

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

In the matter of the Full On-Premises Sales) FINAL FINDINGS OF FACT
License held by:) CONCLUSIONS OF LAW
) AND ORDER
)
Casa Diablo, LLC) OLCC-13-V-008
Carol Lee, Managing Member) OLCC-13-V-008A
dba CASA DIABLO (F-COM))
2839 NW St. Helens Road)
Portland, OR 97210)

HISTORY OF THE CASE

On January 9, 2013, the Oregon Liquor Control Commission (OLCC or Commission) issued a Notice of Proposed License Suspension/Civil Penalty to Casa Diablo, LLC, Carol Lee, Managing Member, dba Casa Diablo (collectively, Licensee). On January 24, 2013, the Commission received Licensee's request for hearing.

On February 1, 2013, the Commission referred the hearing request to the Office of Administrative Hearings (OAH). On April 12, 2013, the OLCC issued an Amended Notice of Proposed License Suspension/Civil Penalty, alleging that Licensee's employee, Melissa Quillin, sold, gave, or otherwise made alcoholic liquor available to three visibly intoxicated patrons; that, alternatively, Licensee's employees, Melissa Quillin and Jeremy Grider, knowingly allowed three visibly intoxicated patrons to consume an alcoholic beverage on the Licensee's premises after observing that they were visibly intoxicated; and that Licensee's employee, Jeremy Grider, failed to evict a patron who he knew had engaged in disorderly activities.

On May 7, 2013, Senior Administrative Law Judge Monica A. Whitaker convened a contested case hearing in Tualatin, Oregon. Duke Tufty, Attorney at Law, represented Licensee. Becky Voelkel represented the Commission. The following persons testified: Carol Lee; Commission Inspectors Jeff Bell and David Luster; Portland Police Bureau (PPB) Officer Nicholas Ragona; PPB Detective Katie Manus; Ryan Carpenter; Louis Tarnay; Roy Lemke; Daniel Adair; Melissa Quillin; Jeremy Grider; Lonni Noris; and Shane Reeves.

The record remained open for receipt of written closing arguments. The record closed on May 22, 2013, after receipt of the Commission's final reply.

The Administrative Law Judge considered the record of the hearing and the applicable law and issued a Proposed Order mailed July 3, 2013.

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

The Commission's exhibits A1 through A17 were admitted into the record without objection. Licensee's Exhibits P1, P2, and P4¹ were admitted into the record without objection. The Commission's objection to the admission of Exhibit P3 was overruled and Exhibit P3 was admitted into the record.

ISSUES

1. Whether Licensee's employee, Melissa Quillin, violated ORS 471.410(1) by selling, giving, or otherwise making available, alcoholic liquor to three visibly intoxicated patrons.

Alternatively, whether Licensee's employees, Melissa Quillin and Jeremy Grider, violated ORS 471.412(1) by allowing three visibly intoxicated patrons to consume alcoholic beverages on the licensed premises after observing that they were visibly intoxicated.

2. Whether Licensee's employee, Jeremy Grider, failed to evict a patron, Ryan Carpenter, for disorderly activities, in violation of OAR 845-006-0347(4)(a).

3. If a violation is proven, what is the appropriate sanction?

FINDINGS OF FACT

1. Licensee Casa Diablo, LLC, and Carol Lee, Managing Member, dba Casa Diablo, located at 2839 NW St. Helens Rd., Portland, Oregon, has held a Full On-Premises Sales License since January 1, 2009. (Ex. A1.)

2. In response to multiple citizen complaints regarding noise and other issues, Commission Inspectors Bell and Luster went to Licensee's establishment in an undercover capacity on the night of December 6, 2012. (Test. of Bell and Luster.) Melissa Quillin was the on-duty bartender that night and was stationed behind the bar. (Test. of Quillin.) Jeremy Grider was on duty performing security work. (Test. of Grider.)

3. Licensee has video surveillance cameras throughout the premises, including near the entrance and restrooms, the bar, and the stage. (See Exs. A5 through A14 and P4.)

4. At approximately 5:07 p.m. on December 6, 2012, Daniel Adair, Ryan Carpenter, and Roy Lemke entered Licensee's establishment. At 5:15 p.m. Ms. Quillin poured two pints of beer for Mr. Adair and Mr. Carpenter. (Exs. P4 disc 1; A6 at 1.) Thereafter, Mr. Carpenter, Mr. Adair, and Mr. Lemke took turns purchasing alcoholic beverages for each other, including purchases at 5:44 p.m., 5:56 p.m., 6:40 p.m., and 7:01 p.m. (Ex. P4 disc 1.)

¹ Exhibit P4 consists of six compact discs.

5. Inspectors Bell and Luster entered Licensee's establishment at approximately 7:34 p.m. on December 6, 2012 and immediately entered the men's restroom. Also at 7:34 p.m., after Inspectors Bell and Luster were in the men's restroom, Mr. Adair and Mr. Carpenter entered the restroom. When Mr. Carpenter entered the restroom, he entered forcibly by ramming his right shoulder into the door. As a result, the door rapidly swung open and hit Inspector Luster in the back. (Exs. P4 disc 5; A11 at 1 through 9.)

