

**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
)	
Park Avenue Jones, Inc.)	OLCC-10-V-006
Michael Leash, President/Director/Stockholder)	OLCC-10-V-006A
dba THE VAULT BISTRO & LOUNGE)	
209 E. 2nd)	
The Dalles, OR 97058)	

HISTORY OF THE CASE

On December 22, 2009, the Oregon Liquor Control Commission (OLCC or Commission) issued a Notice of Proposed License Suspension/Civil Penalty to Park Avenue Jones, Inc., Michael Leash, President/Director/Stockholder (Licensee), dba The Vault Bistro & Lounge, located at 209 E. 2nd, The Dalles, Oregon. The Notice charged Licensee with a violation of OAR 845-006-0345(1), asserting that Licensee’s agents, Stacey Kaseberg and Frankie Welk, consumed alcoholic beverages while on duty at the premises. The Commission proposed a 12-day suspension or a civil penalty of \$1,980. Licensee timely requested a hearing.

On January 28, 2010, the Commission referred Licensee’s hearing request to the Office of Administrative Hearings. A prehearing telephone conference was held on February 25, 2010, with Administrative Law Judge Robert Goss.

The case was reassigned to Administrative Law Judge Lynnette M. Turner and a contested case hearing was held in this matter in The Dalles, Oregon, on August 5, 2010. Licensee was represented by Michael Mills, Attorney at Law. Anna Davis presented the case for the OLCC.

OLCC Inspectors Rich Miller, Mark Smith and Matthew Cobos testified on behalf of the Commission. Licensee did not call witnesses. The record remained open until August 31, 2010 for written closing arguments. The OLCC and Licensee submitted closing arguments and the record closed on August 31, 2010.

The Administrative Law Judge considered the record of the hearing and the applicable law and issued a Proposed Order mailed October 15, 2010.

Licensee filed Exceptions to the Proposed Order on November 1, 2010. Staff filed Comments on the Proposed Order on November 1, 2010. The Administrative Law Judge responded to Licensee’s Exceptions and Staff’s Comments on November 17, 2010.

On December 16, 2010, the Commission considered the record of the hearing, the applicable law, the Proposed Order of the Administrative Law Judge, Licensee’s Exceptions to

the Proposed Order, Staff's Comments on the Proposed Order and the Administrative Law Judge's Response to Licensee's Exceptions and Staff's Comments. Based on this review and the preponderance of the evidence, the Commission enters the following:¹

EVIDENTIARY RULINGS

OLCC Exhibits A1 through A3 were admitted into the record without objection.

ISSUES

1. Whether Licensee's agents, Stacey Kaseberg and Frankie Welk, consumed alcoholic beverages while on duty on July 17, 2009 in violation of OAR 845-006-0345(1).
2. If so, what is the appropriate penalty for the violation?

FINDINGS OF FACT

1. Licensee Park Avenue Jones, Inc., Michael Leash, President/Director/Stockholder, dba The Vault Bistro & Lounge located at 209 E. 2nd, The Dalles, Oregon, has held a Full On-Premises sales license since July 21, 2008. (Ex. A1.)

2. A rodeo was to be held in The Dalles on July 17 and 18, 2009. Licensee wanted to attract people to The Vault Bistro & Lounge (hereinafter The Vault) who were in town for the rodeo. Licensee thought that having pretty "girls" in the bar would provide excitement and help people have a good time. (Stipulation.)

3. Stephen J. Kane, manager of The Vault, contacted a woman named "Diane" or "Diana" (hereinafter Diane), a local distributor and promoter for Jack Daniel's products.² Diane agreed to pay two girls to represent Jack Daniel's at The Vault for two hours each night on July 17 and 18. Kane and Diane agreed that Kane would choose the girls, with the stipulation that they would have no tattoos. (Stipulation.)

4. Kane contacted Stacey Kaseberg and Frankie Welk, his former employees at another location, to work as "Jack Daniel's Girls" from 11:00 p.m. to 1:00 a.m. on July 17 and 18, 2009. Kaseberg and Welk understood that someone from Jack Daniel's would pay them \$20 per hour for their time. Kaseberg and Welk both had valid service permits at the time. (Stipulation.)

5. Kane instructed Kaseberg and Welk to serve up to \$75 worth of Jack Daniel's brand alcohol mixed drinks to patrons of the bar, and to inform the patrons that shots of Jack Daniel's were discounted to \$4 while the "Jack Daniel's Girls" were present. (Stipulation.)

¹ The Commission modified and reorganized the Opinion in this Final Order to more clearly reflect the analysis supporting the outcome in this case, which is unchanged.

² The Proposed Order gave the woman's name as Diane Young. The evidence in the record referred to the woman in question as Diane or Diana. Her last name is unknown. The ALJ agreed in her Response to Exceptions and Comments that this finding of fact and the opinion should be modified accordingly.

