BEFORE THE LIQUOR CONTROL COMMISSION
OF THE STATE OF OREGON

In the Matter of the Full On-Premises Sales License Held by:	) **FINAL FINDINGS OF FACT**) **CONCLUSIONS OF LAW**) **AND ORDER**
Lucky Jade Inc.	) OLCC-09-V-055
Cecilia Qina Chan,	) OLCC-09-V-055A
President/Director/Stockholder	)
Joyce Qiwen Chan, Director/Stockholder	)
dba LUCKY JADE CHINESE	)
RESTAURANT (F-COM)	)
12268 SW Scholls Ferry Road	)
Tigard OR 97223	)
	)

HISTORY OF THE CASE

On April 28, 2009, the Oregon Liquor Control Commission (OLCC or Commission) issued a Notice of Proposed License Suspension/Civil Penalty to Lucky Jade Inc., Cecilia Qina Chan, President/Director/Stockholder and Joyce Qiwen Chan, Director/Stockholder (Licensees), doing business as Lucky Jade Chinese Restaurant, located at 12268 SW Scholls Ferry Road, Tigard, Oregon. The Notice alleged that (1) Licensees' employee Jialin Chan refused to admit a police officer to the licensed premises, when the officer identified himself and asked to conduct a reasonable search, in violation of OAR 845-006-0345(4)(b); (2) that Licensees' employee Jialin Chan made false representations or statements to Commission staff in order to induce or prevent action by the Commission, in violation of ORS 471.425(1); (3) that Licensees' employee Jialin Chan sold, dispensed, served and/or consumed alcoholic liquor on the licensed premises in violation of OAR 845-006-0425(1); and (4) that Corporate Principal Cecilia Chan permitted a minor to be on the licensed premises in violation of OAR 845-006-0335(3)(b), or in the alternative, that Corporate Principal Cecilia Chan failed to verify the age of a minor in an area prohibited to minors, in violation of OAR 845-006-0335(1)(a)(b)(c).

Licensees made a timely request for hearing. The Commission referred the request to the Office of Administrative Hearings on May 14, 2009. The case was assigned to Robert L. Goss, Administrative Law Judge (ALJ). A prehearing conference was held on August 13, 2009. Licensee corporation was not represented by counsel. Corporate Principal Cecilia Chan appeared without counsel. OLCC was represented by Anna Davis, Case Presenter. The purpose of the prehearing conference was to reiterate to the Corporate Principals that the Licensee corporation must be represented at the hearing by an attorney and to set discovery timelines.

A contested case hearing was held on September 1 and 22, 2009 in Tualatin, Oregon, before ALJ Goss. Licensee corporation was not represented by an attorney.[1] Cecilia Chan and Joyce Chan appeared without counsel in their capacity as Corporate Principals. OLCC was represented by Ms. Davis. Witnesses for OLCC were: OLCC Inspectors Jesse Enright, Kevin Wellman and Matt Cobos, Tigard Police officers Jeffery Lain and Robert Witham and Oregon State Police Detective Richard Narvaez. Witnesses for Licensees were: Leora Seaman and Felix U. The hearing was interpreted for Corporate Principals Cecilia Chan and Joyce Chan, and their witness, Permittee Jialin Chan, by Victor Leo, a Cantonese interpreter provided by OAH. The record was combined with OLCC Case No. 09-V-056 (Permittee Jialin Chan). The record closed on September 22, 2009.

The Administrative Law Judge considered the record of the hearing and the applicable law and issued a Proposed Order mailed December 11, 2009. Staff filed Comments on the Proposed Order on January 5, 2010. On January 12, 2010, Licensee was given an additional 25 days to file exceptions. No exceptions were received.

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 Licensees' employee refused to admit a police officer to the licensed premises, which was or appeared closed, when the officer identified himself and asked to enter to conduct a reasonable search to ensure compliance with alcoholic beverage laws. OAR 845-006-0345(4)(b).

2. Whether Licensees' employee made false representations or statements to the Commission in order to induce or prevent action by the Commission. ORS 471.425(1).

3. Whether Licensees' servant, agent, employee, or representative sold, dispensed, served and/or consumed alcoholic liquor on the licensed premises between the hours of 2:30 a.m. and 7:30 a.m. OAR 845-006-0425(1).

