

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

<b>IN THE MATTER OF:</b>	)	<b>FINAL FINDINGS OF FACT</b>
	)	<b>CONCLUSIONS OF LAW</b>
	)	<b>AND ORDER</b>
<b>GURMAIL SINGH</b>	)	OLCC-10-V-042
<b>SURINDER KAUR</b>	)	OLCC-10-V-042A
<b>DBA GPS MARKET</b>	)	

**HISTORY OF THE CASE**

On July 15, 2010, the Oregon Liquor Control Commission (OLCC) issued a Violation Notice to Gurmail Singh and Surinder Kaur (Licensees), doing business as GPS Market, located at 1655 Queen Avenue SW, Albany, Oregon. The notice alleged that Licensees' employee Diana Thomas knowingly sold or otherwise made alcoholic liquor available to a visibly intoxicated person in violation of ORS 471.410(1). The notice proposed a penalty of a 10-day suspension or a civil penalty of \$1,650 for the alleged violation. Licensees filed a timely hearing request.

OLCC referred the case to the Office of Administrative Hearings on August 13, 2010. A contested case hearing was held in Salem, Oregon, on October 27, 2010, before Administrative Law Judge James W. Han. Attorney Michael Mills represented Licensees. Anna Davis presented the case for OLCC. The following witnesses testified for OLCC: Albany Police Officers Roy Wright and Alex Johnson and OLCC Inspector Christine Gittins. Diana Thomas testified for Licensees. The record closed at the conclusion of the hearing on October 27, 2010.

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

Licensees filed Exceptions to the Proposed Order on December 21, 2010.

On February 18, 2011, the Commission considered the record of the hearing, the applicable law, the Proposed Order of the Administrative Law Judge, Licensees' Exceptions to the Proposed Order and the Administrative Law Judge's Response to Licensees' Exceptions. Based on this review and the preponderance of the evidence, the Commission enters the following:

**ISSUES**

1. Whether Diana Thomas knowingly sold or made alcoholic liquor available to a visibly intoxicated person. ORS 471.410(1).
2. If the violation is proved, what is the appropriate penalty?

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## EVIDENTIARY RULING

Exhibits A1 through A7 were admitted in evidence at the hearing without objection.

### FINDINGS OF FACT

1. Gurmail Singh and Surinder Kaur are licensees doing business as GPS Market in Albany, Oregon. Gurmail Singh has been licensed since September 2003; Surinder Kaur has been licensed since September 2006. (Ex. A1 and A2.) They have no record of license violations. (Ex. A1.)

2. At about 9 p.m. on June 22, 2010, John Conser entered GPS Market, went to the beer cooler at the rear of the store, and brought a 24 ounce can of beer to the check-out counter where Licensees' employee Diana Thomas was working. (Test. of Thomas.) Conser had been drinking and was intoxicated. His clothes were dirty, he had urinated and defecated in his pants, his eyes were bloodshot and glassy, and he gave off a strong odor of alcoholic liquor. (Test. of Wright and Johnson.)

3. Conser placed coins on the counter to pay for the beer. He glared and stared at Thomas, making her uneasy. Thomas counted the coins and put the can in a paper bag. Conser took the bag, walked to the door, then turned around and returned to the counter where he told Thomas about a robbery of a store in Portland. (Test. of Thomas; Ex. A7.) Conser then left the store but stood nearby drinking the beer. (Test. of Thomas.)

4. Thomas then locked the market's entrance door to prevent Conser from re-entering the market. She called the Albany police at 9:06 p.m. to report that an intoxicated person had refused to leave the premises and was harassing customers. Thomas unlocked the door when another customer appeared. (Test. of Thomas and Ex. A4 at 1.)

5. Officer Johnson arrived at 9:12 p.m. (Test. of Johnson.) On seeing the police arrive, Conser opened the market's door and asked Thomas whether she had called the police. Thomas told Conser not to bring his cigarette into the store. (Test. of Thomas.) Johnson saw Conser walk unsteadily out of the market. Johnson knew Conser from previous interactions. Johnson saw that Conser had defecated and urinated in his pants, had bloodshot and watery eyes, and "reeked of alcohol." Conser slurred his speech and Johnson could understand only half of what Conser said. Johnson helped Conser to sit on the curb so Conser would not fall over. (Test. of Johnson.)

