

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

IN THE MATTER OF:

**LATIN CORNER, LLC,
JAVIER GARCIA, MANAGING MEMBER
DAVID RIVERO, MEMBER
DBA CASA COLONIAL BAR & GRILL
8640 SW Canyon Road
Beaverton, Oregon**

) **FINAL FINDINGS OF FACT**
) **CONCLUSIONS OF LAW**
) **AND ORDER**
) OLCC-09-V-084
) OLCC-09-V-084A
) OLCC-09-V-084B
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HISTORY OF THE CASE

On June 4, 2009, the Oregon Liquor Control Commission (OLCC or Commission) issued a Notice of Proposed License Suspension/Civil Penalty to Latin Corner, LLC, dba Casa Colonial Bar & Grill, Managing Member Javier Garcia, and Member David Rivero (Licensee). The OLCC alleged that Licensee violated OAR 845-006-0347(2)(a) by permitting disorderly activities on the licensed premises and that Licensee violated OAR 845-006-0335(6) by allowing a minor entertainer to be present in an area of the licensed premises normally prohibited to minors when not performing. The OLCC proposed that Licensee's license be suspended for 41 days or, in the alternative, that Licensee pay a civil penalty of \$6,435 in lieu of 39 days of the suspension and serve a mandatory 2 day license suspension for the alleged violations.

Licensee made a timely request for hearing. The Commission referred the request to the Office of Administrative Hearings on July 23, 2009. The case was assigned to John Mann, Senior Administrative Law Judge (ALJ). A contested case hearing was held on November 13, 2009 in Tualatin, Oregon, before ALJ Mann. Licensee was represented by Cecil Gill, attorney at law. The OLCC was represented by Becky Voelkel, OLCC Case Presenter. The OLCC presented testimony from: Officer Evin Eustice, Beaverton Police Department, Matt Cobos, OLCC Inspector, and Kevin Wellman, OLCC Inspector. Licensee presented testimony from: Javier Garcia, Managing Member, David Rivero, Member, and Gerald Wiese, former employee. The record closed on November 23, 2009 after ALJ Mann received written closing arguments from the parties.

The Administrative Law Judge considered the record of the hearing and the applicable law and issued a Proposed Order mailed January 15, 2010. Staff filed Comments on the Proposed Order on February 1, 2010.

On April 15, 2010, the Commission considered the record of the hearing, the applicable law, the Proposed Order of the Administrative Law Judge, Staff's Comments on the Proposed Order and the Administrative Law Judge's Response to Staff's Comments. Based on this review and the preponderance of the evidence, the Commission enters the following:

ISSUES

1. Whether Licensee violated OAR 845-006-0347(2)(a), as defined by OAR 845-006-0347(1)(a), by permitting disorderly activities on the licensed premises on September 1, 2008.
2. Whether Licensee violated OAR 845-006-0335(6) by allowing a minor entertainer to be present in an area of the licensed premises normally prohibited to minors when not performing.
3. If one or both of the above violations are proved, what is the appropriate penalty?

EVIDENTIARY RULING

The Commission offered Exhibits A1 through A5. Exhibits A1 through A3 and Exhibit A5 were admitted into the record without objection. Exhibit A4, as originally offered, included three pages of photographs. Licensee did not object to the admission of Exhibit A4 as originally offered. However, during the hearing the Commission asked to include enlarged copies of the three photographs in Exhibit A4. Licensee objected on the basis that the enlarged photographs could have been manipulated. Officer Eustice, who prepared the photographs, testified that he did not alter or enhance the photographs for enlargement. The objection was therefore overruled and Exhibit A4, pages 1 through 6, was admitted into the record.

Licensee offered Exhibits P1 and P2. Those Exhibits were admitted into the record without objection.

