

**BEFORE THE LIQUOR CONTROL COMMISSION
OF THE STATE OF OREGON**

In the Matter of the Full)	FINAL FINDINGS OF FACT
On-Premises Sales License Held By:)	CONCLUSIONS OF LAW
)	AND ORDER
Valley Entertainment, LLC)	OLCC-09-V-068 and 09-V-077
Donald Boorman, Managing Member)	OLCC-09-V-068A and 09-V-077A
dba BIG SHOTS BAR & BROILER)	
3755 Portland Road NE)	
Salem, OR 97303)	

HISTORY OF THE CASE

On May 4, 2009, the Oregon Liquor Control Commission (OLCC or Commission) issued a Notice of Proposed License Suspension to Valley Entertainment, LLC, Donald Boorman, Managing Member, dba Big Shots Bar & Broiler (Licensee), alleging that Licensee’s employees permitted persons to drink alcohol in a parking lot under Licensee’s control, in violation of OAR 845-006-0347(5)(a) (Case nos. 09-V-068 and -068A). On May 27, 2009, the Commission issued a Notice of Proposed License Cancellation and Removal From Responsible Vendor Program, alleging that there is a history of serious and persistent problems involving disturbances, lewd or unlawful activities either in the premises or involving patrons of the establishment in the immediate vicinity of the premises in a violation of ORS 471.315(1)(c) (Case nos. 09-V-077 and 077A). Licensee timely requested a hearing on both notices.

The hearing requests were referred to the Office of Administrative Hearings on June 29, 2009, and assigned to Administrative Law Judge Alison Greene Webster. The matters were consolidated for hearing.

The Commission issued an Amended Notice of Proposed Cancellation and Removal From Responsible Vendor Program on December 8, 2009 in Case nos. 09-V-077 and -077A, alleging additional violations. The Amended Notice alleged that Licensee’s employees failed to verify the age of a minor before allowing the minor to buy or be served alcohol in violation of OAR 845-006-0335(1) or, alternatively, that Licensee’s employees permitted a minor in an area of the premises prohibited to minors in violation of OAR 845-006-0335(3).

The hearing was held in Salem, Oregon, on January 12 through 14, 2010, before Administrative Law Judge Webster. OLCC was represented by Case Presenter Becky Voelkel. Licensee was represented by Attorney Michael Mills.

OLCC called the following witnesses: Salem Police Officer Debra Aguilar; Salem Police Officer Alex Asay; Salem Police Sergeant Jeffrey Barratt; Salem Police Corporal Michael Baskett; Salem Police Officer Juan Becerra; Salem Police Officer Brian Bidiman; Salem Police

Officer Matthew Brassfield; Salem Police Officer Jason Donner; Salem Police Officer Cheyne Galusha; Salem Police Officer Robert Johnston; Salem Police Officer Jeffrey Keniston; Salem Police Officer Anthony Mayer; Salem Police Officer Martin Miranda; Salem Police Officer Ryan Morris; Salem Police Officer Robert Piontek; Salem Police Officer Michael Quakenbush; Salem Police Officer Gerrit Roelof; Salem Police Officer Thomas Rousseau; Salem Police Officer Michael Sommer; Salem Police Officer Donald Vidrio; Salem Police Sergeant Darrell Wood; Albany Police Officer Shane Bird; Marion County Sheriff's Deputy Ryan Clarke; Marion County Sheriff's Deputy Justin Kinyon; Marion County Sheriff's Deputy David Watkin; and OLCC Inspectors Steve Berrios and Hector Caballero.

Licensee called the following witnesses: Salem Police Sergeant Doug Carpenter; Kathleen Good, neighboring property owner; Terry L. Crawford, retired Oregon State Police; Toby Haynes, employee; Erik Olsen, employee; Donald Boorman, managing member and Peggy Boorman.

The record remained open for written closing arguments, and closed on February 23, 2010, upon receipt of OLCC Staff's Rebuttal Closing Argument.

EVIDENTIARY RULINGS

OLCC's May 4, 2009 Notice of Suspension, May 27, 2009 Notice of Proposed License Cancellation, December 8, 2009 Amended Notice and Licensee's prehearing statement were received as Pleadings A through D.

OLCC Exhibits A1 through A55 and Licensee's Exhibits L1 through L14 were admitted at hearing without objection.

After the hearing record closed, Licensee offered a Declaration of Mark John and Exhibit L15, pages 1 to 17. The Declaration and Exhibit 15 were excluded from the record as untimely, but received as an offer of proof.

ISSUES

1. Whether there is a history of serious and persistent problems at Licensee's premises, based upon incidents occurring between November 11, 2007 and November 21, 2009. ORS 471.315(1)(c).
2. Whether Licensee has demonstrated a willingness and ability to control the premises. ORS 471.315(1)(c).
3. Whether, on September 20, 2009, Licensee's employees failed to verify the age of a minor, Ryanna Lowsley, before allowing her to buy or be served an alcoholic beverage, when she reasonably appeared to be under 26 years in age in violation of OAR 845-006-0335(1)(a)(b)(c).

Alternatively, whether Licensee's employee's permitted minor Lowsley to be in an area of the premises prohibited to minors in violation of OAR 845-006-0355(3)(b).

4. Whether Licensee's employees permitted persons to consume alcohol in a parking lot that Licensee controls that is associated with the licensed premises. OAR 845-006-0347(5)(a).

5. If one or more violations are found, what is the proper penalty?

FINDINGS OF FACT

1. Valley Entertainment with Donald Boorman, Managing Member, dba Big Shots Bar & Broiler has held a Full On-Premises Sales license at the premises located at 3755 Portland Road, NE, Salem, Oregon since November 1, 2007. (Ex. A1.) Boorman, who had no prior experience owning and operating a restaurant and bar, purchased the business on contract from the prior owner. Upon purchasing the business and obtaining the liquor license, Boorman undertook to upgrade and redecorate the premises. Boorman changed the menu, added new furnishings, and attempted to make the premises more welcoming to customers. (Test. of Boorman.) On December 4, 2007, OLCC approved Licensee for the Responsible Vendor Program. (Ex. A2.)

2. At approximately 12:30 a.m. on November 11, 2007, Salem police officers responded to a fight at the licensed premises. While investigating the fight, an officer contacted a patron, Jonesburg, who was visibly intoxicated. Jonesburg was on parole with a "no alcohol" provision. He admitted to drinking at the licensed premises. Officers arrested the patron for a parole violation. (Ex. A3; test. of Donner.)

3. At approximately 10:32 p.m. on December 6, 2007, a Salem police officer saw a woman passed out in the shrubbery in front of the licensed premises. The officer roused the woman awake. She was visibly intoxicated and smelled strongly of alcoholic beverages. She told the officer she did not know why she fell asleep there, but she recalled drinking inside the licensed premises before being "kicked out." The woman consented to a search of her purse, in which she had a glass pipe with methamphetamine residue. She was arrested for possession of methamphetamine, criminal mischief (intentionally spitting in the patrol car) and an outstanding warrant (failure to appear on other criminal charges). (Ex. A4; test. of Brassfield.)

4. In the early morning hours of December 9, 2007, a large fight involving 20 to 30 people erupted inside the licensed premises. The caller, Licensee's bartender, reported there was "blood everywhere" and the bar was "trashed." He added that the fight had moved out into the parking lot. By the time police arrived, the fight was over and the instigators had left the scene. Officers contacted patrons in the parking lot, who said that there had been a "riot" inside the premises. These patrons had minor scrapes and bruises, but denied the need for medical attention. Two days later, patron Timothy Ferrando contacted the police to report that he had been assaulted in the fight. He had bruising, swelling and a laceration above his right eye. Licensee provided surveillance videos, which showed Ferrando being knocked to the ground and beaten by two Hispanic men. (Ex. A5; test. of Piontek; test. of Quakenbush.)

5. During a bar check of the licensed premises in the early morning hours of January 1, 2008, two Salem police officers and two OLCC inspectors saw a highly intoxicated patron slumped over a table with an alcoholic beverage in her hand. The patron consented to a breath test with a portable breath tester, which indicated she had a blood alcohol content of .34 percent or higher. The patron was unable to walk or stand on her own, and was carried from the bar by her friends. (Ex. A6; test. of Asay; test. of Berrios.)

6. During this same January 1, 2008 bar check, the inspectors noted other several other intoxicated patrons. They notified Licensee's servers about these patrons, and directed that the patrons be cut off. The inspectors also saw Licensee's staff give away a bottle of wine as a prize. Subsequent to this visit, Inspector Berrios issued a Notice of Warning to Licensee for violations of ORS 471.412(1) (allowing a visibly intoxicated person to consume alcohol) and OAR 845-006-0345(8) (prohibiting a licensee from giving any alcoholic beverage as a prize). (Ex. A6; test. of Berrios.)

