

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

In the Matter of the Service Permit)	FINAL FINDINGS OF FACT
Held by:)	CONCLUSIONS OF LAW
)	AND ORDER
Sherry B. Scott)	OLCC-09-V-069
Service Permit No. 242621)	

HISTORY OF THE CASE

On May 14, 2009, the Oregon Liquor Control Commission (OLCC or Commission) issued a Violation Notice to Service Permittee Sherry B. Scott (Scott) alleging that on December 6, 2008, she violated OAR 845-006-0345(1) by drinking alcoholic beverages while on duty. The Notice proposed a 10 day service permit suspension or a civil penalty of \$250. Permittee Scott timely requested a hearing. The Commission referred her hearing request to the Office of Administrative Hearings on June 12, 2009.

A contested case hearing was held in Eugene, Oregon, on November 18, 2009, before Administrative Law Judge Alison Greene Webster of the Office of Administrative Hearings. Permittee Scott appeared in person and without counsel. Kelly Routt presented the case for the Commission.

Springfield Police Officer Jason Molony and OLCC Inspector Mark Lokietz testified on behalf of the Commission. Permittee Scott testified on her own behalf. The record closed on November 18, 2009, 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 December 8, 2009.

No Exceptions to the Proposed Order were filed within the 15-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

OLCC Exhibits A1 through A6 were admitted into the record at hearing without objection.

ISSUES

1. Whether permittee Sherry Scott drank an alcoholic beverage while on duty on

December 6, 2008 in violation of OAR 845-006-0345(1).¹

2. If so, what is the appropriate penalty for the violation?

FINDINGS OF FACT

1. The Commission issued Sherry Scott service permit no. 242621 on November 4, 2005. The permit expires on September 9, 2010. (Ex. A1.)

2. At all times pertinent to this matter, permittee Scott was employed as a premises manager for the Mohawk Tavern, located at 1501 Mohawk Blvd., Springfield, Oregon. As a manager, Permittee Scott's duties included supervising other employees, setting employees' work schedule, and managing the premises. Permittee Scott was also designated as the licensed premises' server education representative. (Test. of Scott; test. of Lokietz.)

3. Permittee Scott worked her shift on December 6, 2008. She finished her shift around 4:00 p.m. She then returned to the premises around 9:30 p.m. to socialize with the other patrons. In her first hour at the bar, she was served a "pounder," a 16 ounce beer. When she had consumed about three-quarters of that drink, she was served a second one. (Test. of Scott.)

3. At about 11:00 p.m. on December 6, 2008, Springfield Police Officers Molony and Speldrich were dispatched to a bar fight in progress at Tommy's Bar & Grill, located at 1509 Mohawk Blvd. in Springfield, just down the street from the Mohawk Tavern. While en route, the officers were notified that the instigator of the fight had left Tommy's and gone to the Mohawk Tavern. Dispatch provided the officers with a description of the suspect, a Hispanic male wearing a University of Oregon Ducks jacket. (Test. of Molony; Ex. A2.)

4. The officers entered the Mohawk Tavern and saw a person matching the suspect's description sitting at the end of the bar. He appeared to be yelling at the patron seated next to him, and the officers were concerned that he was attempting to start another fight. The premises was crowded and loud. As the officers walked toward the suspect, Officer Molony was stopped by permittee Scott. Permittee Scott came up behind him and put her hands on his back to get his attention in the crowded bar. The officer was startled by this contact. Permittee Scott told

¹ OAR 845-006-0345(1) was amended in May 2009. On the date in issue in this case, the rule provided as follows:

(1) Drinking on Duty: No licensee, permittee, employee or agent will drink or be under the influence of intoxicants while on duty. "On duty" means from the beginning of a work shift that involves the sale or service of alcoholic beverages, checking identification or controlling conduct on the premises, to the end of the shift including coffee and meal breaks. "A work shift that involves the sale and service of alcoholic beverages" includes supervising those who sell or serve, check identification or control the premises.