CREDIBILITY DETERMINATION

Commission Staff has alleged that Licensee's Managing Member, Javier Garcia, permitted disorderly activities on the licensed premises by engaging in a physical altercation with April Frank, a 20 year old woman on the premises in connection with a special event. April Frank alleged that Mr. Garcia, without provocation, grabbed her arms, shook her, and held her by the throat for approximately 10 seconds. Mr. Garcia conceded that he was involved in a physical altercation with Ms. Frank, but described her as the aggressor and asserted that he merely took defensive steps to shield himself from her assault after which he immediately had her removed from the premises. Thus, whether Licensee permitted disorderly activities turns in large part on the relative credibility of Mr. Garcia and Ms. Frank and her sister, Tara Frank, who witnessed the event. If the version of events related by the sisters is accurate, then the alleged violation is proved. If the version of events related by Mr. Garcia is accurate, then Licensee did not permit disorderly activity to occur on the premises.

A further complicating factor is that OLCC Staff did not call April or Tara Frank as witnesses, but, instead, presented their statements in hearsay form. A police officer who interviewed the sisters on the night in question testified at the hearing and also provided a copy of his police report documenting his conversations with April and Tara Frank. An OLCC inspector spoke with Tara, but not April, and included a summary of his conversation in his written report. He also testified about his conversation and his ultimately futile attempts to

contact April. Thus, of the three witnesses to the events at issue, only one, Mr. Garcia, actually testified at the hearing. Therefore, in order to prove the violation, the hearsay statements of April and Tara must be found more convincing than the direct testimony of Mr. Garcia.

In *Rainbow Market* (OLCC, Final Order, 08-V-124, October 26, 2009), the Commission held that hearsay can be substantial evidence to support a sanction if it meets the five fold test described in *Cole/Dinsmore v. DMV*, 336 Or 565 (2004). *Cole/Dinsmore* utilized the test first described in *Reguero v. Teacher Standards and Practices*, 312 Or 402 (1991). In *Reguero*, the Oregon Supreme Court held that the reasonableness of relying on hearsay must be assessed “in the light of countervailing as well as supporting evidence.” *Id.* at 418. In making that determination, the court listed several factors that may be considered. This includes the importance of the facts sought to be proved to the outcome of the case and considerations of economy, the alternative to relying on hearsay evidence, the state of any opposing evidence, the degree of efficacy of cross-examination with regard to the proffered hearsay, and the consequences of the decision. *Id.* After considering those factors, the Commission finds that the proffered hearsay was reliable and was substantial evidence sufficient to support the penalty.

The Commission did not call April or Tara Frank as witnesses and did not explain their failure to do so. Although April was apparently reluctant to speak with anyone about the incident in question, and would not return calls from the OLCC inspector, the Commission could likely have subpoenaed the sisters whose last known address was located mere blocks from the hearing location. The proffered hearsay is critical in determining the outcome of the most serious allegation in this case. Furthermore, the penalty proposed by the Commission, a 41-day license suspension, is a serious consequence. These factors all weigh against consideration of the hearsay evidence.

However, in assessing the substantiality of hearsay evidence, the most critical factor to consider is the state of opposing and corroborating evidence. *See, e.g., Petteys v. DMV*, 195 Or App 644, 650 (2004) (Holding that the state of opposing and corroborating evidence entitled to greater weight than other factors under *Reguero*.) In this case, Licensee presented testimony disputing the version of events given by April and Tara Frank. Most significantly, Licensee presented testimony from Mr. Garcia who denied being the aggressor in his altercation with April. That testimony was not credible.

In *Lewis and Clark College v. Bureau of Labor*, 43 Or App 245 (1979), the Oregon Supreme Court explained the factors to be considered in determining credibility:

“[C]redibility (more properly weight) is determinable from a number of factors other than witness demeanor. The credibility, *i.e.*, weight that attaches to testimony can be determined in terms of the inherent probability, or improbability of the testimony, the possible internal inconsistencies, the fact it is or is not corroborated, that it is contradicted by other testimony or evidence and finally that human experience demonstrates it is logically incredible.”

In making a credibility determination in an OLCC matter, the Commission has considered the witnesses' demeanor, the probabilities or improbabilities of the testimony, the

internal consistency or lack of it in the different witnesses' testimony and the witnesses' motivations for lying. *Town & Country Tavern* (OLCC, Final Order, 85-V-047, April 1986).