7. At about 12:21 a.m. on January 19, 2008, Salem officers contacted a driver who had just crashed his car into another vehicle in the premises' parking lot. The driver, who appeared intoxicated and had the odor of alcoholic beverages on his breath, admitted to drinking six or seven beers at the licensed premises. The passenger, a visibly intoxicated minor, also admitted that he had been drinking alcohol at the licensed premises. The driver was arrested for Driving Under the Influence of Intoxicants (DUII) and Reckless Driving. Following the arrest, the driver submitted to a breath test, which disclosed a blood alcohol content of .13 percent. (Ex. A7; test. of Asay.)

8. At about 1:15 a.m. on January 19, 2008, Salem police officers responded to a reported fight at the licensed premises. One of the persons involved fled as officers arrived, but was soon apprehended down the street at the intersection of Portland Road and Bill Frey Dr. The patron, who was visibly intoxicated and smelled heavily of alcohol, was arrested on a parole violation. He was also cited for giving false information. (Ex. A8; test. of Donner.)

9. On the night of March 11, 2008, there was an argument and physical fight between two female patrons at the licensed premises. The dispute started when one of the women threw her poker chips down on the table, hitting the hand of the other patron. The women pulled each other's hair and struggled on the ground until they were separated by bystanders. The following morning, one of the women contacted the police, wanting to press charges for assault. She added that she had wanted to call the police immediately after the incident, but bartender told her not to do so because "they were afraid they'd lose their liquor license." (Ex. A9; test. of Rousseau.)

10. At about 1:00 a.m. on April 5, 2008, Salem police officers and Inspector Berrios responded to a reported drug deal at the licensed premises. The caller, an employee, reported witnessing a drug deal and drug use in the men's bathroom. The 911 operator overheard a scuffle, chaos and screaming in the background. Then a second call came in from the licensed premises. That caller reported that security was fighting with a male patron at the entryway. The first officer to arrive saw security trying to subdue a male patron on the floor. The patron,

Cesar Munoz, was resisting and trying to push security staff off of him. Officers found cocaine and a drug scale in Munoz's pocket. Munoz also had dried white powder in and around his nostril and showed signs of recent drug use. Munoz was arrested for several crimes, including Unlawful Possession of Cocaine, Unlawful Delivery of Cocaine, Disorderly Conduct, Harassment and Resisting Arrest. Officers also arrested the other patron involved in the drug deal, Ronaldo Anaya. He admitted to snorting cocaine in the bathroom with Munoz, but claimed that Munoz gave him the cocaine for free. A third patron, who was visibly intoxicated, was arrested on a felony parole violation. That patron submitted to a portable breath test, which indicated he had a blood alcohol content of .17 percent. (Ex. A10; test. of Asay.)

11. At about 11:59 p.m. on April 12, 2008, Salem officers responded to a fight at the licensed premises. Licensee's security staff reported that after they broke up the fight inside the premises and physically removed the combatants from the bar, one of the combatants, a Hispanic male, pulled out a knife and threatened them. Security staff added that another patron, whom they believed to be the father of the patron with the knife, stopped a stabbing from occurring. Licensee's staff provided the officers with a description of the suspect and the vehicle. The security staffer added that he wanted to pursue criminal charges if the suspect was apprehended. (Ex. A11; test. of Becerra.)

12. During the officers' investigation of this fight and menacing incident, one officer spoke to an extremely intoxicated female patron who said she had been involved in a fight in which she was hit in the head by another female patron. She said the fight had to do with "jealousy." The intoxicated patron described the female who started the fight as a pudgy Hispanic female in a pink shirt. The intoxicated patron denied needing medical attention and said she did not want to be a victim. (Ex. A12; test. of Donner.)

13. On May 21, 2008, OLCC Inspector Berrios met with Mr. and Mrs. Boorman to discuss the disturbances, assaults, fights and other problems that had occurred at the licensed premises over the past several months. Berrios mentioned that that there had been at least 11 incidents involving public safety at the licensed premises since November 2007. Berrios also issued Licensee a "drug letter," a notice that OLCC was aware of at least one instance of drug activity at the licensed premises. Managing Member Boorman noted that Licensee had gone through a learning curve over the past few months, but he was making changes to avoid problems in the future. Boorman also agreed to develop and submit a control plan for the premises. (Test. of Berrios; Ex. A13.)

14. On June 6, 2008, Boorman submitted to OLCC a Security and Alcohol Control Plan for the licensed premises. After reviewing the plan, Inspector Berrios contacted Boorman and reminded him that the security person responsible for checking IDs and sobriety at the door needs to be DPSST certified. (Ex. A14; test. of Berrios.)

15. At about 12:39 a.m. on July 24, 2008, a Salem police officer observed a driver commit traffic violations upon leaving the premises' parking lot. The officer initiated a traffic stop to investigate the violations, and observed indicia of intoxication on the driver. The officer recognized the driver as a bouncer employed at the licensed premises. The driver admitted to

drinking “several alcoholic drinks” at the licensed premises and explained that he was not on duty that night. The driver failed a series of field sobriety tests. He was arrested for DUII. A breath test following the arrest disclosed a blood alcohol content of .12 percent. (Ex. 15; test. of Wood.)

16. At about 2:22 a.m. on August 3, 2008, Salem officers were called to the premises on an “overdose call.” The caller reported that there was a very intoxicated female throwing up in the premises’ parking lot. Officers arrived to find the woman barely conscious. Paramedics arrived and determined that she had alcohol poisoning. She was transported to the hospital via ambulance. Witnesses reported that the bartender served this patron approximately seven shots. The officer also saw several other patrons “stumbling out” of the premises, including some who held on to each other for support as they walked to their cars. (Ex. A16; test. of Aguilar.)

17. On the evening of October 4, 2008, Nick Boorman, an employee of Licensee, made a threatening phone call to a former employee who had patronized the licensed premises earlier in the day. Nick Boorman is Managing Member Boorman’s son. While she was at the licensed premises, the former employee complained that she had been overcharged for drinks. After the woman left the premises, Nick Boorman called her and threatened to break every window in her house. She then contacted the police to report the harassment. When questioned by the police, Nick Boorman admitted making the threatening call, but asserted that because he was not on duty his conduct was unrelated to Licensee’s business. An officer explained to him that because he was an employee and he threatened a patron as a result of her conduct at the premises, his actions were in fact related to Licensee’s business. (Ex. A17; test. of Roelof.)

18. At about 2:35 a.m. on October 5, 2008, a Marion County Sheriff’s deputy saw a vehicle with one headlight out leaving the licensed premises’ parking lot. The deputy also saw this vehicle braking erratically along Portland Road. The deputy initiated a traffic stop. Upon contact with the driver, the deputy observed indicia of intoxication. The driver had the odor of alcoholic beverages on her person and watery eyes. She admitted to drinking at the licensed premises after she got off of work. She failed a series of field sobriety tests and was arrested for DUII. A breath test following the arrest disclosed she had a blood alcohol content of .08 percent. (Ex. 18; test. of Watkin.)

19. At about 11:43 p.m. on October 19, 2008, a Marion County Sheriff’s deputy saw a vehicle traveling through the premises’ parking lot at a high rate of speed. The deputy also saw this vehicle crossing over into the oncoming traffic lane after leaving the parking lot. The deputy initiated a traffic stop. Upon contact with the female driver, the deputy noted signs of intoxication on her including the odor of alcoholic beverages, watery eyes and slurred speech. The driver had a young child with her in the car. She explained that she had been to a poker tournament at the licensed premises. She admitted to drinking beer at the premises. She added that the babysitter had dropped off her daughter at the premises, claiming the child was out of control. The driver failed a series of field sobriety tests and was arrested for DUII, Reckless Endangerment and Reckless Driving. A breath test following arrest disclosed she had a blood alcohol content of .19 percent. (Ex. 19; test. of Kinyon.)

20. At about 11:27 p.m. on October 22, 2007, Salem police officers responded to the licensed premises on a report of menacing. A patron, a Hispanic male, had threatened to beat up other patrons and stab the bartender. When told to leave the premises, the patron did so, but threatened to come back later and shoot the bartender. He returned to the premises a short time later, but sped out of the parking lot before police arrived. He was apprehended by police several blocks from the licensed premises and arrested for Menacing, Criminal Trespass and Disorderly Conduct. (Ex. 20; test. of Vidrio.)

21. At about 11:37 p.m. on October 24, 2008, Salem police officers responded to the licensed premises on a report of an unconscious and unresponsive patron. The female patron, who had been drinking at the licensed premises for about two and a half hours, fell down inside the bar. Other patrons helped her outside and called 911. Paramedics responded and transported her to the hospital for emergency care. The woman's boyfriend, who had been with her at the bar, was also visibly intoxicated. At the hospital two hours later, the woman's blood alcohol content was .30 percent. (Ex. A21; test. of M. Miranda.)

