exhibited many signs of intoxication.

Abstract: As the Commission determined in *OLCC Agency No. 17* (OLCC Final Order, 04-RO-002, July 2004), liquor agents and their employees are liable for either knowing or negligent sales of alcohol to visibly intoxicated persons. To establish a negligent sale of alcohol to a visibly intoxicated person, the preponderance of the evidence must show there were visible signs of intoxication which the seller had some opportunity to observe. Actual observation is not required. There must be visible signs of intoxication before a duty to prevent such a sale attaches. *OLCC Agency No. 60* (OLCC Final Order, 04-RO-005, December 2004).

A person is visibly intoxicated when his or her physical and mental control is diminished by alcohol or drug to a point

where diminished control can be seen. Evidence that only 16 minutes after purchasing alcohol a customer was arrested for DUI and appeared disheveled, had overwhelming odor of alcohol on her breath and person, slurred speech and glassy eyes, suggests that the store clerk should have perceived her as intoxicated.

Defense of laches not established when agent cannot show any disadvantageous change in position or any loss of evidence caused by the delay, such as the parties to the transaction or arresting officer were not available for hearing and subject to cross-examination.

Key Words/Phrases: Retail Sales Agent Agreement, intoxicated patron, laches, signs of intoxication

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: 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:

Laches has three elements: (1) the plaintiff must delay asserting his claim for an unreasonable length of time (2) with full knowledge of all relevant facts, (3) resulting in such substantial prejudice to the defendant that it would be inequitable for the court to grant relief.

In another case involving a claim of laches, the Commission held that it was not barred from terminating an agency agreement because agent submitted late deposits, the last of which occurred two years prior to the hearing. The agent had not taken any significant disadvantageous change in position since the Commission could have first asserted the late deposits as a termination ground. Further, the passage of time since the violations had not been shown to result in the loss of any critical evidence. *Carl Shoemaker, OLCC Agency No. 169* (OLCC, Final Order, 86-RO-003, March 1987).

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: *Mountain View Market*, OLCC-91-V-119, August 1992.

Abstract: Where there was a substantial delay in the matter and witnesses crucial to a full and fair record were no longer available, the Commission determined that the charge should be dismissed.

Case: *Alder Street Market*, OLCC-89-V-102, November 1989.

Abstract: Delay in notice to licensee was not unreasonable where the violation was issued approximately 6 weeks after the Commission received the complaint. Licensee did not show substantial prejudice where licensee had a full opportunity to cross-examine the witnesses and examine the documentary evidence, even though licensee did not personally recall the incident.

Case: *OLCC Agency No. 169*, OLCC-86-RO-003, March 1987.

Abstract: Commission was not barred by laches from terminating agency agreement because agent submitted late deposits, the last of being two years prior to the hearing. Agent had not taken any significant disadvantageous change in position since the Commission could have first asserted the late deposits as a termination ground. Further, the

passage of time since the violations had not been shown to result in the loss of any critical evidence.

Case: *Rise v. Steckel*, 59 Or App 675, 652 P2d 364 (1982).

Abstract: The defense of laches has three elements: (1) the plaintiff must delay asserting his claim for an unreasonable length of time; (2) with full knowledge of relevant facts; (3) resulting in such substantial prejudice to the defendant that it would be inequitable to grant relief. The harm or prejudice to a defendant necessary to the laches defense can be either a disadvantageous change in position or loss of witnesses or critical documentary evidence caused by plaintiff's delay.

C.2.c. Entrapment

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

Case: *Julianna Mitchell*, OLCC-13-V-058, May 2014.

Facts: Permittee served alcohol to minor decoy with OLCC without asking for ID or questioning minor about his age. Permittee stated that she believed decoy was 30 years old. Permittee argued entrapment as a defense, with no evidence to support it.

Abstract: Use of decoys is only invalid as entrapment when badgering or importunity takes place to an extent and degree that it is likely to induce an otherwise law abiding person to commit a crime. No evidence of badgering or importuning has been alleged or took place in this case.

Key Words/Phrases: minor decoy, age verification, true age, subjective belief, entrapment

Case: *Silver Dollar Pizza*, OLCC-13-V-020, OLCC-13-L-005, November 2014.

Facts: Licensee permitted minors (age 19) to operate a food (hot dog) cart on the sidewalk in front of the licensed premises. Minors used the licensed premises regularly including the kitchen, restrooms, safe for deposits, getting change, and socializing after hours. When Licensee decided to cancel the arrangement the minors got upset, and reported the liquor law violations to the OLCC. Licensee also had his minor son as an employee in the kitchen, contrary to his minor posting permissions, who lied to OLCC investigators when questions about his presence in the licensed premises.

Abstract: "Penal entrapment" occurs when a person is entrapped to commit a greater offense that subjects the person to a greater penalty. No evidence of entrapment, penal or otherwise, occurred in this case.

Key Words/Phrases: minor, on premises, access, entrapment, minor posting

Case: *Stone Cliff Inn*, OLCC-11-V-041, April 2012.

Facts: Minor decoy served at licensed premises. Bartender asked for ID, and misread the ID and thought the minor had just turned 21, stating "you just made it." Licensee argued entrapment because he was distracted by the unusual behavior of the undercover police that entered right after the minor decoy.

Abstract: Odd behavior by undercover police in a minor decoy sting may have been distracting, but did not rise to the level of badgering or importuning necessary to constitute entrapment.

Key Words/Phrases: minor decoy, verify, questionable age, minor decoy operation standards, entrapment,

Case: *Bettie Ford's*, OLCC-06-V-021, OLCC-06-L-006, August 2007. (Amended Final Order on Reconsideration)

Facts: OLCC inspectors conducted undercover compliance checks of licensed premises on three occasions. On each occasion different permittees served over-sized and double shots of alcohol in violation of licensee's restrictions.

Abstract: Licensee's arguments that because the inspectors never consumed the alcohol and never intended to no violation occurred was unavailing. Licensee's employees sold and served shots in double or larger than permitted, in violation of licensee's restrictions.

Key Words/Phrases: credibility determination, license restriction, over-service, doubles, multiple employees, cancellation, Oceanside factors, inspector intent to consume

Case: *U-Licious Smokehouse & Grill*, OLCC-06-V-058, February 2007.

Facts: Licensee served a minor decoy without asking for ID. Licensee “let his guard down” because he believed the decoy and undercover deputy were father and daughter or boss/secretary out for a late lunch. Licensee argued entrapment, as well as hardship due to his recent stomach cancer surgery (resulting in extraordinary medical bills and debt from closure of the premises for a period of time).

Abstract: The use of decoys is a permissible method of enforcement of criminal law. The use of decoys only becomes invalid when badgering or importuning takes place to an extent and degree that it is likely to induce an otherwise law abiding person to commit a crime. No such evidence was presented in this case.

Key Words/Phrases: minor decoy, hardship, inability to pay, entrapment

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

Abstract: Licensee was not subjected to “penalty 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.

“Penalty 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.

Case: *Murrayhill Thriftway*, OLCC-98-V-027 and OLCC-98-V-046, April 1999.

Abstract: Relevant defenses to the crime of selling liquor to a minor include entrapment and outrageous conduct defenses. Under Oregon law, simply using decoys does not constitute entrapment. The use of decoys is a permissible method in the enforcement of criminal law. The use of decoys becomes invalid only when badgering or importuning takes place to an extent and degree that it is likely to induce an otherwise law abiding person to commit a crime.

Case: *Elks Club*, April 1983.

Abstract: Licensee was charged with allowing a person other than a member or a guest to purchase and consume distilled spirits on the licensed premises. Although the Commission concluded that a violation had occurred, the violation was excused because the only person served who was not a member or guest was an OLCC inspector who had indicated to the Elks employees that he was there to attend a party.

C.2.d. Immunity

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

Case: *7455 Inc. v. OLCC*. 310 Or 477, 800 P2d 781 (1990).

Abstract: 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.

Case: *State v. Strance*, 95 Or App 488, 769 P2d 793 (1989).

Abstract: ORS 471.770 confers automatic immunity from subsequent criminal prosecutions for witnesses who testify pursuant to an OLCC subpoena on a matter that is the subject of the criminal prosecution.

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

Abstract: ORS 471.770 will operate to immunize a person only if the person is ordered to testify over a claim of privileges. Although the provider was subpoenaed to a deposition, testified there, and at the hearing, the provider never refused to testify.

Cases: *Jiggles*, OLCC-85-L-013, OLCC-85-V-016, 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); *J.J.'s*, OLCC-85-L-014, OLCC-85-V-017, February 1987; *Strance Alcohol Programs*, OLCC-87-MS-002, February 1988.

Abstract: Loss of provider certification is not a punishment, penalty, or forfeiture subject to the protection of ORS 471.770.

C.2.e Conflict of Interest and Misc. Defenses

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

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: The Commission concluded that Licensee established the defense of fake ID because there was no testimony to contradict the bartender's assertion that the minor presented an ID, when the officer did not search the minor for any identification. The minor's testimony was deemed unreliable and therefore his statements that he did not use a fake ID were not given any weight.

For the defense of false identification, the Licensees bear the burden of proving that Deleon showed Licensees convincing false identification. *Mini Mart* (OLCC Final Order, 97-V-066, June 1997); and see ORS 183.450(2). To be a convincing false identification, the identification must be one of the types described in ORS 471.130(1), such as a state-issued motor vehicle operator's license or an identification card. It must look real and must not appear to be altered. *John Dough's Pizza*, OLCC-90-V-161, August 1991. The licensee must reject any "obviously altered document" or one which "obviously does not identify the person offering it." OAR 845-006-0335(1)(b).

The defense does not apply if the alleged false identification does not reasonably identify the person offering it. See *Trappers Lodge*, OLCC Final Order 93-V-018, July 1993 (The false identification defense was not proven where the IDs offered by the minors had photographs of other women and the heights and weights on the IDs did not match the minors.)

Key Words/Phrases: minor, permitted, false ID, fake ID, identification

Case: *Big Shots Bar & Broiler*, OLCC-09-V-068/077, April 2010.

Facts: Licensee served alcohol to a minor who was using a fake ID. Licensee argued that because an ID card photo is only an inch and a quarter in size and a person's weight and appearance may change, security staff could have reasonably believed that the minor was the person pictured in the ID presented.

Abstract: Where the evidence shows that the minor bears little resemblance to the photo in the ID used to gain access to the licensed premises, it was not reasonable to believe the person presenting the ID was the one depicted in the license presented. A reasonable person verifying age would have seen they were not the same person, and consequently licensee has not shown that the false identification was convincing.

Key Words/Phrases: minor, false ID, identification, fake ID, convincing identification

Case: *Circle K Store No. 468*, OLCC-04-V-047, April 2005.

Facts: Licensee's employee sold a can of "Spark" to a minor decoy, on employee's first day of work. Employee didn't know that "Spark" was alcoholic. Licensee had previously had a sale to a minor within 2 years, and had numerous policies and practices to avoid sales to minors.

Abstract: A clerk's mistaken belief that a product did not contain alcohol did not excuse the sale of an alcoholic beverage to a minor. See also *Murrayhill Thriftway* (OLCC, Final Order, 98-V-027, April 1999).

Case: *Cactus Bar & Grill*, OLCC-03-V-014, June 2004.

Abstract: A violation of OAR 845-004-0001 is not intended by the OLCC to provide an affirmative defense for a licensee to a Notice of Violation, but is to be used strictly as a basis for employment eligibility or discipline.

C.3. Responsibility for Violation

C.3.a. Licensee v. Permittee/Employee

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

Case: *Nick's AM/PM*, OLCC-13-V-093/093A, January 2014.

Facts: Employee of Licensee sold alcohol to minor decoy with OLCC. The OLCC had received a complaint of sales to minors, so included Licensee's premises in decoy operations. Employee did not ask for ID or ask minor's age.

Abstract: Licensee is responsible for the acts of employees.

Key Words/Phrases: minor decoy, responsible, employee conduct, age verification

Case: *H20 Martini Bar & Restaurant*, OLCC-06-V-014/014A, December 2006, *affirmed without opinion*, 213 Or App 240 (2007).

Facts: Licensee had several employees working without valid service permits, each with different circumstances. One employee told licensee and inspector that he had one, and gave the licensee a forged one. Licensee argued there was no evidence either employee actually served, sold or mixed alcoholic drinks.

Abstract: Even an employee who only occasionally mixes or serves alcoholic beverages is required to have a service permit. *Downtown Deli & Greek Cuisina* (OLCC, Final Order, 04-V-022, August 2005).

Citing to the *Black's Law Dictionary* definition of "permit," the Commission reasoned that the licensee "acquiesced by failure to prevent" the employee from serving alcoholic beverages without a permit. *Cal Sport* (OLCC, Final Order, 02-V-021, April 2003).

An employee's effort to conceal a service permit violation is not attributed to the licensee for penalty purposes, but it could be an aggravating factor in the service permit violation charge against the employee.

In this case the employee did not have a service permit, told licensee and inspector that he had one, and gave the licensee a forged one. Employee's effort to conceal the service permit violation as to himself is not attributable to the penalty for Licensee. While responsibility for a violation by an employee is imputed to the licensee pursuant to OAR 845-006-0362, responsibility for acts constituting mitigation or aggravation may not be. Just as a licensee and that licensee's employee are each entitled to the benefit of mitigation for their own individual acts, and not for the acts of the other, so, too, liability for individual acts constituting aggravation, such as concealment of a violation, is not shared. See *Sugar Pine Inn* (OLCC, Final Order, 00-V-108, April 2002), citing and clarifying *Flight 99 Tavern*, (OLCC, Final Order, 87-V-033, February 1988).

Key Words/Phrases: service permit, imputed to licensee, concealment of a violation, mitigation, individual acts, monetary penalty in lieu of suspension, nature of the penalty

Case: *Michael Reese*, OLCC-06-V-067, December 2007.

Facts: Permittee served a minor decoy without asking for ID. When inspectors contacted Permittee he became belligerent, and an argument and scuffle ensued. Permittee's employer joined the discussion and was asked to provide all service permits. After looking for them on the premises the employer determined that some may be in his home office. Inspectors typically ask permittees who doesn't have their permit on them for a name and DOB so they can just

verify the permit through OLCC dispatch. Because of the heated exchange with Permittee the inspectors decided not to do this in this instance. The employer's wife went home to retrieve the remaining service permits, including Permittee's. In addition to the minor sale charge, OLCC charged Permittee with failure to make service permit available for immediate inspection.

Abstract: Where permittee failed to have his service permit immediately available it is not mitigating that the employer had taken the service permit home for safe-keeping because it is the permittee's responsibility to have the service permit immediately available. The duty lies with the permittee and not the employer.

Key Words/Phrases: credibility determination, service permit, available for immediate inspection

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: At the very least, tenant was a representative or servant of licensee at the time of sale to a minor, given the history of the tenant performing services for licensee in return for rent, including occasionally working in the store and making sales transactions. Therefore, even though he wasn't authorized to open the store when he did, licensee is still responsible for his actions.

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: *Cal-Sport*, OLCC-03-V-008, December 2003.

Abstract: Licensee was held responsible for a sale to minor based on OAR 845-006-0362, which provides that a licensee may be held responsible for violations of law committed by servants, agents, employees, or representatives. Licensee argued that use of the permissive "may" require OLCC to exercise discretion in holding licensees responsible, and because OLCC routinely holds all licensees responsible, it has abused its discretion. The Commission determined that because it had exercised discretion not to hold licensees responsible under OAR 845-006-0362 in those instances where employees are not on duty and not acting on licensee's behalf, it has not abused its discretion in applying OAR 845-006-0362.

Case: *Linda Estes*, OLCC-02-V-006 & 007, August 2002.

Abstract: ORS 471.385(1)(c) authorizes sanctioning a service permittee for any act which would constitute a violation if the act were performed or permitted by a licensee.

Case: *Main Street Texaco & Mini Mart*, OLCC-00-V-069, October 2001.

Abstract: Unless an employee is both not on duty and not acting on licensee's behalf, the licensee is responsible for an employee's violations of the alcoholic liquor laws, even when the licensee had no knowledge of the employee's acts, the licensee had express policies against the acts, and when the employee disregarded specific instructions of the licensee.

Case: *State ex rel Roberts v. Acropolis McLoughlin Inc.*, 150 Or App 180, 945 P2d 647 (1997).

Abstract: The Court of Appeals held that dancers were not employees, as defined in wage and hour laws.

Case: *Tri-Met, Inc. v. Odighizuwa*, 112 Or App 159 (1992).

Abstract: An agent's knowledge may be imputed to the principal even if the agent does not communicate the information to the principal. However, the knowledge of an agent is imputable only if it is about matters within the agent's authority as agent.

Case: *Harry's Stagecoach Inn*, OLCC-91-V-102, February 1992.

Abstract: Licensees were held responsible under OAR 845-06-025 for the acts of their sublessee and his employee where the sublessee was providing food service for the licensed premises.

Case: *PDQ Mini Market No. 4*, OLCC-90-V-153, July 1991.

Abstract: An employee who is convicted of unlawful conduct is held to have knowledge of that unlawful conduct. This knowledge is also imputed to the licensee who may then be found responsible for that employee's violation.

Case: *Reston Red's Tavern*, OLCC-89-V-058, August 1989.

Abstract: When the licensee's employee who engaged in criminal conduct was not on duty or otherwise acting on behalf of the licensee, the licensee was not responsible for the off-duty employee's criminal act.

Case: *Satyricon*, OLCC-88-V-060, December 1988.

Abstract: The Commission concluded that licensee was not responsible under OAR 845-06-025 for actions of alleged employee, because preponderance of evidence failed to prove that person was licensee's employee. The evidence did not show that licensee had the power or right to control or direct the person in how his work was to be performed.

Case: *Jiggles*, OLCC-88-V-004, August 1988.

Abstract: Licensee received a Letter of Reprimand for violation of OAR 845-06-045(4) [now OAR 845-06-045(3)] because knowledge of criminal acts held by wrongdoer employees is imputed by law to the licensee. It is not a defense that the wrongdoers were disobeying the licensee's instructions when they sold drugs on the licensed premises.

Cases: *Patty Jean's*, OLCC-85-V-037, January 1986; *Pink Pearl Restaurant & Lounge*, OLCC-85-V-026, September 1985.

Abstract: Permittee held not responsible for failing to provide regular meals where licensee did not have enough employees on duty to allow someone to go to the kitchen to fix a regular meal.

Case: *Day & Night Grocery*, OLCC-84-V-026, May 1985.

Abstract: The knowledge of the licensee's employee may be attributed to the licensee even where the licensee was in the hospital at the time of the violations for sale to minors.

Cases: *Prefetto's Pizza*, OLCC-85-V-006, April 1985; *Captain Kidd's*, OLCC-88-V-027, August 1988; *Minute Market No. 10*, OLCC-86-V-056, January 1987.

Abstract: Licensees are responsible for their employees' acts regardless of whether employee disregards specific instructions, although those instructions may provide mitigating circumstances.

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

Abstract: Dismissal of charge against permittee was not inconsistent with sustaining the charge against the licensee. Although not stated in the order, there was a rational basis for the different treatment because the permittee was not at the premises during the time of the alleged violations.

Cases: *Perry v OLCC*, 180 Or 495, 177 P2d 406 (1947); *Palm Gardens, Inc. Oregon Liquor Control Commission*, 15 Or App 20, 514 P2d 888 (1973).

Abstract: Licensee is responsible for acts of employee even though employee's unlawful act of selling whiskey on premises (sale of liquor by glass) took place outside licensee's presence and without her knowledge and against her instructions.

C.3.b. Co-licensees

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

Case: *Capital Market*, OLCC-11-V-030-R, February 2012.

Facts: Licensee submitted renewal application and wrote “none” in response to the question to list any arrests/convictions. One Licensee had previously pled guilty to Endangering the Welfare of a Minor for selling tobacco to a minor decoy, the other for Attempted Theft for keeping a winning lottery ticket.

Abstract: Co-licensees are jointly and severally liable for a false statement violation. OAR 845-006-0301(1), OAR 845-006-0301(3), *see also Lava Lanes of Medford* (OLCC, Final Order, 04-V-007, February 2005); *Jiffy Mart* (OLCC, Final Order, 04-V-027, February 2005).

Key Words: false statement, misleading, material, forgot, “none”, “N/A”, conviction, jointly and severally liable, co-licensees

Case: *Ararat Restaurant & Lounge*, OLCC-04-V-070/070A/070B, August 2005.

Facts: Licensee’s corporate principal served a 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 reaffirms in this order that both the corporate entity and its individual corporate principals are licensees and are jointly and severally liable for violations of their servants, agents, employees or representatives. OAR 845-006-0362. The individual licensees are personally liable not on the basis of their status as corporate principals, but because their license has been issued to them directly in their personal capacity.

Case: *Circle K Store No. 468*, OLCC-04-V-047, April 2005.

Facts: Licensee’s employee sold a can of “Spark” to a minor decoy, on employee’s first day of work. Employee didn’t know that “Spark” was alcoholic. Licensee had previously had a sale to a minor within 2 years, and had numerous policies and practices to avoid sales to minors.

Abstract: The Commission reaffirms in this order that both the corporate entity and its individual corporate principals are licensees and are jointly and severally liable for violations of their servants, agents, employees or representatives. OAR 845-006-0362. The individual licensees are personally liable not on the basis of their status as corporate principals, but because the license has been issued directly to them in their personal capacity.

Case: *Lava Lanes of Medford*, OLCC-04-V-007/007A/007B/007C, February 2005.

Facts: Licensed premises was a 40-lane alley with attached lounge called Bleachers. The lounge had a Number 2 minor posting. The OLCC had received multiple prior complaints related to lack of age verification for younger patrons. The OLCC requested a minor decoy operation due to ongoing concerns about failure to verify ages of patrons and allowing minors in prohibited areas. An inspector and decoy went on a busy night, and sat at a table for a long time before being attended to. The server did ask the decoy for ID and told him he could not drink or be in the area. The OLCC commended the server for refusing service, but cited Licensee for permitting a minor to be in a prohibited area.

Abstract: The Commission found a violation and imposed a penalty on the corporation and the individual corporate officers and shareholders as licensees in this matter. Under OAR 845-006-0301, a “licensee” includes officers and directors of a corporation and certain shareholders. The Commission issued licenses to both the corporate (or other business) entity and the individuals who qualify under the rule as licensees. The corporation and individuals are licensees under a single license, with equal responsibility for violations committed by any licensee (corporate or individual) holding the license. The Commission reaffirmed in this order that both the corporate entity and its individual corporate principals are licensees and are jointly and severally liable for violations of their servants, agents, employees or representatives. OAR 845-006-0362. The individual licensees are personally liable not on the basis of their status as corporate principals, but because their license has been issued to them directly in their personal capacity. See also *Jiffy Mart*, OLCC-04-V-027, February 2005.