4. Whether Corporate Principal Cecilia Chan permitted a minor to be on the licensed premises or an area of the licensed premises prohibited to minors (OAR 845-006-0335(3)(b)), or alternatively, whether Corporate Principal Cecilia Chan failed to verify the age of a minor who was in an area of the licensed premises prohibited to minors and who reasonably appeared to be under 26 years of age. OAR 845-006-0335(1)(a)(b)(c).

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[1] At 3:00 p.m., the day before the hearing, OAH was contacted by an attorney, Ms. Shawa Mu, indicating that she was just retained to represent the Licensee corporation and Corporate Principal Cecilia Chan and requested a reset of the hearing, scheduled for 9:00 a.m. the next morning. The ALJ reviewed the request for reset and denied it. Neither Attorney Mu or any other attorney appeared at the hearing for the Licensee corporation.

5. If violations are proved, what is the appropriate penalty? OAR 845-006-0500.

EVIDENTIARY RULING

OLCC's Exhibits A1 through A9 were admitted to the record, over the objection of the Corporate Principals. Those objections concerned hearsay and relevancy. Corporate Principals Cecilia Chan and Joyce Chan's Exhibits P1 through P8 were admitted to the record without objection.

CREDIBILITY DETERMINATION

A credibility determination is required here, because the testimony of the Corporate Principals and Licensees' employee, Service Permittee Jialin Chan, differed on many points from the testimony of OLCC's witnesses. The Corporate Principals asserted at hearing that the testimony of the OLCC inspectors and the police was not credible.

The concurring opinion in *Lewis and Clark College v. Bureau of Labor*, 43 Or App 245 (1979), provides a good analysis of factors to be considered in determining credibility:

> "credibility (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 this matter, the OLCC inspectors and police officers testified in a clear and straightforward manner. They are trained observers who had the benefit of written reports to refresh their memories of the events regarding the violations at issue. Despite attempts by the Corporate Principals and Permittee Chan to paint a different picture, the Commission finds no evidence in this record to suggest that any of the testimony of the OLCC inspectors or the police officers was fabricated or unfairly slanted against either the Corporate Principals or Permittee Chan. The Commission does find that much of the testimony of the Corporate Principals and Permittee Chan was self serving and improbable. The Commission also notes that the Corporate Principals and Permittee Chan are facing serious administrative sanctions which may provide a motivation to be less than totally truthful. The Commission is also persuaded that at least one of the Corporate Principals, Cecilia Chan, as well as Permittee Chan, gave false statements to OLCC inspectors during their investigation.

The testimony and other evidence presented by the witnesses for OLCC is more reliable than the evidence presented by the Corporate Principals and Permittee Chan. The findings below reflect this Credibility Determination.

FINDINGS OF FACT

1. Lucky Jade Inc., Cecilia Qina Chan, President/Director/Stockholder and Joyce Qiwen Chan, Director/Stockholder (Licensees), have held a Full On-Premises Sales (F-COM) license at Lucky Jade Chinese Restaurant, located at 12268 SW Scholls Ferry Road, Tigard, Oregon, since May 2, 2005. (Ex. A1.)

2. On December 23, 2008, Tigard police officer Jeffery Lain responded to the licensed premises in response to a 911 hang up call. Dispatch advised the officer that the call taker could hear multiple people yelling in the background and an argument over money. The call came from within the licensed premises. Dispatch requested a welfare check. (Test. of Lain; Exs. A4 at Page 3 and A5.)

3. Officer Lain arrived at the licensed premises at approximately 5:00 a.m. The officer was in uniform and displaying a badge. The officer could hear multiple people yelling, screaming and laughing in the back of the licensed premises. The officer saw through a crack in the window coverings a male, later identified as Ming Chin, standing behind the bar, drinking. The officer also watched as Chin handed a beer to a female who appeared to be under the age of 21. The officer also saw four young males and two young females sitting and standing around a table. One of the females and two of the males were drinking. (Test. of Lain; Ex. A4 at Page 3.)

4. As Officer Lain waited for backup units to arrive, he saw three males and two females walk to the front door of the licensed premises. One of the males pushed on the door as if to open it, but it was locked. As the male yelled to be let out, he saw Officer Lain. The male then yelled that the police were outside and ran back into the bar. (Test. of Lain; Ex. A4 at Page 3.)

