

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

In the Matter of the Full On-Premises)	FINAL FINDINGS OF FACT
Sales License Held by:)	CONCLUSIONS OF LAW
)	AND ORDER
Jaime Aguilar)	OLCC-09-V-136
)	OLCC-10-V-005
dba LA TORTA EXPRESS)	
2575 SE Baseline)	
Cornelius, OR 97113)	

HISTORY OF THE CASE

On November 3, 2009, the Oregon Liquor Control Commission (OLCC or Commission) issued a Notice of Proposed License Cancellation to Jaime Aguilar (Licensee), dba La Torta Express, located at 2575 SE Baseline, Cornelius, Oregon. The notice charged Licensee with failing to maintain liquor liability insurance in violation of OAR 845-005-0400(1). Licensee timely requested a hearing.

On December 17, 2009, the Commission referred Licensee’s hearing request to the Office of Administrative Hearings. The matter was assigned case no. 09-V-136.

On January 7, 2010, the Commission issued a Violation Notice to Licensee, alleging that Licensee permitted unlawful activity on the licensed premises in violation of OAR 845-006-0347(3) by permitting an employee to provide private security services without a certification issued by the Department of Public Safety Standards and Training (DPSST). Licensee requested a hearing. The hearing request was referred to the Office of Administrative Hearings on January 29, 2010 and assigned case no. 10-V-005.

The two cases were consolidated for hearing and assigned to Administrative Law Judge Alison Greene Webster. The consolidated contested case hearing was held in Tualatin, Oregon, on March 16, 2010, before Administrative Law Judge Webster. Kelly Routt presented the case for the OLCC. Licensee appeared without counsel. The proceedings were interpreted for Licensee by Laura Lopez, a certified Spanish interpreter.

OLCC Inspector Mark Smith testified at hearing on behalf of OLCC. Licensee testified on his own behalf. The record closed on March 16, 2010, at the conclusion of the hearing.

The Administrative Law Judge considered the record of the hearing and the applicable law and issued a Proposed Order mailed April 6, 2010.

No Exceptions to the Proposed Order were filed within the 25-day period specified in OAR 845-003-0590.

The Commission adopts the Proposed Order of the Administrative Law Judge as the Final Order of the Commission and enters the following based on the preponderance of the evidence:

EVIDENTIARY RULINGS

Pleading documents A through C were received. OLCC Exhibits A1 through A12 were admitted into the record without objection.

ISSUES

1. Whether Licensee failed to maintain liquor liability insurance or a bond with a corporate surety in the amount of not less than \$300,000 in violation of OAR 845-005-0400(1).
2. Whether, on or about January 22, 2010, Licensee permitted employee Jesus Ocegueda to provide private security services at the licensed premises without a private security certification in violation of ORS 181.991(1)(b), and if so, whether Licensee permitted unlawful activity on the licensed premises in violation of OAR 845-006-0347(3).
3. If one or more of the violations are proven, what is the appropriate penalty?

FINDINGS OF FACT

1. Jaime Saucedo Aguilar, dba La Torta Express, located at 2575 SE Baseline, Cornelius, Oregon, has held a Full On-Premises Sales license since April 10, 2009. (Ex. A1.)
2. In April 2009, just prior to obtaining the liquor license, Licensee purchased a liquor liability insurance policy (policy no. CQ00061016) in the amount of \$300,000 through Acceptance Indemnity Insurance Company/Evergreen Insurance Managers, Inc., and its local agent, WSC Insurance. (Ex. A3.) Licensee was unable to pay the full annual premium, so he used a finance company, Premium Financing Specialists, Inc., to finance the premium payments.
3. In late May 2009, Licensee contacted WSC Insurance and changed his mailing address from the licensed premises' address to a post office box in Cornelius, Oregon. (Ex. A4.)
4. On June 17, 2009, OLCC Inspector Mark Smith contacted Licensee at the licensed premises to follow up on a complaint of patrons urinating and vomiting in the premises' parking lot. Inspector Smith advised Licensee of the complaint, and issued verbal instructions regarding visibly intoxicated persons, disorderly conduct and serious and persistent problems at the licensed premises. Licensee agreed to disperse any crowds in the parking lot and monitor the parking lot to avoid future problems. Inspector Smith also told Licensee that his security staff needed to obtain private security certification (PSID) from the Department of Public Safety Standards and Training (DPSST). (Ex. A12; test. of Smith.)
5. On or about August 4, 2009, Premium Financing Specialists sent Licensee and WSC Insurance a Notice of Cancellation, advising that Licensee's liquor liability policy would be

cancelled effective August 7, 2009 based on an unpaid balance of \$311.05. The notice was sent to Licensee at his post office box address. (Ex. A5.)