Key Words/Phrases: minor, permitted in prohibited area, adequate staffing, minor decoy, knowledge of minor’s presence, sufficient time and opportunity to detect, personal liability of corporate officers

Case: *Mountain Inn*, OLCC-90-V-099, April 1991.

Abstract: Although license privileges of co-licensee who was not involved in violations or management of premises would otherwise be canceled under the reasoning of *Rip City Pub*, Commission was bound to continue co-licensee's privileges where he reasonably relied upon and spent significant time and money in responding to Regulatory staff's representation that his license privileges would not be canceled if he removed other co-licensee's interest in premises.

Case: *A.J.'s Homestead Restaurant*, OLCC-90-V-021, December 1990.

Abstract: Where one corporate principal was convicted of a felony, the license was canceled as to that individual and continued in the name of the remaining non-wrongdoing corporate licensee, subject to the condition that the convicted felon divest himself of shares in the licensed corporation, that he resign as director and officer of the corporation, and that a Letter of Reprimand be issued to the remaining licensee.

Case: *Rip City Pub*, OLCC-89-V-181, December 1990.

Abstract: Where violations involve the sale and service of alcoholic beverages, the Commission holds all co-licensees equally responsible for any aggravating circumstances and for aggravated sanctions, regardless of the individual culpability or participation in the violations or aggravating circumstances. The licensee is presumed to have legal ability to participate in the management or control of the licensed premises. The licensee may show circumstances which affirmatively show a lack of legal ability to participate in the management or control of the licensed premises.

Case: *Kingston Saloon*, OLCC-89-V-080, December 1989.

Abstract: The Commission may penalize a licensed corporation where the president and 50 percent stockholder of the corporation, who is a licensee under OAR 845-06-120, commits a violation as a result of being convicted of a felony.

It is not fair or reasonable to attribute a violation resulting from one corporate principal's felony conviction to the records of the other corporate principals who are licensees under OAR 845-06-120, unless the felony was committed on the premises or was related to the operation of the premises where the principals are licensed. However, it is fair and reasonable to attribute a violation to the record of the principal who has been convicted, even if such a relationship to the licensed premises is not present.

Case: *Tony's Tavern*, OLCC-86-V-003, February 1987.

Abstract: Where one co-licensee was convicted of a felony, license was canceled as to that co-licensee, and continued in the name of the remaining licensee, subject to the conditions that the convicted felon divest himself of any interest in the licensed premises. A Letter of Reprimand was issued to the remaining licensee.

Case: *The Frontier*, OLCC-86-V-032, December 1986.

Abstract: License was not canceled where the licensee's corporate officer, who committed a felony on the licensed premises, completely divested himself of any legal interest in the licensed premises.

Case: *Bayou Inn*, OLCC-85-V-067, March 1986.

Abstract: Commission declined licensee's request to apportion responsibility for fine among co-licensees.

Case: *Lowell's Lounge, Inc., Lowell's*, October 1984.

Abstract: Fact that licensee's contract manager failed to ensure that employees had service permit, without licensee's knowledge or approval, not exculpatory.

Case: *7-Eleven, No. 23007*, August 1983.

Abstract: A prospective franchisee who had been issued an "Authority to Operate" by the OLCC, but who had no access to the premises, had no control over employees, and had no right to profits, was exonerated from responsibility for the violation.

Case: *Hoehne v. OLCC*, 37 Or App 621, 588 P2d 87 (1978).

Abstract: A violation by one or more joint licensees is imputed to all licensees in that it is a violation of license privileges.

C.4. Penalties

C.4.a. Aggravation/Mitigation

C.4.a.1. Prior Warnings or Violations

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

Case: *Slim's Restaurant & Lounge*, 14-V-006/041, November 2014.

Facts: The OLCC alleged that Licensees' employee permitted patrons to take open containers of alcohol from the premises' licensed outdoor seating area. The agency proposed a sanction and revocation of Licensee's outdoor area under former OAR 845-005-0331(1) and (4) (effective until June 1, 2014). The license had been issued in 2008 following submission of a Control Plan outlining Licensee's efforts to control the outdoor café area. In 2012 Licensees were cited for patrons being outside the outdoor area and lack of monitoring by Licensees' staff. Subsequent inspections noted additional violations and lack of monitoring, despite multiple efforts to counsel Licensees. After receiving the warning notices and revocation notice, Licensees implemented new policies to control the outdoor area and installed surveillance cameras to monitor the outside area.

Abstract: To find that Licensees permitted patrons to take open containers of alcohol from the licensed premises, the evidence must prove knowledge of the proscribed activity and the failure to take reasonable steps to prevent or control the proscribed activity. *See, e.g., Don Juan's* (OLCC Final Order, 88-V-003, May 1988). The Commission found that Licensees' employee permitted patrons to take open containers of alcoholic beverages from the licensed premises, in violation of OAR 845-006-0345(5).

Grounds for aggravation of the penalty include: a prior warning about compliance problems; repeated failure to comply with laws; and the violation involved more than one patron or employee. The latter factor applied here, and the appropriate sanction is a nine day suspension or a civil penalty of \$1,485 in lieu of suspension.

Key Words/Phrases: outdoor area, open container, adequate supervision, revocation, control plan, good cause, multiple incidents, aggravation

Case: *Dirty Bar & Grill*, OLCC-09-V-101, April 2010.

Facts: Licensee's employee/bartender served a patron who exhibited signs of being on meth. The patron was observed groping other female patrons in the bar. An undercover OLCC investigator and police officer witnessed the patron's conduct and employee's service, and arrested/cited both.

Abstract: The Commission may aggravate a sanction where a licensee has received a prior warning about the same violation. Under these unusual circumstances where the earlier warning was incorrectly issued for the same substantive violation, the prior warning does not provide a valid basis on which to aggravate the sanction. Mitigation is not appropriate when the actions taken are nothing more than what the law already required the licensee to do. *See, e.g., Tony's Tavern* (OLCC Final Order, 06-V-012, August 2006). Efforts and actions taken after the violation, while laudable, do not provide grounds for mitigation. *See Dad's Restaurant & Lounge* (OLCC Final Order, 06-V-029, December 2007).

Key Words/Phrases: intoxicated, signs of intoxication, under the influence, stimulant, meth, prior warning

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: Aggravation is appropriate given Licensee's prior warnings regarding the same compliance problems as the violations proven.

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: *Downtown Deli & Greek Cusina*, OLCC-08-V-028/028A/028B, October 2009. (Amended order).

Facts: Downtown Portland premises had multiple floors for dancing, night club, bar, restaurant and special events. Premises had operated for decades with very few problems, but started having significant number of issues once the second and third floors were opened. The OLCC had issued numerous warnings in the past.

Abstract: 27 documented disturbances involving violence or threat of violence over 15 months creates a history of serious and persistent problems.

In interpreting ORS 471.315(1)(c), the Commission has found that a history of serious and persistent problems is based on the nature and circumstances of the incidents in each case. Incidents inside the licensed premises count, whether related to sale of alcohol or not. Incidents outside do not count unless the incident is related to the licensee's sale or service of alcohol. The Commission gives significant weight to severe crimes, such as those involving drugs, violence or the threat of violence to a patron or licensee, unless the incident was isolated and happenstance. Less severe crimes, such as shoplifting, will be given little weight, unless the crime is shown to be related to alcohol. *Handy Food Mart* (OLCC, Amended Final Order, 91-L-020, March 1994).

Upon consideration of prior Commission cases where a history of serious and persistent problems has been found to exist and the standard penalty of cancellation mitigated, the Commission observes that the pattern of mitigating so much as to give the option of paying a civil penalty in lieu of any suspension period is insufficient to deter violations of this magnitude or to encourage rapid resolution of the underlying problems. The number and nature of incidents giving rise to a history of serious and persistent problems impact the surrounding community and disproportionately strain law enforcement resources. In the future, the Commission intends to impose some appropriate period of mandatory suspension (not less than one day and not to exceed 30 days), with or without the option of paying a civil penalty in lieu of a portion of the suspension period, as a penalty in cases of this type.

Key Words/Phrases: History of serious and persistent problems, restrictions, suspension versus cancellation, mitigation of Category I violation

Case: *Six Corners Chevron*, OLCC-08-V-004/004A/004B, June 2008. [Overruled in part by rule change, see *Cabaret Lounge*, OLCC-08-061, October 2009.]

Facts: Licensee's employee sold alcohol to a minor without asking for ID. Police told licensee they would not cite him for the sale but forwarded the report to OLCC. Licensee decided to move the employee out of the store to the gas pumps to prevent future issues.

Abstract: The Commission has concluded that mitigation is warranted where the licensee had no violations on its record for a period of four (4) years. *Beehive Grocery & Deli* (OLCC, Final Order, 86-V-064, April 1987). Licensees in this case have not had a violation on their record since 1997. Therefore, mitigation is warranted on

this basis. (NOTE: this is no longer a basis for mitigation, see [Cabaret Lounge, OLCC-08-V-061/064/097, October 2009.](#))

Key Words/Phrases: minor sale, direct evidence of a violation, AVE, prior violation, mitigation

Case: *Dad's Restaurant & Lounge*, OLCC-06-V-029/A/B/C/D, December 2007.

Facts: Licensee purchased Dad's without knowing of problems between previous owner and the OLCC. License proposed an extensive Chinese food menu, which was a large factor in the OLCC granting the license. License was granted with several restrictions including sizes of drinks and no doubles. Subsequently Licensee substantially reduced the menu without notifying the OLCC. Licensee's employee also sold doubles, larger mixed drinks and stacked drinks in violation of the license restrictions. Licensee argued she was unaware this occurred, and terminated the employee when she learned of his actions.

Abstract: Licensee's previous history of compliance at a different location is not worthy of as much weight in determining her risk for future compliance with liquor laws, including restrictions, where the previous history comes from a different type of operation, clientele, and location. Licensee had previously run a Chinese restaurant where alcoholic beverages were available but not a significant part of the business, and the new business was a bar in a different part of town.

"Selective enforcement" is defined as: The practice of law-enforcement officers who use wide or even unfettered discretion about when and where to carry out certain laws; esp., the practice of singling a person out for prosecution or punishment under a statute or regulation because the person is a member of a protected group or because the person has exercised or is planning to exercise a constitutionally protected right. *Black's Law Dictionary* 1390 (8th ed. 2004).

Intervention meetings are routinely offered for history cases and they are not routinely offered for restriction violations. Settlements are made on a case-by-case basis. OLCC has provided reasons for not offering a settlement in this case.

Key Words/Phrases: credibility determination, termination of employee, cancellation, Oceanside factors, reduction in menu, selective enforcement, intervention meetings, settlements, mitigation factors

Case: *H20 Martini Bar & Restaurant*, OLCC-06-V-014/014A, December 2006, *affirmed without opinion*, 213 Or App 240 (2007).

Facts: Licensee had several employees working without valid service permits, each with different circumstances. One employee told licensee and inspector that he had one, and gave the licensee a forged one. Licensee argued there was no evidence either employee actually served, sold or mixed alcoholic drinks.

Abstract: Aggravation is warranted where the licensee had previously been warned about service permit violations and there was more than one employee working without a service permit.

Even an employee who only occasionally mixes or serves alcoholic beverages is required to have a service permit. *Downtown Deli & Greek Cuisina* (OLCC, Final Order, 04-V-022, August 2005).

Citing to the *Black's Law Dictionary* definition of "permit," the Commission reasoned that the licensee "acquiesced by failure to prevent" the employee from serving alcoholic beverages without a permit. *Cal Sport* (OLCC, Final Order, 02-V-021, April 2003).

An employee's effort to conceal a service permit violation is not attributed to the licensee for penalty purposes, but it could be an aggravating factor in the service permit violation charge against the employee.

In this case the employee did not have a service permit, told licensee and inspector that he had one, and gave the licensee a forged one. Employee's effort to conceal the service permit violation as to himself is not attributable to the penalty for Licensee. While responsibility for a violation by an employee is imputed to the licensee pursuant to OAR 845-006-0362, responsibility for acts constituting mitigation or aggravation may not be. Just as a licensee and that licensee's employee are each entitled to the benefit of mitigation for their own individual acts, and not for the acts of the other, so, too, liability for individual acts constituting aggravation, such as concealment of a violation, is not shared. See *Sugar Pine Inn* (OLCC, Final Order, 00-V-108, April 2002), citing and clarifying *Flight 99 Tavern*, (OLCC, Final Order, 87-V-033, February 1988).

Even if mitigation was warranted, it would serve only to reduce the length of suspension. It would not change the nature of the penalty. The Commission has previously held that where, as here, the penalty schedule specifies a standard penalty of suspension only, mitigation does not apply to give a licensee the option of paying a monetary penalty in lieu of suspension. *Express Mart* (OLCC, Final Order, 97-V-067, July 1988).

Key Words/Phrases: service permit, imputed to licensee, concealment of a violation, mitigation, individual acts, monetary penalty in lieu of suspension, nature of the penalty

Case: *Justin Market*, OLCC-90-V-174, December 1991.

Abstract: The Commission concluded that the evidence did not establish that the licensee received multiple prior instructions under OAR 845-06-200(7)(c). The record indicated the types of instructions generally given on preventing sales to minors, but the record did not include the specific instructions provided to the licensee.

Case: *Yet Chip*, OLCC-91-V-033, October 1991.

Abstract: Prior warnings given to licensee concerning the subject matter of the violation are generally a reason to aggravate the penalty. However, a warning given approximately six and one-half years ago is not entitled to weight because it was given so long ago.

Case: *Corral Pastime*, OLCC-89-V-165, June 1990.

Abstract: The Commission concluded that there was a basis to aggravate the penalty where a licensee had received multiple warnings regarding the subject matter of the violation prior to the violation. One warning was not sufficient to establish an aggravating circumstance. An instruction given as an educational tool, where there was no wrongdoing on the part of the licensee, was not a basis for aggravation.

Case: *Old Pine Market*, OLCC-89-V-194, April 1990.

Abstract: The extreme youth of the minor purchaser (age 14) was a basis for aggravation. However, this was outweighed by the 20 year violation-free record of the licensee.

Case: *Kingston Saloon*, OLCC-89-V-080, December 1989.

Abstract: It is not fair or reasonable to attribute a violation resulting from one corporate principal's felony conviction to the records of the other corporate principals who are licensees under OAR 845-06-120, unless the felony was committed on the premises or was related to the operation of the premises where the principals are licensed. However, it is fair and reasonable to attribute a violation to the record of the principal who has been convicted, even if such a

relationship to the licensed premises is not present.

Where a licensee had no violations on its record in the previous seven years, the Commission found sufficient mitigating circumstances to reduce the penalty from cancellation to a 15-day suspension or \$975 fine. Licensee's violation resulted from a felony conviction.

Case: *Magic Garden*, OLCC-89-V-122, December 1989.

Abstract: Violation for service to a visibly intoxicated person was mitigated where the licensee's previous violation (for failure to maintain records) is no longer a major violation under the Commission's penalty schedule and this was the licensee's first violation for sale to a visibly intoxicated person.

Case: *Howard's Northwest Deli*, OLCC-88-V-101, February 1989.

Abstract: Commission reduced a penalty based on good compliance history where, although licensee had only been licensed at the location of the violation for one year, licensee and its president had been licensed at four other locations for a number of years without any violations.

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

Abstract: Service permittee with a 34-year record without violations received half the suspension normally prescribed by the penalty schedule.

Case: *Capital Market*, OLCC-88-V-030, 031, September 1988.

Abstract: Once the Commission's staff has made a decision to work with licensees, short of issuing citations that decision should not lead to aggravation of a penalty because of the many contacts the staff had with the licensee. While those contacts may weigh against mitigating factors, the staff's decision to wait until this incident to issue a violation ticket was not a basis for aggravation of the penalty. See also *Beehive Grocery & Deli*, OLCC-89-V-184, March 1990 (six verbal instructions over three and one-half years, and the two current violations were the first violations in over two years).

Case: *Robert Rabbie*, OLCC-88-V-024, August 1988.

Abstract: The fact that a permittee had no prior violations on his record was not mitigating where the permittee had only been working as a bartender for six months.

Case: *John's Food Mart*, OLCC-88-V-008, July 1988.

Abstract: Where the licensee had no prior violations, and because the two violations occurred within hours of one another, without the benefit of any instruction or education by staff in the intervening period, and without the ability to be able to achieve compliance, the Commission concluded that licensee was entitled to mitigation of the penalty.

Case: *J. B.'s Paradise Room*, OLCC-86-V-023, April 1987.

Abstract: Penalty was aggravated where licensee had two prior record keeping violations and had received an additional two warnings from the Commission on the same issue prior to the violation. See also: *Doc's Golden West Tavern*, OLCC-88-V-112, March 1989 (six instructions on VIP's given in prior two years); *East 20th Market*, OLCC-88-V-094, January 1989 (four instructions on avoiding sales to minors given in the three months prior to the violation).

Case: *Beehive Grocery & Deli*, OLCC-86-V-064, April 1987. [overruled by rule change, see *Cabaret Lounge*, OLCC-08-V-061/064/097, October 2009.]

Abstract: Licensees' prior record of four years without a violation was mitigating.

Case: *Sportsman Club*, OLCC-86-V-054, March 1987.

Abstract: Violation for employee without service permit was mitigated where licensee had not had previous problems involving employees without service permits and where the employee in question worked only a short time without a service permit.

Case: *Theresa Gerber*, OLCC-84-V-031, January 1985.

Abstract: False statement made by service permittee three years earlier on permit application may be mitigated by permittee's subsequent good record in following Commission's rules and regulations.

C.4.a.2. Intent/Good Faith Effort

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

Case: *The Red Carpet*, OLCC-14-V-008/008A, March 2015.

Facts: A police officer responding to a tip that Licensee's employee was drinking on duty. The officer noted the employee having dexterity issues, slow/slurred speech, and the odor of alcohol on his breath. The officer administered an HGN test and discovered six possible clues of intoxication. The employee admitted to having a few drinks on duty, and wrote Licensee a note admitting the drinking on duty. Video did not clearly show any signs of intoxication. Licensee reported the violation to the OLCC after terminating his employee. Licensee provided training to all employees on liquor laws and house rules for the sale and service of alcohol, and notified employees he would terminate them if they failed to comply.

Abstract: Licensee's employee was under the influence of intoxicants while on duty at the licensed premises in violation of OAR 845-006-0345(1). The alternate violation for drinking on duty should be dismissed. The appropriate sanction for the violation of OAR 845-006-0345(1) in this case is a 26-day suspension.

While the video was not definitive, the testimony of the officer was persuasive evidence that the employee was under the influence of intoxicants. The officer is a trained observer, and he administered an HGN test that showed clues of intoxication. The results of the officer's observations and testing cannot be overlooked.

The termination of an employee is not a basis for mitigation. Licensee is entitled to mitigation based on prompt reporting and cooperation with the OLCC, and good faith efforts to avoid violations by providing employee training.

The standard penalty for a first Category II violation is a mandatory 30-day suspension. There is no authority to mitigate the penalty down to the equivalent of a Category III violation, as Licensee suggests. The appropriate sanction is the suspension, reduced by 4 days due to mitigating factors described above.

The ALJ erroneously construed *US Market #145* (OLCC Final Order, 11-V-009, February 2012) as a basis for reducing the sanction of a suspension to the option a fine in lieu of suspension. Contrary to the ALJ's interpretation, however, *US Market #145* does not stand for the general proposition that mitigating factors warrant reduction of a sanction by a full level on the penalty schedule. Prior agency precedent has made clear that where the standard penalty is suspension only, mitigating factors are not applied to reduce the penalty to a fine in lieu of a suspension.

Key Words/Phrases: drinking on duty, under the influence, officer, trained observer, HGN test, signs of intoxication, aggravation, mitigation, terminated employee, penalty schedule, Category II, suspension in lieu of fine

Case: *The Grove Restaurant & Bar*, OLCC-13-V-025, July 2014.

Facts: Licensee's bartender permitted a minor and her friends to come on the premises and served them alcohol. Minors stayed for four hours, and were involved in a traffic crash upon leaving. Bartender later asked minors to tell a story that exonerated him from serving minors, by saying they didn't know him and showed fake IDs. After minors informed the police that the bartender did know them and shared his Facebook and text messages asking them to lie, police interviewed the bartender. The bartender admitted knowing the minors were underage and asking them to lie. Bartender was charged with Furnishing Liquor to an Intoxicated Person (misdemeanor) and Witness Tampering (Class C Felony). Bartender's girlfriend called the licensed premises the next day to report that he would be late because he had been snowboarding, when in fact he was in jail awaiting release. Two days later, bartender informed

Licensee that he had been "caught serving minors," the first notice to Licensees, and was the bartender was suspended pending investigation. Licensee notified the OLCC the next day.

Abstract: While Licensee has not established a basis for mitigation due to lack of knowledge, acceptance of responsibility or good faith efforts, it has shown extraordinary cooperation. Therefore Licensee's self-reporting of the violation is a mitigating circumstances.

Key Words/Phrases: minor, premises, consume, conceal evidence, witness tampering, agent, respondeat superior, good faith efforts, extraordinary cooperation, mitigation, self-reporting, employee termination

Case: *Aminata's*, OLCC-11-003, February 2011.

Facts: Licensee's employee allowed several minors to be in the bar area where minors were permitted, and served them alcohol. Licensee was present at the time, and even conversed with the minors at their table. A police officer performed a premises check and discovered the minors consuming alcohol. At hearing licensee claimed that he told his employee to check the minors' IDs and assumed the employee had done so.

Abstract: Licensees are responsible for acts and omissions of their employees that violate any law or rule affecting the license privileges, even if the employee acted contrary to Licensee's instructions.

A licensee's post-violation actions, while laudable, do not provide grounds for mitigation when they are not taken promptly after the violation at issue. *Dad's Restaurant & Lounge* (OLCC Final Order, 06-V-029, December 2007). In this case Licensee did not take steps to change its minor posting until after another incident involving minors had occurred, and he subsequently requested to return to the previous minor posting. Therefore, no mitigation is warranted.

Discharge of an employee is not a basis for mitigation. *See Thrifty Nifty Market* (OLCC Final Order, 05-V-011, December 2005). A "previous lengthy history of compliance" is not a mitigating factor. *Cabaret Lounge* (OLCC Final Order, 08-V-061, October 2009).