22. At about 2:09 a.m. on October 31, 2008, Salem police responded to a report of an intoxicated person stumbling into traffic in the area of Hawthorne Ave NE and Monarch Dr. NE and later on Livingston near Alameda. An officer located the man, who was highly intoxicated. The man said he was lost, and was walking home from Big Shots and Cheetah's (a juice bar and strip club). The man also said he was an employee of the licensed premises. The officer drove the man home. (Ex. A22; test. of M. Miranda.)

23. At about 1:18 a.m. on November 1, 2008, Salem police officers responded to the licensed premises on a report of menacing. After a shouting match erupted inside the bar, security staff escorted several patrons outside. Some patrons carried their alcoholic beverages out with them. Once outside, patrons began fighting. One patron sustained scratches and abrasions and a cut above his left eye during the scuffle. When security told the fighters that they needed to leave the premises immediately, one of them threatened security staff with a knife before leaving the parking lot. Officers arrested one patron for Disorderly Conduct, and another patron for Disorderly Conduct, Menacing, Felon in Possession of a Weapon and Unlawful Use of a Weapon. (Ex. A23; test. of Asay; test. of Bidiman.)

24. About an hour later on the morning of November 1, 2008, Inspectors Berrios and Miranda saw a group of patrons exit the premises and get into a van parked in the parking lot. The inspectors followed the van as it left the parking lot. They saw it swerving and failing to maintain its lane along Portland Road. They called to report the driving complaint as the van turned into a Circle K parking lot. The driver and passengers exited the van. The driver urinated beside the building as her passengers went into the store. Officers contacted the driver and arrested her for DUII and public urination. The driver admitted to drinking three strong alcoholic beverages at the licensed premises. A breath test following her arrest disclosed a blood alcohol content of .16 percent. (Ex. A24; test. of Asay; test. of Berrios.)

25. At 1:45 a.m. on November 3, 2008, while at the premises investigating a fight in which an employee was menaced with a knife, a Salem police officer saw a patron exit the

premises and walk to the parking lot with a bottle of beer in his hand. The officer directed the patron to take the beer back into the bar. A while later, the officer and OLCC inspectors saw another patron exit the premises and walk to the parking lot with a bottle of beer in hand. These patrons failed to heed a posted sign in the patio area stating no alcohol allowed in the parking lot. Inspector Berrios directed that patron to take the beer back inside. Inspector Berrios contacted Managing Member Boorman and advised him that patrons were taking beer out to the parking lot. The inspector issued Licensee verbal instructions regarding alcohol leaving the licensed area. (Ex. A25; test. of Asay; Ex. A40; test. of Berrios.)

26. At about 12:38 a.m. on November 15, 2008, a Salem police officer doing a premises check saw Licensee's security staff pushing a male patron out the front door. The patron had been ejected for threatening other patrons with violence. The Salem officer also saw a female patron exit the premises. She was angry and yelling profanities. She stopped and kicked a nearby iron fence several times. The officer contacted her and told her to leave the premises. He warned her about her disorderly conduct. (Ex. A26; test. of Asay.)

27. About 50 minutes later, at 1:29 a.m. on November 15, 2008, Salem officers were called to the premises regarding a disturbance. An intoxicated patron harassed and threatened another patron and then refused to leave despite Licensee's security staff's repeated requests for her to do so. The patron eventually left the bar and slapped an employee on her way out. Officers contacted the woman as she walked from the premises and arrested her for Harassment and Criminal Trespass. During the disturbance investigation, officers interviewed two other patrons, family members of the suspect, who also showed signs of intoxication. (Ex. A27; test. of M. Miranda.)

28. At about 12:20 a.m. on December 27, 2008, Inspector Berrios and a Salem police officer conducted a compliance check at the licensed premises. They observed a "beer pong" game in progress at a table on the dance floor. Inspector Berrios spoke to the manager on duty, Nick Boorman, and advised that the drinking game was prohibited under OLCC laws and rules. (Ex. A28; test. of Brassfield; Ex. A41; test. of Berrios.)

29. At about 12:54 a.m. on January 1, 2009, a Salem police officer saw a vehicle driving erratically in the premises' parking lot. The female driver exited her vehicle, yelled something to the driver of car behind her, and then got back into her vehicle. She then exited the parking lot and crossed Portland Road at a high rate of speed. An oncoming vehicle had to slow to avoid a collision. The officer stopped the driver for reckless driving. The officer recognized the driver from a previous contact.¹ The driver exhibited indicia of intoxication, including watery and glassy eyes, slow and slurred speech, droopy eyelids and the odor of alcoholic beverages on her breath. She admitted to consuming alcoholic beverages at the licensed premises. She failed field

¹ She was the same woman who the officer had warned about disorderly conduct on November 15, 2008, when he saw her yelling profanities and kicking an iron fence as she left the licensed premises. (Test. of Asay.) See Finding of Fact no. 26.

sobriety tests and was arrested for DUII, Reckless Driving and Resisting Officers. She refused a breath test. (Ex. A29; test. of Asay.)

30. At about 1:39 a.m. on February 1, 2009, Oregon State Police troopers and a Salem officer responded to a fight at the licensed premises. A domestic disturbance between two intoxicated patrons that began inside the premises spilled outside. The dispute did not become physical and no weapons were involved. Both patrons were advised to leave the premises. (Ex. A30; test. of Keniston.)

31. At about 11:36 p.m. on February 7, 2009, Salem police officers responded to a fight between two groups of people at the licensed premises. By the time the officers arrived, the fighting was over and one of the groups had left the premises. One of the patrons who remained at the premises sustained injury and was transported to the hospital by ambulance. (Ex. A31; test. of Johnston.) Two weeks later, Managing Member Boorman provided the police with a DVD containing video from the security cameras on that night. The DVD showed that there were multiple fights inside the premises that night, but officers were unable to identify any suspects or victims from the video. *Id.*

32. At about 12:50 a.m. on February 21, 2009, a Salem police officer conducting a premises check saw a highly intoxicated male sitting just outside the fenced area in front of the bar. The officer asked if the man was okay, and he responded, "I am now that I puked." The man said he got drunk inside the premises and came outside, where he vomited. The man submitted to a portable breath test, which disclosed a blood alcohol of .11 percent. (Ex. A32; test. of Asay.)

33. At about 12:59 a.m. on March 18, 2009, an Aumsville police officer stopped a driver on Highway 214 north of Highway 22 for driving erratically. The driver, who showed signs of intoxication including the odor of alcoholic beverages on his breath, poor enunciation and bloodshot and watery eyes, stated that he was on his way home from the licensed premises, where he had consumed two beers. The driver failed a series of field sobriety tests and was arrested for DUII. A breath test following the arrest disclosed a blood alcohol content of .09 percent. (Ex. A33; test. of Bird.)

34. At about 7:54 p.m. on March 20, 2009, Salem officers responded to a fight at the licensed premises. A male patron and a female patron began arguing inside the premises. The dispute moved outside and became physical, with the two patrons kicking, hitting and grabbing each other. Both patrons were visibly intoxicated. Officers determined that the male patron, who sustained a cut on the bridge of his nose, was the aggressor. He was arrested for Disorderly Conduct. (Ex. A34; test. of Morris.)

35. Beginning at about 11:05 p.m. on March 21, 2009, OLCC inspectors conducted undercover operations at the licensed premises. The inspectors noted a visibly intoxicated male patron with six partially consumed bottles of beer on the table in front of him. The inspectors did not observe the patron drinking, but also noted that the servers appeared unaware of the patron's obvious intoxication. A short while later, the inspectors noticed a large male patron

who had what appeared to be eyeglasses drawn on his face in black ink. This male patron got upset while speaking to another patron, and threw a Jello shot cup and a slice of lime at him. The cup hit one inspector in the back of the head and Jello splashed onto the other inspector's shirt. The patron with the hand drawn glasses on his face walked away, but three other patrons standing nearby apologized profusely for his conduct. They explained to the inspectors that he was drunk, and did not mean to hit them with the drink. (Ex. A35; test. of Caballero).

36. That same night, March 21, 2009, Inspectors Berrios and Miranda conducted outside observations of the licensed premises from a nearby parking lot. At about 11:23 p.m., they observed a patron exit the premises and urinate on the tire of a parked vehicle before getting into another car and driving off. About 15 minutes later, they saw a male patron exit the premises and walk to the parking lot with a bottle of beer in hand. The patron drank from the beer as he talked on his cell phone. The inspectors contacted Licensee's security staffer, who contacted the patron and directed him to return to the premises with his beer. A short time later, while talking to manager Nick Boorman outside the premises, the inspectors saw a second patron drinking a bottle of beer in the parking lot. Boorman contacted that patron and had him pour out the beer. Boorman apologized to the inspectors, noting that Licensee's employees should be better about monitoring patrons and preventing them from drinking outside the licensed area. (Ex. A40; A41; test. of Berrios.)