5. Officer Lain banged on the door while shining his flashlight at Chin. Chin looked at the officer as the officer pointed at him. Chin stayed behind the bar, ignoring the officer, even after the officer knocked several times on the door. The officer also heard persons running out the back door of the licensed premises. He was not able to pursue them, because his cover had not yet arrived. (Test. of Lain; Ex. A4 at Page 3.)

6. After approximately three minutes, Permittee Jialin Chan came to the door and opened it. Permittee Chan is the brother of Corporate Principals Cecilia Chan and Joyce Chan, and he worked as a server at the licensed premises. Officer Lain detected a strong odor of an alcoholic beverage coming from Permittee Chan's breath. When Officer Lain asked who was in charge here, Chan said he was. Permittee Chan told the officer that the business belonged to his family and that he worked there from time to time. Permittee Chan also told the officer that the persons inside the licensed premises were his friends and that no one had been drinking since 2:00 a.m. When Officer Lain told Permittee Chan that he had observed people drinking inside the premises, Permittee Chan responded that it was "Okay" because the business was closed. (Test. of Lain: Ex. A4 at Page 3.)

7. Officer Lain's cover arrived and he asked Tigard Officers Odam and Whitham to check the premises for possible underage drinkers. Both Officers Odam and Whitham were in full uniform. Permittee Chan walked in front of the door and stated that the police could not

enter without a warrant. Officer Lain informed Permittee Chan about the nature of the original 911 call and told him that the police wanted to enter to check the welfare and safety of the occupants he had observed. Permittee Chan did not move away from the door and the officers had to physically take hold of Permittee Chan and remove him from the doorway before they could enter the licensed premises. (Test. of Lain and Witham; Ex. A4 at Page 3.)[2]

8. While inside the premises, Officer Lain smelled a strong odor of marijuana. While checking the bathrooms, he found trace amounts of marijuana around the rim of the toilet bowls, which were still running as if they had recently been flushed. (Test. of Lain; Ex. A4 at Page 3.)

9. Officer Lain found only one of the individuals he had noted inside the licensed premises when he first arrived, Ryan Skinner. He believed the others left out the back door while he was in front waiting for his cover officers to arrive. (Test. of Lain; Ex. A4 at Page 3.)

10. On January 22, 2009, OLCC Inspectors Jesse Enright and Kevin Wellman arrived at the licensed premises at 9:23 p.m. to talk to the owners about the December 23, 2008 incident. The inspectors noted that the licensed premises was clearly posted at the entrance as prohibited to minors at all times. When the inspectors parked, they saw another vehicle park nearby and two males and two females get out and enter the premises. These four persons appeared to be under 21 years old, due to their youthful features and manner of dress. (Test. of Enright and Wellman; Exs. A3 at and A7.)

11. The inspectors decided to wait a few minutes to see if the four individuals returned from the licensed premises. When they determined that those individuals had been permitted inside the premises, the inspectors entered the premises. Both inspectors immediately noted one of the two young females playing a video lottery machine. Corporate Principal Cecilia Chan was working behind the bar. The inspectors contacted Cecilia Chan, identified themselves and asked to speak with her. Cecilia Chan asked that she first serve a few drinks before speaking with the inspectors and they agreed. Cecilia Chan approached the young female playing the video lottery machine and a young male who was with her. The young female walked out of the premises without showing any identification. (Test. of Enright and Wellman; Exs. A3 at Pages 12-13 and A7 at Page 2.)

12. The inspectors followed the young female outside the premises and spoke with her. They determined that the young female was Alexandra West. When the inspectors first asked, West told them that she was "21". When the inspectors told her that they would be verifying that information through dispatch and that she needed to be honest with them, West admitted that she was 20 years of age. Her age was then confirmed through dispatch. (Test. of Enright and Wellman; Exs. A3 at Pages 12-13 and A7 at Page 2.)

13. The inspectors went back into the premises and contacted Corporate Principal Cecilia Chan. She told the inspectors that she did not check West's identification that evening, but had done so before. Cecilia Chan told the inspectors that West had been in the premises several times before and only plays the lottery machines. Cecilia Chan also told the inspectors that it

[2] The Commission corrected the typographical error by changing the words "under age" to the word "underage" in the phrase "check the premises for possible underage drinkers."

was her understanding that a minor could be inside the premises as long as they were not served alcohol. Cecilia Chan said that she was not aware of the law requiring her to verify the identification of any patrons that appeared under 26 years of age. (Test. of Enright and Wellman; Exs. A3 at Pages 12-13 and A7 at Page 2.)