Key Words/Phrases: consume, premises, permitted, mitigation, mitigate, responsible, employee, contrary to instruction

Case: *US Deli & Pub, LLC*, OLCC-09-V-044/04A/044B, June 2010.

Facts: Licensee's employee was working without a service permit. The employee was cited, and later informed OLCC inspectors that Licensee's managing member had contacted him and requested that he give a statement stating that he had shown licensee a false permit. Licensee's managing member denied asking his employee to lie. OLCC inspectors videotaped a statement from the employee regarding these allegations and it was used as evidence to support staff's contention that Licensee encouraged concealment or alteration of evidence in violation of OAR 845-006-0345(3)(a)(C).

Abstract: Applying the Commission's model for evaluating whether hearsay evidence is sufficiently reliable to be substantial evidence (see *Rainbow Market* (OLCC-08-V-124, October 2009), the hearsay statement of Licensee's employee was not sufficiently reliable.

Key Words/Phrases: valid service permit, conceal or alter potential evidence

Case: *Chevron North Wilsonville*, OLCC-09-V-064/064A/064B, April 2010.

Facts: Licensees' employee sold alcohol to minor decoy. Licensee had three prior sale to minor violations. Licensee trained employees on use of AVE, required them to sign that they would, terminated the employee who did the sale, and had cameras of the store that could be accessed from any computer Licensee was at. Licensee contested the penalty, arguing for 4 days of mitigation due to having procedures and programs similar to discussed in *Circle K Store #468* (OLCC, Final Order, 04-V-047, April 2005).

Abstract: Mitigation for good faith efforts to prevent violations of the type found (through things such as rigorous employee training or efforts that exceed those required by the Responsible Vendor Program) can be appropriate. The 2005 *Circle K Store* order recognizes that the Commission can and will award mitigation for the same circumstances in two consecutive cases involving the same licensee, even when another violation has occurred. However, the argument for mitigation in this case is not as strong because Licensees have already received mitigation twice before for its use of AVE and other procedures. This third incident of selling alcohol to minors strongly suggests that the equipment and procedures Licensees have put into place are still not effectively preventing the sale of alcohol to minors.

The 2005 *Circle K Store* order does not hold that the Commission has totally prohibited awarding mitigation for the same circumstances beyond a second violation. Here, the facts are different than those in the 2005 *Circle K Store*.

Key Words/Phrases: minor decoy, mitigation, procedures, policies, AVE, credit, Responsible Vendor Program, good faith efforts to prevent violations

Case: *Cedars Restaurant & Lounge*, OLCC-08-V-009/009A, October 2009.

Facts: Licensee applied for a TUAL for the 2008 Lazy Lizard bike event in Detroit, and the city denied the application. Licensee's spouse then purchased alcohol for the event which was moved outside of Detroit city limits. Licensee's spouse worked for Licensee at the licensed premises. Licensee was told not to sell alcohol at the event, and Licensee claimed that his spouse bought the alcohol and gave it away.

Abstract: Evidence that the OLCC inspectors and police warned licensee not to provide alcohol at the event less than 24 hours before it started shows intentional conduct when the alcohol was provided, warranting aggravation.

Key Words/Phrases: alcohol service outside permitted manner by license, intentional, indirect financial consideration, sale, registration fee, aggravation, cancellation

Case: *Six Corners Chevron*, OLCC-08-V-004/004A/004B, June 2008. [overruled in part by rule change, see *Cabaret Lounge*, OLCC-08-V-061/064/097, October 2009.]

Facts: Licensee's employee sold alcohol to a minor without asking for ID. Licensee had a prior violation. Police told licensee they would not cite him for the sale but forwarded the report to OLCC.

Abstract: The Commission has determined that a licensee's good-faith efforts to comply before or after an incident occurred in order to avoid a violation is a reason to mitigate the penalty. *Flight 99 Tavern* (OLCC, Final Order, 87-V-033, February 1988). Licensees in this case train their employees on how to use age verification equipment, require use of the equipment, and conduct internal "sting" operations to ensure that employees are following Licensees' policies. These efforts to prevent a violation warrant mitigation.

Key Words/Phrases: minor sale, direct evidence of a violation, AVE, good faith efforts, mitigation

Case: *Dad's Restaurant & Lounge*, OLCC-06-V-029/A/B/C/D, December 2007.

Facts: Licensee purchased Dad's without knowing of problems between previous owner and the OLCC. License proposed an extensive Chinese food menu, which was a large factor in the OLCC granting the license. License was granted with several restrictions including sizes of drinks and no doubles. Subsequently Licensee substantially reduced the menu without notifying the OLCC. Licensee's employee also sold doubles, larger mixed drinks and stacked drinks in violation of the license restrictions. Licensee argued she was unaware this occurred, and terminated the employee when she learned of his actions.

Abstract: Breaches of a restriction or condition on the license are not easily mitigated, as certain licenses, such as the license herein, would not have been granted but for restrictions or conditions being placed on the license. These restrictions or conditions are necessary to address specific problems or concerns relating to the license. The objective of elevating a standard requirement of law to a mandatory requirement of the license privilege, through either license restrictions or a settlement agreement, is to provide for strict accountability by imposing the sanction of license cancellation.

That other restrictions were not violated is not mitigating of the penalty for the restriction that was violated repeatedly; that there have not been separate violations for visibly intoxicated persons is not mitigating for the violations which did occur; and voluntary reporting of unconnected patron events is not mitigating of bartender conduct in willfully failing to follow the key over service restriction.

Additional trainings and required meetings for staff to make sure they know and understand restrictions are not mitigating when they do not begin until six months after the first violation and when a second violation occurs despite the training.

While the licensee's efforts were laudable, licensee was not due mitigation because the licensee waited over six months after the violation occurred to begin making positive steps forward. Further, additional violations of the same type occurred after these steps were taken. The earlier acts of posting the restrictions and telling the employees to follow them are not mitigating as Licensee is required to do both. See also *Jiffy Mart* (OLCC, Final Order, 04-V-027, February 2005).

Violation committed by the licensee personally is a cause for aggravation; that a violation or violations were not committed by the licensee personally simply results in no aggravation for this factor.

Setbacks in the process of remodeling did not impact or prevent notification of the substantial reduction of food service to the Commission, and therefore does not warrant mitigation.

Financial investment is not a basis for mitigation, it is a step taken by licensees for business reasons. Support of a local business representative is a neutral consideration, not a factor mitigating the penalty.

Key Words/Phrases: credibility determination, termination of employee, cancellation, Oceanside factors, reduction in menu, selective enforcement, intervention meetings, settlements, mitigation factors

Case: *Michael Reese*, OLCC-06-V-067, December 2007.

Facts: Permittee served a minor decoy without asking for ID. When inspectors contacted Permittee he became

belligerent, and an argument and scuffle ensued. Permittee's employer joined the discussion and was asked to provide all service permits. After looking for them on the premises the employer determined that some may be in his home office. Inspectors typically ask permittees who doesn't have their permit on them for a name and DOB so they can just verify the permit through OLCC dispatch. Because of the heated exchange with Permittee the inspectors decided not to do this in this instance. The employer's wife went home to retrieve the remaining service permits, including Permittee's. In addition to the minor sale charge, OLCC charged Permittee with failure to make service permit available for immediate inspection.

Abstract: Where permittee failed to have his service permit immediately available it is not mitigating that the employer had taken the service permit home for safe-keeping because it is the permittee's responsibility to have the service permit immediately available. The duty lies with the permittee and not the employer.

Key Words/Phrases: credibility determination, service permit, available for immediate inspection

Case: *Tony's Tavern*, OLCC-06-V-012, August 2006.

Facts: Licensee hired a bartender, who previously had a service permit. Bartender submitted an application and intended to take the alcohol server education course, but neglected to do so within 45 days due to his work schedule. Licensee traveled to Greece for an extended period of time, and was unaware that their employee had failed to complete the server education course. Licensee believed their employee had a valid permit until being notified by an OLCC inspector that he did not. Employee was not working at that time due to a broken wrist, and Licensee did not permit him to return to work until he reapplied and took the required server course.

Abstract: Mitigation is not justified when the action taken is simply what is required to comply with the law. *See also Cactus Bar & Grill* (OLCC, Final Order, 03-V-014, June 2004).

Key Words/Phrases: service permit, alcohol server education, denial of permit application, 45 days, knowledge attribution, permitting, imputed knowledge, mitigation

Case: *Thrifty Nifty Market*, OLCC-05-V-011, December 2005.

Facts: Licensee had prior sale to minor violations, and purchased AVE. Employee later sold to a minor on two occasions without verifying age. Licensee fired the employee immediately. Licensee argued for mitigation due to the termination and steps taken to prevent sales to minors.

Abstract: Licensee claimed mitigation for his continuing good faith efforts to prevent such violations. Following the analysis in *Circle K Store #468*, OLCC-03-V-107 (October 2003), Licensee is not entitled to mitigation for the upgrade in equipment. Licensee had received the benefit of OAR 845-009-0140(3) after the previous violation and is not entitled to additional mitigation for the more recent upgrade. No mitigation is provided based on the circumstance that Licensee's employee failed to follow Licensee's procedures. Finally, *Circle K Store #468*, *supra* states that mitigation is not appropriate for the termination of the employee who sold to the minor.

Key Words/Phrases: sale to minor, prior violation, AVE, termination of employee, mitigation

Case: *DiMarco's Restaurant aka Club Miami*, OLCC-04-V-043, OLCC-04V-062, October 2005.

Facts: Restaurant and night club received numerous noise complaints from one neighbor, as well has had history of fights.

Abstract: Licensees' inexperience in running a night club is not equal to a good-faith effort at compliance where instructions, suggestions and advice from the Commission and/or the police on how to avoid serious problems at the licensed premises go unheeded.

Case: *Mac Club*, OLCC-04-V-065/065A, July 2005.

Facts: Licensees had restriction against one licensee drinking on the licensed premises. OLCC inspectors conducted undercover inspection and observed the restricted licensee carrying a bucket into the premises, and then drinking what appeared to be a beer inside. The inspectors left and later returned, contacting the restricted licensee in his vehicle outside. Licensee claimed he had been drinking a non-alcoholic beer on the premises, and smelled of alcohol because he had 2 beers earlier in the day. He later changed his story to having left the premises to go to a friends' house to have beers. He then let inspectors see the inside of his vehicle, where they found bottles of beer in the bucket. Licensee admitted that he would go to his vehicle to drink, because of the restriction forbidding him from consuming alcohol in the licensed premises.

Abstract: OAR 845-006-0347(6) prohibits a licensee from permitting anyone to drink alcohol in any parking lot that the licensee controls that is associated with the licensed business unless the Commission has approved the sale or service of alcoholic beverages in the area. In this case, Licensees concede that Licensee's actions of taking beers from the licensed premises and consuming them in his vehicle in the parking lot that Licensees controlled violated this provision.

The fact that a licensee corrects a false statements when confronted with contrary evidence does not obviate the earlier violation. *See, e.g., Brother's Market & Deli* (OLCC, Final Order, OLCC-99-V-044, February 2000) (the licensee's actions to retrieve the alcoholic beverage and refund the purchase price to the buyer following the sale to a minor did not "undo" the lack of age verification before the sale or the resulting violation.) A later admission to lying does not provide a basis for mitigation either.

Key Words/Phrases: restriction violation, consuming in parking lot, licensee control of premises, false statement, admission to lying, mitigation

Case: *Circle K Store No. 468*, OLCC-04-V-047, April 2005.

Facts: Licensee's employee sold a can of "Spark" to a minor decoy, on employee's first day of work. Employee didn't know that "Spark" was alcoholic. Licensee had previously had a sale to a minor within 2 years, and had numerous policies and practices to avoid sales to minors.

Abstract: The Commission can and will award mitigation for the same circumstances in two consecutive cases involving the same licensee, even when another violation has occurred.

Case: *The New Market*, OLCC-04-V-016, January 2005.

Facts: Licensee personally sold to OLCC minor decoy. Licensee had the sign stating "if you were born after today's date in 1983 we will not sell alcohol to you," but misunderstood it and thought anyone born in 1983 was of legal age.

Abstract: Licensee made a good faith mistake, but his mistake does not excuse the violation.

The fact that Licensee admitted his error immediately and did not claim he did not violate the rule did not rise to

extraordinary cooperation warranting mitigation. (Citing *Synthia Smith [& Teresa Oakes]*, OLCC-03-V-012, October 2003.)

In the past, a seller's effort in checking the identification was viewed as constituting a good faith effort to prevent a violation because the seller who asks for identification of a youthful-looking purchaser was seen as doing more to avoid a violation than a seller who did not even ask for the identification. Consistent with existing precedent, the Commission will award mitigation for this circumstance in this case. However, the Commission has reconsidered its prior position and now concludes that asking for identification and incorrectly reading or interpreting the age-related information does not constitute a good faith effort to prevent a violation. When a seller asks for the identification but does not take note of this date and heed its import, the seller is being inattentive and cannot be said to be making a good faith effort to avoid a violation. Such inattention to obvious data is no better than not asking for the identification at all, and cannot be rewarded without encouraging such behavior. In the future, no such mitigation will be awarded.

Key Words/Phrases: minor sale, minor decoy, mistake in calculating age, aggravation for licensee personally committing the violation, mitigation for good faith efforts, checking identification, change in policy, change in precedent

Case: *Sugar Pine Inn*, OLCC-00-V-108, April 2002.

Abstract: Licensee was found to have violated OAR 845-009-0015 by allowing his employee to sell alcoholic beverages without licensee having mailed or delivered the completed service permit application and fee to the Commission by the end of the first work day following the employee's first shift. Licensee was not entitled to the benefit of the employee's effort to comply (employee timely completed the service permit application and gave it to the employer) in mitigation of licensee's penalty.

Flight 99 Tavern, OLCC-87-V-033, February 1988, does not stand for the proposition that if either licensee or permittee has made good faith efforts to achieve compliance, both benefit, independent of who performed the acts. Each is entitled to mitigation for their own individual acts, not for the acts of the other.

Case: *Jiffy Mart*, OLCC-01-V-053, December 2001.

Abstract: Where the licensed premises has the reputation of selling alcohol to minors, such reputation constitutes an aggravation factor. By itself, it does not warrant imposition of a mandatory suspension. A mandatory suspension was imposed in *Neighbor's Market*, OLCC-87-V-009, September 1987, because the reputation was combined with licensee's willful intent to sell to minors (higher prices charged to minors and secretive sales in the back of the store) and with a prior violation.

Case: *Teri's Town Tavern*, OLCC-00-V-018, November 2000.

Abstract: Where Licensee put herself back on duty by getting up from her table where she was consuming beer to stop a patron from leaving the premises with a drink in his hand, Licensee was acting in good faith to prevent a violation. If this were the only act performed when Licensee put herself back on duty, Licensee would be entitled to mitigation of the penalty for the violation of drinking on duty. However, where Licensee also served beer to individuals, the act of stopping the patron cannot be viewed in isolation from the other on-duty acts to provide mitigation.

Case: *7-Eleven No. 20806*, OLCC-97-V-081, May 1998.

Abstract: The Commission concluded that the following circumstances were mitigating and reduced a third level Category III violation from a mandatory 30 day suspension to a 12 day suspension under the following circumstances:

- a. Licensees' employee made a good-faith effort to comply with the requirements of the law by requesting identification;
- b. Before the violation, Licensees' employee attended an OLCC education class;
- c. Before the violation, Licensees educated employees about properly checking identification;
- d. Licensees implemented a bonus program for employees who call the police when an underage patron attempts to purchase alcohol;
- e. After the violation, Licensees and employees attended another OLCC education class that Licensees scheduled;
- f. Licensee Lite attended a Victim Impact Panel;
- g. Licensees have instructed all employees to use Statement of Age cards;
- h. Licensees fired their clerk after the incident;
- i. Licensees have double employee coverage now at the busy times at their store, so clerks have more time to check age identification; and
- j. Licensees are at their store more often to oversee their employees' compliance with all liquor laws.

Case: *The Royal Esquire*, OLCC-97-V-045, December 1997.

Abstract: The Commission concluded that a Licensees good faith efforts to comply were a basis to mitigate the penalty to a Letter of Reprimand in a violation case involving permitting an employee to serve without a valid service permit where the record showed that the employee had taken and passed the Alcohol Server Education class prior to being hired and had filled out several service permit application forms in an attempt to obtain a valid service permit.

Case: *Everybody's Market*, OLCC-90-V-090, March 1992.

Abstract: The fact that licensee mistakenly believed that his license suspension for a prior violation had not yet begun was not a mitigating circumstance for a violation involving the sale of alcohol while suspended, because the mistaken belief was not reasonable or held in good-faith. This is because the licensee knew his suspension would begin soon, received verbal notice of the dates of the suspension from Regulatory staff whose knowledge and authority he doubted, and failed to call Regulatory staff he trusted to verify the suspension dates.

Case: *William P. Montgomery*, OLCC-91-V-094, February 1992.

Abstract: Permittee's reliance upon a door checker to screen out minors did not rise to the level of a good-faith error that would justify mitigation.

Case: *Golden Slipper*, OLCC-90-V-154, July 1991.

Abstract: Even though the false identification shown by the minor was not convincing enough to provide a defense to the charge, the fact that the licensee did require the minor to show identification before she served him is a reason to mitigate the penalty for licensee's good-faith efforts to comply before the violation occurred. See also *John Dough's Pizza*, OLCC-90-V-161, August 1991.

Case: *John Dough's Pizza*, OLCC-90-V-161, August 1991.

Abstract: Licensee's mistaken, but good-faith belief that the minor is 21 is a basis to mitigate the penalty.

Case: *The Trap Restaurant*, OLCC-90-V-118, May 1991.

Abstract: Letter of Reprimand was an appropriate penalty where permittee had over 15 year good compliance record, permittee and licensee had taken significant preventive and remedial steps, and evidence showed that permittee's service to a visibly intoxicated person was an uncharacteristic lapse in judgment that was not likely to happen again.

Case: *Plaid Pantry No. 96*, OLCC-90-V-048, January 1991.

Abstract: The Commission concluded it is an aggravating circumstance if a violation involves a person who objectively appears to be under 21 years old and that person is, in fact, under 18 years old.

Case: *O'Ryan's Irish Sports Pub*, OLCC-89-V-190, November 1990.

Abstract: Mitigation was appropriate where licensee made good faith effort to avoid violations by planning to have enough employees on hand to handle the crowd, but due to circumstances beyond licensee's control, two persons whom he had anticipated being able to work were not able to work, and a sale to minor resulted.

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

Abstract: Mitigation was appropriate where the permittee mistakenly, but in good faith, believed that the minor was 21 because she had earlier checked the identification of a person of similar appearance who provided identification showing that he was 21.

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

Abstract: Penalty was aggravated where licensee unreasonably retained employees who were likely to engage in additional unlawful activity at the premises and who then in fact did so.

Licensee's failure to react more firmly to illegal drug use on the premises was not sufficient in itself to show that licensee was a poor risk for future compliance [and should have its license canceled]. Since the violations licensee had demonstrated a greater appreciation of the seriousness of permitting illegal drug use on the premises, licensee had fired a number of employees for drug use, and licensee had hired a more capable on-the-premises manager.

Case: *Old Pine Market*, OLCC-89-V-194, April 1990.

Abstract: The extreme youth of the minor purchaser (age 14) was a basis for aggravation.

Case: *Corral Pastime*, OLCC-89-V-165, June 1990.

Abstract: There was a basis to mitigate the penalty where the licensee took some steps to alleviate the disorderly activities.

Case: *Reston Red's Tavern*, OLCC-89-V-155, April 1990.

Abstract: Although licensee could have taken more steps to control a disorderly situation, the penalty is mitigated where licensee was a victim of circumstances and his conduct was motivated by his concern over maintaining

compliance with OLCC laws.

Case: *Lori Scott*, OLCC-89-V-166, March 1990.

Abstract: The Commission canceled the service permit where the permittee made an intentional false statement on her application. The intentional act was an aggravating factor that outweighed mitigating factors (felony conviction was two years old and the applicant had a good recommendation from her employer).

Case: *Diamond Sports Center*, OLCC-89-V-167, January 1990.

Abstract: There was a basis to mitigate the penalty where circumstances beyond the licensee's control occurred in his personal life that resulted in his paying less attention to compliance than he would have under normal conditions.

Cases: *Tamara Garrett*, OLCC-89-V-077, December 1989; *Alexis Poppa*, OLCC-89-V-158, December 1989; *Samuel E. Waller*, OLCC-89-V-069, November 1989.

Abstract: The repeated and intentional nature of a permittee's sale of illegal drugs while on duty on a licensed premises indicated that the permittee was a poor risk for compliance and her permit should be canceled, notwithstanding good faith compliance efforts that she had made.

Case: *Union Gap Tavern*, OLCC-89-V-079, September 1989.

Abstract: Only slight mitigation was appropriate when licensee was distracted by talking with a Commission inspector because licensee still had a reasonable opportunity to prevent the violation. The facts fail to show that the violation would not have occurred but for the presence of the inspector.

Case: *Spigot Tavern*, OLCC-89-V-022, September 1989.

Abstract: Where the managing licensee had actual knowledge of criminal activities on the licensed premises and the absentee licensee did not have actual knowledge, the Commission imposed a lesser penalty than license cancellation, subject to the conditions that the managing licensee divest his interest in the business within six months and that the managing licensee be restricted from the licensed premises.

Case: *Sparkles Tavern*, OLCC-88-V-107, September 1989.

Abstract: Intentional false statements are a basis to aggravate the penalty.

Case: *Stagecoach Saloon*, OLCC-89-V-043, August 1989.

Abstract: Violation was aggravated where licensee intentionally violated a licensed restriction and lied about the violation to a Commission inspector.

Case: *Oceanside Restaurant & Lounge*, OLCC-88-L-123, August 1988.

Abstract: The Commission concluded that the licensee's penalty should be aggravated to license cancellation where licensee committed a substantial breach of condition. Licensee consumed alcoholic liquor multiple times in violation of condition that she abstain from consuming alcoholic liquor during the duration of the license.

Case: *The Pump House Tavern*, OLCC-89-V-014, June 1989.

Abstract: Penalty against licensee was not aggravated when evidence failed to prove that licensee knew of illegal drug sales by employees and patrons.

Case: *Rip City Pub*, OLCC-88-V-131, June 1989.