6. On the night of July 17, 2009, OLCC Inspectors Matthew Cobos and Mark Smith entered The Vault to check for compliance with liquor laws. The band announced several times that the “Jack Daniel’s Girls” would be at the premises at 11:00 p.m. Jack Daniel’s banners were on the walls of the premises, but no other promotional merchandise was on display. (Stipulation.)

7. At approximately 11:42 p.m., Cobos and Smith saw Kaseberg and Welk at the premises, wearing black t-shirts with “Jack Daniel’s” stenciled on the front. Kaseberg and Welk served drinks mixed with Jack Daniel’s to random patrons. The patrons did not pay for the drinks. Kaseberg and Welk also drank alcoholic beverages while serving the whiskey to patrons. (Stipulation.)

8. Cobos and Smith contacted Kaseberg and Welk, who explained that their duties were to hand out promotional pieces from Jack Daniel’s and hand out free “Jack and Cokes” to patrons. They informed patrons that shots of Jack Daniel’s were discounted to \$4 while they were there. Both Kaseberg and Welk acknowledged drinking alcohol while serving the free drinks to patrons. (Stipulation.)

CONCLUSIONS

1. Licensee’s agents, Stacey Kaseberg and Frankie Welk, consumed alcoholic beverages while on duty on July 17, 2009 in violation of OAR 845-006-0345(1).

2. The appropriate penalty for the violation is a 12-day suspension or a civil penalty of \$1,980.

OPINION

As set out above, the Commission alleges that Licensee violated the Commission’s rules when Licensee’s agents drank alcoholic beverages while on duty at the licensed premises. As the proponent of this contention, 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. Violation

The Commission has charged Licensee with a violation of OAR 845-006-0345(1), which states:

The Commission holds licensees accountable for the acts of their agents and employees. (OAR 845-006-0362). No employee or agent of a licensee may violate any provision of this rule. A violation of any section of this rule by an employee or agent of a licensee is considered a violation by the licensee.

(1) Drinking on Duty: No licensee or permittee 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. Being under the influence of intoxicants on duty is a Category II violation. Drinking on duty is a Category III violation.

Pursuant to OAR 845-006-0362, a licensee is responsible for the acts and omissions of his or her employees, servants, agents or representatives:

Each licensee may be held responsible for violation of any liquor control law or administrative rule or regulation of the Commission affecting his license privileges and for any act or omission of his servant, agent, employee, or representative in violation of any law, municipal ordinance, administrative rule, or regulation affecting his license privileges.

Licensee stipulates that Kaseberg and Welk served Jack Daniel's alcoholic beverages at The Vault on the night of July 17, 2009, and that the two women told patrons that Jack Daniel's shots were being offered for \$4 while they were present. Licensee also stipulates that Kaseberg and Welk consumed alcoholic beverages while serving alcohol to patrons of the bar. The dispute in this matter is whether Kaseberg and Welk were agents of Licensee when this conduct occurred. The OLCC did not allege, and did not establish, that Kaseberg and Welk were Licensee's employees.

Licensee raises three arguments in asserting that Kaseberg and Welk were not acting as Licensee's agents on the night in issue. First, Licensee asserts that there was not a sufficient nexus between the actions of the "Jack Daniel's Girls" and Licensee to establish an agency relationship and that Licensee had only limited control over their actions. Second, Licensee contends that it did not consent to have the two women act as its agents and the women did not have the authority to put themselves on duty at the premises. Third, Licensee contends that the patrons would not have considered the women as agents of Licensee, because they were promoting only Jack Daniel's products. As explained below, these challenges are not persuasive.

The word "agent" is not defined in OLCC rules or the underlying statutes. Licensee cites to *Eads v. Borman*, 234 Or App 324 (2010) for the common law definition of "agency." In *Eads*, the Court found that, "[g]enerally, an agency relationship 'results from the manifestation of consent by one person to another that the other shall act *on behalf of and subject to his control*, and consent by the other to so act.'" *Id.* at 329. (Emphasis in the original). Licensee contends that Kaseberg and Welk were not agents of Licensee under this common law definition and therefore Licensee is not responsible for their actions.

The Commission has established the meaning of the term "agent" for purposes of OAR 845-006-0362 and OAR 845-006-0347(1) through case precedent and this precedent dictates the result in this case. However, the common law definition of the term is discussed below as required to address the arguments raised by Licensee.

Commission case precedent makes it clear that OAR 845-006-0362, which states that a licensee is responsible for the acts of its employees, agents, servants and representatives, is to be

construed broadly. The terms used in the rule, including the term “agent”, are intended to be inclusive to address the substance and not the technical form of the relationship between licensees and the persons who perform services on their behalf. *See Hunters RV Park* (OLCC, Final Order, 06-V-068, February 2007) (The Commission holds licensees responsible for the unauthorized actions of their employees and for the actions of non-employees acting outside the scope of their limited authority.) *See also Eclectic/Envy Lounge Bar* (OLCC, Final Order, 09-V-028, October 2009) (Licensee was responsible for the actions of security providers working as independent contractors at the premises).