Mr. Garcia testified that he entered his office, found the sisters alone, asked them to leave, and was violently attacked by April Frank. The only explanation offered as to why April (but not Tara) would have reacted so aggressively was that Mr. Garcia allegedly told them to “get the fuck out” of the office and briefly touched April’s back to escort her out. Mr. Garcia denied initiating any other contact. April’s alleged bizarre behavior, while not impossible, was greatly out of proportion to Mr. Garcia’s actions. It is unclear what would motivate April to react violently to a request to leave an office; especially when her sister readily complied. Mr. Garcia, on the other hand, admitted that he did not want the women in the office and used coarse language to get them out. He also admitted that April, unlike Tara, did not immediately comply with his request. Under those circumstances, Mr. Garcia had some motivation to use force to try to remove April from the room.

Furthermore, Mr. Garcia made statements to Officer Eustice that were not consistent with his testimony. At the hearing, Mr. Garcia testified that the sisters never told him that they were going to change their clothes and that he never said anything to them about getting naked. He also testified that he did not grab April by the arms or neck. However, after he was arrested, and read his *Miranda* rights, Mr. Garcia told Officer Eustice that the sisters told him that they had been given permission to change in the office and that April told Mr. Garcia that they wanted some privacy. Mr. Garcia told Officer Eustice that he told April “Who wants to see you naked?” (Ex A3 at 6.) When specifically asked by the officer if he had grabbed April by the arm or the neck, Mr. Garcia claimed that he could not remember.¹

In addition, testimony from Mr. Rivero and Mr. Wiese, offered by Licensee, tends to corroborate the hearsay statements of April and Tara Frank. Mr. Wiese stated that immediately after he escorted April out of the building, she told him that Mr. Garcia had grabbed her neck and tried to show the marks to him. Although Mr. Wiese denied seeing any marks, it is unlikely that April would have immediately fabricated that specific detail so shortly after the incident. Mr. Rivero testified that he took the sisters home and that April cried during the ride and repeatedly stated that she hated Mr. Garcia. If, as asserted by Mr. Garcia, April was the aggressor, and that she reacted with such hostility merely because she was asked to leave an office, it is implausible that she would be upset for such a prolonged period.²

¹ Mr. Garcia disputed the statements attributed to him by Officer Eustice. Those self-serving denials were not persuasive in light of the detailed report prepared by Officer Eustice shortly after Mr. Garcia’s arrest and in light of the officer’s sworn testimony at the hearing.

² Licensee noted that Officer Eustice’s report stated that the sisters took a cab home, in contrast to Mr. Rivero’s testimony that he gave them a ride. Mr. Rivero’s testimony was plausible and reliable. The statement that the sisters went home by cab, in contrast, appears in just one sentence in Officer Eustice’s report. How the sisters got home was clearly not the focus of Officer Eustice’s investigation. The fact that the report may have been erroneous in this one minor respect does not detract from the overall reliability of the statements of April and Tara Frank regarding the incident in question.

The hearsay statements are further corroborated by photographs showing bruises on April's arm and marks on her neck. Officer Eustice, who took the photographs, testified that the marks were fresh and not consistent with self-inflicted injuries.

Finally, Licensee offered no explanation as to why Tara and April would have made up an elaborate story of a physical attack by a much older man within two hours after the incident in question. April apparently did not pursue the matter after that night and had no obvious motivation to lie. Mr. Weise testified that April made statements indicating that she would own the licensed premises. The obvious implication was that April thought that she could sue Licensee. If that was her intention, it does not appear that she ever followed through on the threat. Mr. Garcia, on the other hand, is facing the suspension of his liquor license and, perhaps, a substantial monetary penalty. His motivation for minimizing his conduct on the night in question is therefore obvious.

On balance, the hearsay statements of April and Tara were more persuasive than the self-serving testimony offered by Mr. Garcia. The quality of the evidence opposing the hearsay was not reliable. Other evidence in the record corroborated the hearsay evidence. Thus, applying the analysis set forth under *Reguero*, the hearsay statements were reliable and constituted substantial evidence of the alleged violation.