Abstract: Penalty against licensee was aggravated to a six-month suspension when licensee failed to instruct a new employee regarding visibly intoxicated persons after a prior violation involving a fatal car accident; licensee's uncooperative actions threatened the inspector's ability to maintain control of a sensitive situation; and licensee was unwilling to discuss compliance measures with the Commission.

Case: *Roma Pizza*, OLCC-89-V-002, April 1989.

Abstract: Aggravation circumstances offset any mitigation when the licensee knew that after hours sales were prohibited and willfully attempted to hide the violation.

Cases: *Howard's Northwest Deli*, OLCC-88-V-101, February 1989; *Jackpot Food Mart*, OLCC-88-V-088, January 1989; *The Pink Elephant*, OLCC-88-V-054, November 1988; *River Road House*, OLCC-88-V-018, June 1988; *Minute Market No. 10*, OLCC-86-V-056, January 1987.

Abstract: Letter of Reprimand appropriate where licensee did as much as it reasonably could have to ensure that its employee would follow the law and the violation occurred because the employee failed to follow the licensee's instructions.

Cases: *Sandy Market*, OLCC-88-V-090, February 1989; *Star Market*, OLCC-88-V-073, January 1989.

Abstract: While the Commission has considered language and cultural differences to be mitigating when these differences result in the licensee making good faith errors in computing a patron's age, the Commission did not find this argument persuasive where the Commission had given instructions to the licensees regarding how to properly calculate a person's age.

Case: *Trocadero Inn*, OLCC-88-V-058, December 1988.

Abstract: A violation for permitting an employee without a service permit to serve alcoholic beverages was mitigated where licensee mistakenly, but reasonably, assumed the employee held a permit.

Case: *King-Wah Restaurant*, OLCC-88-V-050, December 1988.

Abstract: Mitigating circumstances were offset where violation for sale to a visibly intoxicated person was blatant because the patron had told the bartender that the patron was drunk.

Case: *Master Mart*, OLCC-88-V-032, November 1988.

Abstract: The Commission found a licensee's continuing good-faith compliance efforts to be mitigating, even though the Commission had previously recognized the licensee's compliance efforts by imposing a reduced penalty in a prior

case.

Case: *Captain Kidd's*, OLCC-88-V-027, August 1988; *Casa Del Rio*, OLCC-88-V-033, August 1988.

Abstract: The Commission found it mitigating where licensee had been cooperative with the local Commission inspector and the licensee had made other good faith compliance efforts in the past.

Case: *Casa Del Rio*, OLCC-88-V-033, August 1988.

Abstract: Mitigation due to licensee's good compliance and prior good faith compliance efforts were partially offset where licensee could have reasonably done more to prevent the violations.

Case: *Don Juan's*, OLCC-88-V-003, May 1988.

Abstract: Licensee's compliance efforts were not mitigating where, although licensee took some steps to address problems, licensee's efforts were lacking in many respects.

Case: *Log Cabin Inn*, OLCC-87-V-042, January 1988.

Abstract: Mitigating factors were offset where licensees had ample opportunity to detect and correct a violation, but failed to do so.

Case: *Sandra Dugger*, OLCC-87-V-044, January 1988.

Abstract: Mitigation is appropriate where permittee with a 17-year good record of compliance showed that it was her normal practice to refuse service to VIP's and that she had made good faith effort to comply by refusing service to a VIP just prior to receiving the ticket in the instant case.

Case: *Rodeo Inn*, OLCC-87-V-037, December 1987.

Abstract: The licensee's employment of two door checkers showed a good faith effort to try to keep minors out of the premises and, thus, was mitigating.

Case: *Pub Tavern*, OLCC-87-V-016, November 1987.

Abstract: Licensee's intentional commission of a number of serious violations provided a basis for license cancellation.

Case: *Top Value Market*, OLCC-87-V-018, October 1987.

Abstract: The licensee's good faith, honest, albeit mistaken belief that the minor was 21 was a basis for mitigation and not outweighed by the fact that licensee received instructions on preventing sales to minors one week prior to the violation.

Case: *Neighbor's Market*, OLCC-87-V-009, September 1987.

Abstract: Violation for sale to minor was aggravated where licensee exploited the situation by charging a higher price

than normal and where licensee tried to conceal the sale by accepting the money in back of the store.

License suspension without the option of a fine is appropriate where the licensee has a reputation as someone who sells alcohol to minors. The suspension will discourage minors from attempting to purchase from the licensee.

Case: *Fast Stop Market No. 2*, OLCC-86-V-065, September 1987.

Abstract: Violation was mitigated where the hidden ownership was negligent rather than willful. The licensee had always intended to obtain Commission approval of the sale.

Case: *Murphy's Tavern*, OLCC-86-V-060, April 1987.

Abstract: Violation was mitigated where licensee had shown exceptional cooperation with the local police and had requested a training class from the Commission in order to prevent recurring violations.

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: Violation for false statements was aggravated because the statements were part of an intentional, continuing, long-term effort to hide a hidden owner's interest.

Case: *Water'n Hole*, OLCC-86-V-057, February 1987.

Abstract: Some mitigation existed for violation for sale to visibly intoxicated person where permittee was making some effort to comply. Permittee had cut VIP off twice, earlier in the day, and finally served VIP after repeated requests, only after VIP gave permittee his car keys and promised to walk next door to sleep after the drink.

Case: *Columbia Cafe & 3 C's Club*, OLCC-86-V-034, January 1987.

Abstract: Failure to disclose hidden ownership interest was willful and warranted license cancellation where licensee failed to disclose the hidden ownership interests of several persons, and where a complete sale of the premises and business occurred without Commission approval.

Case: *Prefetto's Pizza*, OLCC-86-V-035, January 1987.

Abstract: Mitigation was appropriate where the violation of permitting a minor to consume occurred as a result of a deliberate attempt to "set up" and discredit the licensees in an unrelated court matter.

Case: *Brandy's Restaurants, Inc., Brandy's Restaurant and Lounge*, OLCC-86-V-027, December 1986.

Abstract: Mitigation for permitting a minor to enter was appropriate where licensee was at the door training a new employee and left only because an OLCC inspector asked to speak with him. Evidence showed the licensee was interested in preventing sales to minors and took numerous steps prior to this incident to prevent violations regarding minors.

Case: *Owl Grocery*, OLCC-86-V- 022, December 1986.

Abstract: In a sale to minor case, the Commission concluded that mitigation was appropriate where the minor appeared to be mature and close to 21, and where licensee had taken steps to avoid future violations by hiring an English-speaking clerk.

Case: *Circle J Market*, OLCC-86-V-014, OLCC-86-V-025, OLCC-86-V-026, December 1986.

Abstract: Mitigation was appropriate for three violations where the first violation had no mitigating circumstances, the second was the result of a sale made after a minor argued with the licensee, and the third occurred because the licensee made a mistake in calculating the minor's age. The first violation was not mitigated, the second violation was slightly mitigated, and the third violation had no penalty.

Case: *Neighbor's Market*, OLCC-86-V-010, August 1986.

Abstract: Mitigation was appropriate where the licensee asked the purchaser his age and the compliance inspector observed the licensee demonstrate good faith efforts on two subsequent occasions to verify the age of youthful-appearing persons and observed licensee refuse service to one of them.

Case: *Mick's Mini Mart*, OLCC-85-V-056, June 1986.

Abstract: Special circumstances which led licensee to believe a minor purchaser's false representation that he was of legal age were basis for mitigation of penalty in sale to minor case.

Case: *Your Inn Tavern*, September 1983.

Abstract: Aggravated violation found because applicant had knowledge of hidden ownership rule yet took steps to conceal hidden ownership from Commission.

Case: *Tualatin Heights Market*, May 1982.

Abstract: There was sufficient reason for aggravating the penalty to cancellation where licensees intentionally sold alcoholic beverages to minors by passing beer out a drive-in window in order to avoid detection.

C.4.a.3. Extent of Licensee's/Permittee's Participation

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

Case: *Clancy's*, OLCC-14-V-017/017A, March 2015.

Facts: Minor decoy and undercover officer went to the licensed premises, and after being seated by an employee were asked what they wanted to drink. The minor decoy ordered a bud light. The employee went to the bar area and told another employee about the drink order, and that other employee brought it to the minor. The employee asked who ordered the beer and the decoy replied "me," the employee set it down and stepped away from the table. The undercover officer then contacted the employee and cited her for serving a minor. The employee who took the drink order was fired because he should have asked for ID when the drink was ordered. A few days after the incident, Licensee's manager contacted the OLCC about the situation.

Abstract: Licensee's employees failed to verify the age of a minor before allowing her to buy or be served an alcoholic beverage when she reasonably appeared to be under 26 years of age in violation of OAR 845-006-0335(1)(a), (b) and (c).

Licensee argued that the employee who took the drink order didn't sell or serve alcohol, and therefore did not violate the liquor law, and to use his actions as aggravation would exceed the OLCC's scope of authority. The Commission disagreed. Although there are no prior cases directly on point, based on the cases of Giovanni's *Mountain Pizza* (OLCC Final Order, 03-V-013 & 018, February 2004) and *Handy Food Mart* (OLCC Final Order, 98-V-029, April 1999), the Commission concluded that two employees were involved in the sale, making aggravation appropriate.

Because aggravation existed, removal from the Responsible Vendor Program was also warranted.

Key Words/Phrases: minor, sale to minor, decoy, responsible vendor, sale, multiple employees, aggravation

Case: *Lotsa Luck Bar & Grill*, OLCC-13-V-015/015A, February 2014.

Facts: Licensee's managing member was working as a bartender with an expired server's permit.

Abstract: Because Licensee's managing member was personally involved in the violation, aggravation of the penalty was appropriate. Aggravation is warranted when a licensee personally commits the violation.

Key Words/Phrases: server's permit, expired, licensee involvement, participation, aggravation

Case: *Silver Dollar Pizza*, OLCC-13-V-020, OLCC-13-L-005, November 2014.

Facts: Licensee permitted minors (age 19) to operate a food (hot dog) cart on the sidewalk in front of the licensed premises. Minors used the licensed premises regularly including the kitchen, restrooms, safe for deposits, getting change, and socializing after hours. When Licensee decided to cancel the arrangement the minors got upset, and reported the liquor law violations to the OLCC. Licensee also had his minor son as an employee in the kitchen, contrary to his minor posting permissions, who lied to OLCC investigators when questions about his presence in the licensed premises.

Abstract: Aggravation factors included: Licensee was involved in the violations when he leased a food cart to minors, knowing they were underage and accessing the leased premises. The violation involved more than one minor.

Key Words/Phrases: minor, premises, underage, access, multiple minors, aggravation

Case: *Jammers*, OLCC-10-V-016, July 2011.

Facts: OLCC inspectors performed a premises check on New Years' Eve on a tip that the premises was allowing patrons to stay after the 2:30 a.m. cut off. Inspectors discovered one patron with one bottle of beer after the cut off, and he admitted hiding it in his jacket. Licensee's employees claimed they regularly walked through the customers before the cut off to remove all alcoholic beverages from them.

Abstract: The Commission found a mitigating factor because a patron hiding an alcoholic beverage was not reasonably within Licensee's control. The Commission declined to aggravate the penalty for a violation of for licensee's personal involvement and multiple employees. The employees and Licensee were present, but were not facilitating the offense through their actions.

Key Words/Phrases: permitting, within licensee's control, 2:30 cut off, aggravation, mitigation

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. After a credibility determination the ALJ determined that licensees had made false statements to the inspector.

Abstract: Because both licensees were involved in making false statements, and the violation was intentional. Both factors warrant aggravation.

Key Words/Phrases: minor decoy, knowing sale, false statement, aggravation, licensee involvement, intentional, witness credibility, credibility determination

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 Licensees were not personally involved.

Abstract: Lack of licensee involvement is not a valid basis for mitigation. The Commission has held that *aggravation* is warranted when a licensee personally commits the violation. *P-Mart* (OLCC, Final Order, 92-V-098, April 1993). This implies that the standard sanction assumes a lack of personal involvement by a licensee. The Commission made this point clear in *Dad's Restaurant & Lounge*, OLCC-06-V-029, December 2007.

Key Words/Phrases: licensee involvement, lack of involvement, mitigation, aggravation

Case: *R Palate Restaurant & Bar*, OLCC-09-V-018/A/B/C, September 2009.

Facts: Police observed a fight outside the licensed premises, and contacted one of the participants who was under 21 and intoxicated. He had been allowed into the licensed premises and served using a fake ID. Officers contacted the door security employee and Licensee's corporate principal, both of whom were obviously intoxicated. The door employee acknowledged allowing the minor in with a fake ID. Licensee did not appear for hearing.

Abstract: OLCC has demonstrated a prima facie case supporting the violations of drinking on duty and service of a minor. Aggravation was appropriate because both the door employee and an unnamed bartender failed to verify age of the minor, and Licensee's corporate principal was personally involved in the drinking on duty violation.

Key Words/Phrases: drinking on duty, minor sale, permitting a minor on licensed premises, multiple employees involved in the violation, corporate principal personal involvement, aggravation, letter of reprimand

Case: *Bing's Restaurant*, OLCC-08-V-057/A/B/C/D, April 2009.

Facts: Police responded after hours to licensed premises on report of a fight. Police observed a known minor enter the premises. Police observed multiple people inside the premises who refused to allow police to enter. Several hours later a fire started at the premises. Licensee's corporate principal acknowledged that a private Christmas party had been going on and that he refused police request to enter the premises.

Abstract: Licensee's personal involvement in violation of failing to admit police onto the premises warranted aggravation.

Key Words/Phrases: refuse to admit police, reason to believe, probable cause, aggravation, personal involvement

Case: *Lotsa Luck*, OLCC-08-V-054/054A/054B, April 2009.

Facts: Licensees are husband and wife, and husband had a history of drinking to excess; a restriction requiring him to sustain from alcohol was imposed and not contested. The husband had little involvement with the business, which was primarily run by the wife. Six months after the restriction was imposed an OLCC inspector received an anonymous tip that the husband was drinking on the licensed premises, which the inspector later confirmed. The husband resigned from the corporate licensee prior to hearing and has abstained from alcohol since the violation.

Abstract: Violation of a restriction is proven, and warranted cancellation due to Licensee's corporate principal committing the violation. Even though he resigned his position prior to hearing, and the incident may have been isolated, it was a willful and substantial breach of the restriction. For the same reason as cancellation, the Commission may refuse to renew the license as well.

Key Words/Phrases: restriction violation, drinking to excess, cancellation, willful and substantial breach, violation by licensee, *Oceanside* factors

Case: *Dad's Restaurant & Lounge*, OLCC-06-V-029/A/B/C/D, December 2007.

Facts: Licensee purchased Dad's without knowing of problems between previous owner and the OLCC. License proposed an extensive Chinese food menu, which was a large factor in the OLCC granting the license. License was granted with several restrictions including sizes of drinks and no doubles. Subsequently Licensee substantially reduced the menu without notifying the OLCC. Licensee's employee also sold doubles, larger mixed drinks and stacked drinks in violation of the license restrictions. Licensee argued she was unaware this occurred, and terminated the employee when she learned of his actions.

Abstract: While the fact that a violation was committed by licensee personally is cause for aggravation, the fact that a violation was committed by employees is not cause for mitigation.

Key Words/Phrases: credibility determination, termination of employee, cancellation, *Oceanside* factors, reduction in menu, selective enforcement, intervention meetings, settlements, mitigation factors

Case: *H20 Martini Bar & Restaurant*, OLCC-06-V-014/014A, December 2006, *affirmed without opinion*, 213 Or App 240 (2007).

Facts: Licensee had several employees working without valid service permits, each with different circumstances. One employee told licensee and inspector that he had one, and gave the licensee a forged one. Licensee argued there was no evidence either employee actually served, sold or mixed alcoholic drinks.

Abstract: An employee's effort to conceal a service permit violation is not attributed to the licensee for penalty

purposes, but it could be an aggravating factor in the service permit violation charge against the employee. In this case the employee did not have a service permit, told licensee and inspector that he had one, and gave the licensee a forged one.

In this case the employee did not have a service permit, told licensee and inspector that he had one, and gave the licensee a forged one. Employee's effort to conceal the service permit violation as to himself is not attributable to the penalty for Licensee. While responsibility for a violation by an employee is imputed to the licensee pursuant to OAR 845-006-0362, responsibility for acts constituting mitigation or aggravation may not be. Just as a licensee and that licensee's employee are each entitled to the benefit of mitigation for their own individual acts, and not for the acts of the other, so, too, liability for individual acts constituting aggravation, such as concealment of a violation, is not shared. See *Sugar Pine Inn* (OLCC, Final Order, 00-V-108, April 2002), citing and clarifying *Flight 99 Tavern*, (OLCC, Final Order, 87-V-033, February 1988).

The negligent failure to transmit a service permit application to OLCC is not a mitigating factor. Furthermore, the licensee must take reasonable steps to verify that the employee has a valid service permit, and there is no mitigation where the licensee allowed the employee to continue serving and supervising alcohol servers after learning that the employee did not have a valid service permit.

Key Words/Phrases: service permit, imputed to licensee, concealment of a violation, mitigation, individual acts, monetary penalty in lieu of suspension, nature of the penalty

Case: *Monmouth Market*, OLCC-05-V-045/045A/045B, October 2006.

Facts: Licensee sold alcohol to a minor without asking for ID. Licensee claimed at hearing that he had checked the minor's ID and verified it against a credit card. The officer who had contacted the minor outside the store testified that the minor did not have any ID or credit cards on him when he was stopped.

Abstract: After credibility determination that licensee's version was not credible, violation was proven. Aggravation was warranted due to licensee personally committing the violation.

Key Words/Phrases: credibility determination, sale to minor, aggravation, personally committing violation

Case: *H2O Martini Bar & Restaurant*, OLCC-05-V-012, December 2005, *affirmed without opinion*, *Capital Asset Holdings, Inc., et al v. OLCC*, 213 Or App 240 (2007).

Facts: Licensee had a No. 1 minor posting. Licensee's minor sister was observed at the premises by OLCC inspectors, and receipts showing the sister had "comped" food and drink orders on other occasions was found. OLCC also performed a minor decoy operation due to complaints of minors entering the premises, and Licensee's employees permitted the decoy to enter and be served. Licensee had prior violations for serving a minor and paying for alcohol with NSF checks. Since the violations Licensee installed electronic ID scanner and hired DPSST certified security.

Abstract: The Commission's contention that the "comped" food and drink orders by minor sister was evidence that minor had been furnished alcohol was not persuasive. The Commission recently addressed the meaning of "make available" in *Justin Scriber* (OLCC, Final Order, 04-V-050, August 2005), and held it means "at hand" and "accessible" and should be construed to mean at the time of sale or initial possession of the drink. In this case, although the receipts bear the minor's name, and many reflect the sale or comp of alcoholic beverages, they do not persuasively establish that Licensee's employee's knowingly "sold, gave, or otherwise made alcoholic beverages available" to the minor. See also *Cabana Club Café & Grill* (OLCC, Final Order, 04-V-066, October 2005).

Licensee made multiple intentional and material false statements about his sister's presence on the licensed premises. Licensee's assertion that the penalty for covering a minor posting sign should be mitigated because he did not direct

anyone to cover the sign and did not know that it had been covered was not persuasive. The fact that Licensee was unaware that the sign had been covered does not provide a basis for reducing the sanction.

Key Words/Phrases: credibility determination, make available to minor, “comped”, false statement

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: Cancellation is appropriate because of aggravating factors: number of violations, and that licensee was arrested for possession of prescription meds in another’s name, and therefore personally committed a violation.

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

Case: *Sharon Purcell*, OLCC-96-V-031, July 1997.

Abstract: The Commission concluded that aggravation was appropriate where, after the violation had occurred, the Permittee called the police emergency dispatcher and told her not to send police to the premises without Permittee’s approval. The commission expects permittee’s and licensees to call the police when requested to do so by Regulatory staff and to request police assistance whenever it is necessary to prevent unlawful activities. Moreover, the penalty schedule rule recommends aggravation when there has been an effort to conceal a violation. OAR 845-06-200(7)(c). Permittee’s demands that she be contacted before any police are sent to the premises could be an attempt to conceal a violation and also could be an unreasonable interference with protecting the public safety.

Cases: *Samuel Waller*, OLCC-89-V-069, November 1989; *Mark's Tavern*, OLCC-89-V-030, July 1989; *The Sportsman Club*, OLCC-87-V-002, June 1987.

Abstract: A permittee must be on duty, engaged in work activities related to the serving of alcoholic beverages, before the Commission may suspend the permit for actions that would be violations.

Case: *P-Mart*, OLCC-92-V-098, April 1993.

Abstract: Where the licensee personally commits a violation, there is a basis for aggravation.

Case: *Sparkles Tavern*, OLCC-88-V-107, September 1989.

Abstract: Where licensee's employees disregarded licensee's instructions and engaged in lewd activities, there was a basis to mitigate the licensee's penalty.

The Commission concluded that cancellation of a service permit was too severe a sanction and mitigated the penalty because of the permittee's youth and because the permittee was unduly influenced by his father.

Case: *Donn's Den*, OLCC-89-V-003, July 1989.

Abstract: The Commission concluded that mitigation was appropriate where the licensee had taken over management only six days before the incident, was forced to work with some personnel from prior management, had a very limited

time to enact his own rules, and did not have the support of the permittee who committed the violation.

Case: *The Pump House Tavern*, OLCC-89-V-014, June 1989.

Abstract: In assessing a penalty for a sale of illegal drugs, the Commission has distinguished between the penalty given an employee who commits criminal acts on the licensed premises and the penalty given the licensee. When the licensee did not participate in the criminal activity, the Commission has found that mitigation is appropriate. In contrast, the offending employee's service permit could be canceled because of aggravating circumstances.

Case: *Grove Tavern & Cafe*, OLCC-88-V-104, May 1989.

Abstract: A complete change of stockholders is analogous to a complete change of ownership. Where the individuals who own or control the corporation were no longer the same as those at the time of the violation, the Commission found a violation, but did not impose a penalty or count the violation as a prior violation on the licensee's record.

Case: *T-Bombadil's*, OLCC-88-V-129, April 1989.

Abstract: Aggravating circumstances exist when a corporate principal is directly involved in criminal activities in the licensed premises. License cancellation was the appropriate penalty because the licensee did not show that the imposition of license conditions would ensure future compliance.

Case: *Howard's Northwest Deli*, OLCC-88-V-101, February 1989.

Abstract: Licensee's violation for its employee's unauthorized sale of a keg was not aggravated by the fact that purchaser provided the keg to a minor, where the employee had no reason to suspect purchaser would do so.