In *Satyricon* (OLCC, Final Order, 88-V-060, December 1988), the OLCC determined that an individual was not an employee of the licensee because the licensee did not have the power or right to control or direct the individual in how his work was to be performed. In that case, a band was performing at a licensed premises and had selected a person of its choice to work at the door of the licensed premises and to collect the band cover charge. The licensee in that case had not selected the person who was collecting the cover charge and did not pay him. The door person sold cocaine to an undercover police officer, which led to an OLCC hearing involving unlawful activity of the “employee.” While the Commission concluded that the person was not an employee, it noted in the decision that the OLCC did not take the position or present evidence to prove that the person was the licensee’s servant, agent or representative, and that issue was not addressed.

Unlike the situation in *Satyricon*, Licensee in this case exercised direct control over Kaseberg and Welk. The two women, as the “Jack Daniel’s Girls,” were on the premises at Licensee’s request. Licensee, through its manager, contacted the two women and offered them work, specified the days and hours they would work, and established the number of drinks they could serve. Diane paid Kaseberg and Welk for their time, instructed Kane that “Jack Daniel’s Girls” could have no tattoos, and presumably provided them with t-shirts, but in all other respects, Licensee controlled Kaseberg’s and Welk’s actions at The Vault.³

In addition Kaseberg and Welk were acting on Licensee’s behalf by appearing at the licensed premises as “Jack Daniel’s Girls” and serving drinks to Licensee’s patrons. In *Teri’s Town Tavern*, (OLCC, Final Order, 00-V-018, November 2000), a bartender-in-training sold alcohol to a minor. The Commission sought to hold the licensee responsible for the acts of the bartender. The licensee argued that the bartender who committed the violation was not an employee, but was only trying out for the job. The Commission determined that the non-employee bartender was working as the bartender on duty at the premises at the time of the violation, therefore the bartender was the licensee’s servant, agent, employee, or representative for purposes of holding the licensee responsible under OAR 845-006-0025 (now OAR 845-006-0362).

In this case, Licensee wanted to attract patrons to the bar on a busy rodeo weekend, and thought that having pretty “girls” in the bar would provide excitement and help people have a

³ Licensee argued that Kaseberg and Welk could not have promoted other brands of alcohol while in The Vault, but there is no evidence to that effect in the record.

good time. Licensee arranged to have the “Jack Daniel’s Girls” at The Vault on the rodeo weekend in order to attract patrons to the bar and keep them there. The band announced several times that the “Jack Daniel’s Girls” would be there that evening, to entice patrons in off the street and to keep existing patrons in the bar until their arrival. Kaseberg and Welk gave out free drinks and told patrons about discounted shots of Jack Daniel’s, to encourage patrons to remain on the premises and purchase additional alcohol. Like the bartender in *Teri’s Town Tavern*, the two women in this case were serving alcoholic beverages to patrons at a licensed premises on behalf of the licensee and were under its direction and control. Therefore, the licensee is responsible for their actions. Licensee argues that the OLCC did not establish that patrons remained in the bar longer or purchased more alcohol due to Kaseberg’s and Welk’s presence, and such an outcome cannot be assumed. However, the success or failure of the venture is irrelevant. Licensee’s intent in having the “Jack Daniel’s Girls” at The Vault was to benefit his business (i.e., increase patronage and the sale of food and alcohol), and not simply to market Jack Daniel’s products. Kaseberg and Welk were there on Licensee’s behalf, and as such were acting as Licensee’s agents.

Licensee argues that Kaseberg and Welk were not agents of the Licensee in this case for several reasons. It argues that the presence of the “Jack Daniel’s Girls” was of no benefit or *de minimis* benefit to the premises, and that the two women were present at The Vault exclusively as representatives of Jack Daniel’s, and not on the behalf of Licensee. The common law definition of an agent as cited in *Eads* requires that an agent act on behalf of the principal. Licensee argues, for instance, that Kaseberg and Welk did not distribute drinks other than Jack Daniel’s, they did not sell drinks, and they did not otherwise promote any aspect of the business. As discussed above, the Commission finds that Kaseberg and Welk were under the direction and control of Licensee and were acting on Licensee’s behalf in encouraging patrons to sample and purchase Jack Daniel’s whiskey at the licensed premises.

