

BEFORE THE LIQUOR CONTROL COMMISSION
OF THE STATE OF OREGON

In the Matter of the)	
Renewal of a)	
Dispenser Class A)	
License by:)	FINAL
)	FINDINGS OF FACT,
Van's Olympic Room, Inc.)	CONCLUSIONS OF LAW,
dba J.B.'S PARADISE ROOM)	AND ORDER
3530 N Vancouver Avenue)	
Portland, Oregon 97227)	OLCC-85-L-005
- - - - -)	
Multnomah County)	

A hearing in this matter was held on March 26, 1985, in Portland, Oregon, before Hearings Examiner Allen R. Scott. The Applicant appeared and was represented by James K. Neill, Jr., Attorney at Law, Portland, Oregon. The Commission was represented by legal counsel.

On July 22, 1985, the Commission considered the record of the hearing, the applicable law, the Proposed Order of the Hearings Examiner, Exceptions to the Proposed Order of the Hearings Examiner, and Response to Exceptions. Based on this review, the Commission makes the following:

BACKGROUND

Applicant seeks renewal of the DA license at J.B.'s Paradise Room. Applicant corporation has held the license since December of 1980. The premises has operated with a dispenser license for at least 27 years.

ISSUES

I. The staff asserts that the license should not be renewed because Applicant has not operated the premises

substantially as proposed when the license was originally granted or previously renewed. OAR 845-05-025(3).

II. The staff asserts that the license should not be renewed because Applicant has failed to provide at least the food service last approved by the Commission. OAR 845-08-015(6).

III. The staff asserts that the license should not be renewed because Applicant has less than or is unable reasonably to project at least a 25 percent ratio of food sales to total sales of food and alcoholic beverages. OAR 845-05-025(4).

I. FAILED TO OPERATE AS PROPOSED

The following criteria will be given sufficient consideration so that a license will not be issued unless good cause which outweighs the criteria involved is shown by the applicant:

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(3) The applicant has or will have inadequate financial resources or facilities to build and operate the licensed premises as proposed by the applicant. If the application is for renewal, the applicant has not built or operated the licensed premises substantially as proposed by the applicant when the license was originally granted or previously renewed. OAR 845-05-025(3).

Findings of Fact

1. In October and November 1981, Applicant requested permission from the Commission to change aspects of the operation. The proposal involved the addition of topless dancing, a change of location of the stage, a change in the number of electronic games on the premises, the addition of dining seating,

and the removal of a wall. Applicant also proposed to add various items to the menu if the remodeling request were approved. Applicant also indicated the intention of having the topless dancing at lunch to increase lunch food sales.

2. The Commission's staff approved the request.

3. Applicant instituted some of the proposed changes but did not institute some of the other proposals, such as the change in seating and the additions to the menu. Applicant also offered topless dancing at lunch only on rare occasions.

4. The remodeling request was not made in connection with the renewal of the license.

Conclusions of Law

The Commission concludes that this regulation does not provide a basis for non-renewal. The rule calls for nonrenewal if an Applicant fails to operate the premises "substantially as proposed when the license was originally granted or previously renewed." (Emphasis added.) Renewal may therefore be denied if an Applicant proposed to operate in a particular manner when previously renewed and then either did not implement the proposal, or, having done so, then changed the operation in a way that substantially deviates from the proposal.

In this case, the only proposal which Applicant made concerning the operation of the premises was the proposal described in the Findings of Fact above. It was not made in connection with the renewal of the application. The Commission granted the request. Applicant then implemented some of the proposal but

did not implement other portions of it, such as the additions to the menu, the additions to dining seating, and the addition of topless dancing at lunch. The staff did not argue that those portions of the proposal which Applicant received approval for and then carried out could be the basis for nonrenewal of the license. The staff did argue, however, that Applicant's failure to carry out the other approved portions of the proposal is a basis for nonrenewal. However, as these changes were not in fact carried out by Applicant, they can not be the basis for the conclusion that Applicant has changed the operation of the premises from the way it proposed to operate the premises at the time of some prior renewal. In other words, a proposed change not actually made is not a change.

The Commission concludes that it has not been established that Applicant has failed to operate the licensed premises as proposed when the license was previously renewed. This criterion thus does not provide a basis for denying the renewal of the application.

II. FAILURE TO PROVIDE AT LEAST THE
FOOD SERVICE LAST APPROVED

Operating as Proposed. Commercial establishments must provide at least the food service last approved by the Commission, including number of meal periods, hours of meal service, and type of cuisine. Failure to provide this level of service is a violation and may result in a notice of violation or be grounds for refusing to renew a license. OAR 845-08-015(6).