Case: *Trocadero Inn*, OLCC-88-V-058, December 1988.

Abstract: Mitigating circumstances were offset because licensee was present when his employees served visibly intoxicated persons.

Case: *Master Mart*, OLCC-88-V-032, November 1988.

Abstract: Where a licensee was responsible for a violation because of the actions of its employee, a mitigating circumstance that led the Commission to not cite the employee was considered mitigating concerning the licensee's penalty.

Case: *G.L. v. Kaiser Foundation Hospitals, Inc.*, 306 Or 54, 757 P2d 1347 (1988).

Abstract: The most common limitation on employer liability under the doctrine of respondeat superior is that the intentional act must have been undertaken with the intent of furthering the business purposes of the employer, however misguided that intent might seem. Court did not impose tort liability on a hospital for the criminal conduct of an employee outside the scope of employment.

Case: *Chesterman v. Barman*, 305 Or 439, 305, 753 P2d 404 (1988).

Abstract: In stating a colorable tort claim against an employer for the tort of an employee, three requirements must be met to conclude the employee was acting within the scope of employment. 1) Whether the act occurred substantially within the time and space limits authorized by the employment; 2) whether the employee was motivated, at least partially, by a purpose to serve the employer; and 3) whether the act was of a kind which the employee was hired to perform.

Case: *Jiggles*, OLCC-88-V-004, August 1988.

Abstract: Licensee received a Letter of Reprimand for violation of OAR 845-06-045(4) [now OAR 845-06-045(3)] because knowledge of criminal acts held by wrongdoer employees is imputed by law to the licensee. It is not a defense that the wrongdoers were disobeying the licensee's instructions when they sold drugs on the licensed premises. However, the Commission imposed a Letter of Reprimand where there was no evidence that the corporate licensee's principal or management was involved in the illegal activity.

Case: *River Road House*, OLCC-88-V-018, June 1988.

Abstract: Mitigation was appropriate in "sale after hours" case where the licensee took steps to insure her employees would follow the law by instructing her regular bartender to go to the tavern to assist a new employee in closing the tavern after 2:30 a.m. and both employees then failed to follow those instructions.

Cases: *Ivan Smith*, OLCC-86-V-075, June 1987; *The Sportsman Club*, OLCC-87-V-002, June 1987.

Abstract: The Commission does not have the authority to suspend a service permittee for actions unrelated to the mixing, selling, or serving of alcoholic liquor. However, the Commission held the licensee responsible for the actions of the person as an employee. ORS 471.360(1)(a);

Case: *Minute Market No. 10*, OLCC-86-V-056, January 1987.

Abstract: Violation for sale to minor was mitigated for licensee where licensee did as much as it reasonably could have to ensure that its employee would follow the law in checking identification and where the violation occurred because employee failed to follow the licensee's instructions.

Case: *Clifford Simpson*, OLCC-85-V-031, September 1985.

Abstract: Permittee's penalty for allowing minor to remain and consume was mitigated where licensee failed to fix back door that minors could sneak through and where licensee had no other employees on duty to help permittee serve crowd of 100 persons.

Case: *Prefetto's Pizza*, OLCC-85-V-006, April 1985; *Don Juan's*, OLCC-88-V-003, May 1988.

Abstract: Licensees are responsible for their employees' acts regardless of whether employee disregards specific instructions, although those instructions may provide mitigating circumstances.

Case: *Trazarra's Pub*, February 1984.

Abstract: The Commission found mitigation in a "sale to minor" case with respect to the licensee, but not with respect to the permittee who made the sale. The licensee had taken affirmative steps to police the premises and prevent sales to minors. The violations were primarily a result of the permittee's failure to follow the licensee's instructions.

C.4.a.4. Others' Penalties

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Case: Albert H. Grossman, *Handy Pantry*, OLCC-86-V-005, April 1986.

Abstract: The licensee's proposed fine of \$455 should not be mitigated simply because the minor involved in the violation was fined only \$55 for possessing alcohol.

Case: *Spigot Tavern*, OLCC-85-V-068, June 1986.

Abstract: The fact that the employee who committed the violation received a lesser penalty than the licensee is not a basis for mitigation of the licensee's penalty. The basis for reducing a penalty is to prevent inequity or to take into account extraordinary circumstances. OAR 845-06-200(3).

Case: *Sportsman Tavern*, OLCC-87-V-051, February 1988.

Abstract: Licensee's argument that proposed fine of \$650 was too high because of disparity with penalty in criminal case involving same incident was not persuasive where criminal penalty also included six months' probation.

Aggravation of a penalty based on incidents occurring at or post-hearing is improper as a matter of law. Misrepresentations (reason for proposed aggravation) could be basis of new charge. Above not reflected in Final Order; determination made during consideration of Ochoco Inn, Inc., *Ochoco Inn & Cinnabar Lounge*, OLCC-84-V-003, November 1984.

Case: *American Legion LaPine Post No. 45*, OLCC-84-V-023, February 1985.

Abstract: DB licensee committed a violation by falsely telling the Commission in its application that it had over 200 members, which were required for the licensee to qualify for a DB license. The Commission did not cancel the license where the licensee had attained at least 200 members by the date of the hearing.

Case: *Owl Grocery*, OLCC-86-V-022, December 1986.

Abstract: In a sale to minor case, the Commission concluded that mitigation was appropriate where the minor appeared to be mature and close to 21, and where licensee had taken steps to avoid future violations by hiring an English-speaking clerk.

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

Abstract: Some mitigation was shown where the Commission amended its rules, so that the licensee's actions would no longer be a violation under the amended rules.

Some mitigation was shown where the Commission inadvertently misled licensee to incur unnecessary costs in a lawsuit related to the violation charges.

Case: *Penny Saver Market & Deli*, OLCC-88-V-087, January 1989.

Abstract: Licensee's efforts after a violation to discourage minors from attempting to purchase alcohol were mitigating.

Case: *Captain Kidd's*, OLCC-88-V-027, August 1988.

Abstract: Licensee's remedial efforts after the violation occurred are mitigating where licensee fired the employee who disregarded licensee's instructions.

C.4.a.5. Actions/Events after Violation

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

Case: *The Red Carpet*, OLCC-14-V-008/008A, March 2015.

Facts: A police officer responding to a tip that Licensee's employee was drinking on duty. The officer noted the employee having dexterity issues, slow/slurred speech, and the odor of alcohol on his breath. The officer administered an HGN test and discovered six possible clues of intoxication. The employee admitted to having a few drinks on duty, and wrote Licensee a note admitting the drinking on duty. Video did not clearly show any signs of intoxication. Licensee reported the violation to the OLCC after terminating his employee. Licensee provided training to all employees on liquor laws and house rules for the sale and service of alcohol, and notified employees he would terminate them if they failed to comply.

Abstract: Licensee's employee was under the influence of intoxicants while on duty at the licensed premises in violation of OAR 845-006-0345(1). The alternate violation for drinking on duty should be dismissed. The appropriate sanction for the violation of OAR 845-006-0345(1) in this case is a 26-day suspension.

While the video was not definitive, the testimony of the officer was persuasive evidence that the employee was under the influence of intoxicants. The officer is a trained observer, and he administered an HGN test that showed clues of intoxication. The results of the officer's observations and testing cannot be overlooked.

The termination of an employee is not a basis for mitigation. Licensee is entitled to mitigation based on prompt reporting and cooperation with the OLCC, and good faith efforts to avoid violations by providing employee training.

The standard penalty for a first Category II violation is a mandatory 30-day suspension. There is no authority to mitigate the penalty down to the equivalent of a Category III violation, as Licensee suggests. The appropriate sanction is the suspension, reduced by 4 days due to mitigating factors described above.

The ALJ erroneously construed *US Market #145* (OLCC Final Order, 11-V-009, February 2012) as a basis for reducing the sanction of a suspension to the option a fine in lieu of suspension. Contrary to the ALJ's interpretation, however, *US Market #145* does not stand for the general proposition that mitigating factors warrant reduction of a sanction by a full level on the penalty schedule. Prior agency precedent has made clear that where the standard penalty is suspension only, mitigating factors are not applied to reduce the penalty to a fine in lieu of a suspension.

Key Words/Phrases: drinking on duty, under the influence, officer, trained observer, HGN test, signs of intoxication, aggravation, mitigation, terminated employee, penalty schedule, Category II, suspension in lieu of fine

Case: *Aminata's*, OLCC-11-003, February 2011.

Facts: Licensee's employee allowed several minors to be in the bar area where minors were permitted, and served them alcohol. Licensee was present at the time, and even conversed with the minors at their table. A police officer performed a premises check and discovered the minors consuming alcohol. At hearing licensee claimed that he told his employee to check the minors' IDs and assumed the employee had done so.

Abstract: Licensees are responsible for acts and omissions of their employees that violate any law or rule affecting the license privileges, even if the employee acted contrary to Licensee's instructions.

A licensee's post-violation actions, while laudable, do not provide grounds for mitigation when they are not taken promptly after the violation at issue. *Dad's Restaurant & Lounge* (OLCC Final Order, 06-V-029, December 2007). In this case Licensee did not take steps to change its minor posting until after another incident involving minors had

occurred, and he subsequently requested to return to the previous minor posting. Therefore, no mitigation is warranted.

Discharge of an employee is not a basis for mitigation. *See Thrifty Nifty Market* (OLCC Final Order, 05-V-011, December 2005). A “previous lengthy history of compliance” is not a mitigating factor. *Cabaret Lounge* (OLCC Final Order, 08-V-061, October 2009).

Key Words/Phrases: consume, premises, permitted, mitigation, mitigate, responsible, employee, contrary to instruction

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

Facts: Licensee had a server working for a year with an expired temporary permit. Server claimed she believed she had a permit but never received it because she had moved several times, and she took the server education course. Licensee argued for mitigation because they took immediate steps to resolve the problem by ensuring that the employee secured a service permit shortly after the violation.

Abstract: A licensee’s subsequent actions were required to comply with the law and were therefore not a separate basis for mitigation. *See Tony’s Tavern* (OLCC, Final Order, 06-V-012, August 2006) (holding that mitigation was not warranted merely because the licensee required its employee to secure a permit *after* the Commission discovered a violation.

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

Case: *City Center Food Mart*, OLCC-08-V-070/070A, September 2009.

Facts: Licensee with prior violations was secretly indicted for tobacco-related felonies, and was subsequently arrested and released. In filling out his renewal application he wrote “N/A” on question regarding arrests or convictions. Shortly after being renewed Licensee requested a change of ownership, making Licensee a corporation and himself the individual corporate principal because he knew he was facing criminal charges and wanted to protect his business. Corporate principal later pled guilty to a felony related to distributing tobacco products without a license.

Abstract: The Commission will consider the date of the criminal act (not the date of conviction) that occurred four years prior to the proposed license cancellation, good record of compliance with liquor laws, and Licensee’s successful completion of the terms of his probation as grounds to mitigate the penalty, however intervening circumstances since the commission of the crime (making a false statement to the Commission to prevent action when licensee did not disclose on renewal application his arrest) offset these mitigating factors.

Similarly, the intervening circumstance of a false statement on the renewal application negates any good cause due to the passage of time between the underlying misconduct giving rise to the felony conviction. The Commission is entitled to refuse to renew the license. *See also Center Market*, OLCC-08-V-104, October 2009.

Key Words/Phrases: false statement, conviction, felony, English, change of ownership, liability of individual corporate principal, mitigation

Case: *Downtown Deli & Greek Cusina*, OLCC-08-V-028/028A/028B, October 2009. (Amended order).

Facts: Downtown Portland premises had multiple floors for dancing, night club, bar, restaurant and special events. Premises had operated for decades with very few problems, but started having significant number of issues once the second and third floors were opened. The OLCC had issued numerous warnings in the past.

Abstract: 27 documented disturbances involving violence or threat of violence over 15 months creates a history of serious and persistent problems.

In interpreting ORS 471.315(1)(c), the Commission has found that a history of serious and persistent problems is based on the nature and circumstances of the incidents in each case. Incidents inside the licensed premises count, whether related to sale of alcohol or not. Incidents outside do not count unless the incident is related to the licensee's sale or service of alcohol. The Commission gives significant weight to severe crimes, such as those involving drugs, violence or the threat of violence to a patron or licensee, unless the incident was isolated and happenstance. Less severe crimes, such as shoplifting, will be given little weight, unless the crime is shown to be related to alcohol. *Handy Food Mart* (OLCC, Amended Final Order, 91-L-020, March 1994).

Upon consideration of prior Commission cases where a history of serious and persistent problems has been found to exist and the standard penalty of cancellation mitigated, the Commission observes that the pattern of mitigating so much as to give the option of paying a civil penalty in lieu of any suspension period is insufficient to deter violations of this magnitude or to encourage rapid resolution of the underlying problems. The number and nature of incidents giving rise to a history of serious and persistent problems impact the surrounding community and disproportionately strain law enforcement resources. In the future, the Commission intends to impose some appropriate period of mandatory suspension (not less than one day and not to exceed 30 days), with or without the option of paying a civil penalty in lieu of a portion of the suspension period, as a penalty in cases of this type.

Key Words/Phrases: History of serious and persistent problems, restrictions, suspension versus cancellation, mitigation of Category I violation

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: The fact that security personnel later obtained the required DPSST certification does not mitigate the penalty. An action taken by a licensee to prevent future violations is not mitigation when the action taken is simply what is required to comply with law. *Tony's Tavern* (OLCC, Final Order, 06-V-012, August 2006).

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: *Dad's Restaurant & Lounge*, OLCC-06-V-029/A/B/C/D, December 2007.

Facts: Licensee purchased Dad's without knowing of problems between previous owner and the OLCC. License proposed an extensive Chinese food menu, which was a large factor in the OLCC granting the license. License was granted with several restrictions including sizes of drinks and no doubles. Subsequently Licensee substantially reduced the menu without notifying the OLCC. Licensee's employee also sold doubles, larger mixed drinks and stacked drinks in violation of the license restrictions. Licensee argued she was unaware this occurred, and terminated the employee when she learned of his actions.

Abstract: While the licensee's efforts were laudable, licensee was not due mitigation because the licensee waited over six months after the violation occurred to begin making positive steps forward. Further, additional violations of the same type occurred after these steps were taken. The earlier acts of posting the restrictions and telling the employees to follow them are not mitigating as Licensee is required to do both. See also *Jiffy Mart* (OLCC, Final Order, 04-V-027, February 2005).

Key Words/Phrases: credibility determination, termination of employee, cancellation, Oceanside factors, reduction in menu, selective enforcement, intervention meetings, settlements, mitigation factors

Case: *H2O Martini Bar & Restaurant*, OLCC-06-V-014/014A, December 2006, *affirmed without opinion*, 213 Or App 240 (2007).

Facts: Licensee had several employees working without valid service permits, each with different circumstances. One employee told licensee and inspector that he had one, and gave the licensee a forged one. Licensee argued there was no evidence either employee actually served, sold or mixed alcoholic drinks.

Abstract: The negligent failure to transmit a service permit application to OLCC is not a mitigating factor. Furthermore, the licensee must take reasonable steps to verify that the employee has a valid service permit, and there is no mitigation were the licensee allowed the employee to continue serving and supervising alcohol servers after learning that the employee did not have a valid service permit.

Even if mitigation was warranted, it would serve only to reduce the length of suspension. It would not change the nature of the penalty. The Commission has previously held that where, as here, the penalty schedule specifies a standard penalty of suspension only, mitigation does not apply to give a licensee the option of paying a monetary penalty in lieu of suspension. *Express Mart* (OLCC, Final Order, 97-V-067, July 1988).

Key Words/Phrases: service permit, imputed to licensee, concealment of a violation, mitigation, individual acts, monetary penalty in lieu of suspension, nature of the penalty

Case: *Tony's Tavern*, OLCC-06-V-012, August 2006.

Facts: Licensee hired a bartender, who previously had a service permit. Bartender submitted an application and intended to take the alcohol server education course, but neglected to do so within 45 days due to his work schedule. Licensee traveled to Greece for an extended period of time, and was unaware that their employee had failed to complete the server education course. Licensee believed their employee had a valid permit until being notified by an OLCC inspector that he did not. Employee was not working at that time due to a broken wrist, and Licensee did not permit him to return to work until he reapplied and took the required server course. Licensee argued for mitigation because of his steps to correct the issue and submit the application.

Abstract: A licensee without any violations for more than four years is a basis for mitigation of a penalty. *Beehive Grocery & Deli* (OLCC, Final Order, 86-V-064, April 1987). [NOTE: this is no longer a basis for mitigation, see *Cabaret Lounge*, OLCC-08-061, October 2009].

Mitigation is not justified when the action taken is simply what is required to comply with the law. See *Cactus Bar & Grill* (OLCC, Final Order, 03-V-014, June 2004).

Key Words/Phrases: service permit, alcohol server education, denial of permit application, 45 days, knowledge attribution, permitting, imputed knowledge, mitigation

Case: *Thrifty Nifty Market*, OLCC-05-V-011, December 2005.

Facts: Licensee had prior sale to minor violations, and purchased AVE. Employee later sold to a minor on two occasions without verifying age. Licensee fired the employee immediately. Licensee argued for mitigation due to the termination and steps taken to prevent sales to minors.

Abstract: Licensee claimed mitigation for his continuing good faith efforts to prevent such violations. Following the analysis in *Circle K Store #468*, OLCC-03-V-107 (October 2003), Licensee is not entitled to mitigation for the

upgrade in equipment. Licensee had received the benefit of OAR 845-009-0140(3) after the previous violation and is not entitled to additional mitigation for the more recent upgrade. No mitigation is provided based on the circumstance that Licensee's employee failed to follow Licensee's procedures. Finally, *Circle K Store #468, supra* states that mitigation is not appropriate for the termination of the employee who sold to the minor.

Key Words/Phrases: sale to minor, prior violation, AVE, termination of employee, mitigation

Case: *New Copper Penny Restaurant*, OLCC-04-V-040/040A, October 2005.

Facts: Licensee and premises have been licensed to sell alcohol since 1973. Licensee had a long history of prior compliance with liquor laws. Licensed premises started having a series of serious incidents including a security employee placing a patron in a choke hold that resulted in the patron's death. Licensee also added an individual as secretary to the corporation and didn't notify the OLCC.

Abstract: Licensee is entitled to mitigation of the standard penalty for a history of serious and persistent problems because it has demonstrated an ability and willingness to control the premises. Licensee's willingness and ability to control the problems is reflected in: (1) the relative number of problem incidents constituting the history of serious and persistent problems herein that arose from Licensee's appropriate steps to deal with problem persons; four of the eight incidents comprising the history of serious and persistent problems arose from Licensee's security staff taking appropriate steps to deal with problem persons by denying them entry or reentry into the licensed premises or to prevent escalation of a brewing problem; (2) the steps licensee has taken since the last incident to control future problems of the types identified herein; licensee changed its radio advertising practice, discontinued live music events, modified its hours on weekends, and developed a new late-night food menu to offer more food during the late night hours; and (3) Licensee's 24-year compliance history shows evidence of Licensee's willingness and ability to control problems at the premises.

In addition to continuation of existing security practices (dress code, security camera/surveillance system, recording of all persons entering the premises, photographing of the identification cards of all patrons, searches of patrons upon entry, employment of DPSST certified security staff, clearly identifiable security personnel), Licensee made significant changes to its operation after the last incident. Licensee changed its radio advertising practice, discontinued live music events, modified its hours on weekends, and developed a new late-night food menu to offer more food during the late night hours.

Key Words/Phrases: history of serious and persistent problems, incidents attributable to security efforts, fights, homicide, death, compliance history, violence, security practices, change in corporate structure

Case: *Jiffy Mart*, OLCC-04-V-027/027A/027B, February 2005.

Facts: Licensee with a history of violations at this location. Licensee's employee was caught selling marijuana to a police informant (CRI). Licensee had employed a manager but was currently working at the store himself and taking measures to improve/clean it up. Licensee held licenses at multiple grocery stores in the state for decades.

Abstract: Licensee's efforts after the last violation (to remodel, locking exterior bathroom, working personally on the premises rather than using a manager), while laudable, are not due mitigation. They didn't start to occur until nearly 6 months after the violation. The number of prior violations should have alerted Licensee to the need for close supervision sooner. The amount of time it took for changes to occur negates any mitigation Licensee may be due for making efforts to prevent violations.

Key Words/Phrases: sale to minor, mitigation efforts to prevent violations, marijuana, drug sales, reputation in the community, absentee licensee, responsible for acts of employees

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: After the violation, Licensee purchased age verification equipment to prevent sales to minors in the future. The Commission mitigated the sanction by two days for this circumstance.

Key Words/Phrases: AVE, prevent sales, mitigation, credibility determination

Case: *Jiffy Mart*, OLCC-01-V-053, December 2001.

Abstract: Where Licensee did not know of the store's reputation for selling beer to minors and took remedial steps suggested by OLCC after the violation to prevent future violations by minors, mitigation is appropriate.

Case: *Main Street Texaco & Mini Market*, OLCC-00-V-069, October 2001.

Abstract: Where a co-worker reported the illegal sale to a minor to the police, mitigation is available to the Licensee. The Commission wishes to encourage and reward such efforts by licensees and their employees, assisting, as it does, the Commission's goal of keeping alcohol out of the hands of minors, and assisting in its retrieval once such a transaction has occurred.

Case: *A Taste of Thai*, OLCC-99-V-015, February 2000.

Abstract: Licensee violated a restriction prohibiting her from allowing her former husband to work in the licensed business, when husband was observed performing tasks on the licensed premises on 8 occasions in 2 months. The Commission concluded that mitigation of penalty short of cancellation was appropriate as Licensee did not want her former husband working on the premises and asked him not to do so, but did not press the matter because of fear of assault by him; former husband did not commit any violations of liquor laws during the time he worked; Licensee has had no previous violations during the six years she has been licensed at the premises; following the events constituting the violation, Licensee obtained a restraining order against her former husband; and Licensee has since enforced the restraining order and her former husband was jailed.

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. The Commission retains jurisdiction to issue a Letter of Reprimand to a former licensee in order to establish the licensee's record of compliance.

Cases: *Omar's Inc.*, OLCC-04-V-031, August 2005; *Rod's Old Town*, OLCC-92-V-073, February 1993; *300 Liberty Place*, OLCC-97-V-023, March 1998; *Sawyer Market*, OLCC-98-V-004, June 1998.