Officer Molony that she was the manager, and demanded to know what he and the other officers were doing inside her bar. Officer Molony detected the odor of alcoholic beverages on Permittee Scott's breath. He also noted a slur to her speech, and he believed she was intoxicated. Officer Molony told permittee Scott that he was investigating a fight, and that her actions were interfering with him trying to do his job. He advised her to quit touching him and step away. She refused. She told him that the officers were not welcome in the bar. Officer Molony pushed her aside and contacted the suspect at the bar. (Test. of Molony; Ex. A2.)

5. The suspect was intoxicated and uncooperative. The officers physically escorted him outside the premises through the back door. While the officers were interviewing the suspect, permittee Scott came outside. She started harassing Officer Molony about coming into the bar. She again said that this was her bar, and the Springfield Police were not welcome there. Officer Molony warned permittee Scott that she needed to go back inside and let him do his job. She refused. Officer Molony then told her that he could arrest her for harassment and interfering with a police officer. Permittee Scott responded something to the effect of, "Then go ahead and arrest me. I don't have a criminal record." (Test. of Molony; Ex. A2.)

6. Officer Molony told permittee Scott that she was under arrest for harassment and interfering with police. He advised her of her *Miranda* rights and asked if she understood them. She said "No." Officer Molony retrieved his citation book and asked permittee Scott for her name. She sarcastically responded "Smith" when asked for her last name, and "Jane" when asked for her first name. When Officer Molony asked for her middle name, she sarcastically responded, "Whatever." Officer Molony did not believe her name was Jane Whatever Smith. Because she lied to him about her name, Officer Molony handcuffed permittee Scott and advised her that she was also being charged with giving false information to the police for citation purposes. (Test. of Molony; Ex. A2.)

7. The night manager/bartender on duty, Kirk Ostermiller, retrieved permittee Scott's purse from inside the premises and provided the officers with her driver's license, identifying her as Sherry Beth Scott. Officer Molony placed permittee Scott in his patrol car while he spoke to Ostermiller. (Test. of Molony; Ex. A2.)

8. From Ostermiller, Officer Molony learned that permittee Scott was not the owner, but the day manager of the licensed premises. Ostermiller advised Officer Molony that permittee Scott returned to the premises that night after her day shift, and that she had consumed two alcoholic beverages before the officers arrived. Ostermiller also acknowledged that he had seen permittee Scott place her hands on Officer Molony when he entered the premises looking for the suspect. (Test. of Molony; Ex. A2.)

9. Officer Molony transported permittee Scott to jail. She was charged in the Springfield Municipal Court with Harassment (ORS 166.065), Giving False Information (ORS 162.385), and Interfering with a Peace Officer (ORS 162.247). (Exs. A3, A4 and A5.) She later pled guilty to the Interfering with a Police Officer offense. (Test. of Scott.)

CONCLUSIONS

1. Permittee Scott drank an alcoholic beverage while on duty on December 6, 2008 in violation of OAR 845-006-0345(1).
2. The appropriate penalty for the violation of ORS 471.410(1) is a 10 day service permit suspension or a civil penalty of \$250.

OPINION

1. Violation

OLCC staff contends that on the night of December 6, 2008, permittee Scott drank an alcoholic beverage while on duty in violation of OAR 845-006-0345(1). As the proponent of this contention, the Commission bears the burden to prove this allegation by a preponderance of the evidence. 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); *Cook v. Employment Div.*, 47 Or App 437 (1980) (in the absence of legislation adopting a different standard, the standard in administrative hearings is preponderance of the evidence). 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).

As noted above, OAR 845-006-0345(1) prohibits an employee from drinking or being under the influence of intoxicants while on duty. The rule further defines "on duty" as "from the beginning of a work shift that involves the sale or service of alcoholic beverages, checking identification or controlling conduct on the premises, to the end of the shift including coffee and meal breaks."