14. On January 28, 2009, Inspectors Enright and Wellman met with Permittee Chan at the OLCC offices in Milwaukie to discuss the events of December 23, 2008. The inspectors had reviewed the Tigard police report regarding the December 23, 2008 incident, but did not disclose many of the details in the report, because they wanted to hear Permittee Chan's recollection of those events without any prompting. Permittee Chan was able to communicate with the inspectors in English. He told the inspectors that he was the only employee on duty that day and he worked from 11:30 a.m. to 2:30 a.m. He said that he was alone when he closed up at 2:30 a.m., that it was snowing at that time, and that he called his friend Leo Chin to pick him up. According to Permittee Chan, Chin arrived at the premises around 3:30 a.m. When Chin arrived, Permittee Chan saw another person standing outside, Ryan Skinner. Permittee Chan said that he knew Ryan as a patron, but that he had not been inside the premises that evening. Permittee Chan added that Ryan left the premises about five minutes later, after he told Ryan that he needed to leave the premises. Permittee Chan also said he watched as Ryan walked away through the Lamb's Thriftway parking lot. (Test. of Enright and Wellman; Ex. A3 at Pages 6 - 10.)[3]

15. Inspector Enright told Permittee Chan that they were investigating possible administrative violations concerning the events of December 23, 2008 and that any statements Permittee Chan made in an attempt to prevent OLCC action would likely result in a violation. Permittee Chan told the inspectors that he understood what they were telling him. When asked if he wished to change any statements, Permittee Chan replied "No." (Test. of Enright and Wellman; Ex. A3 at Pages 6 - 10.)

16. Permittee Chan also told the inspectors that he was almost done closing the premises at approximately 4:00 a.m., that he cooked food for himself at around 4:30 a.m. but that his friend Chin did not have anything to eat. Permittee Chan denied that anyone consumed alcohol at the premises after 2:30 a.m. Permittee Chan said that he could not drink alcohol because of what the inspectors understood from Permittee Chan was cirrhosis of the liver. Permittee Chan admitted that the officers had smelled alcohol on his breath but continued to deny any consumption of alcohol. (Test. of Enright and Wellman; Ex. A3 at Pages 6 - 10.)

17. Inspector Enright again reminded Permittee Chan that any false statements could result in a violation. Permittee Chan again stated he and Chin were the only persons in the premises after 3:30 that morning. Inspector Wellman again reiterated the warning about making false statements. (Test. of Enright and Wellman; Ex. A3 at Pages 6 - 10.)

18. During his interview with the inspectors, Permittee Chan eventually changed his story and admitted that Ryan Skinner returned to the premises between 3:30 a.m. and 4:00 a.m. and was at the premises when the police arrived at 5:00 a.m. Permittee Chan continued to deny

[3] The Commission corrected the typographical error by adding the word "up" to the phrase "he called his friend Leo Chin to pick him up."

that anyone else was at the premises and asserted that officers were lying in the police report about seeing females in the premises that morning. (Test. of Enright and Wellman; Ex. A3 at Pages 6 - 10.)

19. Towards the end of the interview, Inspector Enright asked Permittee Chan if he would like an interpreter for the interview and he declined. (Test. of Enright; Ex. A3 at Pages 6 - 10.)

20. Permittee Chan told the inspectors that the police officers yelled at him as he stood in front of the door and told him to step away from the door. Permittee Chan then changed the story and said that he stepped away and let the police inside the premises after they answered his questions about the search warrant. (Test. of Enright; Ex. A3 at Pages 6 - 10.)

CONCLUSIONS OF LAW

1. Licensees' employee refused to admit a police officer to the licensed premises, which was or appeared closed, when the officer identified himself and asked to enter to conduct a reasonable search to ensure compliance with alcoholic beverage laws.

2. Licensees' employee made false representations or statements to the Commission in order to induce or prevent action by the Commission.

3. Licensees' servant, agent, employee, or representative served and/or consumed alcoholic liquor on the licensed premises between the hours of 2:30 a.m. and 7:30 a.m.