Abstract: The Commission has no jurisdiction to impose a fine or suspension on a former license when the license is no longer in existence. However, the Commission retains jurisdiction to issue a Letter of Reprimand to a former licensee in order to establish the licensee's record of compliance.

Case: *Alexis Poppa*, OLCC-89-V-158, December 1989.

Abstract: Where a permittee committed violations as a result of felony convictions, the fact that she had been subsequently convicted of additional felonies beyond those for which she was charged indicated she was a poor risk and that her service permit should be canceled.

Case: *The Hide Out*, OLCC-89-V-061, October 1989.

Abstract: The Commission mitigated the penalty to a Letter of Reprimand. The Commission concluded that the reasons to mitigate the penalty outweighed the multiple prior instructions about disturbing noise where the licensee discontinued the live music after receiving the violation ticket and there had been no compliance problems since then.

Case: *Sparkles Tavern*, OLCC-88-V-107, September 1989.

Abstract: The Commission concluded that the licensee's action to prevent future violations of lewd activities was a basis to mitigate the penalty where the licensee moved the doorman inside the premises where the doorman could watch the dancers to ensure that the dancers were not getting too close to customers.

Case: *Mark's Tavern*, OLCC-89-V-030, July 1989.

Abstract: The Commission concluded that the licensee's effort to avoid future violations by firing the permittee who committed the violation was a basis for mitigation.

Case: *Howard's Northwest Deli*, OLCC-88-V-101, February 1989.

Abstract: Licensee's violation for unauthorized sale of a keg was not aggravated because purchaser provided keg to a minor, where licensee was not involved and had no reason to suspect purchaser would do so.

C.4.a.6. Inability to Pay Fine

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

Case: *U-Licious Smokehouse & Grill*, OLCC-06-V-058, February 2007.

Facts: Licensee served a minor decoy without asking for ID. Licensee “let his guard down” because he believed the decoy and undercover deputy were father and daughter or boss/secretary out for a late lunch. Licensee argued entrapment, as well as hardship due to his recent stomach cancer surgery (resulting in extraordinary medical bills and debt from closure of the premises for a period of time).

Abstract: The Commission has previously concluded that inability to pay a fine set in the penalty schedule is not a persuasive reason to apply mitigation because the schedule already provides relief for the licensee of a low-profit business by allowing a choice between a fine or suspension.

Key Words/Phrases: minor decoy, hardship, inability to pay, entrapment

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

Abstract: The Commission declined to reconsider its policy that low profits and an inability to pay a fine set in the penalty schedule are not persuasive reasons for mitigation because the schedule already provides relief for the licensee of a low-profit business by allowing a choice between a fine or suspension.

Cases: *New Arirang Tavern*, OLCC-84-V-036, February 1985; *Union Gap Tavern*, OLCC-89-V-005, April 1989.

Abstract: Low profits and an inability to pay the fine set in the penalty schedule are not persuasive reasons for mitigation because the schedule already provides relief for the licensee of a low-profit business by allowing for a choice between a fine or suspension.

C.4.a.7. Death of Licensee

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

Case: *Day & Night Grocery*, OLCC-84-V-026, May 1985.

Abstract: The death of the licensee after the violations for sales to minors but before the licensee's contested case hearing does not moot or provide a basis to dismiss the charges. The licensee's death does, however, provide a basis for mitigation.

C.4.a.8. Failure to Use Age Verification Equipment

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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. The Commission found that aggravation for failing to use AVE per prior penalty was appropriate, removal from Responsible Vendor program, and suspension or fine.

Abstract: In cases where AVE has been purchased in lieu of other penalty after a sale to a minor, the failure to use AVE on a subsequent violation is an aggravating factor in the second case. The factors set out in OAR 845-006-0500 apply to members of the Responsible Vendor Program, but they are not a basis for determining removal from the RVP. That analysis is under OAR 845-009-0135(7). However, subsection (3)(g) provides that aggravating factors are "not limited to" those enumerated, and the Commission is precluded from considering other aggravating circumstances, including those from a different administrative rule.

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

Case: *Nick's AM/PM*, OLCC-13-V-093/093A, January 2014.

Facts: Employee of Licensee sold alcohol to a minor decoy with OLCC. Employee did not ask for ID or ask minor's age, and failed to use age verification equipment (AVE).

Abstract: The Commission has discretion to take into account the particular circumstances of each case, and increase or decrease the sanction where there are aggravating or mitigating circumstances. Failure to use age verification equipment purchased as an offset to a previous penalty can aggravate a penalty.

Key Words/Phrases: minor decoy, responsible, employee conduct, age verification, AVE

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. Licensee had previously opted to install AVE equipment in lieu of paying a penalty for a 2007 sale to a minor. The same employee was again cited in June 2012 for selling alcohol to a minor, and on that occasion attempted to use the AVE equipment. OLCC staff initially charged that Licensee violated its restriction for failing to use AVE equipment, and later amended the Notice of Violation to allege that Licensee violated the restriction when it "failed to require" its employee to use the AVE equipment. Licensee was unable to show evidence that its employee had been trained or required to use the AVE.

Abstract: Licensee's restriction required that all individual employees be required to use the AVE equipment. Licensee's managing member's testimony that he trained his employee to use it is not credible. The preponderance of the credible evidence shows that Licensee's employee did not use the AVE and was not trained to do so.

The Oregon Court of Appeals holdings in *US Market #109 v. OLCC*, 250 Or App 335 (2012), and *US Market #180, LLC v. OLCC*, 249 Or App 666 (2012), are distinguishable in this case. In the present case there was a failure to train appropriately, and as a consequence, a failure to require the employee to use the AVE to verify the age of the patron

who appeared under the age of 26 years.

Utilizing the *Oceanside* factors, the violation was substantial. However, the combined weight of the *Oceanside* factors in this case may not by itself merit cancellation. Where, as here, only two of the four *Oceanside* factors are present, the presence of other aggravating or mitigating circumstances can be considered in determining whether or not a penalty of cancellation is warranted.

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

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: Where age verification equipment was bought to offset the penalty for a previous sale to a minor and is not used to prevent the current violation then the failure to use the equipment is an aggravating factor.

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

C.4.a.9. Miscellaneous

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

Case: *Slim's Restaurant & Lounge*, 14-V-006/041, November 2014.

Facts: The OLCC alleged that Licensees' employee permitted patrons to take open containers of alcohol from the premises' licensed outdoor seating area. The agency proposed a sanction and revocation of Licensee's outdoor area under *former* OAR 845-005-0331(1) and (4) (effective until June 1, 2014). The license had been issued in 2008 following submission of a Control Plan outlining Licensee's efforts to control the outdoor café area. In 2012 Licensees were cited for patrons being outside the outdoor area and lack of monitoring by Licensees' staff. Subsequent inspections noted additional violations and lack of monitoring, despite multiple efforts to counsel Licensees. After receiving the warning notices and revocation notice, Licensees implemented new policies to control the outdoor area and installed surveillance cameras to monitor the outside area.

Abstract: To find that Licensees permitted patrons to take open containers of alcohol from the licensed premises, the evidence must prove knowledge of the proscribed activity and the failure to take reasonable steps to prevent or control the proscribed activity. *See, e.g., Don Juan's* (OLCC Final Order, 88-V-003, May 1988). The Commission found that Licensees' employee permitted patrons to take open containers of alcoholic beverages from the licensed premises, in violation of OAR 845-006-0345(5).

Grounds for aggravation of the penalty include: a prior warning about compliance problems; repeated failure to comply with laws; and the violation involved more than one patron or employee. The latter factor applied here, and the appropriate sanction is a nine day suspension or a civil penalty of \$1,485 in lieu of suspension.

Key Words/Phrases: outdoor area, open container, adequate supervision, revocation, control plan, good cause, multiple incidents, aggravation

Case: *Clancy's*, OLCC-14-V-017/017A, March 2015.

Facts: Minor decoy and undercover officer went to the licensed premises, and after being seated by an employee were asked what they wanted to drink. The minor decoy ordered a bud light. The employee went to the bar area and told another employee about the drink order, and that other employee brought it to the minor. The employee asked who ordered the beer and the decoy replied "me," the employee set it down and stepped away from the table. The undercover officer then contacted the employee and cited her for serving a minor. The employee who took the drink order was fired because he should have asked for ID when the drink was ordered. A few days after the incident, Licensee's manager contacted the OLCC about the situation.

Abstract: Licensee's employees failed to verify the age of a minor before allowing her to buy or be served an alcoholic beverage when she reasonably appeared to be under 26 years of age in violation of OAR 845-006-0335(1)(a), (b) and (c).

Licensee argued that the employee who took the drink order didn't sell or serve alcohol, and therefore did not violate the liquor law, and to use his actions as aggravation would exceed the OLCC's scope of authority. The Commission disagreed. Although there are no prior cases directly on point, based on the cases of *Giovanni's Mountain Pizza* (OLCC Final Order, 03-V-013 & 018, February 2004) and *Handy Food Mart* (OLCC Final Order, 98-V-029, April 1999), the Commission concluded that two employees were involved in the sale, making aggravation appropriate.

Because aggravation existed, removal from the Responsible Vendor Program was also warranted.

Key Words/Phrases: minor, sale to minor, decoy, responsible vendor, sale, multiple employees, aggravation

Case: OLCC-14-V-033, August 2014.

Facts: Permittee's service permit was revoked after a felony conviction for Unlawful Possession of Cocaine. Permittee was contacted by OLCC inspectors after a complaint. When they ran his permit number OLCC dispatch advised he had a warrant from Washington County. OLCC inspectors then contacted Permittee and placed him under arrest for the warrant. Permittee attempted to reach into his pockets, and a bag of cocaine was discovered.

Abstract: Possession of a controlled substance while on duty relates to a permittee's fitness to hold a service permit. Admitting to an intent to deliver a controlled substance on a licensed premises does as well. Passage of nine months from the conviction is not enough to determine if the permittee has reformed to the extent that he/she would be a good risk for compliance. Further, commission of felonies on the licensed premises showed a lack of good judgment and a disregard for Commission rules and laws and therefore provides a basis to aggravate the penalty.

Key Words/Phrases: aggravation, crime on licensed premises, cocaine, inspector arrest

Case: *Undefeated Sports Bar & Grill*, OLCC-14-V-13/13A, August 2014.

Facts: Licensee's managing member worked as bartender until about 8 pm when another employee came on duty. Only one employee was scheduled to work because Licensee did not expect it to be busy. Licensee began playing cards with friends/other patrons at 9 pm, and consumed alcohol while playing cards. At 10 pm approximately 30-40 other patrons came into the bar for a birthday party. Three of the patrons were minors. The party got out of hand. Licensee attempted to call for a security service, and then instructed his employee to shut the party down. The employee did not immediately do so. Licensee argued "choice of evils" defense, in that even though he was intoxicated he acted reasonably to control the premises once the unexpectedly large crowd became unruly.

Abstract: The defense of lesser evils does not negate the charge, but can be the basis for mitigation in some circumstances. Where, however, a licensee puts himself on duty while intoxicated, even to eject an unruly patron, that licensee will not be rewarded with mitigation. Intoxication impairs the judgment of the actor and further elevates the risk of disorder. No reduction from the suspension is warranted (with citation).

Although managing member eventually placed himself back on duty to deal with an unruly crowd, Licensee should not bear the responsibility for the fact that managing member did not earlier personally check ID or monitor for minors when he considered himself off duty. Managing member had not intended to perform acts on behalf of the licensee, and should not be considered as involved in the minors on premises violation.

Key Words/Phrases: drinking on duty, intoxication, signs, control conduct

Case: *Aroma Restaurant*, OLCC-12-V-072/072A/072B, June 2013.

Facts: Licensee permitted security personnel without DPSST certification to provide security services. Licensee hired its security through a Craigslist ad. Licensee later created a false record of events in an effort to discredit the security guard's testimony that Licensee knew he was unlicensed.

Abstract: Licensee falsifying his log book in an effort to discredit testimony and avoid responsibility for a violation merits additional days of mandatory suspension.

Key Words/Phrases: unlawful activity, DPSST certification, security services, witness credibility, falsify records, discredit witness

Case: *Fajitas Mexican Restaurant*, OLCC-12-V-007/007A, August 2013.

Facts: Licensee held licenses at Fajitas Mexican Restaurant, which was operated by an individual. That individual also was controlling member of JA Meza, Inc., which owned three 7-Eleven licensed premises. The controlling member pled guilty to felony Coercion stemming from sexual contact with a female employee at one of the 7-Eleven stores. Controlling member's daughter signed a promissory note to purchase all of controlling member's shares in Juan Meza, Inc. in order to remove him from any role in the company. The OLCC approved the corporation's change in membership with restrictions prohibiting controlling member from being on the premises or participating in any operation or management of the business, based on the financial interest the controlling member would be receiving from the sale of stock to his daughter. Licensees did not contest the restrictions. When renewing the 7-Eleven licenses for JA Meza, Inc., individual controlling member disclosed his conviction. Commission concluded that a material false representation was made and cancellation was an appropriate sanction. Licensee argued that the license shouldn't be cancelled because of prior cases where a corporate licensee has been permitted to continue notwithstanding the felony conviction of a principle.

Abstract: The Commission has allowed a corporate licensee to continue after a corporate principal is convicted of a felony related to fitness to hold a liquor license on the condition that the wrongdoing principal completely divests him- or herself from the corporation and any involvement in the business enterprise. More recently, the Commission has allowed a corporate licensee to continue despite a corporate principal's felony convictions where there was a significant passage of time between the underlying criminal conduct and no negative intervening circumstances. *See, e.g., Center Market #1, #2, #9 et al* (OLCC Final Order, 08-V-104, October 2009).

The Commission no longer recognizes a lengthy record of compliance with the liquor laws as a basis for mitigation. *See Cabaret Lounge* (OLCC Final Order, 08-V-061, October 2009) at n8.

Pursuant to OAR 845-006-0500(9), "[a] licensee may not avoid the sanction for a violation * * * by merely adding or dropping a partner or converting to another form of legal entity when the individuals who own, operate, or control the business are substantially similar." Commission Staff asserts that this provision supports its position that Licensee may not avoid the sanction by virtue of the sale of the company stock to Ms. Meza. Licensee, on the other hand, asserts that may avoid the sanction for Mr. Meza's violation under this rule because the business is now owned and operated by a different person. Because Licensee did not merely add or drop a partner and did not convert to another form of legal entity, this rule is not directly applicable to the circumstances at issue.

The Commission has held that the passage of time since the criminal conduct must be long enough to allow the Commission to find that the applicant or licensee has reformed and will not be a poor risk for compliance. *See Swan Mart* OLCC-05-L-008, October 2006; OLCC-90-SP-189, May 1991. The more time that has passed, the greater the inference can be made that the applicant has reformed. *See OLCC-92-SPR-056*, September 1992. But, if other factors exist that weigh against good cause, the passage of three years is not enough time to weigh in favor of good cause. *See Thomas Creek Steak and Seafood*, OLCC-00-L-008, April 2001.

Key Words/Phrases: felony conviction, passage of time, intervening circumstances, mitigation, good cause

Cases: *Daniel Gruska*, OLCC-12-V-025, January 2013; *Gabriel Burton*, OLCC-12-V-023, January 2013.

Facts: Two service permittees' licenses were suspended for permitting disorderly activities on licensed premises. Two groups of patrons initially started yelling and chest bumping, and permittees intervened and told them to "calm down" and "break it up." The patrons did so and permittees went back to the bar, only to have a large fight with pool sticks and balls break out seconds later. Neither permittee took steps to intervene or break up the fight, and did not call the police because another patron said the police were on their way.

Abstract: Where a patron was "savagely beaten" in a fight when permittees "permitted" unlawful activity, aggravation of the sanction is justified.

Key Words/Phrases: disorderly conduct, permit, intervene, serious injury, aggravation

Case: *The Crown Room*, OLCC-11-V-071/071A/071B/071C, October 2012.

Facts: Licensee argued that a 32 day suspension for multiple violations, including two inadequate food service violations issued in two consecutive days due to broken fridge, was an unduly harsh sanction.

Abstract: Constitutional prohibitions against “excessive punishment” apply only in the criminal context and not civil administrative actions. *Cinnabar*, OLCC-11-V-060, August 2012; *OLCC Agency 183* (OLCC Final Order, 03-R0-002, 2003).

Key Words: excessive punishment, criminal, civil, unduly harsh

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: Aggravation for a minor drinking multiple beverages in one night is appropriate.

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, multiple drinks

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.

Abstract: Negative impact to local economy is not a valid basis to mitigate a penalty.

Key Words/Phrases: licensee involvement, lack of involvement, mitigation, aggravation, local economy impact

Case: *The Old Spaghetti Warehouse*, OLCC-09-V-063, November 2009.

Facts: Licensee’s employee served a minor decoy. When the officer asked for the employee’s service permit, she stated she didn’t have it on her. Later the OLCC confirmed that the employee had never had a service permit, and had never taken the alcohol education course. Licensee claimed he was duped or conned by the employee because she repeatedly advised the premises manager that she had a permit.

Abstract: Licensees have a duty to verify service permits, not just take their employees words for it that they have one. Violation proven. Aggravation was warranted due to the amount of time the employee was allowed to serve/sell alcohol (approximately 7 months).

Key Words/Phrases: service permit, permitted, duty to verify, aggravation

Case: *Downtown Deli & Greek Cusina*, OLCC-08-V-028/028A/028B, October 2009. (Amended order).

Facts: Downtown Portland premises had multiple floors for dancing, night club, bar, restaurant and special events. Premises had operated for decades with very few problems, but started having significant number of issues once the second and third floors were opened. The OLCC had issued numerous warnings in the past.

Abstract: Upon consideration of prior Commission cases where a history of serious and persistent problems has been found to exist and the standard penalty of cancellation mitigated, the Commission observes that the pattern of mitigating so much as to give the option of paying a civil penalty in lieu of any suspension period is insufficient to deter violations of this magnitude or to encourage rapid resolution of the underlying problems. The number and nature of incidents giving rise to a history of serious and persistent problems impact the surrounding community and disproportionately strain law enforcement resources. In the future, the Commission intends to impose some appropriate period of mandatory suspension (not less than one day and not to exceed 30 days), with or without the option of paying a civil penalty in lieu of a portion of the suspension period, as a penalty in cases of this type.

Key Words/Phrases: History of serious and persistent problems, restrictions, suspension versus cancellation, mitigation of Category I violation

Case: *Cabaret Lounge*, OLCC-08-061, October 2009. [Distinguished in *JB's Deli and The Galley Sports Bar*, OLCC-13-V-002, September 2013.]

Facts: Licensee has several employees without valid service permits and DPSST certification as required. Licensee's employees engaged in fights with patrons being ejected, and one employee was charged with prostitution for engaging in sexual contact on the premises. Licensee fired the employee who was engaged in prostitution immediately upon seeing the contact.

Abstract: Although after the dance and exchange of money Licensee intervened and ejected the patron from the premises and fired the dancer for violating Licensee's policy, his response to the situation does not mitigate against a finding that Licensee permitted the unlawful activity.

The Commission no longer recognizes a lengthy record of compliance with the liquor laws as a basis for mitigation.

Key Words/Phrases: permitting unlawful activity, DPSST certification, service permit, management duties, prostitution

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: The fact that security personnel later obtained the required DPSST certification does not mitigate the penalty. An action taken by a licensee to prevent future violations is not mitigation when the action taken is simply what is required to comply with law. *Tony's Tavern* (OLCC, Final Order, 06-V-012, August 2006).

Aggravation is appropriate given Licensee's prior warnings regarding the same compliance problems as the violations proven.

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: *Girtles Restaurant & Lounge*, 08-V-079, October 2009.

Facts: Licensees of established premises began experiencing a number of fights. OLCC inspector met with licensees to warn of the possible violation for serious and persistent problems, and offered to help create a control plan. Licensees declined and instead submitted a written statement that they would be remodeling to increase their dining area into the lounge area, and closing earlier on weekends to avoid the “late tavern crowd.” Licensees did close early for about 3 weeks, then went back to being open until 2:30 a.m., and problems continued.

Abstract: 10 disturbances involving violence or threat of violence, 4 instances of unlawful activity by patrons on the premises related to Licensee’s sale or service of alcohol, and 6 less serious incidents involving public drunkenness and/or public urination related to Licensee’s sale or service of alcohol, in 28 month period is a history of serious and persistent problems.

Driving under the influence of intoxicants is an unlawful activity. ORS 813.010. Under the plain language of ORS 471.315(1)(c), “unlawful activities” involving patrons of the establishment in the immediate vicinity of the premises count towards a history of serious and persistent problems if those unlawful activities in the immediate vicinity of the premises are related to the sale or service of alcohol under the exercise of the license privilege. Therefore, an intoxicated driver in the immediate vicinity of the licensed premises can provide grounds for cancellation or suspension under this provision if the unlawful activity is related to the licensee’s sale or service of alcohol under the exercise of the license privilege.

Although the Commission considers problems involving public drunkenness and public urination as “less serious” than those involving violence or threat of violence, such incidents nevertheless count in determining whether a licensee has a history of serious and persistent problems.

The Commission has, in the past, mitigated the penalty from cancellation to a suspension or fine where the licensee demonstrates a willingness and ability to adequately control the premises. *See, e.g., New Copper Penny Restaurant* (OLCC, Final Order, 04-V-040, October 2005) (mitigation was appropriate because, subsequent to having a history of serious and persistent problems, the licensee made significant changes in operation and demonstrated the willingness and ability to control the premises).

Because Licensee demonstrates a willingness and ability to control patrons/premises, mitigation to less than cancelation is warranted. Based on the Commission’s recent pronouncement and reasoning in *Downtown Deli & Greek Cusina*, a mandatory suspension plus fine is appropriate in this case.

Similarly, despite Licensee’s history of violations and serious problems, Licensee should be renewed due to evidence that Licensee has been better at controlling the premises and patrons’ behavior and is implementing new measures designed to reduce the number and frequency of serious problems.

Key Words/Phrases: history of serious and persistent problems, willingness and ability to control, DUII, unlawful activity, mitigation, mandatory suspension period, less serious incidents, deny renewal, risk for future compliance

Case: *Tommy’s Too*, OLCC-09-V-024, October 2009.

Facts: OLCC inspectors contacted a person at the door of licensed premises who appeared to be an employee. The individual denied being an employee, stating he was just helping the bartender out for no compensation. He gave the inspectors a false name. When inspectors went inside to talk to the bartender, the individual left the premises. Both the bartender and Licensee’s corporate principal confirmed the individual was an employee. Inspectors later were able to contact him and he stated he lied because he was afraid of getting in trouble for not having DPSST certification. At hearing Licensee did not dispute the false information, but claimed it was not material because the employee did not need to be DPSST certified, and therefore nothing he lied about would have prevented any

Commission action.