FINDINGS OF FACT

1. Latin Corner, LLC, Managing Member Javier Garcia, and Member David Rivero, dba Casa Colonial Bar & Grill,³ located at 8640 SW Canyon Road in Beaverton, Oregon has held a Full On-Premises Commercial (F-COM) Sales license for the premises since July 1, 1997. Mr. Garcia and Mr. Rivero each own a 50 percent interest in Latin Corner, LLC. On January 4, 2008, the Commission imposed a \$990 civil penalty against Licensee for failure to have the minimum amount of food available in all areas, a Category III violation. (Ex. A1; test. of Cobos.)

2. On September 1, 2008, April Frank, born April 23, 1988, and her sister Tara Frank, born September 22, 1984, went to the licensed premises to participate in a special show. The sisters arrived at the premises at approximately 12:15 a.m. and understood that they would be dancing topless at the show.⁴ April was 20 years old at the time. (Test. of Eustice; Ex. A3.) When Tara and April arrived at the licensed premises, Mr. Rivero allowed them to enter through a side door located approximately three feet from the business office of the premises. (Test. of Rivero.) The sisters entered the business office intending to change clothes for the show. (Ex. A3 at 4-5; Ex. A2 at 5.)

3. Mr. Rivero invited Gerald Wiese, a former security employee, to attend the September 1, 2008 event as a customer. Mr. Wiese arrived at the premises before April and Tara and also

³ Although Licensee lists Casa Colonial Bar & Grill as its assumed business name, it actually operates the premises under the name Club Caribe.

⁴ In his Response to Staff Comments, the Administrative Law Judge concurred that this finding of fact should be modified to note that the sisters arrived at the premises at approximately 12:15 a.m.

entered through the side door near the business office. Mr. Wiese was standing just outside of the office with Mr. Rivero when April and Tara arrived. After April and Tara went into the office, Mr. Rivero left to go work in a DJ booth on the licensed premises. Mr. Wiese continued to stand outside of the office where he was able to observe the sisters who were sitting on a couch. After a few minutes, Mr. Wiese observed Mr. Garcia approaching the office, at the same time, Mr. Wiese left to go speak to security personnel in the bar area of the licensed premises. When Mr. Wiese returned a few moments later, he could hear April screaming and saw that she was involved in an altercation with Mr. Garcia. (Test. of Wiese.) Mr. Garcia told Mr. Wiese to “get [April] the fuck out of here.” (Test. of Garcia.) Mr. Wiese then escorted April and Tara out of the building. (Test. of Wiese.)

4. Mr. Wiese stood with April and Tara outside of the building. April was extremely upset and referred to Mr. Garcia as a “motherfucker.” She stated that she was going to sue and would own the business. April told Mr. Wiese that Mr. Garcia had assaulted her. April asked Mr. Wiese to look at some marks that Mr. Garcia left on her neck. When Mr. Wiese said that he could not see any marks, April tried to demonstrate how Mr. Garcia grabbed her. (Test. of Wiese.)

5. Shortly after 1:00 a.m., Officer Evin Eustice of the Beaverton Police Department received a call from dispatch of a reported assault at the licensed premises. Officer Eustice called April who asked him to meet her at her apartment in Tualatin, Oregon. Officer Eustice arrived at the apartment, located at 8325 SW Mohawk Street in Tualatin at approximately 2:00 a.m. Both April and Tara were present. Officer Eustice met with each sister separately so that the two women would give independent statements. (Test. of Eustice; Ex. A3 at 1, 4.)