4. Corporate Principal Cecilia Chan permitted a minor to be on the licensed premises or an area of the licensed premises prohibited to minors.

5. The appropriate penalty is an 81 day suspension, with the Licensees having the option of paying a $3,465 civil penalty in lieu of 21 days of the suspension.

OPINION

The Commission alleges that Licensees are liable for four violations: (1) Licensees' employee refusing to admit a police officer to the licensed premises; (2) Licensees' employee making false representations or statements to the Commission to induce or prevent action by the Commission; (3) Licensees' servant, agent, employee or representative selling, dispensing, serving and/or consuming alcoholic liquor on the licensed premises between the hours of 2:30 a.m. and 7:00 a.m.; and (4) a Corporate Principal permitting a minor to be on the licensed premises or an area of the licensed premises prohibited to minors, or alternatively, failing to verify the age of a minor when the minor was in an area of the licensed premises prohibited to minors. As the proponent of these contentions, the Commission bears the burden of proof. ORS 183.450(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).

Licensee corporation did not appear through an attorney at hearing and therefore the Licensee corporation was in default. The notice was mailed approximately four months before the hearing itself. Licensee corporations are required to be represented by an attorney in any action, suit or proceeding, unless exempted by law. ORS 9.320. There is no exemption to that general rule for OLCC administrative proceedings. Corporate Principals Cecilia Chan and Joyce Chan, appeared at hearing and represented themselves solely in regard to their personal interests as Corporate Principals and Licensees. Under OAR 845-006-0301(1), if a licensee is a corporation, the principal officers and directors of the corporation are also deemed licensees. In *Omar's* (OLCC, Final Order, 04-V-031, August 2005), the Commission reaffirmed that both the corporate entity and individual corporate principals are licensees and are jointly and severally liable for violations of their servant's, agents, employees or representatives. The individual licensees are personally liable not on the basis of their status as corporate principals but because their license has been issued to them directly in their personal capacity.

As their personal interests as corporate principals and licensees are affected by the hearing, Corporate Principals Cecilia and Joyce Chan are entitled to party status at this hearing and as such have the right to appear and present evidence and contest the evidence presented by the Commission. Having failed to appear, Licensee corporation itself could not put on a defense to the allegations. Therefore, OLCC staff's evidence is evaluated to determine whether the evidence presents a prima facie case in regard to the Licensee corporation. OAR 137-003-0670(1) and (3). If it does, then Corporate Principals Cecilia and Joyce Chan's rebuttal evidence, which was presented in support of their individual interests as Licensees, is not evidence that can be considered with respect to Licensee corporation's liability because a defaulting party cannot receive the benefit of another party's evidence. As demonstrated through the discussion of the rebuttal evidence as it pertains to Corporate Principals Cecilia and Joyce Chan's individual interests, even if the Commission were to consider the rebuttal evidence in regard to Licensee corporation's interests, the rebuttal evidence would not change the outcome.

1. Licensees' employee refusing to admit a police officer to the licensed premises.

The Commission alleges that, on December 23, 2008, Licensees' employee, Permittee Jialin Chan, refused to admit a police officer to the licensed premises, which was or appeared to be closed, when the officer identified himself and asked to enter to conduct a reasonable search to ensure compliance with alcoholic beverage laws. OAR 845-006-0345(4)(b) provides, in pertinent part:

> Examination of premises that are or appear closed occurs only when there is reason to believe an alcoholic beverage law violation is occurring. No licensee or permittee will refuse or fail to promptly admit a Commission regulatory employee or police officer to the licensed premises when the regulatory employee or officer identifies him/herself and asks to enter to conduct a reasonable search to ensure compliance with the alcoholic beverage laws.

The Corporate Principals' contentions center on two aspects of the violation: one, the employee, Permittee Chan, denies that he refused or failed to promptly admit the police officers,

and two, even if proved that the employee committed the violation, Licensees should not be held liable, as they were not aware of employee's action until after the fact.