Licensee also contends that it did not consent to have the women act as its agents and that the women did not intend to act as agents for Licensee.⁴ For purposes of determining whether a person is acting as an agent or employee of a licensee under OAR 845-006-0345(1) and OAR 845-006-0362, consent is not determinative. It is the function that the individual or entity is performing on the licensee’s behalf that is the relevant inquiry. In *Tharwat Mart*, (OLCC, Final Order, 99-V-076, January 2000) the Commission found that the licensee was responsible for the actions of his daughter, who sold an alcoholic beverage to a minor. The licensee did not authorize his daughter to sell alcohol, but had asked her to watch for shoplifters when the licensee worked outside and help clean the store. The daughter had sold candy on occasions when the licensee was outside pumping gas. The Commission determined that the daughter was

⁴ Licensee asserts that the two women believed they were not working for the premises and could drink alcoholic beverages while serving which demonstrates a lack of consent. The women’s clearly erroneous belief is irrelevant. The relevant inquiry is whether the *principal* has consented for the agent *to act on its behalf*. See *Checkley v. Boyd*, 198 Or App 110 (2005). This consent may be express or implied from the circumstances and conduct of the parties. *Id.* Here, Licensee, through its manager, arranged for the two women to work as servers at the licensed premises, and the two women agreed to perform, and did perform, those services. They acted with the consent of the Licensee and on its behalf.

not the licensee's employee but she was acting on his behalf by watching for shoplifters, helping clean the store, and selling candy when he was outside. Therefore the Commission held that the daughter was licensee's agent or representative and the licensee was responsible for her conduct. The licensee and his daughter did not consent or express an intent for the daughter to act as licensee's agent. In that case, as here, the actions of the parties were the determining factor in establishing that relationship.

Licensee also argues that Kaseberg and Welk were not agents of Licensee as they did not have the authority to put themselves "on duty." Licensee cites to *The Sportsman Club*, (OLCC, Final Order, 87-V-002, June 1987) and *Mark's Tavern*, (OLCC, Final Order, 89-V-030, July 1989). In *The Sportsman Club*, the Commission concluded that the issues to be decided in determining whether a person is "on duty" are whether the person has the authority to put him or herself on duty and whether the acts that were performed were done on behalf of the licensee. If so, then the next inquiries are whether the acts involved the mixing, sale or service of alcoholic beverages and whether the person was consuming or under the influence of alcohol when performing those acts.

OAR 845-006-0345(1) 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." Kane instructed Kaseberg and Welk to work from 11:00 p.m. to 1:00 a.m. on July 17 and 18, 2009. During that time, they served mixed drinks to patrons and promoted Licensee's drink special (\$4 shots of Jack Daniel's). Under the Commission's definition of "on duty," the two women were on duty at the licensed premises when they consumed alcoholic beverages. This is not a case where one needs to explore whether the two women had the authority to place themselves on duty, because it is evident that Licensee's manager placed them on duty.

Finally, Licensee contends that the patrons likely would not have believed that the two women were acting as Licensee's agents. First, there is no evidence as to the patrons' respective state of mind. Second, the patrons' perceptions would not be determinative. As discussed at length above, the record establishes that Kaseberg and Welk were acting as Licensee's agents when they consumed alcoholic beverages in violation of OAR 845-006-0345(1).

2. Penalty

OAR 845-006-0500(7) sets forth violation categories and standard sanctions for violations within each category. The Commission may increase or decrease the standard penalty if aggravating or mitigating circumstances are found. OAR 845-006-0500(7)(c).

In this case, the Commission charged the aggravating circumstance that two agents of Licensee were involved in the violation. OAR 845-006-0500(7)(c) specifically allows for aggravation if the violation involved more than one patron or employee. Kaseberg and Welk were not employees of Licensee, but were acting as Licensee's agents. As Licensee is responsible for the conduct of its agents as well as its employees, the aggravation for the conduct of more than one agent is appropriate. In this instance, the conduct of the two agents was sufficiently related in time and subject matter that the issuance of a single violation with

aggravating factors was consistent with OLCC precedent. *Stockman's Exchange* (OLCC, Final Order, 99-V-003, May 2000). Aggravation of the penalty on this basis is warranted. Licensee has not demonstrated any basis to mitigate the penalty.

A violation of OAR 845-006-0345(1) is a Category III violation. The standard sanction is a 10-day license suspension or civil penalty of \$1,650. Past practice and precedent dictate that the standard conversion factor for each aggravating factor is two days suspension or a \$330 civil penalty. *Parilla Grill*, (OLCC, Final Order, 01-V-082, August 2002). Accordingly, the recommended penalty of a 12-day suspension or a \$1,980 civil penalty is appropriate.

FINAL ORDER

The Commission orders that a 12-day license suspension or a \$1,980 civil penalty be imposed upon Licensee Park Avenue Jones, Inc., dba The Vault Bistro & Lounge for the violation of OAR 845-006-0345(1).

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 December, 2010.

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

Mailed this 22nd day of December, 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.