Findings of Fact

5. In October and November 1981, Applicant requested permission from the Commission to remodel the premises and to change aspects of the operation (see Finding of Fact 1). At this time, Applicant's dinner menu was as follows: Super burger, chili burger, little smokies, pressed ham sandwich, pressed turkey sandwich, and pressed chicken sandwich. In addition, all items on the lunch menu were available at dinner, including three types of hamburgers, chili, chicken wings, chicken dinner, hot link sandwich, hot tamales, and deep fried burrito. Applicant stated in the modeling request that if remodeling were approved, it would add the following items to the dinner menu: chilirito, tostadas, Mexican dinner plate, corny hush puppy sticks, and Laredo burger.

6. The remodeling request was granted; however, Applicant did not add the five items noted above to the menu.

7. As of December 10, 1984, the menu at Applicant's premises offered the following dinners: chicken wings, fish dinner, English muffins and coffee, and various specials. The lunch menu offered a hamburger, a cheeseburger, and a double cheeseburger. Applicant had, however, instituted a breakfast menu at this time which offered bacon and eggs and a breakfast special.

8. As of February 27, 1985, shortly before the hearing, Applicant offered the following dinner entrees: chicken dinner, fish and chips, pork chop dinner, and ham and cheese. The lunch menu offered three burgers, ham sandwich, and chicken

wings. Four kinds of omelettes also were available. Also, the breakfast menu contained ham and eggs, sausage and eggs, bacon and eggs, and pork chops and eggs.

Conclusions of Law

In 1981, Applicant proposed to add five items to its menu. This proposal was approved by the Commission. Applicant did not, however, add the five items to the menu. Under the regulation quoted above (OAR 845-08-015(6)), a renewal application may be denied if the applicant has not provided the food service "last approved" by the Commission. In a literal sense, the 1981 menu with the five items added might be regarded as the food service "last approved" by the Commission. However, under another rule, OAR 845-06-100(6), Applicant was not even required to obtain Commission approval to add these five items to the menu. OAR 845-06-100(6) requires that a licensee obtain prior approval from the Commission for "any change in type of style of the cuisine offered by a dispenser licensee, if a special type or style of cuisine was proposed at the time of licensing." As Applicant's 1981 proposal to add five items to the menu did not constitute a proposal to change the type or style of cuisine offered at the premises, Applicant was not required to obtain the approval of the Commission. The fact that the Commission did "approve" the addition of these items does not, in the Commission's view, obligate Applicant, under OAR 845-06-015(6), to actually add the items or to maintain them on the menu. Applicant's failure to actually add these items does not appear to be basis for non-renewal.

Applicant's 1981 food service (without the five items proposed for addition to the menu) appears, then, to be the food service which was "last approved" by the Commission. Under the regulations, Applicant was therefore required to maintain "at least" this food service. The question is whether the 1984 menu and the 1985 menu (Findings of Fact 7 and 8) are such a deviation from the 1981 menu to constitute a failure to provide at least the service offered in 1981. The 1984 menu has significantly fewer dinner items and lunch items than the 1981 menu. Although OAR 845-08-015(6) does not state that a deviation in the number of items offered is a factor in determining whether the last approved service has been maintained, it is reasonable to conclude that a substantial reduction in the variety or number of offerings might be regarded as a failure to maintain the approved food service. In this sense, the 1984 food service is somewhat less in magnitude than the 1981 food service. On the other hand, Applicant had in 1984 added breakfast service. That factor would seem to offset the reduction in lunch and dinner items. Furthermore, the February 1985 menu would appear to be reasonably comparable in terms of numbers of items to the 1981 menu. It is also noted that both the December 1984 and February 1985 menus maintain the same general type of cuisine as approved in 1981.

The Commission concludes that the reduction in the number of items offered in the 1984 menu, given the addition of breakfast and given the fact that the 1985 menu compares reasonably

to the 1981 menu, is not enough to provide a basis for non-renewal under this criterion.

III. FAILURE TO MAINTAIN THE REQUIRED FOOD PERCENTAGE

The following criteria will be given sufficient consideration so that a license will not be issued unless good cause which outweighs the criteria involved is shown by the applicant:

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(4) The applicant seeks a Dispenser Class "A" license under ORS 472.110(2) and has less than or is unable reasonably to project at least 25 percent ratio of food sales to gross sales of food and alcoholic liquor. OAR 845-05-025(4).

The Commission may choose not to renew a commercial establishment's license if the licensee fails to maintain at least a 25 percent ratio of food sales to gross sales of food and alcoholic beverages during the current license year. This criterion will be waived if the licensee meets the three requirements listed below:

(A) The licensee has complied with the regular meal requirements and the minimum food service requirements; AND

(B) The licensee shows that a serious and substantial effort to promote food service was made during the current license year; AND

(C) The licensee has adopted a reasonable corrective plan to increase food sales on both a short and long term basis during the next license year. This plan should include steps to be taken immediately plus steps to be taken within the next year. OAR 845-08-015(5)(a).