A person is "on duty," when the person has the authority to put him or herself on duty and does so by performing acts on behalf of the licensee. See *Cactus Bar & Grill* (OLCC Final Order, 03-V-014, June 2004); *The Sportsman Club* (OLCC Final Order, 87-V-002, June 1987). For example, in *Edi's Fireside Cantina* (OLCC, Final Order, 93-V-063, May 1994), the Commission found that the on duty bartender effectively put a permittee on duty by allowing the permittee to voluntarily perform server activities on behalf of the licensee. After completing a shift earlier in the day, the permittee returned to the licensed premises to see if she was needed to fill in that night for another server who was ill. While waiting to see if she was needed, she slowly consumed a beer and periodically "helped out" by clearing tables, taking drink orders and serving an alcoholic beverage. The Commission found a violation of the rule prohibiting drinking on duty because the permittee drank an alcoholic beverage while she helped out, and because the help included serving one alcoholic beverage to a patron. *Id.* at 18-23.

In *Cactus Bar & Grill* (OLCC Final Order, 03-V-014, June 2004), the licensee remained at the premises after his shift and consumed several alcoholic beverages. He drank at the bar to be available to the bartender, who was a trainee. When a fight broke out inside the premises, the licensee assisted the bartender and other employees in ejecting patrons from the premises. The licensee represented himself as the owner and got into a scuffle with a patron while escorting the

patron from the premises. The Commission held that the licensee controlled conduct on the premises and placed himself on duty.

In *Foghorn Sports Pub & Grill* (OLCC Final Order, 05-V-027, February 2006), the Commission held that when a licensee or off duty employee drinks an alcoholic beverage on the premises and then voluntarily performs services that put him or her back on duty, it is not necessary that the person continue to drink the alcoholic beverage during the performance of those duties. The determinative factor for purposes of OAR 845-006-0345(1) is whether the person was drinking an alcoholic beverage (or was under the influence of intoxicants) at the time he or she returned to duty. *See also Mac Club* (OLCC, Final Order, 99-V-110, December 2000) (by deciding the cost of a drink and overruling the bartender's decision not to serve a patron a double serving of wine in a beer glass, the licensee put himself on duty after he began drinking alcoholic beverages at the licensed premises).

In this case, the evidence establishes that as the premises' manager, permittee Scott had the authority to put herself on duty. When she stopped Officer Molony, advised him that she was the manager and demanded to know what he and the other officers were doing inside her bar, she was acting on the licensee's behalf. Considering the definition of "on duty" includes controlling conduct on the premises, the Commission is persuaded that permittee Scott put herself on duty when the officers responded to the licensed premises on the night of December 6, 2008. Permittee Scott exerted control of the premises by contacting the officer, representing herself as the premises manager, demanding to know why the police were there and directing them to leave.

The evidence also establishes that permittee Scott was drinking an alcoholic beverage while on duty. By her own admission, she consumed the better part of a "pounder" before the police arrived. According to Ostermiller, she consumed two drinks. Officer Molony observed indicia of intoxication on her, including slurred speech and the odor of alcoholic beverage. Consequently, the violation of OAR 845-006-0345(1) has been proven.

Permittee Scott asserted at hearing that Officer Molony's report was inaccurate, in that she did not grab him inappropriately, did not harass him and did not tell him to leave. Permittee Scott testified that Officer Molony was rude and yelled at her, which caused her to get defensive. She claimed that the officer misunderstood her actions that night. Regardless of what transpired between the two of them during the officers' visit to the premises, however, permittee Scott pled guilty to the offense of interfering with a peace officer. Moreover, regardless of Officer Molony's manner, the fact remains that permittee Scott had the authority to put herself on duty, and did so, while consuming an alcoholic beverage at the licensed premises.

2. Penalty

A violation of OAR 845-006-0345(1) is a Category III violation. OAR 845-006-0500(7). The standard penalty for a service permittee's first Category III violation is a 10 day suspension or a civil penalty of \$250. OAR 845-006-0500(7). Staff has charged no aggravating or mitigating circumstances for this violation and recommends that the standard sanction be imposed. The Commission also finds no basis to aggravate or mitigate this sanction. Therefore,

the standard penalty is appropriate.

FINAL ORDER

The Commission orders that, for the charge that Permittee Sherry B. Scott violated OAR 845-006-0345(1), the Commission shall suspend Sherry Scott's service permit for 10 days or impose a civil penalty of \$250.

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 8th day of January, 2010.

/s/ Rudy Williams for:
Stephen A. Pharo
Executive Director
OREGON LIQUOR CONTROL COMMISSION

Mailed this 8th day of January, 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.