6. On or about August 10, 2009, WSC Insurance sent Licensee a Cancellation Notice regarding policy no. CQ00061016. The agent advised that the policy had been cancelled, and stated that if Licensee wanted the insurer to consider reinstating the policy, he would need to sign and return a “no loss” letter and pay the unpaid balance of \$316.05 no later than August 14, 2009. The notice was sent to Licensee at his post office box address. (Ex. A6.)

7. On August 17, 2009, Premium Financing Specialists sent Licensee and WSC Insurance a “#1 Cancellation Follow Up” seeking confirmation that its cancellation notice had been received. The notice was sent to Licensee’s post office box address. (Ex. A7.)

8. OLCC received notice that Licensee’s liquor liability policy had been cancelled for nonpayment effective August 7, 2009. On September 10, 2009, OLCC employee Laura Paul contacted WSC Insurance and confirmed that Licensee’s policy no. CQ0061016 had been cancelled as of August 7, 2009 and had not been reinstated. Paul then contacted Licensee. Licensee said he was unaware of the cancellation and would take care of the problem immediately. Licensee also mentioned he thought that the insurer was sending the bills to the wrong address. (Ex. A8; test. of Smith.)

9. Later in the day on September 10, 2009, Licensee made a premium payment to WSC Insurance. The insurer was unwilling to retroactively reinstate the policy (because Licensee failed to timely return the “no loss” letter and pay the unpaid balance to the financing company), but agreed to issue Licensee a new liquor liability policy (no. CQ0006120), effective as of September 11, 2009. (Exs. A2, A9, A10; test. of Smith.)

10. On September 17, 2009, Licensee’s employee Jesus Aguilar failed to properly check the identification of a person who reasonably appeared to be under the age of 26 years old. On November 25, 2009, OLCC Inspector Kevin Wellman issued Licensee a Notice of Violation ticket for this violation, and for failing to have an employee on premises who can effectively communicate with Commission Staff. Licensee accepted responsibility for these Category III violations and, in January 2010, served a 12-day license suspension. (Ex. A1.)

11. Meanwhile, at about 12:27 a.m. on November 22, 2009, Inspector Smith, along with Regional Manager Kindrick and Inspector Tallmadge, went to the licensed premises on a compliance check. Just outside the front door, they were stopped by Licensee’s employee, Jesus Ocegueda, and asked to show identification. Ocegueda was wearing a black t-shirt with the word “SECURITY” stenciled on the back in bold white letters. The inspectors showed their issued OLCC badges and identification and were permitted entry into the premises. (Test. of Smith; Ex. A11.)

12. During the inspectors’ visit, Inspector Smith asked Ocegueda about his duties at the licensed premises. Ocegueda said he had been employed at the licensed premises for about two months. He explained that he was responsible for stopping persons at the door, checking their identification, and denying access to minors and visibly intoxicated persons. Ocegueda also said

that he was responsible for monitoring the parking lot, including protecting patrons who may be smoking outside and protecting the premises' property and patrons' vehicles in the lot. Ocegueda added that he was also expected to break up any fights at the premises and to contact the police if necessary. (Ex. A11; test. of Smith.)

13. Inspector Smith asked to see Ocegueda's DPSST PSID card. Employee Ocegueda was unaware that he needed DPSST certification to perform private security services in Oregon, and said he did not have such certification. Inspector Smith then issued Ocegueda a criminal citation under ORS 181.991 for performing private security services at the licensed premises without a DPSST PSID certification. (Ex. A11; test. of Smith.)

14. On December 15, 2009, Ocegueda was convicted of performing private security services without a valid private security certification in violation of ORS 181.991. (Test. of Smith.)

15. Around the time Licensee's liquor liability insurance was cancelled for non-payment in August 2009, Licensee had left his brother, Jesus Aguilar, in charge of the business. Jesus Aguilar was supposed to manage the premises and pay the business' bills. Licensee was focusing on another one of his licensed businesses, Aguilar Tienda Mexicana, in Beaverton. Jesus Aguilar does not read or understand English proficiently. When he received the insurance bills and cancellation notices, he was confused as to what he needed to pay and to which company, so he disregarded them. (Test. of Licensee.)