Abstract: The fact that the corporate principal of Licensee was truthful with inspectors and did not attempt to conceal information does not rise to the level of extraordinary cooperation; this basic compliance is expected of all licensees. As a result, mitigation of the penalty for this circumstance is not warranted.

Key Words/Phrases: false statement, material, preventing commission action, prior warning, extraordinary cooperation, mitigation

Case: *Chan's Steakery*, OLCC 07-V-057, August 2008.

Facts: Licensee had multiple servers working without valid permits. The OLCC received an anonymous complaint about employees drinking on duty, and discussed with Licensee's manager, who stated she was having a problem with one bartender doing that. Later undercover inspectors witnessed the bartender make alcoholic drinks for two employees, who consumed them while working.

Abstract: Aggravation was warranted due to the violations being repeated and involving multiple employees. It is not a mitigating circumstance that licensee is unable to pay the fine, nor that it is the first violation. Moreover, Licensee had not been licensed long enough to qualify for mitigation on the basis of a lengthy history of good compliance. The Commission has determined that a history of four years without a violation is a mitigating circumstance. *Beehive Grocery & Deli* (OLCC, Final Order, 86-V-064, April 1987). Because Licensees have only been licensed 18 months, they are not eligible for mitigation on this basis. (NOTE: this is no longer a basis for mitigation, see *Cabaret Lounge*, OLCC-08-061, October 2009).

Key Words/Phrases: drinking on duty, "tasting", service permit, mitigation, aggravation, inability to pay, compliance history

Case: *Oregon Beverage Service*, OLCC-07-V-037, April 2008.

Abstract: No aggravation is warranted for an employee working for more than six months without a service permit when the employee only worked at three specific, special events which were only a few days long. This case is distinguishable from *Rick's White Horse Restaurant & Lounge* (OLCC-04-V-036, April 2005) based on the fact that employee worked only at a few special events during the time she was without a permit.

Case: *Dad's Restaurant & Lounge*, OLCC-06-V-029/A/B/C/D, December 2007.

Facts: Licensee purchased Dad's without knowing of problems between previous owner and the OLCC. License proposed an extensive Chinese food menu, which was a large factor in the OLCC granting the license. License was granted with several restrictions including sizes of drinks and no doubles. Subsequently Licensee substantially reduced the menu without notifying the OLCC. Licensee's employee also sold doubles, larger mixed drinks and stacked drinks in violation of the license restrictions. Licensee argued she was unaware this occurred, and terminated the employee when she learned of his actions.

Abstract: Licensee's unforeseen setbacks in remodeling the kitchen that prevented her from serving the full menu did not prevent her from notifying OLCC of the reduced menu, therefore she was not entitled to mitigation for the remodeling setbacks.

Violation committed by the licensee personally is a cause for aggravation; that a violation or violations were not committed by the licensee personally simply results in no aggravation for this factor.

Setbacks in the process of remodeling did not impact or prevent notification of the substantial reduction of food

service to the Commission, and therefore does not warrant mitigation.

That other restrictions were not violated is not mitigating of the penalty for the restriction that was violated repeatedly; that there have not been separate violations for visibly intoxicated persons is not mitigating for the violations which did occur; and voluntary reporting of unconnected patron events is not mitigating of bartender conduct in willfully failing to follow the key over service restriction.

The fact that both OLCC and police did some compliance checks during which they found no violation of restrictions is not mitigating for the times in which they did find violations.

Financial investment is not a basis for mitigation, it is a step taken by licensees for business reasons.

Support of a local business representative is a neutral consideration, not a factor mitigating the penalty.

Posting the restrictions and telling the employees to follow them are not mitigating as Licensee is required to do both

Licensee's limited English proficiency is not cause for mitigation. Licensee understood the restrictions and is required to comply with liquor laws regardless of English proficiency. Licensee's English was sufficient for her to engage in ordinary conversation, but she needed help reading documents, composing letters in English, and accurately conveying her ideas in English.

Key Words/Phrases: credibility determination, termination of employee, cancellation, Oceanside factors, reduction in menu, selective enforcement, intervention meetings, settlements, mitigation factors

Case: *Meriwether's*, OLCC-06-V0077/077A/077B, April 2007.

Facts: Licensee filled out and paid for bartender's renewed service permit, but failed to mail it in to the OLCC. The bartender also worked at another bar, and his expired permit was discovered during a compliance check at that location. Licensee admitted to failing to mail in the service permit application, and it was licensee's second violation in two years (previously allowing three employees to work without service permits). Licensee argued the penalty as excessive under the circumstances.

Abstract: Mitigation for negligence is not appropriate. See *Rick's White Horse Restaurant and Lounge* (OLCC, Final Order, 04-V-036, April 2005), *H2O Martini Bar & Restaurant* (OLCC, Final Order, 06-V-014, December 2006); *Sugar Pine Inn* (OLCC, Final Order, 00-V-108, April 2002 at n. 10).

Under OAR 845-006-0500(7)(c), the Commission may mitigate a penalty based upon a previous lengthy history of compliance, good faith efforts to prevent a violation and extraordinary cooperation in the Commission's violation investigation.

The Commission has not considered the nature of the licensed premises, *i.e.*, a fine dining establishment versus a tavern or nightclub, in awarding mitigation.

Key Words/Phrases: service permit, negligence, mitigation

Case: *Monmouth Market*, OLCC-05-V-045/045A/045B, October 2006.

Facts: Licensee sold alcohol to a minor without asking for ID. Licensee claimed at hearing that he had checked the minor's ID and verified it against a credit card. The officer who had contacted the minor outside the store testified that the minor did not have any ID or credit cards on him when he was stopped.

Abstract: After credibility determination that licensee's version was not credible, violation was proven. Aggravation was warranted due to licensee personally committing the violation.

Licensee had argued for mitigation because he had age verification equipment, but the Commission declined to grant mitigation because licensee had not used the equipment while making the sale to a minor. The mere presence or ownership of the equipment is not a mitigating factor.

Key Words/Phrases: credibility determination, sale to minor, aggravation, personally committing violation

Case: *The Foghorn Sports Pub & Grill*, OLCC-05-V-027, February 2006.

Facts: Licensee was off duty drinking a beer, and periodically would get up to assist his bartender in making a drink for other patrons. Licensee claimed that he was not actually drinking while he was performing those duties, but rather would perform the duties and then return to his seat to drink his beer, and therefore was not drinking on duty per OAR 845-006-0345(1).

Abstract: "Choice of evils" defense does not negate a violation. If proven, the circumstances may warrant mitigation of the penalty.

Key Words/Phrases: drinking on duty, voluntarily performs services, choice of evils defense, mitigation

Case: *New Copper Penny Restaurant*, OLCC-04-V-040/040A, October 2005.

Facts: Licensee and premises have been licensed to sell alcohol since 1973. Licensee had a long history of prior compliance with liquor laws. Licensed premises started having a series of serious incidents including a security employee placing a patron in a choke hold that resulted in the patron's death. Licensee also added an individual as secretary to the corporation and didn't notify the OLCC.

Abstract: Licensee's willingness and ability to control the problems is reflected in (1) the relative number of problem incidents constituting the history of serious and persistent problems herein that arose from Licensee's appropriate steps to deal with problem persons; (2) the steps licensee has taken since taken since April 1, 2004, to control future problems of the types identified herein; and (3) Licensee's compliance history as it evidences the willingness and ability to control problems at the premises.

The death of a patron at the hands of Licensee's security during one of the problem incidents warrants aggravation.

Licensee is entitled to mitigation of the standard penalty for a history of serious and persistent problems because it has demonstrated an ability and willingness to control the premises. Licensee's willingness and ability to control the problems is reflected in: (1) the relative number of problem incidents constituting the history of serious and persistent problems herein that arose from Licensee's appropriate steps to deal with problem persons; four of the eight incidents comprising the history of serious and persistent problems arose from Licensee's security staff taking appropriate steps to deal with problem persons by denying them entry or reentry into the licensed premises or to prevent escalation of a brewing problem; (2) the steps licensee has taken since the last incident to control future problems of the types identified herein; licensee changed its radio advertising practice, discontinued live music events, modified its hours on weekends, and developed a new late-night food menu to offer more food during the late night hours; and (3) Licensee's 24-year compliance history shows evidence of Licensee's willingness and ability to control problems at the premises.

Key Words/Phrases: history of serious and persistent problems, incidents attributable to security efforts, fights, homicide, death, compliance history, violence, security practices, change in corporate structure

Case: *Jiffy Mart*, OLCC-04-V-027/027A/027B, February 2005.

Facts: Licensee with a history of violations at this location. Licensee's employee was caught selling marijuana to a police informant (CRI). Licensee had employed a manager but was currently working at the store himself and taking measures to improve/clean it up. Licensee held licenses at multiple grocery stores in the state for decades.

Abstract: Licensee is responsible for the acts of its employees.

The Commission has previously held that a premises' reputation for selling to minors is an aggravating factor. It is also an aggravating factor for a licensee to have a reputation in the community for selling drugs either within the premises or in areas adjacent to the premises for which licensee is responsible.

Licensee's efforts after the last violation (to remodel, locking exterior bathroom, working personally on the premises rather than using a manager), while laudable, are not due mitigation. They didn't start to occur until nearly 6 months after the violation. The number of prior violations should have alerted Licensee to the need for close supervision sooner. The amount of time it took for changes to occur negates any mitigation Licensee may be due for making efforts to prevent violations.

Key Words/Phrases: sale to minor, mitigation efforts to prevent violations, marijuana, drug sales, reputation in the community, absentee licensee, responsible for acts of employees

Case: *Rick's White Horse Restaurant & Lounge*, OLCC-04-V-036, April 2005. [Distinguished by *Oregon Beverage Service*, OLCC-07-V-037, April 2008.]

Facts: Licensee gave prospective employees money for the permit application, and told them they were responsible for sending in the applications. One of the servers didn't send her application in until after an OLCC compliance check showed she couldn't find a copy of her application.

Abstract: Violation proven despite conflicting testimony about when applicant started working and filled out her service permit application. The length of time she was allowed to work without a permit (over six months) warranted aggravation. Prior history of compliance warranted mitigation, but no mitigation due to the error being negligent, rather than intentional.

The fact that Licensee received a letter of recommendation from a local police department official and that Licensee's employee attended and completed server education while failing to obtain the server permit are not relevant to the issue of mitigation.

Key Words/Phrases: service permit, application, date of application, working without permit, aggravation for length of time, new agency rule regarding aggravation for lack of service permit

Case: *The New Market*, OLCC-04-V-016, January 2005.

Facts: Licensee personally sold to OLCC minor decoy. Licensee had the sign stating "if you were born after today's date in 1983 we will not sell alcohol to you," but misunderstood it and thought anyone born in 1983 was of legal age.

Abstract: Licensee made a good faith mistake, but his mistake does not excuse the violation.

The fact that Licensee admitted his error immediately and did not claim he did not violate the rule did not rise to extraordinary cooperation warranting mitigation. Citing *Teresa Oakes* [and *Synthia Smith*], OLCC-03-V-012, October 2003.

In the past, a seller's effort in checking the identification was viewed as constituting a good faith effort to prevent a violation because the seller who asks for identification of a youthful-looking purchaser was seen as doing more to avoid a violation than a seller who did not even ask for the identification. Consistent with existing precedent, the Commission will award mitigation for this circumstance in this case. However, the Commission has reconsidered its prior position and now concludes that asking for identification and incorrectly reading or interpreting the age-related information does not constitute a good faith effort to prevent a violation.

Key Words/Phrases: minor sale, minor decoy, mistake in calculating age, aggravation for licensee personally committing the violation, mitigation for good faith efforts, checking identification, change in policy, change in precedent

Case: *Griff's Mini Market*, OLCC-04-V-015/015A, October 2004.

Facts: Licensee sold alcohol to a minor decoy who Licensee thought resembled another customer who was over 21. The decoy also had previously been in the licensed premises for other things, not purchasing alcohol. Licensee has a previous violation for sale to minors, and was unaware of the option to purchase AVE equipment and enroll in the Responsible Vendor Program.

Abstract: The Commission concluded that Licensee was mistaken when he thought the decoy was another customer he had checked ID of before selling alcohol; violation proven.

In a second sale to a minor within a two-year period, Licensee argued for mitigation of penalty because he believed he had not been given an opportunity to purchase age verification equipment or to join the Responsible Vendor Program at the time of the first violation. OLCC staff maintained that Licensee was provided the same information as all other Off-Premises licensees concerning the options available when a violation has occurred, and that the Licensee made an informed choice to pay the fine after the first violation. Whether or not Licensee understood the options provided him relative to an earlier case and whether or not he would have exercised those options had he understood them at that time has no bearing on the penalty to be imposed in a subsequent case. Licensee is not now entitled to affirmative mitigation for options he failed to exercise, for whatever reason, at an earlier time for a separate violation. Mitigation is not warranted.

Key Words/Phrases: sale to minor, mitigation

Case: *Cactus Bar & Grill*, OLCC-03-V-014, June 2004.

Abstract: The Commission declined to allow mitigation based on the bartender cutting the perpetrator off from further alcohol service prior to the disorder. That step was nothing more than that which the law already required the bartender to do, given the perpetrator's visibly intoxicated state. That step, in itself, was ineffectual in preventing the disorder that followed. The bartender was obligated to follow up on the warning of potential disorder, which he did not do.

Where "choice of evils" does not constitute a defense to the charge, it can be the basis for mitigation in some instances. Where, however, a licensee puts himself on duty while intoxicated, even to eject an unruly patron, that licensee will not be rewarded with mitigation. Intoxication impairs the judgment of the actor and further elevates the risk of disorder.

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. 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: Where Licensee permitted seven unlawful drug activities on the licensed premises (including three on the same date), in violation of OAR 845-006-0347(3), license cancellation was the appropriate penalty

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

Case: *The Blue Parrot*, OLCC-03-V-043, June 2004.

Abstract: Where licensee relied on language on the application which appears to direct the applicant to mail in the application; had endeavored to ensure that the server had, in fact, mailed in the application and had received a false assurance from the server that the application had been mailed; and where Licensee established a palm pilot tracking system after the violation to prevent similar violations, the Commission awarded for three mitigating circumstances (equaling a reduction of 6 days or \$990).

Case: *Circle K Store #468*, OLCC-03-V-017, October 2003.

Abstract: Licensees were members of the Responsible Vendor Program at the time their employee sold alcohol to a minor. The Commission concluded that members of the Responsible Vendor Program were eligible for mitigation. The Commission awarded mitigation for the following efforts which exceeded the requirements for the Program: (1) Licensees internal minor decoy program and participation in a community-based program; and (2) Licensees extensive orientation program, monthly training program and daily review of taped transactions. The Commission declined to award requested mitigation for the termination of the clerk who sold to the minor and for the upgrade to the age verification equipment.

Case: *Synthia Smith [& Teresa Oakes]*, OLCC-03-V-012, October 2003.

Abstract: Admitting the violation to OLCC inspector does not rise to extraordinary cooperation warranting mitigation.

Case: *Dekum Market*, OLCC-03-V-002, August 2003.

Abstract: Cancellation of the license is the appropriate penalty for Licensees' permitting unlawful activities associated with the sale or possession of drugs within a two-month period, particularly where Licensees know drug sales were occurring just outside the premises and drug paraphernalia was being sold at the premises. Licensees were not vigilant in making efforts to prevent or control illegal activity in or around their store.

Case: *Sugar Pine Inn*, OLCC-02-V-038, July 2003.

Abstract: Where the corporate principal was managing the bar the night two minors were present and drinking for two hours. During this time, the minors were openly visible to the principal and the principal had direct contact with the minors; consequently, the principal was directly involved in Licensee's failure to check the identifications of the minors. Aggravation to the penalty was given on the basis of the principal's direct involvement.

Case: *Parilla Grill*, OLCC-01-V-082, August 2002.

Abstract: Where Licensees were charged with and found to have committed one violation of ORS 471.360(1)(6) (as to three named employees), the appropriate level of aggravations for the multiple employees is two days or \$330 for each employee beyond the first one.

Past practice and precedent dictate that the standard conversion factor for each mitigating factor is two days suspension or \$330 civil penalty. This conversion factor applies whether the deduction is being made from a maximum penalty of ten days suspension or \$1,650 civil penalty, or from a maximum penalty of thirty days suspension or \$4,950 civil penalty. The conversion factor is not proportionately increased as the maximum penalty increases.

Case: *La Macarena*, OLCC-00-V-116, August 2002.

Abstract: Substantial breach(es) of a restriction or condition on the license constitute(s) a violation of ORS 471.405(1), a Category I violation. Such breaches are not easily mitigated, as certain licenses would not have been granted or renewed but for restrictions or conditions being placed on the licenses. These restrictions or conditions are necessary to address specific problems or concerns relating to the license. The objective of elevating a standard requirement of law to a strict requirement of the license privilege, through either license restrictions or a settlement agreement, is to provide for strict accountability by introducing the possibility of license cancellation. The Commission believes strict accountability is appropriate where failure to abide by standard requirements of law bears a relationship to ongoing problems.

Case: *Nick's AM/PM*, OLCC-02-V-003, August 2002.

Abstract: Slight mitigation of penalty was awarded to Licensee whose clerk was found to have sold alcohol to a minor without verifying age, because Licensee required their employees to read and sign a statement every week agreeing to follow Licensee's training and policies governing the sale of alcohol and tobacco.

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

Abstract: Where Licensees simultaneously permitted four minor dancers to be in an area prohibited to minors, the penalty was aggravated only to that of a second level violation due to partially offsetting mitigation.

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

Abstract: Where permittee violated ORS 471.385(1)(a) by making a false statement in the application for a permit, which false statement made her eligible for the permit when she was in fact ineligible at the time of application, it is appropriate to aggravate the penalty to cancellation.

Case: *Sugar Pine Inn*, OLCC-00-V-108, April 2002.

Abstract: Licensee was found to have violated OAR 845-009-0015 by allowing his employee to sell alcoholic beverages without licensee having mailed or delivered the completed service permit application and fee to the Commission by the end of the first work day following the employee's first shift. Licensee was not entitled to the benefit of the employee's effort to comply (employee timely completed the service permit application and gave it to the employer) in mitigation of licensee's penalty.

Flight 99 Tavern, OLCC-87-V-033, February 1988, does not stand for the proposition that if either licensee or permittee has made good faith efforts to achieve compliance, both benefit, independent of who performed the acts. Each is entitled to mitigation for their own individual acts, not for the acts of the other.

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

Abstract: Penalty 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.

Case: *Cascade West Grub & Ale House*, OLCC-01-V-071/-076, February 2002.

Abstract: That licensee was uncooperative and verbally abusive to police and OLCC inspectors during the investigation is not an independent basis for aggravating the penalty; such evidence does rebut any claim for mitigation based on cooperation (i.e., steps taken to avoid future problems by following OLCC suggestions).

Mitigation of penalty was not allowed for the immediate termination of the clerk who sold to a minor where the clerk had violated the law before and was not fired.

Case: *Jiffy Mart*, OLCC-01-V-053, December 2001.

Abstract: Where the licensed premises has the reputation of selling alcohol to minors, such reputation constitutes an aggravation factor. By itself, it does not warrant imposition of a mandatory suspension. A mandatory suspension was imposed in *Neighbor's Market*, OLCC-87-V-009, September 1987, because the reputation was combined with licensee's willful intent to sell to minors (higher prices charged to minors and secretive sales in the back of the store) and with a prior violation.

Where Licensee did not know of the store's reputation for selling beer to minors and took remedial steps suggested by OLCC after the violation to prevent future violations by minors, mitigation is appropriate.

Case: *Shanghai Restaurant*, OLCC-01-V-040, November 2001.

Abstract: Aggravation of penalty is warranted where none of Licensee's five employees had service permits, even after repeated warnings to Licensee, and where OLCC had provided application forms two months earlier.

Case: *Main Street Texaco & Mini Market*, OLCC-00-V-069, October 2001.

Abstract: Where a clerk admitted he knew the juvenile buyer was a minor at the time of sale, and made furtive efforts to conceal the transaction (took the juvenile outside, got the items from the cooler, and surreptitiously concluded the sale away from the cash register), the violation was committed intentionally and forms a basis to aggravate the penalty.

Where a co-worker reported the illegal sale to a minor to the police, mitigation is available to the Licensee. The Commission wishes to encourage and reward such efforts by licensees and their employees, assisting, as it does, the Commission's goal of keeping alcohol out of the hands of minors, and assisting in its retrieval once such a transaction has occurred.

Case: *Benjamin Soto Lopez*, OLCC-01-V-008, August 2001.

Abstract: Mitigation was not allowed for past good record where Permittee had held permit for only one year.

Case: *300 Club*, OLCC-99-V-060, April 2001.

Abstract: Where, in a violation case based on a history of serious and persistent problems (Category I), Licensee's willingness and ability to adequately control the premises (mitigation) and the extensive nature and degree of efforts

to prevent violations were noted, the Commission mitigated the penalty from cancellation to a \$975 fine or a license suspension of 15 days.

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

Abstract: When Licensees adopt voluntary compliance steps, a failure to follow through on some of their suggested steps will not defeat mitigation where Licensees made serious and substantial efforts to follow through on the voluntary compliance steps and where any failings to achieve a compliance step were minor in light of the substantial steps taken.

Case: *Teri's Town Tavern*, OLCC-00-V-018, November 2000.

Abstract: Where Licensee put herself back on duty by getting up from her table where she was consuming beer to stop a patron from leaving the premises with a drink in his hand, Licensee was acting in good faith to prevent a violation. If this were the only act performed when Licensee put herself back on duty, Licensee would be entitled to mitigation of the penalty for the violation of drinking on duty. However, where Licensee also served beer to individuals, the act of stopping the patron cannot be viewed in isolation from the other on-duty acts to provide mitigation.

Case: *Jefferson Grocery*, OLCC-00-V-037, October 2000.

Abstract: Where the record shows that the licensee participates in the Responsible Vendor program, absent additional aggravating or mitigating circumstances, the recommended penalty in the penalty schedule for a Responsible Vendor Program participant is appropriate.

Case: *Cisco & Pancho's*, OLCC-99-V-080ES, September 2000.

Abstract: Where violation of dancing restriction was not substantial, no violation of ORS 471.405(1) occurred.

Case: *Yen Ha Coast*, OLCC-99-L-005, May 2000.