6. Officer Wright arrived at 9:25 p.m. He saw Conser had a "stuporous look." Wright smelled a strong odor of alcoholic liquor and an overwhelming odor of urine and feces coming from Conser. Wright ordered Conser to leave the market's premises. Conser made several attempts to stand up from the curb before he succeeded and staggered to a dumpster, where he picked up and drank from a can in a paper bag. (Test. of Wright.)

7. While Officer Johnson remained with Conser outside the market, Officer Wright entered the market and talked to Thomas. Thomas admitted to Wright that she sold Conser a can of beer and that Conser "was like that" when he bought the beer. Thomas asked whether Wright

intended to arrest her and she said, “I’m sorry, I was scared.” Wright issued a citation to Thomas for furnishing alcohol to a visibly intoxicated person in violation of ORS 471.410. (Test. of Wright.)

8. At 10:16 p.m., Officer Wright dictated a report of the incident. (Ex. A4.) At 10:51 p.m., Wright, responding to a dispatch call, saw Conser lying on the pavement in a fetal position next to the wheels of a parked car a block away from the market. Vomit was next to Conser and an empty can of beer that looked like the can Conser had bought at the market earlier that night. (Test. of Wright and Ex. A5.)

9. On June 29, 2010, OLCC Inspector Gittins interviewed Thomas about the incident. Thomas admitted that before she sold the beer to Conser she knew Conser was intoxicated, that she could smell the odor of an alcohol beverage coming from him, and that she saw he had urinated on himself. Thomas told Gittins that she sold the beer because she was scared of Conser and wanted him to leave. (Test. of Gittins.) Gittins signed her report of the interview on July 10, 2010. (Ex. A3 at 4.)

### **CONCLUSIONS OF LAW**

1. Diana Thomas knowingly sold or made alcoholic liquor available to a visibly intoxicated person, in violation of ORS 471.410(1).

2. The appropriate penalty for the violation is a 10-day license suspension or a civil penalty of \$1,650.

### **OPINION**

#### *Violation*

The Oregon Liquor Control Act provides that “[n]o person shall sell, give or otherwise make available any alcoholic liquor to any person who is visibly intoxicated.” ORS 471.410(1). OLCC has the power and the duty to enforce the Act, including regulating the licensing of persons to sell alcoholic liquors. ORS 471.730. Under that authority, OLCC may cancel or suspend any liquor license and may impose a civil penalty if it finds or has reasonable ground to believe the licensee:

Knowingly has sold alcoholic liquor to persons under 21 years of age or to persons visibly intoxicated at the time of sale or has knowingly allowed the consumption of alcoholic liquor on the licensed premises by a person who is visibly intoxicated at the time of consumption.

ORS 471.315(1)(a)(G). Although a licensee may not have personally committed the violation, the licensee may be held responsible for the acts or omissions of its agents or employees in violation of any law or regulation affecting the license. OAR 845-006-0362.<sup>1</sup>

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<sup>1</sup> OAR 845-006-0362 provides: “Each licensee may be held responsible 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.”

To establish a violation of ORS 471.410(1), OLCC must show: (1) a sale or service of or making available alcoholic liquor; (2) by an on-duty licensee, permittee, or agent or representative of a licensee; (3) to a person who showed visible signs of intoxication before the sale or service. *The Wild Rose* (OLCC, Final Order, 97-V-057, August 1998); *Mark Edward Hess* (OLCC, Final Order, 85-V-057, February 1986). In addition, the licensee, permittee, or the licensee's agent or representative must have known the person was visibly intoxicated; and the person must have actually been intoxicated. *Manila Express* (OLCC, Final Order, 91-V-055, March 1992).

OLCC has concluded that a visibly intoxicated person is one whose physical and mental control is diminished by alcohol or drugs to a point where such diminished control can be seen or observed. *Portland Civic Stadium* (OLCC, Final Order, 85-V-032, January 1986). Signs of visible intoxication include, but are not limited to, slurred speech, a heavy odor of alcohol, difficulty in handling money or lighting cigarettes, swaying or unsteadiness, watery or glassy eyes, disruptive or loud behaviors, argumentativeness, and spilling drinks. *Jody's Restaurant & Lounge* (OLCC, Final Order, 97-V-015, August 1997).