CONCLUSIONS

1. Licensee failed to maintain liquor liability insurance or a bond with a corporate surety in the amount of not less than \$300,000 in violation of OAR 845-005-0400(1).
2. Licensee permitted unlawful activity on the licensed premises in violation of OAR 845-006-0347(3) by permitting employee Jesus Ocegueda to provide private security services at the licensed premises without a private security certification in violation of ORS 181.991(1)(b).
3. The appropriate penalty is cancellation of the license.

OPINION

As set out above, the Commission alleges that Licensee is liable for two violations, failing to maintain liquor liability insurance or a bond and permitting unlawful activity on the licensed premises. As the proponent of these contentions, the Commission bears the burden of proof. 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).

1. Failure to Maintain Liquor Liability Insurance

ORS 471.168(1)¹ and OAR 845-005-0400(1)² require that a licensee maintain liquor liability insurance of not less than \$300,000 or a bond with an authorized corporate surety of not less than \$300,000. The Commission alleges that Licensee violated OAR 845-005-0400(1) when he failed to maintain liquor liability insurance on the licensed premises for the period of August 7, 2009 to September 10, 2009.

The record establishes that Licensee's liquor liability policy was cancelled for non-payment on August 7, 2009, and Licensee did not have the requisite liability insurance or a surety bond in place again until September 11, 2009. Even assuming that the insurance policy's cancellation and resultant lapse in coverage are attributable to the negligence of Licensee's brother, Licensee is nevertheless responsible for the violation. OAR 845-006-0362 (a licensee is

¹ ORS 471.168(1) provides:

For the purpose of providing coverage for injuries suffered by persons by reason of the conduct of intoxicated persons who were served alcoholic beverages on licensed premises while visibly intoxicated, all persons holding a license described in this section must either:

- (a) Maintain liquor liability insurance of not less than \$300,000; or
- (b) Maintain a bond with a corporate surety authorized to transact business in this state in the amount of not less than \$300,000.

² 845-005-0400 provides as follows:

Liquor Liability Insurance or Bond Requirement

(1) ORS 471.313(4)(i) requires applicants for a liquor license to demonstrate financial responsibility sufficient to adequately meet the requirements of the business proposed to be licensed. ORS 471.313(2) requires applicants listed in 471.168 to maintain liquor liability insurance or bond. In addition to other requirements, the Commission has determined that licensees listed in 471.168 must demonstrate financial responsibility for licensees' liability for damages to third parties caused by patrons off the licensed premises by meeting the requirements in section (1)(a) or (b) of this rule. ORS 471.168 requires certain licensees to provide coverage for injuries suffered because of the conduct of visibly intoxicated persons who were served in licensed premises by:

- (a) Maintaining liquor liability insurance of not less than \$300,000; or
- (b) Maintaining a bond with a corporate surety authorized to transact business in this state in the amount of not less than \$300,000.

(2) The requirement applies to the covered licenses issued or renewed on or after March 15, 1998.

(3) ORS 471.168 also requires licensees subject to the requirement to supply proof of compliance at the time the license is issued or renewed. For insurance, licensees must provide proof by naming the Commission as Certificate Holder on the policy and giving the Commission a copy of the certificate. For a bond, proof may be satisfied by identifying the name of the surety and providing the bond identification number.

(4) Failure to maintain insurance or a bond as required is a Category I violation and the Commission may cancel the license.

responsible for the acts of its servants, agents, employees or representatives). The violation of OAR 845-005-0400(1) has been established.

2. Employee Ocegueda's Lack of DPSST Certification

The Commission also alleges that on November 22, 2009, Licensee permitted unlawful activity in violation of OAR 845-006-0347(3) when employee Jesus Ocegueda performed private security services at the licensed premises without DPSST certification.

OAR 845-006-0347(3)(a) provides:

No licensee or permittee will permit any unlawful activity on the licensed premises or in areas the licensee controls that are adjacent to or outside the premises. Unlawful activity includes any activity that violates a criminal statute. Examples include, but are not limited to, crimes related to prostitution, public indecency, controlled substances and gambling. The Commission does not require a conviction to establish a violation of this section except as ORS 471.315 and 471.700 requires.