37. At 11:53 p.m. on March 24, 2009, Salem officers responded to a fight at the licensed premises. A patron called 911 to report that two males were fighting, with one choking the other until the other passed out. The patron who had been choked left before officers arrived. Officers determined that two male patrons argued verbally, one threw a plastic chair at the other, and the other put the first into a choke hold, holding on until the man went limp. The victim could not be identified, but officers arrested the choker for Disorderly Conduct. (Ex. A36; test. of Asay.)

38. At about 12:27 a.m. on March 28, 2009, a Salem officer on a bar check came upon a man vomiting in the premises' parking lot. The man was obviously intoxicated. He smelled strongly of alcohol and could not stand without support. The man admitted to drinking at the licensed premises. The officer contacted two of Licensee's servers, who admitted to serving him several drinks. One server acknowledged that the patron was visibly intoxicated. (Ex. A37; test. of Asay.)

39. At about 12:40 a.m. on March 29, 2009, an off-duty Salem officer, who was across the street from the licensed premises, saw two males fighting in the premises' parking lot. Officers responded and determined that Licensee's security staff had been involved in a scuffle with a very intoxicated patron. Earlier in the night, the patron created a disturbance inside the bar and security staff ejected him. He returned several times and attempted to reenter the premises. Security staff advised the officers that they had to remove the patron from the bar six times that night. Officers arrested the patron for Criminal Trespass and Disorderly Conduct. (Ex. A38; test. of Sommer.)

40. On April 2, 2009, Managing Member Boorman met with Inspector Berrios and OLCC Regional Manager James Lynch to discuss the recurring serious problems at the licensed

premises. The following day, Boorman emailed Inspector Berrios with Licensee's revised Security and Alcohol Control Plan. Boorman also advised the inspector of changes Licensee planned to implement to minimize the number of problem incidents at the premises. Among other things, Licensee planned to prohibit alcoholic beverages in the outside patio area, to assign servers to specific areas to better monitor patrons for intoxication, and to train Nick Boorman with regard to managerial duties, so that he could assume the role of premises manager. (Exs. A39 and A41; test. of Berrios.)

41. On April 8, 2009, Inspector Berrios contacted Managing Member Boorman to confirm that Licensee had implemented the revised Control Plan. Boorman explained that he had decided to prohibit alcoholic beverages in the outside patio area from 9:00 p.m. to closing, and to post a security staffer at the door with the ability to refuse entry to problematic patrons. (Ex. A41.)

42. At about 1:13 a.m. on May 2, 2009, a Salem police officer responded to a reported fight between two female patrons at the licensed premises. Upon arrival, the officer learned that the two women who were fighting had been ejected from the premises and left on foot. Witnesses to the fight provided a description of the women. The officer located one of them a few blocks from the premises. She was too intoxicated to provide coherent information, but asserted that the argument started when other woman came up behind her in the bathroom and called her a "ho." The woman had some redness and signs of injury over her right eye. (Ex. A42; test. of Mayer.)

43. At about 5:48 p.m. on May 21, 2009, Salem police officers responded to the licensed premises on a report of two males fighting in the parking lot. Upon arrival, the officers were contacted by a man wearing a blue bandana with a cordless phone in his hand. The man, who identified himself as a bartender, told the officers that everything was fine. He added that there had been a shoving match, no one was hurt and the parties involved were back inside the premises. The officers believed that the bartender wanted them to leave, but they insisted on speaking with the patrons involved in the fight. Both patrons came outside to speak to the officers. They were both intoxicated and said they had been drinking at the licensed premises. They explained that they were arguing and their dispute escalated into a fight in the back parking lot. Both men denied injury, and neither wanted to be a victim. (Ex. A43; test. of Barratt.)

44. At about 11:56 p.m. on May 26, 2009, Salem police officers responded to a fight at the licensed premises involving four Hispanic males. Dispatch advised that someone was armed with a Tazer. Officers arrived and contacted four men in the premises' parking lot, two of whom appeared as if they had just been involved in a fight. Officers then contacted Licensee's security staff, who directed them to another patron involved in the fight. This patron, who was highly intoxicated, claimed that another patron punched him for no reason. Officers also reviewed surveillance video of the incident. One patron pushed another. Things calmed down, and then minutes later the second patron punched the other in the face, and a large fight ensued. Officers arrested three patrons for Disorderly Conduct. Employee Chris Boorman told the officers that security staff was not able to subdue the fighting so he used a "stun gun" on one of the combatants. (Ex. A44; test. of Asay; test. of Keniston.)

45. At about 1:08 a.m. on July 17, 2009, a Marion County Sheriff's deputy saw a car leave the premises' parking lot and make an improper turn into a nearby gas station. The car drove through the parking lot and entered onto Wayside Terrace without stopping or slowing before entering the roadway. The deputy initiated a traffic stop on the driver for the observed violations. The driver showed signs of intoxication, including a blank stare, droopy eye lids, watery and bloodshot eyes, and slurred speech. At times, the driver's speech was incoherent. The passengers in the car also appeared intoxicated. The driver acknowledged that he had been to the licensed premises but did not admit to how much he had drank that night. The driver failed a series of field sobriety tests and was arrested for DUII. His breath test disclosed a blood alcohol content of .15 percent. (Ex. A45; test. of Clarke.)

46. At about 3:18 a.m. on July 17, 2009, a Salem police officer responded to a report of a man lying face down in front of a residence at 3167 Northgate Avenue NE. This location is approximately one half mile from the licensed premises. The officer roused the man, who was highly intoxicated. Paramedics responded and determined that the man did not require medical treatment. The man advised the officer that he had been drinking at the licensed premises earlier in the night. (Ex. A46; test. of Baskett.)

47. At about 1:54 a.m. on August 2, 2009, during a walk through of the premises, a Salem officer saw an extremely intoxicated female patron sitting in front of a video poker machine. She had her head hung down, with her chin nearly touching her chest. Her eyes were closed and she was swaying back and forth on the stool. She had a bottle of Corona beer in front of her. The officer walked the patron outside to talk to her. She smelled strongly of alcohol and had very slurred speech. The patron remained outside, explaining to the officer that her friend was coming to pick her up. After several minutes, the patron vomited. (Ex. A47; test. of Keniston.)

48. At about 2:30 a.m. on August 15, 2009, a Salem officer saw a pickup truck driving through the licensed premises' parking lot without its headlights on. When the pickup left the parking lot, it made a wide left turn into the far right lane, and then drifted into the bicycle lane. The officer initiated a traffic stop to investigate the observed violations. The driver was slow to yield. Upon contact with the female driver, the officer noted signs of intoxication, including the odor of alcoholic beverages, red, bloodshot and watery eyes, slurred speech and droopy facial features. The passenger, the driver's sister, was also visibly intoxicated. The sister claimed she felt sick, and got out of the car to walk around. She eventually vomited. The driver admitted that she consumed three rum and Coke drinks at the licensed premises. She refused to do field sobriety tests, and was arrested for DUII. After her arrest, the driver told the officer about her night at the licensed premises. She showed officer a cut on the inside of her lip, which was still bleeding. She explained that someone hit her when she stepped in to stop a fight between a male and female patron. She commented that Licensee's security staff did not step in to stop the fight. She later refused to submit to a breath test. (Ex. A48; test. of Asay.)

49. At about 12:40 a.m. on September 20, 2009, a Salem police officer saw a vehicle make an improper right turn upon exiting the premises' parking lot. The officer caught up to the

vehicle to initiate a traffic stop for the observed violation. The driver drove up and over a curb while yielding for the stop. The officer contacted the driver, Ryanna Lowsley. Lowsley, who at the time was 20 years of age, showed signs of intoxication including the odor of alcoholic beverages, slurred speech, glassy and watery eyes and poor finger dexterity. Both Lowsley and her passenger admitted that they had been drinking at the licensed premises.² The officer arrested Lowsley for DUII. She submitted to a breath test, which showed her blood alcohol content to be .09 percent. Lowsley had in her possession an Oregon identification card of her friend, Racheal Berry (date of birth March 7, 1985). Lowsley said that she used Berry's ID to gain entry into the licensed premises.³ In addition to DUII, Lowsley was charged with Failing to Appear on a Bench Warrant and Misuse of an Identification Card. (Ex. A49; test. of Baskett.)

50. At about 11:04 p.m. on October 6, 2009, a Marion County Sheriff's deputy saw a car crossing the licensed premises' parking lot at a high rate of speed. The car pulled partially out onto Portland Blvd. before coming to an abrupt stop. The deputy initiated a traffic stop to investigate the driver's failure to properly stop when leaving a driveway. The driver showed signs of intoxication, including droopy eye lids, watery and bloodshot eyes, finger dexterity problems and slurred speech. The driver failed a series of field sobriety tests and was arrested for DUII. The driver admitted to drinking at the licensed premises. Her breath test showed a blood alcohol content of .14 percent. (Ex. A50; test. of Clarke.)