6. Officer Eustice first met with April who told him the following: Mr. Garcia asked April and Tara to perform at the licensed premises on September 1, 2008. April understood that she and her sister would be dancing topless in an upstairs area at the club and would work for tips. April danced topless at the licensed premises approximately one year earlier and earned approximately \$200 in tips. April and Tara were in an office at the licensed premises and were preparing to change as Mr. Garcia stood outside of the opened door. April told Mr. Garcia that she was going to close the door so that she and Tara could change. (Ex. A3 at 4.) Mr. Garcia said something to the effect of “You[’re] going to get naked anyway just go ahead and change.” (*Id.*) April then said that she needed to close the door so that they could change in privacy. When April attempted to close the door, Mr. Garcia grabbed her arm and then “[w]ent crazy, and attacked me.” (*Id.*) Mr. Garcia then grabbed April’s neck for approximately ten seconds. After he let go of her neck, he grabbed her by the arms and started shaking her back and forth. April attempted to fight back and Mr. Garcia eventually let her go, telling her to “get the fuck out.” (*Id.*)

7. Officer Eustice then met with Tara who told him the following: Mr. Garcia approached Tara at Club 503 on August 31, 2008 and asked her to get girls to dance at the licensed premises at an event the following evening. Tara and April went to Club Caribe on the night in question and entered an office to change clothes. Mr. Garcia followed them into the office and told them to go ahead and change. April told Mr. Garcia that they wanted privacy to change. (*Id.* at 5.) Mr. Garcia then said something to the effect of “Why you were already

naked.” (*Id.*) When April attempted to close the door, Mr. Garcia grabbed her by the arm and attempted to pull her out of the office. April attempted to fight back and Mr. Garcia grabbed her by the neck for approximately ten seconds. April and Mr. Garcia were “wrestling” briefly before Mr. Garcia let go of April. April was crying after the incident. (*Id.*)

8. Officer Eustice took several photographs of April which showed several marks on her neck and left arm. (Test. of Eustice; Ex. A3.) Officer Eustice believed the marks were relatively new and consistent with a person being grabbed by the neck and arm. The marks on April’s neck looked as though they formed an oval pattern caused by a person grabbing her neck. Officer Eustice did not believe that any of the marks were consistent with self-inflicted injuries. (Test. of Eustice.)

9. Mr. Rivero went outside the licensed premises to meet with April and Tara after he learned that they were leaving and would not be dancing. Mr. Rivero offered to give the girls a ride home and they accepted. Mr. Rivero did not notice any marks on April. During the ride home, April was upset and cried at times. She repeatedly said that she hated Mr. Garcia. (Test. of Rivero.)

10. Mr. Garcia met with Officer Eustice at the Beaverton Police Station on September 4, 2008. Mr. Garcia told the officer that he went into the office on the licensed premises on September 1, 2008 and saw April and Tara. Mr. Garcia stated that no one was allowed in the office other than himself or Mr. Rivero because there was a substantial amount of money and alcohol inside. Mr. Garcia stated that April and Tara told him that Mr. Rivero had given them permission to change in the office. According to Mr. Garcia, he told them that he did not care and that the girls would have to leave. Mr. Garcia told Officer Eustice that Tara left the office but April did not. (Ex. A3 at 5.) When Mr. Garcia attempted to move April out of the office, she “freaked out.” (*Id.*) Officer Eustice asked Mr. Garcia if he grabbed April. (*Id.*) He told the officer that “he attempted to move her out of his office.” (*Id.*) Officer Eustice then placed Mr. Garcia under arrest for Assault IV. (*Id.*)

11. Officer Eustice read Mr. Garcia his *Miranda* rights and asked if he wanted to speak with him in more detail about the incident with April. Mr. Garcia agreed and told the officer that he knew both sisters and that Tara had danced at the licensed premises approximately one year earlier. Mr. Garcia stated that he did not know that Tara and April were going to be dancing at the club on September 1, 2008 and if they were hired it would have been by Mr. Rivero. Mr. Garcia told Officer Eustice that when he saw the sisters in the office he told them to get out. Tara left, but April did not. Mr. Garcia said that April told him that they needed to change and wanted privacy. (*Id.* at 5-6.) Mr. Garcia told the officer that he told April “Who wants to see you naked?” (*Id.* at 6.) When April asked how Mr. Garcia wanted her to change, he replied “I don’t care get out.” (*Id.*) Mr. Garcia stated that he moved his arm to escort April out of the office and made contact with her lower back. (*Id.*; test. of Eustice.) According to Mr. Garcia, after he touched April she started swinging her arms at him. He claimed that he put his arms in front of him, and started hitting the inside of her arms, to block her blows. Officer Eustice asked Mr. Garcia if he grabbed April’s arms or neck. Mr. Garcia stated that he could not remember. (*Id.*)

12. Mr. Rivero formerly owned a business that featured nude dancing. Tara worked for him at that establishment for about two months approximately four years ago. He met April during the time that Tara worked for him.⁵ (Test. of Rivero.) When he met them, Tara (who was born in 1984) was 20 or 21 years old, and April (who was born in 1988) was 16 or 17. (Ex. A3 at 1; test. of Rivero.)