As previously described in the Credibility Determination above, the evidence presented by the police as to what occurred on December 23, 2008 is more reliable than the contradictory evidence presented by Permittee Chan. The preponderance of the reliable evidence in the record supports a conclusion that, on December 23, 2008, Permittee Chan refused, or failed to promptly admit Tigard Police Officer Lain access to the premises. Officer Lain had to physically remove Permittee Chan from the doorway before he could enter the premises. Permittee Chan also informed Officer Lain that he needed a warrant. Officer Lain was investigating possible violations of alcoholic liquor laws, including intoxication by Permittee Chan while on duty, as well as possible minors on the premises, some of whom Officer Lain saw consuming alcohol. A search of the premises to investigate was a reasonable response to those observations, to ensure compliance with alcoholic liquor laws. The premises was closed at the time that the police wished to enter, and the police officers were clearly identified as such. A violation of OAR 845-006-0345(4)(b) has been proven.

Pursuant to OAR 845-006-0362, Licensees are responsible for violation of any administrative rule or regulation of the Commission affecting a license privilege and any act or omission of an employee or representative in violation of any administrative rule, or regulation affecting the license privileges. Licensees are liable for the refusal of Permittee Chan to admit Officer Lain to the licensed premises on December 23, 2008.

2. Licensees' employee making false representations or statements to the Commission.

The Commission alleges that, on January 28, 2009, Licensees' employee, Permittee Chan, made false representations or statements to Commission staff (Inspector Enright) in order to induce or prevent action by the Commission. ORS 471.425(1).[4]

The first element of the violation is whether there were false statements or representations. Permittee Chan made several statements to OLCC Inspector Enright that were demonstrably false. The statements involved the events surrounding Officer Lain's contact with Permittee Chan on the early morning of December 23, 2008. Both Officer Lain and Inspector Enright testified as to what Permittee Chan told Officer Lain on that date, and Enright testified to the statements that Permittee Chan told him during an interview held on January 28, 2009. Those statements directly contradicted Chan's earlier statements. Permittee Chan also made false statements to Officer Lain on December 23, 2008, and repeated them at the January 28 interview with the inspectors.

Permittee Chan's false statements to Commission staff, combined with Officer Lain's observations to demonstrate the falseness of the statements, include:

[4] ORS 471.425(1) states: "No person shall make false representations or statements to the Oregon Liquor Control Commission in order to induce or prevent action by the commission."

1. Denying that there were any females inside the premises after 2:30 a.m., when Officer Lain personally observed females inside the premises around 5:00 a.m.

2. Denying that any alcohol was consumed after the premises closed at 2:30 a.m., when Officer Lain saw multiple persons drinking inside the premises at around 5:00 a.m.

3. Denying that anyone exited the premises from the back door, when Officer Lain heard several people do so.

4. Telling Inspectors Wellman and Enright that Mr. Skinner left the premises shortly after 3:30 a.m. and did not return, and later admitting that Skinner returned and was still on the premises when the police arrived around 5:00 a.m.

5. Telling the inspectors that he allowed police entry after they answered his questions about a search warrant, when he instead stood in front of the entrance doors and refused to allow the entry, forcing the officers to physically move him away from the door.

6. Denying drinking alcohol on the premises, when Officer Lain noted that he smelled a strong odor of an alcoholic beverage on Permittee Chan's breath.

Similar to the argument regarding his refusal to admit police officers to the premises, Permittee Chan claims that Officer Lain lied about his statements and actions. Permittee Chan also denies making at least some of the statements attributed to him by Inspector Enright. As noted before, the testimony of Permittee Chan is less reliable than the evidence presented by the Inspectors and Officer Lain on this issue. In addition, Permittee Chan admitted at hearing to making some false statements during his interview with the inspectors. The record supports a finding that Permittee Chan made several false statements.

The second element of the violation is whether the false statements were material. In *Trocadero Inn* (OLCC, Final Order, 90-V-055, February, 1991), the Commission held that a false statement is material if the subject of the false statement is a basis for refusal, cancellation or suspension of a license by the OLCC. Here, Permittee Chan's false statements were made as the OLCC inspectors were investigating the multiple violations that are the basis for this suspension. Permittee Chan's statements relate specifically to whether the violations of after hours service and refusing to admit police officers occurred. In both *Jiggles* (OLCC, Final Order, 85-V-016, February 1987) and *Frenchy's Tavern* (OLCC, Final Order, 88-BS-001, June 1988), the Commission held that a false statement is material if it has a logical correlation to whether the Licensee committed a violation. Here, Permittee Chan's false statements were material, because they impeded the investigation into whether violations occurred. OLCC has proven that the false statements were material.