51. On October 7, 2009, in response to learning that minor Lowsley used a friend's ID card to gain entry into the licensed premises, Managing Member Boorman sent a reminder to employees to be vigilant about checking identification and to use the electronic scanner. He advised them, "when in doubt – refuse entry." (Ex. L12.)

52. At about 1:43 a.m. on October 17, 2009, a Salem police officer traveling southbound on Portland Road south of Hyacinth Street NE saw an approaching vehicle make an abrupt and illegal U-turn ahead of him. As the officer caught up to the vehicle, it made another U-turn and pulled up next to a female walking northbound on the east side of the road. The officer turned around, activated the overhead lights on his patrol car and pulled up behind the vehicle. The woman looked like she was going to get into the vehicle, but the officer directed her to stay back. The officer contacted the driver, who explained that he was trying to convince his wife to get into the car. In response to further questioning, the driver said that he and his wife had been to

² Lowsley's passenger claimed that Lowsley drank beer inside the licensed premises. Lowsley initially denied drinking at the bar, but when the officer told her he had reason to believe she drank at the bar, she admitted to ordering a shot of tequila. (Ex. A49.) Later, during an interview with Inspector Berrios, Lowsley admitted she was intoxicated while at the licensed premises, but could not recall what she had had to drink: "Maybe we had a shot, but I don't remember." (Ex. A49 at 8.)

³ Lowsley (born 12/09/1988) appeared her true age (20 years old). Lowsley does not resemble Berry's ID photo. The two women have different facial features, different hair coloring, different heights and different weights. Lowsley has blond hair and a round face with three noticeable moles on her left cheek. Berry's ID photo shows a brunette with an oval face and no noticeable moles. Lowsley is 5'7" and 160 pounds; Berry's ID indicates she is 5'6" and 125 pounds. (Ex. A49 at 1, 10 and 11.)

the licensed premises. The driver showed signs of intoxication including glassy and watery eyes, slow and slurred speech and the odor of alcoholic beverages. He admitted to drinking two beers at the licensed premises. The woman, who was standing nearby and overheard the officer talking with the driver, said that she was drunk and just playing “hard to get” with her husband. The driver failed a series of field sobriety tests and was arrested for DUII. His breath test showed a blood alcohol content of .15 percent. (Ex. A51; test. of Baskett.)

53. At about 11:49 p.m. on October 23, 2009, Salem police officers were dispatched to investigate a suspicious vehicle parked behind the St. Vincent DePaul building, just to the south of the licensed premises. The caller reported that there were several people around the vehicle acting strangely, like they were intoxicated. The car was gone by the time officers arrived, but when the officer drove to the front of the licensed premises, security staff approached and asked if he was there about the car they had pepper sprayed. Licensee’s security staff explained that a car parked in the back parking lot was blocking access for other patrons. When security asked the driver to move the car, the driver became irate and cursed at them. Security threatened to trespass the driver, prompting him to gun the engine, put the car in drive and lunged the car toward the two security staffers. The security staffers jumped out of the car’s path, and then sprayed pepper spray into the car’s open windows. The officer warned the security staffers that they should have reported this incident to the police. (Ex. A52; test. of Asay.)

54. At about 2:12 a.m. on October 24, 2009, a patron called the police to report a fight at the licensed premises. Officers responded and contacted the complainant, who said he was afraid that other patrons, believing him to be a “gang banger,” were going to jump him. The complainant admitted there had been no fight, but a group of people had circled him outside the premises. (Ex. A53; test. of Galusha.)

55. A short time later, at 2:25 a.m. on October 24, 2009, officers responding to the fight call saw a car drive from the back parking lot to the front parking lot at a high rate of speed (approximately 35 to 40 mph). An officer followed as the car exited the parking lot onto Portland Road northbound. When the car turned into a Circle K parking lot and parked, the officer contacted the driver to investigate the reckless driving. The driver appeared intoxicated, as did his three passengers. The driver had glassy and watery eyes, dilated pupils, slurred speech, slow movements and the odor of alcoholic beverages on his breath. The driver denied drinking, but claimed he had taken a number of medications, including Nyquil and a muscle relaxant. He said he took his last dose about an hour before he left to pick up his passengers at the licensed premises. The driver was arrested for DUII and Reckless Driving. He refused both a breath test and a urine test. (Ex. A54; test. of Baskett.)

56. At about 1:54 a.m. on November 21, 2009, Salem police officers responded to a reported fight inside the licensed premises. Three patrons approached three other patrons seated at the bar and physically attacked them. Security staff intervened and pepper sprayed the largest and most aggressive fighter in the face, which broke up the fight. Both the suspects and victims left the premises before the officers arrived. Security told the officers that the three patrons who started the fight had only been in the bar for a minute or so and were not served any alcohol. (Ex. A55; test. of Asay.)

57. Since the license was granted to Licensee in November 2007, Licensee has made many changes in operation. At the time Licensee took over the business, the former licensee had three happy hours during the day (morning, evening and late at night), two-for-one drink specials and inexpensive drinks. Licensee eventually eliminated the morning and late night happy hours, eliminated the two-for-one drink specials, and raised drink prices. Licensee also changed the music format, moved the location of the dance floor, and, in February 2009, added an additional security person.⁴ In the first six months of Licensee's operation, Managing Member Boorman was at the premises 12 hours a day. He is still at the premises seven days a week, although primarily during the daytime hours. Nick Boorman manages the premises at night. (Test. of D. Boorman.)

58. Licensee's Security and Alcohol Control Plan (updated as of July 3, 2009) includes the following requirements: all security staff will obtain DPSST certification; security staff or the servers will make a good faith effort to remove an alcoholic drink from the possession of a any patron showing signs of visible intoxication; a patron is only allowed to purchase one drink at a time; the bartenders will keep an incident log and security will keep a separate log, and both will be made available to law enforcement and OLCC on request; no "last call" will be announced; any "cut off" patron who refuses to surrender his or her drink will be excluded from the premises for 14 days, and an entry will be made in the "86ed" log; any patron participating in unlawful activity, disorderly conduct or physical altercation will be excluded from the premises for a minimum of 30 days and an entry will be made in the "86ed" log. (Ex. L10; test. of Boorman.)

59. On December 21, 2009, Managing Member Boorman met with Sergeant Doug Carpenter of the Salem Police to discuss ideas and options for better controlling licensed premises and patrons' behavior. Carpenter made the following suggestions: closing at 1:30 a.m. rather than 2:30 a.m.; retrain staff on signs of visible intoxication; establish a method to count the number of drinks per customer; retrain security to better deal with problematic and/or intoxicated patrons; increase drink prices; retain surveillance tapes on file for a longer period of time; and prosecute any criminal activity on the premises. Licensee was receptive to the suggestions, and shortly after this meeting changed the closing time to 1:30 a.m. (Test. of Carpenter; test. of Boorman.)

CONCLUSIONS

1. There is a history of serious and persistent problems at Licensees' premises, based upon incidents occurring between November 11, 2007 and November 21, 2009. ORS 471.315(1)(c).

⁴ In the Exceptions, Licensee requested additional findings to more fully reflect the changes made to the licensed premises. In her response to Licensee's Exceptions, the Administrative Law Judge agreed that supplementing FOF 57 with these additional facts would be appropriate, based upon the record.

2. Licensee has not demonstrated both the willingness and ability to control the premises. ORS 471.315(1)(c).

3. Licensee's employees failed to verify the age of a minor, Ryanna Lowsley, before allowing her to buy or be served an alcoholic beverage, when she reasonably appeared to be under 26 years in age in violation of OAR 845-006-0335(1)(a)(b)(c). The alternative charged violation of OAR 845-006-0355(3)(b) shall be dismissed.

4. Licensee should be removed from the Responsible Vendor Program.

5. Licensee's employees permitted persons to consume alcohol in the parking lot that Licensee controls that is associated with the licensed premises in violation of OAR 845-006-0347(5)(a).

6. The proper penalty is cancellation of the license.

OPINION

1. History of Serious and Persistent Problems

The Commission has charged Licensee with a history of serious and persistent problems at the licensed premises pursuant to ORS 471.315(1)(c).⁵ In the Amended Notice, the Commission alleged that there have been 50 serious incidents inside or in the immediate vicinity of the premises since licensee received the liquor license on November 1, 2007. These incidents include fights at the licensed premises resulting in injury or threat of injury to one or more patrons, plus instances of unlawful activities, including drug activity, driving under the influence

⁵ ORS 471.315(1)(c) states in relevant part:

(1) The Oregon Liquor Control Commission may cancel or suspend any license * * * if it finds or has reasonable ground to believe any of the following to be true:
* * *

(c) That there is a history of serious and persistent problems involving disturbances, lewd or unlawful activities or noise either in the premises proposed to be licensed or involving patrons of the establishment in the immediate vicinity of the premises if the activities in the immediate vicinity of the premises are related to the sale or service of alcohol under the exercise of the license privilege. Behavior which is grounds for cancellation or suspension of a license under this section, where so related to the sale or service of alcohol, includes, but is not limited to obtrusive or excessive noise, music or sound vibrations; public drunkenness; fights; altercations; harassment or unlawful drug sales; alcohol or related litter; trespassing on private property; and public urination. Mitigating factors include a showing by licensee that the problems are not serious or persistent or that licensee has demonstrated a willingness and ability to control adequately the licensed premises and patrons' behavior in the immediate vicinity of the premises which is related to licensee's sale or service of alcohol under licensee's exercise of the license privilege.

of intoxicants, promoting a drinking game and public drunkenness. As the proponent of these allegations, the Commission bears the burden to prove the violation. ORS 83.450(2); *Harris v. SAIF*, 292 Or 683, 690 (1982) (general rule regarding allocation of burden of proof is that the burden is on the proponent of the fact or position).