The following are some of the factors that will be considered in determining whether or not a serious and substantial effort to promote food service has been made or that

a corrective plan to increase food is reasonable. Licensees are responsible for offering evidence of their efforts or projections which show an increase or improvement. The list is not all-inclusive; other factors may be considered.

(A) An increase in the hours of food service operation.

(B) An improvement in the type of food service during non-meal hours.

(C) An improvement in the type of food service and menu during meal hours.

(D) An increase in the ratio of seating capacity for food service compared to seating for alcoholic beverage service.

(E) Decor and atmosphere conducive to dining.

(F) An increase in food service advertising.

(G) Increase in the number of hours worked by food service personnel.

(H) Food service inventory reports, purchase orders and invoices which show an increase in the amount of food purchased and available.

(I) Promotions to increase food sales.

(J) Description of the licensee's market, competition, and community economic conditions which directly affect the licensee's food sales. OAR 845-08-015(5)(b).

Findings of Fact

9. On the renewal application involved in this matter, Applicant provided the following average monthly sales figures: food - \$2,489; alcoholic beverage - \$9,804; total - \$12,293. This yields a food percentage of 20.24.

10. Applicant provided the following figures for the four months preceeding the hearing:

<u>Month</u>	<u>Food</u>	<u>Alcoholic Beverage</u>	<u>Total</u>	<u>Food Percent</u>
12-84	2,084	\$9,691	\$11,775	17.69
1-85	2,765	7,262	10,026	27.57
2-85	3,020	7,602	10,622	28.43
3-85 (1-24)	2,320	7,573	10,755	21.57

11. The food sales percentage at this premises since 1978 have been as noted below. The premises was owned by different licenses during 1978 and 1979 and was closed during 1980.

<u>Year</u>	<u>Percent</u>
1978	24.32
1979	26.00
1980	Closed
1981	13.05
1982	15.15
1983	18.68

12. Applicant has made the following attempts to stimulate food sales during the 1984 license year: Readerboards advertising the food service were placed on the sidewalk outside the premises. However, two such readerboards were stolen and not replaced. The cost of the readerboards was approximately \$100. Applicant distributed a flyer advertising a special barbecue sauce sold at the premises. The cost of the flyer was approximately \$75. Applicant began serving breakfast and thereby increased the hours of food service. Applicant made some slight changes in the menu and in the price structure in an attempt to attract food clientele. Applicant sold various items on the menu in single pieces, such as chicken wings, in an attempt to stimulate sales. Applicant made lunch items available at dinner and dinner items available at lunch. Applicant changed cooks in order to find someone who would help

him promote food sales in the neighborhood. Applicant purchased a microwave oven to allow for better use of frozen foods and less spoilage.

13. Applicant had food service available on the premises at all times during 1984 and otherwise complied with the minimum food service requirements.

14. Applicant's premises is located in that portion of Portland in which many black people live. It is frequented primarily by blacks. The unemployment rate in the area is very high and the general economic climate is depressed. Many people in the area do not have enough money to eat out frequently. It is difficult for restaurants in the area to maintain high food sales. Evidence from the Commission's records indicates that four black-owned DA outlets in the area patronized primarily by blacks have the following food percentages: Eldorado - 34.4 percent; B.G.'s - 16.84 percent; Genevas - 20.00 percent; Lowells - 13.04 percent.

15. Applicant's premises and the other black owned DA outlets in the area tend to function to some degree as social clubs or gathering spots rather than as restaurants.

Conclusions of Law

The evidence clearly establishes that Applicant's food sales are below the 25 percent figure. The staff argued and provided convincing evidence that the figures provided by Applicant on the renewal form are not reliable. The evidence indicates that the recordkeeping at the premises during 1984

was not well organized, particularly during a period of approximately four months late in the year after Applicant Lowell Jackson's wife had been seriously injured. The evidence also indicates that some of the records provided by Applicant indicate a mark-up on food of 600 or 700 percent, which, according to the evidence, is a remarkably high mark-up. The Commission concludes that Applicant's food sales were in fact below the 20 percent figure indicated on the renewal form. It is not possible to determine the exact figure from the evidence. In any event, Applicant's sales clearly are below the 25 percent figure. Applicant provided no projections of future sales, although Applicant did argue that food sales percentage has gone up gradually over the past few years. However, the Commission concludes that given the state of the records and the fact that sales are well below 25 percent, it would not be reasonable to project that Applicant will reach the 25 percent figure.