The third element of a false statement violation is whether they were made to induce or prevent action by the OLCC. Inspector Enright had informed Permittee Chan during the interview that the consequences of lying included a possible violation. The main purpose of

Permittee Chan's false statements were to cause OLCC to not pursue action against him or the Licensees. Permittee Chan's admission of lying at hearing is not a defense. *See Mac Club* (OLCC, Final Order, 04-V-065, July 2005) (later retraction of a false statement cannot be a defense).

A violation of ORS 471.425(1) has been proved.

3. Licensees' employee selling, dispensing, serving and/or consuming alcoholic liquor on the licensed premises between the hours of 2:30 a.m. and 7:00 a.m.

The Commission alleges that, on December 23, 2008, Licensees' employee, Permittee Chan, sold, dispensed, served, and/or consumed alcoholic liquor on the licensed premises between the hours of 2:30 a.m. and 7:00 a.m., in violation of OAR 845-006-0425(1).[5] That rule restricts the above activities on a licensed premises to the hours between 7:00 a.m. and 2:30 a.m. The rule does not include "permitting" as an element of the violation. Licensees are held responsible for violations of the rule, whether they permitted the act or not. *See McAnulty and Barry's* (OLCC, Final Order, 93-V-048, October 1993) and *Balzer's Pub and Grill* (OLCC, Final Order, 99-V-019, March 2001).

Officer Lain personally observed a person (Ming Chin) inside the premises handing a beer to a young looking female at approximately 5:00 a.m. When Lain later spoke to Permittee Chan, who was also found inside the premises, Permittee Chan initially denied that anyone had been drinking inside the premises, but later stated that it was "Okay," because the business was closed.

In *Amber Inn* (OLCC, Final Order, 85-V-014, July 1985), the Commission held that selling to employees or friends rather than to the general public is not a defense to a charge of operating during prohibited hours. OLCC has proven that a violation of OAR 845-006-0425(1) has occurred.

Corporate Principal Cecilia Chan contends that she should not be held responsible for the after hours drinking for two reasons. One, because there was nothing in the till to indicate alcohol sales, and two, she was not aware of the after hours drinking until after the fact. Neither contention is persuasive. As noted above, a licensee does not have to "permit" after hours drinking in order to be held responsible. Also, besides prohibiting the sale of alcohol, the rule prohibits dispensing, serving or consuming alcohol during the prohibited hours.

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[5] OAR 845-006-0425(1) provides:

Except as provided by sections (2) and (3) of this rule, and OAR 845-015-0140, alcoholic liquor may be sold, dispensed, served, consumed on, or removed from licensed premises only between the hours of 7 a.m. and 2:30 a.m.

The exceptions in sections (2) and (3) and OAR 845-015-0140 do not apply here.

4. Corporate Principal Cecilia Chan permitting a minor to be on the licensed premises.

OLCC alleges that, on January 22, 2009, Corporate Principal Cecilia Chan permitted minor Alexandra West to be on the licensed premises, in violation of OAR 845-006-0335(3)(b). The rule prohibits a licensee or licensee's employee from permitting a minor to be on a licensed premises. "'Permitting' is proved by establishing that the licensee or permittee had knowledge of or had sufficient time and opportunity to detect and determine the minor's presence at the premises." *Sparkles Tavern* (OLCC, Final Order, 88-L-021, September 1989). Alternatively, OLCC alleges that Cecilia Chan failed to verify the age of a minor who was in an area of the licensed premises prohibited to minors and who appeared to be under 26 years of age. OAR 845-006-0335(1)(a)(b)(c).

Inspectors Enright and Wellman observed several young looking individuals enter the premises on January 22, 2009. The inspectors waited a few minutes, and then went inside, where they observed one of the young people at a video lottery terminal and Corporate Principal Cecilia Chan behind the bar. When the inspectors identified themselves to Cecilia Chan, she excused herself and spoke to the young female at the video lottery terminal, who then left the premises. The inspectors followed the female, Alexandra West, outside and spoke to her, verifying that she was a minor and that she did not have any ID in her possession. Signs were clearly posted on or near the front door that minors were prohibited inside.