In interpreting ORS 471.315(1)(c), OLCC 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. 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.

In *La Brisa* (OLCC, Final Order, 91-L-037, December 1992), OLCC found that incidents involving persons intending to go into the licensed premises are related to the exercise of the license privilege and count regardless of whether the persons consumed alcoholic liquor on the premises. In that case, OLCC found that the language "related to the sale or service of alcohol" does not require a showing that the patron involved purchased, was served or consumed alcohol in the licensed premises. The OLCC presumed that the persons are coming to the premises because the licensee has a license and for the purpose of consuming alcoholic liquor. *Id.*

In *Headless Horseman* (OLCC, Final Order, 92-L-016, June 1993), the OLCC found that the licensed premises had a history of serious and persistent problems where there were seven incidents over 13 months. Although the number of incidents was not large, most of the incidents involved fights. Similarly, in *Balzer's Pub & Grill* (OLCC, Final Order, 99-V-019, March 2001), the OLCC found a history of serious and persistent problems where there were five serious incidents within six months: two fights outside the premises, an assault on a security guard, the display of a gun by a patron who was denied entry to the premises, an assault and robbery upon a waitress by patrons inside the premises, and a very intoxicated person on the street outside the premises.

In *The Hydrant* (OLCC, Amended Final Order, 00-L-006, October 2001), the Commission held that incidents resulting from a licensee's appropriate steps to deal with problem persons by refusing service and/or by removing them from the premises would be counted among those comprising a history of serious and persistent problems. The Commission explained that it will weigh each incident 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). The Commission will consider the licensee's security staff's efforts in evaluating the licensee's willingness and ability to control the problems associated with the licensed premises.

More recently, in *Dr. Feelgood's Pub* (OLCC Final Order, 08-V-052 and 08-V-074, June 2009), the Commission found a history of serious and persistent problems when, over the course of 13 months, there were at least 11 disturbances involving violence or the threat of violence with patrons of the licensed premises inside, or in the immediate vicinity of the premises. The Commission also noted that during this same time period, there were at least six other instances of visibly intoxicated patrons, public drunkenness and/or public urination related to the licensee's sale or service of alcohol. In *Girtle's Restaurant & Lounge* (OLCC Final Order, 08-V-079, December 2009), the Commission found a history of serious problems when, over the course of 28 months, there were 10 disturbances, two DUII arrests, a theft, a minor in a prohibited area, and six instances public drunkenness and/or public urination.

As noted above, in this case, the Commission has alleged that there were 50 serious incidents inside or in the immediate vicinity of the premises over the course of 24 months. As set out in the findings above, there have been at least 20 disturbances (fights, altercations, harassment or crimes involving violence or threat of violence such as assault and disorderly conduct) inside or in the immediate vicinity the premises involving patrons of the establishment:

- (1) December 9, 2007: A large fight involving 20 to 30 patrons inside the premises with patrons injured.
- (2) January 19, 2008: Fight at the licensed premises. One of the combatants, who was visibly intoxicated, fled the premises on foot but was apprehended by police down the street.
- (3) March 11, 2008: Physical fight between two female patrons at the poker table.
- (4) April 5, 2008: Physical altercation between a patron and security after a security staffer witnessed the patron using cocaine and engaging in a drug deal in the restroom.
- (5) April 12, 2008: Physical fight at the licensed premises; security staffers threatened with a knife after breaking up the fight.
- (6) April 12 or 13, 2008: Physical fight between two female patrons. Police contacted one of the two women who was extremely intoxicated and did not want to be a victim.
- (7) October 22, 2007: A patron threatened to beat up other patrons and stab the bartender. The patron left the premises and threatened to return with a gun, and was apprehended by police when he returned a short time later.
- (8) November 1, 2008: A shouting match inside the bar erupted into a physical fight after security escorted the patrons outside. One patron sustained injury, another patron threatened security with a knife before leaving the parking lot.

- (9) November 15, 2008: A male patron was ejected from the premises for threatening other patrons. A short time later, an angry female patron walked out of the bar and kicked a nearby iron fence several times.
- (10) November 15, 2008: An intoxicated patron harassed and threatened another patron, and then slapped an employee when she was asked to leave the premises.
- (11) February 1, 2009: A domestic dispute erupted between two intoxicated patrons.
- (12) February 7, 2009: A physical fight between two groups of patrons. One patron was transported to the hospital via ambulance for treatment of his injuries.
- (13) March 20, 2009: Physical fight between two intoxicated patrons. One patron sustained a cut on the bridge of his nose.
- (14) March 24, 2009: Physical fight between two patrons. One tossed a chair at the other. The other choked the first one until he passed out.
- (15) March 29, 2009: Security staff scuffled in the premises' parking lot with a very intoxicated patron who had been ejected from the premises earlier and tried repeatedly to reenter.
- (16) May 2, 2009: Physical fight between two female patrons. Police contacted one of the patrons, who was too intoxicated to provide coherent information.
- (17) May 21, 2009: Two intoxicated male patrons were involved in a shoving match in the premises' parking lot.
- (18) May 26, 2009: Several patrons involved were in a physical fight inside the licensed premises. At least one patron involved was highly intoxicated. Licensee's employee used a stun gun on one of the patrons to break up the fight.
- (19) October 23, 2009: Licensee's security staff threatened to trespass the driver of a car parked in the back parking lot that was blocking access for other patrons of the premises. The driver threatened the security staffers, prompting them to spray pepper spray into the car's open windows as the driver sped off.
- (20) November 21, 2009: A physical fight involving two groups of three patrons inside the licensed premises. Security staff intervened and pepper sprayed the aggressor, which broke up the fight.

As Commission staff notes, many of these disturbances involved intoxicated patrons. In addition to these 20 incidents (all of which involved violence or threat of violence inside the premises or outside in the premises' parking lot), there were other serious problems at the

licensed premises. This includes one instance of illegal drug activity and several DUII arrests related to Licensee's sale or service of alcohol at the licensed premises.

Licensee does not dispute that there has been a history of serious and persistent problems at the licensed premises since Licensee took over operations in November 2007. Licensee does, however, take issue with several incidents the Commission proposes to count as serious problems. Specifically, with regard to the DUII arrest allegations, Licensee asserts that the Commission should not count a DUII arrest as a serious problem in the absence of evidence that the person was over-served at the licensed premises. Licensee also asserts that 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. With regard to the allegations of visibly intoxicated patrons or patrons who were drunk in public, Licensee asserts that such incidents should not count among those comprising a history of serious and persistent problems in the absence of evidence that the licensee served the patron while the patron was exhibiting signs of visible intoxication. As explained below, Licensee's contentions are not persuasive.

DUII Arrests. In *Girtle's Restaurant & Lounge*, the Commission held that 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. In that case, the Commission counted two DUII arrests against the licensee where the evidence showed that the patron consumed alcoholic beverages at the licensed premises and then engaged in the unlawful activity of driving under the influence of intoxicants in the immediate vicinity of the premises. Final Order at 15-16.