To prove a sale or service was made "knowingly," OLCC must show that before the sale or service of alcohol the patron showed signs of visible intoxication, the licensee or permittee had the opportunity to observe the signs, and the licensee or permittee either actually observed the signs or knew of a circumstance from which knowledge of visible intoxication may be inferred (a knowing "flag factor"). *Cheers to You* (OLCC, Final Order, 00-V-070, October 2001). The knowing "flag factors" include, but are not limited to, the following:

- Actual interaction with the patron while the patron was showing signs of visible intoxication;
- Knowledge of the patron, including drinking patterns and alcohol tolerance from prior occasions;
- The number of drinks served during an identifiable time frame;
- Notifying the patron at the time of service that he or she is cut-off or has reached his or her maximum;
- Contemporaneous statements by the server about the patron's condition;
- Admissions or stipulations by the server or patron that the patron was visibly intoxicated or should not have been served; or
- One or more signs of intoxication so open and notorious that it or they could not be reasonably missed.

*Cheers to You* (OLCC, Final Order, 00-V-070, October 2001).

There was no dispute that Licensees' agent, Thomas, sold alcoholic liquor to Conser when Thomas was on-duty. Licensees asserted that before the sale Conser did not show visible signs of intoxication and Thomas did not know Conser was visibly intoxicated. At the hearing, Thomas denied admitting to Officer Wright and Inspector Gittins that she knew Conser was visibly intoxicated. Licensees' counsel argued that the market's video recording of the transaction was the most compelling evidence that Conser did not show signs of intoxication that were visible to Thomas.

The video recording was not helpful in determining whether Conser displayed signs of intoxication. The video showed only the entrance door and counter area; Conser entered the market and immediately walked out of the camera's view as he went to the rear of the store. The single camera lens pointed downward from above Conser's head and showed only his profile at the counter. The video's resolution was poor and showed only two frames a second so that movements were jerky.

The most probative evidence was Officer Wright's and Officer Johnson's descriptions of Conser's condition when they met him at the market; Thomas's own action in calling the police minutes after the sale; Wright's report of his interview with Thomas less than a half hour after the sale; and Inspector Gittins's testimony regarding Thomas's admissions on June 27, 2010, five days after the sale.

Officer Wright contacted Conser less than 15 minutes after the sale and Johnson arrived less than 15 minutes later. They immediately saw signs of Conser's intoxication: Conser slurred his speech, had a heavy odor of alcohol, swayed and staggered on his feet, and had watery and glassy eyes. These signs were very likely also evident to Thomas when she sold him the liquor.

Minutes after Conser left the store, Thomas called the police and reported that Conser was intoxicated. Before she called the police, Thomas's only contact with Conser had been during the sale. Thus, it was more probable than not that Thomas made the sale knowing Conser was intoxicated.

Officer Wright reported that Thomas admitted she sold Conser a can of beer and that Conser "was like that" when he bought the beer. Although the phrase was somewhat ambiguous, more likely than not Thomas was referring to Conser's visibly intoxicated appearance. Thomas also asked Wright whether he would arrest her and apologized for selling alcohol to Conser, thereby indicating she knew her sale had violated the law. Thomas also admitted to Gittins that she knew Conser was intoxicated before she sold the beer and that she made the sale in the hope of getting Conser to leave the store.

Officer Wright's and Inspector Gittins's reports were more reliable than Thomas's testimony at the hearing, during which she denied making the admissions to Wright and Gittins. Wright interviewed Thomas shortly after he arrived and dictated his report less than an hour after he issued his citation to Thomas. Gittins interviewed Thomas five days after the incident and signed her written report of the interview less than two weeks later. There was no evidence that Wright or Gittins presented false testimony nor did the Licensees suggest any reason to doubt the accuracy of their reports. In *Dirty Bar & Grill* (OLCC Final Order 09-V-101, April 2010) and *Wolf Den* (OLCC Final Order, 89-V-021, July 1989), OLCC found that a licensee's admission to inspectors made immediately after the incident was more credible than the licensee's testimony at the hearing several months later because the licensee had not had time to fabricate a story, the inspectors had no reason to lie about the licensee's admission, and the inspectors' report documenting the licensee's statements was completed just days after the incident. The same reasons apply in determining the reliability of the evidence in this case.