13. The licensed premises is required to have a Number 1 posting, meaning that Licensee is required to post a notice stating that minors are prohibited from the entire premises. (Test. of Cobos; Ex. A5.) In 2008, Mr. Garcia met with OLCC Inspector Karen Keith about the possibility of changing his operation to include nude dancing. Ms. Keith told Mr. Garcia that he would have to submit a written request to the Commission to change his operation and would need to include a plan on where minor entertainers would be located when not performing. Licensee never submitted such a request. (Test. of Cobos.)

14. On February 4, 2009, OLCC Inspectors Matt Cobos, Kevin Wellman, and Jason Tallmadge met with Mr. Garcia at Studio 503, another business owned by Mr. Garcia. Mr. Wellman explained that they wanted to get a statement from him regarding the incident with April, but that he was not required to answer their questions due to the pending criminal charges. Mr. Wellman explained that there would be no repercussions if Mr. Garcia refused. Mr. Garcia agreed to answer questions. (Ex. A2 at 5; test. of Wellman; test. of Cobos.)

15. Mr. Garcia told the inspectors that he went to the office of the licensed premises on September 1, 2008 and found April and Tara in his office and did not want them there. He stated that the girls did not take him seriously so he left to get Mr. Rivero. Mr. Garcia claimed that while he was gone, a former security staff named Jerry observed April trying to make marks on herself. Mr. Garcia stated that Mr. Rivero paid the girls \$200 and they left. (Ex. A2 at 6; test. of Cobos.)

16. Mr. Cobos attempted to contact April several times from September through October 2008 and left several phone messages. April did not return any of those calls. On December 11, 2008, Mr. Cobos spoke with Tara by phone. Tara told Mr. Cobos that the incident had caused a strain in her relationship with April because Tara did not do anything when Mr. Garcia was choking April. Tara stated that April changed her phone number because she was getting a lot of phone calls from people wanting to discuss the incident and was afraid that they were from people who were associated with Mr. Garcia or his attorney. (Ex. A2 at 5.)

17. On July 20, 2009, the Beaverton Municipal Court dismissed the criminal charges against Mr. Garcia. (Ex. P2.) Mr. Garcia does not know why the charges were dismissed. (Test. of Garcia.)

⁵ In his Response to Staff Comments, the Administrative Law Judge concurred that this finding of fact should be changed to reflect that Mr. Rivero met April during the time that Tara worked for him.

CONCLUSIONS OF LAW

1. Licensee violated OAR 845-006-0347(2)(a), as defined by OAR 845-006-0347(1)(a), by permitting disorderly activities on the licensed premises on September 1, 2008.

2. Licensee violated OAR 845-006-0335(6) by allowing a minor entertainer to be present in an area of the licensed premises normally prohibited to minors when not performing.

3. Licensee's license should be suspended for 41 days or, in the alternative, that Licensee may pay a civil penalty of \$6,435 in lieu of 39 days of the suspension and serve a mandatory 2 day license suspension for the alleged violations.

OPINION

OLCC Staff has alleged that Licensee violated OAR 845-006-0347(2)(a) by permitting disorderly activities on the licensed premises. Staff also alleged that Licensee violated OAR 845-006-0335(6) by allowing a minor to be present at the licensed premises in a location normally prohibited to minors.