Abstract: Licensee was charged, in the alternate, with a violation of ORS 471.405(1), sale in manner other than the license permits and OAR 845-006-0100(2)(b), changing the principal use of any room or area without prior OLCC permission. Because there was no proof that alcoholic beverages were sold or offered for sale at the dances, a necessary element, the Commission concluded that Licensee did not violate ORS 471.405(1). The Commission concluded that Licensee violated OAR 845-006-0100(2)(b) by changing the principal use of her dining room to hold two all-age dances on two dates, after approval from the OLCC had been denied.

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

Abstract: Where service to two minors occurred simultaneously, and the bartender failed to check the identification of either, the incident was penalized as a single violation that was aggravated, rather than two violations.

Case: *A Taste of Thai*, OLCC-99-V-015, February 2000.

Abstract: Licensee violated a restriction prohibiting her from allowing her former husband to work in the licensed business, when husband was observed performing tasks on the licensed premises on 8 occasions in 2 months. The Commission concluded that mitigation of penalty short of cancellation was appropriate as Licensee did not want her former husband working on the premises and asked him not to do so, but did not press the matter because of fear of assault by him; former husband did not commit any violations of liquor laws during the time he worked; Licensee has had no previous violations during the six years she has been licensed at the premises; following the events constituting

the violation, Licensee obtained a restraining order against her former husband; and Licensee has since enforced the restraining order and her former husband was jailed.

Case: *Brother's Market & Deli*, OLCC-99-V-044, February 2000.

Abstract: The Licensee's actions following the sale and the minor's departure from the store do not "undo" the lack of age verification before the sale or the resulting violation. Licensee's subsequent action to retrieve the alcoholic beverage and to refund the money should be considered in assessing a penalty, not in determining whether a violation occurred. The Commissioners determined that an appropriate penalty was a Letter of Reprimand.

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

Abstract: In January 1999, 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.

Case: *Express Mart*, OLCC-97-V-067, July 1998.

Abstract: The Commission has concluded that where the penalty schedule specifies a standard penalty of suspension (only), any mitigation will be applied only to reduce the length of suspension, and will not result in giving the Licensee the option of paying a monetary penalty in lieu of suspension.

Case: *7-Eleven Food Store No. 14495D*, OLCC-98-V-003, May 1998.

Abstract: The fact that Licensees have had three violations within a six month period is not a reason to aggravate the penalty because the Commission's penalty schedule rule, OAR 845-06-200, already reflects increased sanctions for each successive violation within a two-year period.

Case: *Mini Mart*, OLCC-97-V-006, June 1997.

Abstract: The Commission concluded that the circumstances in this case were mitigating circumstances under OAR 845-06-200(7)(c) and reduced the penalty to a Letter of Reprimand where: the minor decoy was six feet tall, on multiple occasions over a period of years the minor decoy had worn the uniform of a Washington County Search and Rescue unit into the licensee's store, on other occasions the minor decoy had worn a 45-caliber handgun when he went to licensee's store. Licensee argued that because he had seen the minor on multiple occasions wearing a uniform that licensee believed was a law enforcement agency uniform, and on other occasions had seen the minor carrying a hand gun, that he reasonably believed that the minor was 21 years of age or older.

Case: *H-Market No. 2*, OLCC-96-V-008, December 1997.

Abstract: The Commission imposed an indefinite suspension on the license. Where licensee allowed others to obtain an interest in the business without prior Commission approval, the Commission suspended the licensee "until such time as Mr. Rahim and Mr. Naseri are divested of their interest in the business or become approved as licensees."

Case: *Deborah Anderson*, OLCC-96-V-042, December 1996.

Abstract: The Commission concluded that the fact that permittee accepted marijuana as a tip for service at the licensed premises is directly related to the service permit privilege and is a circumstance warranting aggravation of any penalty. Moreover, the Commission concluded that aggravation is also warranted because the violation involved two controlled substances.

Case: *Flynn Vineyards*, OLCC-94-V-080, February 1996.

Abstract: Where licensee held a winery license and licensee committed a violation of being convicted of a felony, Commission mitigated the penalty because there were mitigating circumstances and, in addition, the Commission imposed a fine only rather than a fine and suspension combined because the licensee showed that imposition of a suspension on the winery would have significant adverse effect on the licensee's ability to continue operation of the winery due to the ongoing nature of the wine-making process.

Case: *New Max's Tavern*, OLCC-95-V-010, February 1996.

Abstract: Where the licensee has had one prior violation for maintaining a noisy establishment, the appropriate level of sanction for the licensee's second Category III Violation is Level 2.

Cases: *Whiskey Gulch Gang*, OLCC-93-V-008, October 1993; *Headless Horseman*, OLCC-93-V-049, December 1993.

Abstract: A Letter of Warning does not count in any cumulative way to increase future sanctions against the licensee.

Where the standard sanction in the penalty rule was a Letter of Reprimand and there were reasons to mitigate the penalty, the penalty was mitigated to a Letter of Warning.

Case: *Seafood Mama*, OLCC-92-V-087, March 1993.

Abstract: For a violation of ORS 471.360(1), mitigation of penalty is warranted where a service permit is obtained after a violation, but before hearing.

Case: *Lighthouse Inn/Rosie's Restaurant*, OLCC-92-V-086, March 1993.

Abstract: Significant mitigation was appropriate for licensees in this case where employee disregarded licensees' instruction not to serve the customer hard liquor, where licensees had genuine interest in complying with liquor laws and a long, prior history of good compliance, and where food service was emphasized over liquor sales.

Case: *Powderhorn*, OLCC-92-V-004, February 1993.

Abstract: The use of a deadly weapon by the licensee in a disorderly activity he committed was an aggravating circumstance.

Case: *Beer Nutz*, OLCC-92-V-003, May 1992.

Abstract: The Commission overrules the portions of the *Drumstick Tavern*, OLCC-89-V-018, April 1989, and *Eola Inn*, OLCC-90-V-105, June 1991, which established precedents holding that mitigation is appropriate when minors did not attempt to consume alcohol or did not, in fact, consume alcohol when they were on the licensed premises unlawfully. The Commission concludes that the fact that a violation did not occur is not in itself a mitigating circumstance.

Case: *Sao-Mai Restaurant*, OLCC-91-V-136, August 1992.

Abstract: Where the license was suspended on an emergency basis, and by the time the Final Order was issued, licensees had already served the number of days of suspension that was ordered, the Commission gave licensees credit for the number of days of suspension that they had already served.

Case: *Montero's Authentic Mexican Restaurant*, OLCC-92-V-018, July 1992.

Abstract: There was no basis for crediting and reducing licensee's penalty for the time and profits she lost during the days she waited for the Commission to complete their investigation of the pending violations and approve her license application.

Case: *Candy and Jeans*, OLCC-91-V-192, June 1992.

Abstract: Where licensee argued that penalty should be mitigated because the customer who was VIP was taking a cab home and was not driving, the Commission concluded this is not a reason to mitigate because statute prohibiting sale to visibly intoxicated persons does not distinguish between VIPS who are driving and those who are not.

Case: *New Max's Tavern*, OLCC-91-V-087, December 1991.

Abstract: There was a reason to aggravate the penalty where the licensee failed to immediately transmit the service permit applications of five employees, but only one violation was charged.

Instructions given to a licensee at her request for educational purposes are not a reason to aggravate the penalty for prior warnings.

Case: *17th & Lincoln Market*, OLCC-91-V-060, December 1991.

Abstract: Licensee's good-faith effort to prevent a violation was a reason to mitigate the penalty. Just before selling beer to the minor in the instant case, licensee refused to sell to a minor who could not show identification.

Case: *Old Town Club*, OLCC-90-V-168, November 1991.

Abstract: There was a reason to mitigate the penalty for licensee's good-faith effort to comply where licensee's employee discovered one of two minors on the premises and required the minor to leave when he could not show identification.

Cases: *Plaid Pantry No. 96*, OLCC-90-V-048, January 1991; *The Marketeria*, OLCC-91-V-088, November 1991.

Abstract: Where the minor involved is a juvenile, there is a basis to aggravate the penalty.

Case: *The Marketeria*, OLCC-91-V-088, November 1991.

Abstract: There is a basis to mitigate the penalty where the licensee did as much as she reasonably could to ensure that the employee would not sell to a minor, but the violation occurred in spite of licensee's efforts.

Cases: *Robin Munson*, OLCC-87-V-011, September 1987; *Blue Moon*, OLCC- 87-V-012, September 1987.

Implicitly overruled in *Yogee's*, OLCC-10-V-066/066A-/66B, December 2011 (at FN 1)].

Abstract: Violations of permitting a minor to consume (OAR 845- 06-035(2)(a)), enter and remain in a posted area (OAR 845-06-035(2)(b)), and permitting on the premises without verifying age, should be considered one violation for purposes of sanction and violation record because the offenses involve one minor and were sufficiently related in

time and subject matter.

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

Abstract: Where a licensee is charged with several violations, the penalties for the separate violations should not be merged if the violations are not based on the same factual circumstances.

Cases: *Pratt v. Real Estate Division*, 76 Or App 483, 709 P2d 1134 (1985); *Britton v. Bd. of Podiatry Examiners*, 55 Or App 544, 632 P2d 1273 (1981).

Abstract: Agency is not permitted to permute a single discrete act of misconduct into two or more by affixing different labels to the act.

C.4.b. Consolidation of Penalties

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

Case: *7-Eleven Store #2363-14504A*, OLCC-08-V-107, April 2009.

Facts: Licensee pled no contest to two misdemeanors committed on the licensed premises. During the violation hearing Licensee argued that she did not commit those crimes and wouldn't have pled no contest if she had known the consequences to her license.

Abstract: Where two convictions are at issue for violating two different and distinct laws, the incident should be penalized as a single violation that was aggravated, rather than two violations.

The convictions at issue, although similar in nature, were for violating two different and distinct records laws. Therefore aggravation for multiple incidents was appropriate.

Key Words/Phrases: conviction, committed on licensed premises, relitigate, tobacco records

Case: *The Gold Mine*, OLCC-94-V-039, July 1995.

Abstract: Where licensee argued that he should have been found to be in violation of one instead of two separate violations for an employee serving alcohol without a service permit, the Commission concluded that it was appropriate to charge licensee with two separate violations because there had been numerous contacts by OLCC staff between the incidents during which time staff instructed licensee on employees serving without service permits. Only one employee was involved and the incidents were approximately two weeks apart.

Case: *Punjab Tavern*, OLCC-92-V-088, June 1993.

Abstract: Where licensee was charged with two separate violations, but under similar circumstances the Commission had charged other licensees with one violation and recommended aggravation of the penalty, the Commission determined to apply the sanction consistent with one violation with an aggravated penalty so that licensee was not treated differently from other licensees to his detriment.

Cases: *Sao-Mai Restaurant*, OLCC 91-V-136, August 1992; *Cow Palace*, OLCC-91-V-180, June 1992; *Seafood Mama*, OLCC-92-V-087, March 1993.

Abstract: The Commission has charged a single violation and imposed a single penalty in circumstances where a licensee had multiple employees who did not have valid service permits.

Case: *Doc's Golden West*, OLCC-89-V-085, October 1989.

Abstract: The Commission has concluded that where the record did not indicate, in terms of facts or argument presented, why the licensee should be treated differently from other licensees alleged to have committed similar multiple violations, the Commission imposed a lesser penalty so that the licensee was not treated differently from other licensees, to his detriment.

Case: *Howard's Northwest Deli*, OLCC-88-V-101, February 1989.

Abstract: Where licensee who held both package store and restaurant licenses committed violation by selling kegs, the Commission charged a violation against only the restaurant license, not the package store license. The Commission did not consider whether separate violations and penalties could have been charged against each license.

Case: *214 Tavern*, OLCC-87-V-045, December 1987.

Abstract: A charge for the violation of ORS 471.315(1)(d) (maintained disorderly establishment) is not separate or discrete from the violation of OAR 845-06-045(2) (permitted disorderly activities) and OAR 845-06-045(3) (permitted criminal activities), because the two rules interpret the statute.

Case: *Sandy Texaco Gas & Goodies*, OLCC-87-V-019, November 1987.

Abstract: Violations of ORS 471.315(1)(g), for selling to a minor, and of ORS 471.130(1), for failing to check identification, should be considered one violation for purposes of a sanction and the licensee's violation record.

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. The separate statutory origins of the statute and the rule presumably indicate that they have differing regulatory purposes. This would be a basis for identifying separate discrete acts and, thus, separate violations and sanctions. However, the Hearings Examiner followed the recommendation of Regulatory staff and treated the two violations as one incident for purposes of the licensee's violation record and proposed sanction.

C.4.c. Penalty Schedule

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

Case: *7-Eleven #2363-14504A*, OLCC-08-V-107, April 2009.

Facts: Licensee pled no contest to two misdemeanors committed on the licensed premises. During violation hearing Licensee argued that she did not commit those crimes and wouldn't have pled no contest if she had known the consequences to her license.

Abstract: Where two convictions are at issue for violating two different and distinct laws, the incident should be penalized as a single violation that was aggravated, rather than two violations.

Key Words/Phrases: conviction, committed on licensed premises, relitigate, tobacco records

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: The schedule matrix for standard penalties includes repeated violations of the same statute within two years, so aggravating the standard penalty on these grounds, as the ALJ had proposed, would be unfairly duplicative. The Commission disagrees with the ALJ's proposed sanction in this case.

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: *H2O Martini Bar & Restaurant*, OLCC-06-V-014/014A, December 2006, *affirmed without opinion*, 213 Or App 240 (2007).

Facts: Licensee had several employees working without valid service permits, each with different circumstances. One employee told licensee and inspector that he had one, and gave the licensee a forged one. Licensee argued there was no evidence either employee actually served, sold or mixed alcoholic drinks.

Abstract: Even if mitigation was warranted, it would serve only to reduce the length of suspension. It would not change the nature of the penalty. The Commission has previously held that where, as here, the penalty schedule specifies a standard penalty of suspension only, mitigation does not apply to give a licensee the option of paying a monetary penalty in lieu of suspension. *Express Mart* (OLCC, Final Order, 97-V-067, July 1988).

Key Words/Phrases: service permit, imputed to licensee, concealment of a violation, mitigation, individual acts, monetary penalty in lieu of suspension, nature of the penalty

Case: *H2O Martini Bar & Restaurant*, OLCC-05-V-012, December 2005, *affirmed without opinion*, *Capital Asset Holdings, Inc., et al v. OLCC*, 213 Or App 240 (2007).

Facts: Licensee had a No. 1 minor posting. Licensee's minor sister was observed at the premises by OLCC inspectors, and receipts showing the sister had "comped" food and drink orders on other occasions was found. OLCC also performed a minor decoy operation due to complaints of minors entering the premises, and Licensee's employees

permitted the decoy to enter and be served. Licensee had prior violations for serving a minor and paying for alcohol with NSF checks. Since the violations Licensee installed electronic ID scanner and hired DPSST certified security.

Abstract: A violation of OAR 845-006-0360 (covering over a minor posting sign) is not specifically categorized in the Commission's penalty schedule, Exhibit 1 to OAR 845-006-0500. The Commission sought to classify the violation as a Category IV violation, i.e., one that creates a climate conducive to abuses associated with the sale or service of alcoholic beverages. All licensees that allow on-premises consumption are required to post signs stating when or if minor patrons are allowed on the premises. As set forth in OAR 845-006-0340(1), the Commission has "a responsibility to send a clear message to the community and its youth that drinking alcohol is an adult activity, and that drinking environments are for adults." A licensed premises that does not have its minor posting in full public view runs the risk that a minor seeking entry would not know that he or she was not allowed inside. It was appropriate for the Commission to classify the violation of covering a minor posting sign as a Category IV violation.

The Commission was authorized to cancel a license where Licensee had seven violations within the first six months the licensed premises was open for business. At least three of the seven violations (Licensee's false statements to the Commission and his employees' failure to verify the age of persons seeking to buy alcohol) were serious offenses. They were violations that created an immediate threat, or at least a potential threat, to the public safety. These seven violations also established a pattern of disregard for the law, which was further evidenced by the Licensee's attempts to conceal from the Commission that his minor sister had been on the premises on multiple occasions, and his allowing her unfettered access to the premises even after he had been warned by an inspector not to allow minors inside.

Key Words/Phrases: credibility determination, make available to minor, minor posting

Case: *Circle K Store No. 468, OLCC-04-V-047, April 2005.*

Facts: Licensee's employee sold a can of "Spark" to a minor decoy, on employee's first day of work. Employee didn't know that "Spark" was alcoholic. Licensee had previously had a sale to a minor within 2 years, and had numerous policies and practices to avoid sales to minors.

Abstract: Where the record shows that the licensee participates in the Responsible Vendor Program, absent additional aggravating or mitigating circumstances, the recommended penalty in the penalty schedule for a Responsible Vendor Program participant is appropriate. See also *Jefferson Grocery* (OLCC, Final Order, 00-V-037, October 2000).

Case: *The Shack Restaurant & Sports Bar, OLCC-01-V-067, January 2002.*

Abstract: Where licensee entered the Responsible Vendor Program after, rather than before, the violation occurred, the standard penalty matrix for category III violations is applicable, rather than the category III(a) matrix for those already enrolled in the Program.

Case: *Quick Stop Market, OLCC-99-V-028/-063, June 2000.*

Abstract: The Commission will not impose a greater civil penalty than that which was in effect at the time of violation, regardless of the penalty rule in effect at later stages of the proceeding. Generally, the most lenient version of the penalty schedule rule in effect at the time of violation, time of charging document, or at the time of the Final Order, will apply.

Case: *Agate Beach Market & Deli, OLCC-99-V-068, January 2000.*

Abstract: Where the penalty schedule rule in effect at the time of the Final Order was more stringent than that in

effect at the time of the violation, the Commission applied the less stringent penalty schedule.

Case: *Sharon Ann Purcell*, OLCC-96-V-031, July 1997.

Abstract: The Commission concluded that a conviction for a violation of any municipal ordinance committed on the licensed premises (ORS 471.385(1)(b)) is more similar to a conviction for permitting unlawful activity (OAR 845-06-047(3)) than a felony conviction, which is also included in ORS 471.385(1)(b). According to the penalty schedule rule, a violation for permitting unlawful activity (OAR 845-06-047(3)) is a Category III violation. The Commission concluded that an appropriate penalty for violation of ORS 471.385(1)(b), when the violation does not involve a felony, is the penalty recommended for Category III violations.

Case: *Dillinger's Pub Inc.*, OLCC-92-V-095 October 1993.

Abstract: For determining whether there are "successive violations in the same category within a two-year period" in OAR 845-06-200(8), the relevant date of a violation would be the date that the act was committed which violated a statute, rule or order, rather than the date that a Final Order concluded that there had been a violation.

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

Abstract: The Commission determined to assess violations of ORS 471.315(3) (history of serious and persistent problems) as Category I violations under the penalty schedule.

Case: *Plaid Pantry No. 96*, OLCC-90-V-048, January 1991.

Abstract: It is an aggravating circumstance if a violation involves a person who is less than 18 years old and the person objectively appears to be less than 21 years old.

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

Abstract: Where none of the suspensions for the individual violations exceeded 30 days, the Commission allowed the licensee the option of paying a fine instead of suspension, even though the aggregate suspension for all of the violations exceeded 30 days. [Reference is made to ORS 471.322 which allows the Commission to accept payment of a fine in lieu of suspension only when the suspension would be for 30 days or less].

Case: *Doc's Golden West*, OLCC-89-V-085, October 1989.

Abstract: Where the Commission inspector had not had a chance to intervene between violations, and where the record did not indicate, in terms of facts or argument presented, why the licensee should be treated differently than other licensees alleged to have committed similar multiple violations, the Commission imposed a lesser penalty so that the licensee was not treated differently than other licensees, to his detriment.

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

Abstract: The Commission has a policy of treating separate violations at the first level of the penalty schedule or even as the same violation where the Commission inspector has not had a chance to intervene between violations.

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: Where a licensee is guilty of a violation solely as the result of the licensee's responsibility for the actions of an employee, the penalty schedule requires the same term of suspension for the licensee and employee, absent any

aggravating or mitigating circumstances to distinguish the appropriate suspensions. The Commission cannot impose a longer suspension on the licensee by simply labeling the licensee's violation as something different than the permittee's violation.

Case: *Gilmore v. Board of Psychologist Examiners*, 81 Or App 321, 725 P2d 400 (1986).

Abstract: Agency may revoke psychologist's license where psychologist was guilty of at least one of the 20 charges against her. The revocation of a license is a sanction within the agency's discretion.

Case: *Patty Jean's*, OLCC-85-V-037, January 1986.

Abstract: A prior warning, where the licensee was not given the opportunity for a hearing, should not be treated as a prior violation for penalty schedule purposes. The penalty should not be elevated to the next level on the schedule because of the prior warning.

Case: *Tom's Grocery*, OLCC-84-V-019, 020, February 1985.

Abstract: Violation charges involving previous dates that are consolidated into one hearing with charges involving subsequent dates may be treated as prior violations for purposes of the Commission's penalty schedule rule.

C.4.d. Mixed Penalty

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Case: *Downtown Deli & Greek Cusina*, OLCC-08-V-028/028A/028B, October 2009. (Amended order).

Facts: Downtown Portland premises had multiple floors for dancing, night club, bar, restaurant and special events. Premises had operated for decades with very few problems, but started having significant number of issues once the second and third floors were opened. The OLCC had issued numerous warnings in the past.

Abstract: Upon consideration of prior Commission cases where a history of serious and persistent problems has been found to exist and the standard penalty of cancellation mitigated, the Commission observes that the pattern of mitigating so much as to give the option of paying a civil penalty in lieu of any suspension period is insufficient to deter violations of this magnitude or to encourage rapid resolution of the underlying problems. The number and nature of incidents giving rise to a history of serious and persistent problems impact the surrounding community and disproportionately strain law enforcement resources. In the future, the Commission intends to impose some appropriate period of mandatory suspension (not less than one day and not to exceed 30 days), with or without the option of paying a civil penalty in lieu of a portion of the suspension period, as a penalty in cases of this type.

Key Words/Phrases: History of serious and persistent problems, restrictions, suspension versus cancellation, mitigation of Category I violation

Case: *Reston Red's Tavern*, OLCC-89-V-155, April 1990.

Abstract: It is appropriate to mitigate the standard penalty to a three day suspension or \$195 fine, and also provide a Letter of Reprimand to emphasize the Commission's concern about disorderly premises.