The Commission has interpreted the term "permitted" to mean that the Licensees had knowledge of the minor's presence or had sufficient time and opportunity to detect and determine the minor's presence. It is not necessary to show that a licensee had knowledge of the presence of the minor on the premises. A licensee also permits a minor to remain if the licensee has sufficient time and opportunity to detect the minor. The only relevant issues are whether the minor appeared to be under 26 years of age and whether licensee's employees permitted the minor to be on the premises. *See also Sugar Pine Inn* (OLCC, Final Order, 02-V-052, July 2003), where the Commission found a violation where a minor was in a prohibited area for a brief period of time before police arrived and then was spotted sitting by the front door when the police arrived. In *Lava Lanes of Medford* (OLCC, Final Order, 04-V-007, February 2005), the Commission held that the rule prohibiting minors does not include a requirement that the minor drink alcoholic beverages or mingle with persons who had consumed alcoholic beverages.

In this case, Corporate Principal Chan behaved in ways that strongly suggest that she was aware that Ms. West was under 21 years of age. Her statements that Ms. West only played Lottery games and that she thought a minor could be on the premises if alcohol was not sold to her or him reflect Corporate Principal Chan's awareness of Ms. West's status as a minor. The evidence also demonstrates that Corporate Principal Chan was aware of the minor's presence, as indicated by her immediate response when the inspectors identified themselves to her.

Licensees have provided no evidence that the minor had false identification, or that she had shown any identification to Cecilia Chan on January 22, 2009. A violation of OAR 845-006-0335(3)(b) has been shown. The alternate violation of OAR 845-006-0335(1)(a)(b)(c) (failing to verify the age of a minor) should be dismissed.

Penalty

The standard OLCC sanctions for violations are described in OAR 845-006-0500. A refusal to promptly admit law enforcement officers and the false statement violations are both Category II violations. The standard Category II sanction is a 30 day mandatory suspension for the first violation and cancellation of the license for the second violation within two years. Here, OLCC charged both violations at the first level, because the false statements were discovered during the investigation of the refusal to admit police officers violation.

The after hours violation and the violation regarding the minor on the premises are both Category IV violations. The standard Category IV sanction is 7 days suspension or a penalty of $1,155 for the first violation and a 10 day suspension or $1,650 penalty for the second violation within two years. Here, OLCC charged the two violations at the first and second level, because the two violations did not occur concurrently and were unrelated.

OLCC alleges aggravation for the two Category IV violations because Corporate Principal Cecilia Chan was personally involved in the violation involving the minor and because multiple individuals were served alcoholic beverages in the after hours charge. As discussed more fully above, the aggravation factors have been demonstrated in this record and are appropriate. Past practice and precedent dictate that the standard conversion factor for each aggravating factor is two days suspension and/or $330 civil penalty. *Parilla Grill*, (OLCC, Final Order, OLCC-01-V-082, August 2002). An additional two days of suspension or an additional civil penalty of $330 are appropriate here for each aggravating factor, for a total of four additional days of suspension or $660 additional civil penalty.

OLCC proposes a total suspension of 81 days, with the Licensees having the option of paying a $3,465 civil penalty in lieu of 21 days of the suspension. The 81 days are calculated using two 30 day suspensions for the two Category II violations, a total of 17 days for the two Category IV violations (7 days plus 10 days), and four additional days for the proven allegations of aggravation. (30 + 30 + 7 + 10 + 4 = 81 days.)

The penalty is calculated as follows: $1,155 for the first Category IV violation, plus $1,650 for the second Category IV violation, plus $660 for the two aggravating factors, for a total of $3,465. The civil penalty may be paid in lieu of the 17 days for the two Category IV violations, plus the four additional days for aggravating circumstances, for a total of 21 days, leaving 60 days of mandatory suspension.

FINAL ORDER

The Commission issues the following order:

The Full On-Premises Sales (F-COM) license held by Lucky Jade Inc., Cecilia Qina Chan, President/Director/Stockholder and Joyce Qiwen Chan, Director/Stockholder, doing business as Lucky Jade Chinese Restaurant, located at 12268 SW Scholls Ferry Road, Tigard, be suspended for 81 days or that Licensees pay a civil penalty of $3,465 in lieu of 21 days suspension and be suspended for 60 days.

If you choose to pay the fine, it must be paid within 20 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 21st day of April, 2010.

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

Mailed this 21st 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 20 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.