In this case, the Commission has alleged 13 DUII arrests related to the licensed premises. In 11 of those 13 arrests, the police or OLCC inspectors actually observed the arrested driver leaving the premises' parking lot. In 10 of those 11 arrests, the driver admitted to consuming alcoholic beverages at the licensed premises.⁶ In eight of those 10 cases, the arrested driver

⁶ On each occasion, the police stopped the arrested driver in, or moments after the driver exited from, the premises' parking lot:

- (1) January 19, 2008: The driver admitted to drinking six or seven beers at the licensed premises. Blood alcohol content (BAC) .13 percent.
- (2) July 24, 2008: The driver, an off-duty employee of the licensed premises, admitted to drinking several alcoholic beverages at the premises. BAC .12 percent.
- (3) October 5, 2008: The driver admitted to drinking at the licensed premises after she got off of work. BAC .08 percent.
- (4) October 19, 2008: The driver, an off-duty employee at the premises participating in a pool tournament, admitted to drinking beer at the licensed premises. BAC .19 percent.
- (5) November 1, 2008: The driver admitted to drinking three strong alcoholic beverages at the licensed premises. BAC .16 percent.
- (6) January 1, 2009: The driver admitted to consuming alcoholic beverages at the licensed premises.
- (7) July 17, 2009: The driver admitted to patronizing the licensed premises, but did not admit how much alcohol she had consumed. BAC .15 percent.
- (8) August 15, 2009: The driver admitted that she had three rum and Cokes at the

submitted to a breath test, which disclosed a blood alcohol content of .08 percent or more. In the other two cases, the arrested drivers refused a breath test, but nevertheless exhibited signs of visible intoxication. In the 11th arrest, on October 24, 2009, the driver asserted that he had just picked up his passengers (all of whom were intoxicated) at the licensed premises. The 12th arrest, on October 17, 2009, occurred just up the road from the licensed premises and, although the officer did not observe the patron's vehicle leaving the premises' parking lot, both the patron and his wife acknowledged that they were on their way home from the premises. That driver admitted to consuming beer at the licensed premises and had a blood alcohol content of .15 percent. The 13th DUII arrest (in Aumsville, Oregon on March 18, 2009) did not occur in the immediate vicinity of the licensed premises, but the driver claimed that he was coming from the licensed premises where he had consumed two beers.

Even without counting the March 18, 2009 Aumsville arrest and the October 24, 2009 arrest against Licensee (because of insufficient evidence linking the driver's intoxication to consuming alcoholic beverages at the licensed premises), the record establishes 11 instances of unlawful activity involving intoxicated patrons of the licensed premises that are related to Licensee's sale or service of alcohol under the exercise of the licensed privilege. Furthermore, and contrary to Licensee's contention, it is not necessary to establish that the licensee "permit" 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.")

Visibly Intoxicated Patrons/Public Drunkenness. As discussed above, Licensee also argues that 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. Not so. In *Cisco & Panchos*, (OLCC Final Order, 99-V-080ES, September 2000), the Commission noted that, with regard to visibly intoxicated persons found in the vicinity of a licensed premises, such incidents should be counted among a history of serious and persistent problems, but given little or lesser weight when there is insufficient evidence that the licensee was the cause of the public drunkenness. Conversely, where there is reliable evidence that the person became visibly intoxicated while patronizing the licensed premises, it is appropriate to give that incident greater weight.

In this case, apart from the disturbances and unlawful activities discussed above, the following are instances in which patrons became visibly intoxicated while patronizing the licensed premises:

(1) January 1, 2008: OLCC inspectors saw a highly intoxicated patron slumped over a table with an alcoholic beverage in hand. A portable breath test instrument indicated the patron had a BAC of .34 percent.

licensed premises. She was also injured in a fight at the premises that night.

(9) September 20, 2009: The driver, a minor, admitted to drinking at the licensed premises. She also admitted using a friend's ID card to gain entry into the premises. BAC .09 percent.

(10) October 6, 2009: The driver admitted to drinking beer at the licensed premises. BAC .14 percent.

(2) August 3, 2008: Officers and medical personnel responded to the premises' parking lot on an alcohol overdose. Several witnesses reported the patron, who was barely conscious when the emergency responders arrived, had been served approximately seven shots at the licensed premises.

(3) October 24, 2008: A patron who had been drinking at the premises for more than two hours fell down inside the bar. She was transported via ambulance to the hospital, where her BAC was determined to be .30 percent.

(4) March 21, 2009: OLCC inspectors at the premises in an undercover capacity saw two visibly intoxicated patrons. One had several beers in front of him. The other threw a Jello shot that hit the inspectors. Other inspectors observed a patron exit the premises and urinate on the tire of a vehicle in the premises' parking lot.

(5) March 28, 2009: An officer conducting a premises check saw an intoxicated patron vomiting in the premises' parking lot. Licensee's servers admitted to serving him several drinks. One server acknowledged the patron was intoxicated.

(6) August 2, 2009: An officer conducting a premises check saw an extremely intoxicated female patron seated at a video poker machine. Her head was hung down, her eyes were closed and she swayed while seated. She had a bottle of beer in front of her.

Even without addressing the other instances in which the police contacted or assisted visibly intoxicated persons inside or in the immediate vicinity of the licensed premises, the record establishes that from November 1, 2007 to November 21, 2009, there have been 20 disturbances involving violence or threat of violence, 11 DUII arrests of patrons leaving the licensed premises, one instance of illegal drug activity, at least six other instances of visibly intoxicated patrons and one instance of public urination. This record constitutes a history of serious and persistent problems under ORS 471.315(1)(c).

2. Willingness and Ability to Control the Premises

Having found that Licensee has a history of serious and persistent problems under OAR 471.315(1)(c), the next issue is whether Licensee has demonstrated a willingness and ability to adequately control the premises and patrons' behavior in the immediate vicinity of the premises. As noted above, the willingness and ability to control the licensed premises is a mitigating factor in assessing a history of serious and persistent problems. Licensee has the burden of establishing this mitigating circumstance. ORS 183.450(2); *Cisco & Pancho's*, Final Order at 12.

As for Licensee's willingness, Boorman cites to the changes he has implemented since taking over the business in November 2007. Among other things, he notes that he has an Alcohol Control Plan for the premises, that he has surveillance cameras and has made the tapes available to the police investigating incidents at the premises, that he keeps a daily log of incidents and problems, that he permanently "86's" patrons who cause fights or disobey

employee directions and excludes other problematic patrons for varying lengths of time, that he encourages staff to call the police for all types of incidents, that he has changed the layout, menu, music format, happy hour schedule and business hours and that he has raised prices on drinks to discourage increased consumption.

Boorman further asserts that the premises location is in a high crime area with a gang presence and homeless population. He maintains that, unbeknownst to him at the time he purchased the business, the premises had a history of serious problems under the prior owner. Boorman also notes that prior to November 2007, he had no experience owning or managing a liquor establishment. Finally, he asserts that Licensee did not “permit” any of the unlawful activities on the premises, and that in many of the incidents, security staff took appropriate steps to deal with the matter by ejecting the problematic patron from the premises or calling the police and detaining the person until the police arrived. Boorman asks the Commission to take these factors into consideration in evaluating Licensee’s current ability to adequately control the premises.

In cases in which the Commission found that the licensee had demonstrated a willingness and ability to control the premises, the licensee made significant changes in operations and/or implemented new policies that effectively reduced the number of serious problems at the premises. *See, e.g., Girtle’s Restaurant & Lounge*, Final Order at 18-20 (subsequent to a string of serious problems over 12 months, the licensee maintained better control of the premises; the few other problems that occurred over the next 16 months were more sporadic than persistent); *Downtown Deli & Greek Cusina* (OLCC Amended Final Order, 08-V-028, October 2009) (after a record of serious and persistent problems over 15 months, the licensee made changes in operation, refocused its security and bar staff to recognize and address intoxicated patrons and inappropriate behavior, and closed a portion of the premises, which resulted in a reduction in patron capacity); *New Copper Penny Restaurant* (OLCC, Final Order, 04-V-040, October 2005) (mitigation was appropriate because, subsequent to having history of serious and persistent problems, the licensee made significant changes in operation and demonstrated the willingness and ability to control the premises).

On the other hand, 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).

In this case, notwithstanding the claims of willingness, Boorman and Licensee have not demonstrated the ability to adequately control the licensed premises and patrons’ behavior in the

immediate vicinity of the premises.⁷ Indeed, OLCC inspectors first met with Boorman in May 2008 to discuss the disturbances, assaults and fights that had occurred in the seven months since Licensee took over the business. Boorman instituted a Security and Alcohol Control Plan in June 2008, but, within six weeks, serious problems returned and persisted. This plan was therefore ineffective in curbing problems at the premises. In April 2009, OLCC inspectors met with Boorman a second time, prompting him to revise Licensee's Control Plan. Serious problems, including physical fights inside the bar, visibly intoxicated patrons and DUII arrests, nevertheless continued unabated into November 2009. Again, either the revised plan fell short or Licensee's servers and staff did not consistently comply with its measures.⁸ In either event, Licensee has not demonstrated the ability to adequately control the premises or patrons' behavior in the immediate vicinity of the premises, especially after 11:00 p.m. Therefore, mitigation is not warranted.

3. Failure to Verify Minor Lowsley's Age

The Commission also alleges that Licensee's employees failed to verify the age of minor Ryanna Lowsley before allowing her to buy or be served an alcoholic beverage when she reasonably appeared to be under 26 years of age, a violation of OAR 845-006-0335(1)(a)(b)(c).⁹

⁷ Where, as here, serious problems persistently recurred despite Licensee's overall attempts to reduce them, any incidents resulting from appropriate steps by licensee's staff to deal with problem persons reflect on licensee's willingness to control the premises, rather than ability.