The OLCC had the burden to prove its allegations by a preponderance of the evidence. ORS 183.450(2); *Harris v SAIF*, 292 Or 683, 690 (1983) (general rule regarding allocation of burden of proof is that the burden is on the proponent of the fact or position); *Sobel v. Board of Pharmacy*, 130 Or App 374, 379, (1994), *rev den*, 320 Or 588 (1995) (standard of proof under the Administrative Procedures Act is preponderance of evidence absent legislation adopting a different standard). Proof by a preponderance of the evidence means that the fact finder is persuaded that the facts asserted are more likely true than not true. *Riley Hill General Contractors v. Tandy Corp.*, 303 Or 390 (1989).

1. Disorderly Activities

The OLCC alleged that Licensee violated OAR 845-006-0347(2)(a), as defined by OAR 845-006-0347(1)(a), by permitting disorderly activities on the licensed premises on September 1, 2008. OAR 845-006-0347 provides, in relevant part:

(1) Definitions. As used in this rule:

(a) "Disorderly activities" are those that harass, threaten or physically harm another person;

* * * * *

(2) Noisy or Disorderly Activity:

(a) No licensee or permittee will permit noisy or disorderly activities on the licensed premises or in areas the licensee controls that are adjacent to or outside the premises.

(b) Violation of this section is a Category III violation.

On September 1, 2008, while at the licensed premises, Javier Garcia, Licensee's managing member, grabbed April Frank by the arms and by the neck with enough force to leave marks and cause bruises. Mr. Garcia's actions were both threatening and caused physical harm. The actions also amounted to harassment. Although the incident was brief, it constituted disorderly activity within the meaning of OAR 845-006-0347. Given that Mr. Garcia engaged in the disorderly activity, the evidence demonstrated that Licensee permitted the activity. The evidence therefore established that Licensee permitted disorderly activity in violation of OAR 845-006-0347(2).

Licensee noted that the criminal charges were dropped and asserts that Mr. Garcia's conduct did not amount to criminal harassment or assault. Those facts are irrelevant. The Commission has not alleged violation of a criminal statute, it has alleged that Mr. Garcia's actions violated OAR 845-006-0347(2)(a) as defined by OAR 845-006-0347(1)(a). Actions that "harass, threaten or physically harm another person" amount to disorderly activities under the rule even if they may not rise to the level of a criminal offense.

2. Minor Entertainer at the Licensed Premises

845-006-0335(6) provides as follows.

(6) Minor Entertainer:

(a) A minor entertainer may perform on licensed premises. If the minor entertainer stays on the premises when not performing, he/she must stay in an area where minors are permitted. If there is no break room, dressing room or patron area where minors are permitted, the licensee may, with prior Commission approval, designate space for minor entertainers in an area normally prohibited to them. At a minimum, the place must be within the bartender's sight but not at the bar, and there must be no alcoholic beverages in this place;

Licensee admits that April was a minor on September 1, 2008 and that she was in an area of the licensed premises normally prohibited to minors. However, Licensee argues that April was not on the premises as a minor entertainer. Rather, Licensee contends that Mr. Rivero asked Tara to dance at a special event and did not expect April to perform. That contention is not plausible.

Mr. Rivero testified that he asked Tara to dance at the event and did not ask her to bring any other girls. However, he met Tara and April at the door and allowed them both to come inside. There is no evidence that he asked Tara or April why April was present. If, as contended by Licensee, April had not been invited to the show, Mr. Rivero most likely would have asked Tara why April was there.

Mr. Weise gave contradictory testimony regarding the reason for April's presence. Initially, Mr. Weise testified that he saw the two young women come into the club and assumed that "they were there for the show." Mr. Weise also testified that he was told that there would be several dancers at the event, including Tara. Given what he had been told, it would be reasonable for him to assume that both women would be dancing. However, he later testified that he assumed that Tara would be dancing, but that April would not. His only basis for his alleged assumption that April would not be dancing was that only Tara was carrying a bag, which he assumed contained costumes. However, Mr. Wiese apparently never attempted to clarify why April was present.

April and Tara told Officer Eustice that both of them had been asked to perform at the licensed premises. When April arrived with her sister, no one questioned the reason for her presence. It would make little sense for April, who was a minor, to accompany her sister to the licensed premises merely as an observer or a customer. The evidence established, more likely than not, that Licensee hired both girls to perform in the show. The self-serving testimony to the contrary was not plausible.