Licensees argued that Thomas's fear of Conser could have "masked" the visible signs of intoxication and that even if Thomas knew Conser was intoxicated it was not reasonable, given Thomas's fear, to require Thomas to call the police before the sale. Thomas testified that she was scared because of Conser's glaring at her and his mentioning a store robbery. The argument

and testimony were not persuasive. Contrary to Thomas’s testimony, the video of the sale showed nothing menacing or belligerent in Conser’s conduct at the counter. And Thomas had already concluded the sale and Conser started to leave the store when he returned to talk to Thomas.

Licenses asserted that Thomas “made a good faith effort under OAR 845-006-0345 to not allow the sale to a ‘VIP.’” The “good faith effort” defense provided in OAR 845-006-0345(9) and ORS 471.412(2) may apply where a licensee is being charged with allowing a visibly intoxicated person to drink alcoholic beverages. It does not apply to an off-premises sale such as occurred here.

Licenses also asserted that Thomas was “protected by the choice of evils defense found in ORS 161.200.” That defense applies to conduct “necessary as an emergency measure to avoid an imminent public or private injury.”<sup>2</sup> As just discussed, there was no evidence that Thomas faced a threat of imminent injury.

Licenses also asserted the defense that its “employee did not allow an intoxicated person to consume or drink alcoholic beverages on the licensed premises.” The defense is inapplicable because OLCC has not charged or alleged that Licenses committed such a violation.

### *Penalty*

OAR 845-006-0500(7)(a) sets forth categories of license violations. Under that rule, a sale to a visibly intoxicated person in violation of ORS 471.315(1)(a)(G) and 471.410(1) is a Category III violation, “[v]iolations that create a potential threat to public health or safety.” Exhibit 1 of the rule lists guidelines for the applicable sanctions within each category. If OLCC finds aggravating or mitigating circumstances, it may assess a greater or lesser sanction. OAR 845-006-0500(7)(c).

OLCC’s violation notice proposed to impose a civil penalty of \$1,650 or a 10-day suspension for the violation in this case, which is the standard penalty for the first Category III violation within two years. Licenses argued that a lesser sanction should be imposed because Thomas “called the police immediately after the sale, thus mitigating any possible damages.” The argument was not persuasive because the evidence did not establish mitigating circumstances.

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<sup>2</sup> ORS 161.200 provides:

(1) Unless inconsistent with other provisions of chapter 743, Oregon Laws 1971, defining justifiable use of physical force, or with some other provision of law, conduct which would otherwise constitute an offense is justifiable and not criminal when:

(a) That conduct is necessary as an emergency measure to avoid an imminent public or private injury; and

(b) The threatened injury is of such gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding the injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue.

(2) The necessity and justifiability of conduct under subsection (1) of this section shall not rest upon considerations pertaining only to the morality and advisability of the statute, either in its general application or with respect to its application to a particular class of cases arising thereunder.

OLCC has held that a licensee's actions after the sale and the patron's departure from the store may be considered in assessing a penalty. *See Brother's Market & Deli* (OLCC Final Order, 00-V-044, February 2000).<sup>3</sup> In that case, the licensee asked for the minor's identification, looked at it but failed to notice that it showed the minor to be under 21 years old, and sold a bottle of wine to the minor. After the minor left the store, the licensee realized the minor's age, ran out of the store, took the bottle out of the minor's hands, asked to see her identification again, told the minor she could not buy the wine, and gave back the minor's money. OLCC concluded that the licensee's "immediate and responsible actions" after the sale justified a lesser sanction.

Here, Thomas sold the liquor to Conser knowing he was intoxicated and to get him out of the store. She then called the police—not because she sold the beer to him but because Conser stood outside the store drinking the beer and harassing customers. Thomas's sale likely contributed to the fact that later that evening he vomited and lay sleeping or unconscious on the pavement next to a parked car. Thomas's sale directly increased the "potential threat to public health or safety" that the law against selling liquor to visibly intoxicated persons was intended to prevent. These facts did not support a mitigation of the penalty. Thus, the standard penalty is appropriate.

### **FINAL ORDER**

The liquor license of Gurmail Singh and Surinder Kaur will be suspended for 10 days or they shall pay a civil penalty of \$1,650.

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 24<sup>th</sup> day of February, 2011.

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

Mailed this 24<sup>th</sup> day of February, 2011.

**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.

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<sup>3</sup> The order in *Brother's Market & Deli* also concluded that the licensee's actions did not "undo" the violation and should not be considered in determining whether a violation occurred.