⁸ For example, despite the requirement that the on duty manager routinely walk through all areas to monitor patron behavior and alcohol consumption, and the requirement that servers and security staff make a good faith effort to remove alcoholic drinks from any patron exhibiting signs of visible intoxication, Licensee's staff did not notice the visibly intoxicated female sitting at the video poker machine, and did not take the beer away from her in the early morning hours of August 2, 2009. On September 20, 2009, Licensee's staff was not vigilant about checking identification and allowed entry to minor Lowsley. In October 2009, there were several instances of over-service. On October 6 and 17, patrons were arrested for DUII upon leaving the licensed premises. One had a BAC of .14 percent, the other a BAC of .15 percent. On October 24, 2009, a person arrested for DUII upon leaving the premises' parking lot had had three visibly intoxicated passengers in his car.

⁹ OAR 845-006-0335 provides, in pertinent part:

(1) Age Verification:

(a) ORS 471.130 requires a licensee or permittee to verify the age of a person who wants to buy or be served alcoholic beverages when there is any reasonable doubt that the person is at least 21 years old. The Commission requires a licensee or permittee to verify the age of anyone who wants to drink alcoholic beverages or is in an area prohibited to minors if there is reasonable doubt that the person is at least 21 years old. Reasonable doubt exists if the person appears to be under the age of 26;

(b) Whenever a licensee or permittee verifies age, he/she must verify it as ORS 471.130 requires (statement of age card or the specified items of identification) and must reject any obviously altered document or one

A preponderance of the evidence establishes that Lowsley, a minor who reasonably appeared to be under 26 years of age, was allowed entry into the licensed premises on the night of September 19, 2009 or the early morning hours of September 20, 2009. The evidence also establishes that, once inside, she bought or was served an alcoholic beverage.

The evidence also indicates that minor Lowsley used another person's ID card to enter the licensed premises. In *Trapper's Lodge* (OLCC Final Order, 93-V-018, July 1993), the Commission confirmed that a minor's use of a false identification is not a defense to a violation for selling alcoholic liquor to a minor where a reasonable person would have determined that the identification was false. Furthermore, where it is established that a minor used a false identification, the burden is on the licensee to prove that the false identification was convincing. *17th & Lincoln Market* (OLCC Final Order, 91-V-060, December 1991).

Licensee asserts that because an ID card photo is only an inch and a quarter in size and a person's weight and appearance may change, and security staff could have reasonably believed that minor Lowsley was Racheal Berry, the person pictured on the ID card she presented. Despite Licensee's contention, the evidence (namely, Lowsley's booking photo, which was taken shortly after her arrest) shows that Lowsley bears little resemblance to the photo on Berry's Oregon ID card. A reasonable person verifying the age of a person who wants to buy or be served alcoholic beverages would have recognized that Lowsley, with her blonde hair, round face and distinctive moles on her cheek, was not the same person described and pictured on Berry's Oregon ID. Consequently, Licensee has not shown that the false identification was convincing. The violation has been established.

Because the violation of ORS 845-006-0335(1) is proven, the alternative charge under 845-006-0335(3) shall be dismissed.

4. Alcohol Consumption in the Premises' Parking Lot

The Commission also charged Licensee with a permitting persons to consume alcohol in a parking lot that Licensee controls that is associated with the licensed premises in violation of OAR 845-006-0347(5)(a).¹⁰

which obviously does not identify the person offering it;

(c) Licensees must require all their employees who sell, serve, oversee or control the sale or service of alcoholic beverages to verify age as subsection (a) of this section requires.

¹⁰ OAR 845-006-0347(5)(a) provides:

(5) Drinking Alcohol Outside the Premises:

(a) No licensee or permittee will permit 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.

To prove that a licensee permitted an unlawful activity, two elements must be shown. First, the evidence must prove that the licensee had knowledge of the proscribed activity, and second, the evidence must show that the licensee failed to take reasonable steps to prevent or control the unlawful activity. *See, e.g., Capital Market* (OLCC Final Order, 92-L-003, May 1993) (the Commission held that, based on prior warnings of persons drinking in the parking lot, the licensees had reasonable grounds to know about persons drinking in the parking lot).

Both permitting elements have been established in this case. During visits to the licensed premises in early November 2008, police officers and OLCC inspectors saw patrons exit the premises and walk to the parking lot with alcoholic beverages in hand. Inspector Berrios notified Boorman that patrons were taking beer out to the parking lot and issued verbal instructions about alcoholic beverages leaving the licensed area. Then, on the night of March 21, 2009, inspectors again saw patrons leave the premises with bottles of beer in hand, and drink from the bottles while in the premises' parking lot. The inspectors notified security staff and the on duty manager of the problem. The manager, Nick Boorman, acknowledged that the employees should have been better about monitoring the patrons and preventing them from drinking outside the licensed area.

Based upon the November 3, 2008 incident and resultant verbal instructions, Licensee had reasonable grounds to know that patrons were taking alcoholic beverages from the licensed premises and drinking in the premises' parking lot. As the on duty manager later acknowledged, Licensee's staff failed to take reasonable steps on the night of March 21, 2009 to prevent the prohibited activity from reoccurring. The violation of OAR 845-006-0347(5)(a) has been proven.

5. Sanction

1. Penalty for violation of ORS 471.315(1)(c). The Commission treats a violation of ORS 471.315(1)(c) as a Category I violation. OAR 845-006-500(7), Exhibit 1. The standard penalty for a first Category I violation is cancellation of the license. OAR 845-006-0200. The Commission also has the discretion to take into account the particular circumstances of each case, and increase or decrease the sanction where there are aggravating or mitigating circumstances. OAR 845-006-0200(7)(c).

As discussed above, in the context of a history of serious and persistent problems violation, a licensee's demonstrated willingness and ability to adequately control the premises warrants mitigation to a sanction short of license cancellation. But, where problems persist despite the licensee's measures to control the premises, cancellation is appropriate. *Mak's Old City Hall Lounge*, Final Order at 29; *Dr. Feelgood's Pub*, Final Order at 18.

Licensee asserts that Boorman's inexperience in owning and managing a bar, and his lack of knowledge of prior problems at the premises should be considered in assessing the penalty. The Commission rejected a similar contention in *DiMarco's Restaurant aka Club Miami* (OLCC Final Order, 04-V-043 and 04-V-062, October 2005). There, the Commission noted that the 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.” Final Order at 19. The same rationale applies here. Although Boorman met with Sgt. Carpenter in December 2009 (two years after the serious problems began) and has subsequently heeded some of the sergeant’s suggestions (such as closing earlier), these efforts to control the licensed premises are untimely and do not merit mitigation of the standard penalty. *See, e.g., Jiffy Mart* (OLCC Final Order, 04-V-027, February 2005) (finding that the amount of time it took the licensee to make changes negates any mitigation that may be due for making efforts to prevent violations). Consequently, the standard Category I sanction of license cancellation is appropriate for Licensee’s violation of ORS 471.315(1)(c).

2. Penalty for the violations of OAR 845-006-0335(1) and OAR 845-006-0347(5)(a).

Based on the determination that cancellation is the appropriate sanction for Licensee’s demonstrated history of serious of persistent problems, it is not necessary to impose a separate sanction for these two Category III violations.

3. Removal from Responsible Vendor Program.

Again, based on the determination that Licensee’s license should be cancelled due to the history of serious and persistent problems under ORS 471.315(1)(c), the Commission is entitled to remove Licensee from the Responsible Vendor Program. OAR 835-009-0135(8)(d).¹¹

FINAL ORDER

Licensee Valley Entertainment LLC, Donald Boorman, Managing Member, dba BIG SHOTS BAR & BROILER, 3755 Portland Road NE, Salem, Oregon, violated ORS 471.315(1)(c), OAR 845-006-0335(1) and OAR 845-006-0347(5)(a).

The Commission orders that the Full On-Premises Sales license held by Licensee Valley Entertainment LLC, Donald Boorman, Managing Member, dba BIG SHOTS BAR & BROILER, 3755 Portland Road NE, Salem, Oregon, be CANCELLED.

It is further ordered that Licensee Valley Entertainment LLC, Donald Boorman, Managing Member, dba BIG SHOTS BAR & BROILER, 3755 Portland Road NE, Salem, Oregon be removed from the Responsible Vendor Program.

¹¹ OAR 854-009-0135, the Responsible Vendor Program rule, provides, in pertinent part, as follows:

(8) Removal from Program and Reinstatement.

* * * * *

(d) For a Category I or II violation by the licensee personally, the licensee is removed from the program. The licensee may not reapply for the program. For a Category I or II violation by an employee, the licensee is removed from the program, but may reapply for the program in one year.

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

Dated this 23rd day of April, 2010.

/s/ Stephen A. Pharo
Stephen A. Pharo
Executive Director
OREGON LIQUOR CONTROL COMMISSION

Mailed this 23rd day of April, 2010.

THIS ORDER IS EFFECTIVE ON THE DATE MAILED.

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