(Emphasis added.)

Pursuant to ORS 181.991(1)(b), it is a violation for a person to provide "private security services" as a "private security professional" without a valid DPSST certification.³ "Private security professional" is defined in ORS 181.871(6) and means an individual who performs, as a primary responsibility, private security services for consideration.⁴ The term "private security services" is defined in ORS 181.870(8):

³ ORS 181.991(1)(b) provides:

(1) A person commits a: * * *

(b) Class A violation if the person provides private security services as a private security professional without being certified to do so under ORS 181.878 and having in the person's possession the certificate issued under ORS 181.878.

Pursuant to ORS 131.005(6), "criminal action" includes a violation.

⁴ ORS 181.871(6) provides:

"Private security professional" means an individual who performs, as the individual's primary responsibility, private security services for consideration, regardless of whether the individual, while performing the private security services, is armed or unarmed or wears a uniform or plain clothes, and regardless of whether the individual is employed part-time or full-time to perform private security services.

“Private security services” means the performance of at least one of the following activities:

- (a) Observing and reporting unlawful activity.
- (b) Preventing or detecting theft or misappropriation of goods, money or other items of value.
- (c) Protecting individuals or property, including but not limited to proprietary information, from harm or misappropriation.
- (d) Controlling access to premises being protected.

In this case, the evidence establishes that on November 22, 2009, Licensee’s employee Jesus Ocegueda provided private security services as a private security professional at the licensed premises without DPSST certification. Ocegueda was convicted of violating ORS 181.991(1)(b) for performing private security services at the premises. Ocegueda also admitted to the inspectors that he performed activities recognized as private security services, *e.g.*, controlling access to the licensed premises, protecting individuals from harm and property from theft or misappropriation and observing and reporting unlawful activity.

The evidence also establishes that Licensee permitted this unlawful activity. In June 2009, Inspector Smith notified Licensee that his security staff would be providing private security services requiring DPSST certification. Licensee therefore had knowledge of the legal requirement. Despite this, Licensee hired Ocegueda to perform private security services at the licensed premises without requiring that, or verifying whether, Ocegueda had DPSST certification. The violation of OAR 845-006-0347(3)(a) has also been proven. *See Interstate Bar & Grill* (OLCC Final Order, 09-V-027, September 2009) (holding that, after being made aware of the requirement for DPSST-certified security staff, the licensee permitted the unlawful activity when he did not take reasonable steps to prevent employing non-certified security personnel).

3. Penalty

The Commission treats a violation of OAR 845-005-0400(1) (failure to maintain liquor liability insurance or a bond) 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).

In this case, Licensee has not established any mitigating circumstances that would warrant decreasing the sanction to something short of cancellation. Licensee was without liquor liability insurance coverage for more than 30 days, and was unable to obtain reinstatement of the policy or retroactive coverage for that period. *Compare Jonicole Vineyards* (OLCC Final Order, 89-V0-65, September 1989) (mitigating the penalty in part because the licensee obtained a bond

that retroactively covered any claims occurring during the time the licensee was not bonded); *Evil Sister Saloon* (OLCC Final Order, 97-V-012, October 1997) (licensee's attempts to obtain insurance after the policy was cancelled was a reason to mitigate the penalty). In the absence of any basis on which to mitigate the sanction, license cancellation is warranted for this Category I violation.

The Commission treats a violation of OAR 845-006-0347(3) (permitting unlawful activity) as a Category III violation. OAR 845-006-0500(7), Exhibit 1. This is Licensee's third Category III violation since obtaining the license in April 2009. The standard penalty for a third Category III violation within two years is a 30 day license suspension. But, based on the determination that cancellation is the appropriate sanction for Licensee's failure to maintain liquor liability insurance or a bond, it is not necessary to impose a separate sanction for the Category III violation.

FINAL ORDER

License Jaime Saucedo Aguilar, dba La Torta Express violated OAR 845-005-0400(1) and OAR 845-006-0347(3).

The Commission orders that the Full On-Premises Sales license held by Jaime Saucedo Aguilar, dba La Torta Express, located at 2575 SE Baseline, Cornelius, Oregon be CANCELLED.

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

Dated this 12th day of May, 2010.

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

Mailed this 12th day of May, 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.