Under the regulations quoted above, there are potentially two bases for Applicant's license to be renewed despite the failure to meet the 25 percent figure. Under OAR 845-05-025(3), a license may be renewed despite low food sales if "good cause" is shown. Under OAR 845-08-015(5), a license may be renewed despite low food sales if three conditions stated in the regulation are met. Those three conditions include compliance with the regular meal requirements and minimum food service requirements, a showing of a serious and substantial effort to promote food service during the current year, and the adoption of a reasonable corrective plan to increase food sales.

The evidence indicates that Applicant has met the minimum food service requirements and regular meal requirements set out by the Commission's rules. Applicant has thus met one of the three requirements set out by OAR 845-08-015(5).

However, the evidence does not establish that Applicant has made a serious and substantial effort to promote food sales during the current year. Applicant did make some attempts to advertise, but they were not extensive. Applicant also changed the menu slightly and lowered prices. Applicant also made some attempt to promote sales by selling individual items rather than whole dinners and by permitting patrons to order from either the lunch or dinner menu during any time of the day. It is concluded, however, that these efforts and the others noted in the Findings of Fact above were not serious and substantial. They involve very little cost and very little effort on the part of Applicant and its employees.

Licensee also offered no corrective plan for the forthcoming year. Applicant thus has failed to meet two of the three requirements for overcoming the low food sales set out by OAR 845-08-015(5).

Applicant's primary contention regarding the low food sales centers on the difficult market conditions in the area. Applicant provided persuasive evidence that it is quite difficult for a dispenser licensee located in this part of Portland and patronized primarily by the black community to attain food sales above the 25 percent figure. The problem appears to rest

primarily on the economic conditions in the area, where unemployment is high and the general income level is low enough to keep many people from spending significant amounts of money on dining out. Applicant also provided evidence that people in the area tend to view the dispenser establishments primarily as neighborhood bars rather than as places to eat large meals. The fact that it is difficult to meet the 25 percent requirement in the area is supported by the evidence that most of the other bars in the area that are patronized primarily by black people have food sales figures either below the 25 percent level or only slightly above.

This evidence of market conditions and economic factors may be relevant in several ways to this matter. Under OAR 845-08-015(5)(b)(J), it is relevant to the question of whether a "serious and substantial effort" has been shown by a licensee during the past year and to whether the corrective plan offered is reasonable. In this case, however, Applicant did not establish that market conditions and economic factors made its rather slight efforts "serious and substantial." Furthermore, as Applicant did not offer any corrective plan, market conditions and economic factors have no relevance to that issue.

The market conditions and economic factors in the area are also relevant, however, to OAR 845-05-025(4), which allows for renewal of a license, even if sales are below the 25 percent figure, if the Applicant shows "good cause." The Commission concludes that Applicant has established good cause for overcoming the failure to meet the 25 percent figure through its

evidence relating to the market and economic conditions in the area. This is a very close case, however. The Commission is swayed, nevertheless, by the fact that the evidence indicates that Applicant has made genuine attempts to sell food. Food has been available, according to the evidence, at all times when required. Applicant has made some attempts to promote or advertise food service. Applicant has also attempted to suit the type of food service to the desires of the clientele. Furthermore, the evidence that other establishments in the area have comparable difficulties in meeting the 25 percent requirement is persuasive evidence that it is unusually difficult to meet the 25 percent requirement in this area. There is also evidence that Applicant's food sales have increased slightly, although the lack of reliability of many of the records casts some doubt upon this. On balance, the Commission concludes that the unique market and economic conditions in the area provide good cause for Applicant's failure to meet the 25 percent requirement. Under OAR 845-05-025(4), the license may therefore be renewed despite the failure to meet the 25 percent requirement.

ULTIMATE CONCLUSIONS OF LAW

The license should be renewed despite Applicant's failure to meet the 25 percent food service figure because Applicant has provided good cause for its failure to do so, because Applicant has not failed to operate as proposed at the time of licensing or renewal, and because Applicant has not failed to

provide the food service last approved by the Commission.

OAR 845-05-025(4); OAR 845-05-025(3); OAR 845-08-015(6).

FINAL ORDER

The Commission orders that the application for renewal of a Dispenser Class A license by Van's Olympic Room, Inc., in the trade name J. B.'s Paradise Room, 3530 N. Vancouver, Portland, Oregon be GRANTED.

It is further ordered that notice of this action, including the reasons for it, be given as provided by law.

Dated this 26th day of July, 1985.



C. Dean Smith
Administrator
OREGON LIQUOR CONTROL COMMISSION

NOTICE: You are entitled to Judicial Review of this Order. Judicial Review may be obtained by filing a Petition for Review within 60 days from the service of this Order. Judicial Review is pursuant to the Provisions of ORS Chapter 183.