3. Sanctions

Violation of OAR 845-006-0347(2)(a) is a Category III violation. This was Licensee's second Category III violation within two years. The standard penalty for a second Category III violation is a 30 day suspension or a civil penalty of \$4,950. OAR 845-006-0500(7)(Exhibit 1).

Violation of OAR 845-006-0335(6) is a Category IV violation. This was Licensee's first Category IV violation. The standard penalty is a seven day suspension or a civil penalty of \$1,155. OAR 845-006-0500(7)(Exhibit 1).

Licensee asserted that there were mitigating factors regarding the violation of OAR 845-006-0347(2)(a). First, Licensee argued that Mr. Garcia acted reasonably in using force to remove April from his office and that any injuries were unintentional. That argument is not well founded. The evidence established that Mr. Garcia grabbed April by the throat hard enough to leave marks. He grabbed her by the arms with sufficient force to leave bruises. His actions far exceeded a reasonable use of force. Second, Licensee argued that Mr. Garcia was cooperative during the investigation because he voluntarily spoke with Officer Eustice and the Commission's inspectors. However, the evidence established that Mr. Garcia's statements to police and inspectors were inconsistent and self-serving. It is inappropriate to use such statements as a basis for mitigation.

There are, however, aggravating circumstances with the current violations. Mr. Garcia was personally involved with the violation of OAR 845-006-0347(2)(a). Mr. Rivero, who knew both April and Tara, had reason to know that April was underage. Mr. Rivero personally allowed April into the licensed premises and therefore was personally involved with the violation of OAR 845-006-0335(6) *See P-Mart* (OLCC, Final Order, OLCC-92-V-098, April 1993) (where the licensee personally committed the violation, there is basis for aggravation). Staff therefore requested that the penalty for each violation be increased by two days. That request is

reasonable. Thus, Licensee is subject to a suspension of 32 days for violation of OAR 845-006-0347(2)(a) and 9 days for violation of OAR 845-006-0335(6).

ORS 471.322(1) allows the Commission to accept payment of a civil penalty in lieu of a suspension of 30 days or less. However, the civil penalty may not exceed \$5,000. ORS 471.322(2). In order to stay under that statutory limit, the Commission typically computes a civil penalty in lieu of suspension at \$165 per day. OAR 845-006-0500(6). Because the standard sanction for the violation of OAR 845-006-0347(2)(a) is \$4,950 in lieu of a 30 day suspension, the Commission cannot assess a civil penalty of \$165 for each of the two additional days of the suspension without violating the statutory limit. Commission staff has therefore proposed that two days of the suspension be mandatory. That proposal is reasonable and consistent with the Commission's authority.

Therefore, Licensee is subject to a suspension of 9 days, or may pay a civil penalty of \$1,485 for violation of OAR 845-006-0335(6). Licensee is subject to a suspension of 32 days, or may pay a civil penalty of \$4,950 in lieu of 30 days of the suspension, for violation of OAR 845-006-0347(2)(a). Taken together, this results in a total suspension time of 41 days, or payment of a civil penalty of \$6,435 plus a two day license suspension.

FINAL ORDER

The Commission orders that the license held by Latin Corner, LLC, Managing Member Javier Garcia, and Member David Rivero, dba Casa Colonial Bar & Grill, located at 8640 SW Canyon Road in Beaverton, Oregon, be suspended for 41 days or, in the alternative, that Licensee pay a civil penalty of \$6,435 and serve a mandatory license suspension of 2 days for violation of OAR 845-006-0347(2)(a) and OAR 845-006-0335(6).

If you choose to pay the fine, it must be paid within ten (10) days of the date of this Order; otherwise, the suspension must be served.

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

Dated this 22nd day of April, 2010.

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

Mailed this 22nd day of April, 2010.

THIS ORDER IS EFFECTIVE ON THE DATE MAILED. Any monetary fine or civil penalty set out in the order shall be due and payable 10 days after the date of mailing.

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.