6. Immediately thereafter, Inspectors Bell and Luster exited the men's restroom and walked to the bar, where Inspector Bell ordered a pitcher of beer from Ms. Quillin. (Ex. P4 disc 5; test. of Bell and Luster.) Inspector Luster stood in close proximity to Inspector Bell during this time. (Ex. P4 disc 1.)

7. At approximately 7:38:01 p.m., Inspector Luster informed Ms. Quillin that Mr. Carpenter was intoxicated and had threatened him.² (Exs. P4 at 1; A12 at 2; Test. of Luster.) After confirming with Inspector Luster that Mr. Carpenter was the one who made the alleged threats, Ms. Quillin reported the allegation to Mr. Grider. (Test. of Quillin and Grider.) At 7:38 p.m., Mr. Grider approached Mr. Carpenter, Mr. Adair, and Mr. Lemke at their table and asked if "there was a problem." All three men reported that there was no problem. After assessing the situation, Mr. Grider concluded the men did not pose a risk. Mr. Grider then informed Mr. Luster that he would keep "an eye" on the men. (Test. of Grider; Ex. A12 at 4.)

8. At approximately 8:10 p.m., PPB Officers Manus³ and Ragona arrived at Casa Diablo to assist Inspectors Bell and Luster. Upon arrival, and at the request of Inspectors Bell and Luster, Officers Manus and Ragona made contact with Mr. Carpenter and Mr. Adair and asked them to step into the main lobby area.⁴ While obtaining identification from Mr. Carpenter and Mr. Adair, Officer Ragona noted that both men had the odor of alcoholic beverage on their breath, bloodshot and glassy eyes and slurred speech. (Ex. A16 at 1; test. of Ragona.) Officer Manus noted the following in his report:

I could immediately smell a strong odor of alcohol on their breath. Both men had slurred speech, droopy blood shot eyes and were uneasy on their feet. Both men needed to be told repeatedly why we were talking with them, they would forget what I told them minutes after I explained the situation. The men were verbally aggressive and beligerant [sic].

(Ex. A17.)

² Although Inspector Bell was standing in close proximity to Inspector Bell when Mr. Carpenter allegedly threatened Inspector Luster, Inspector Bell never heard the alleged threat. (Test. of Bell.)

³ Officer Manus has since been promoted to Detective. (Test. of Manus.)

⁴ The Inspectors did not request that the officers speak with Mr. Lemke. (Test. of Bell and Luster.)

Inspector Bell's Report

9. Inspector Bell prepared a report, signed and dated December 19, 2012, regarding the December 6, 2012 incident at Licensee's establishment. (Ex. A3.) In the report, Inspector Bell wrote the following regarding the incident in the men's restroom:

* * * I was standing next to Inspector Luster when I heard a loud bang. The loud bang was followed by the bathroom door hitting inspector Luster in the back. A patron identified as Ryan Carpenter hit the door to the bathroom in an aggressive manner. Another patron identified as Daniel Adair was directly behind Carpenter as he entered the restroom. I observed that Adair was having difficulty standing as he had to brace himself by placing one hand on a partition. Adair proceeded to urinate all over the floor. Both patrons were unusually loud as they spoke to each other while using profanity.

(*Id.* at 3 and 4.)

Inspector Luster's Report

10. Inspector Luster prepared a report, signed and dated December 6, 2012, regarding the incident at Casa Diablo. (Ex. A4.) In the report, Inspector Luster wrote of the incident in the men's restroom as follows:

* * * After approximately 30 seconds, I heard a loud boom and was struck forcefully in the center of my spine by a heavy door leading into this restroom. Acting as if unaffected by being struck by the door, I turned slowly and observed a patron later identified as 36-year-old, Ryan Carpenter stumble forward into the restroom losing his balance and nearly falling face first into a wall mounted urinal.

Carpenter was followed into this restroom by an additional patron, later identified as 40-year-old, Daniel Adair. I could see that Carpenter's eyes were red and glassy and he had the distinct odor or alcoholic beverage irradiating [*sic*] from his breath and person. Carpenter then lurched sideways to his left, into a partitioned area, where a floor mounted toilet seat is located. At this time, I moved over to the sink and began to wash my hands. I could clearly hear what I recognized to be a heavy stream of Carpenter[']s urine splashing into this toilet and on to the floor. I could also hear Carpenter and Adair loudly shouting obscenities at each other * * *. I also observed Adair bracing himself against the wall of this restroom and urinating on the wall, his shoes and floor.

(*Id.* at 2.)

11. With regard to the alleged threat Mr. Carpenter made against Inspector Luster, the inspector reported:

* * * Inspector Bell and I walked up to the bar counter and ordered a pitcher of Coors Light from the bartender, later identified as 30-year-old, Melissa Quillin. At this time, Carpenter had left the restroom and took a seat at a table approximately five feet behind me, near the bar counter. I could now hear Carpenter making violent threats and point at me as I observed him through my peripheral vision. Carpenter loudly shouted, "I'M GONNA KILL THAT MOTHERFUCKER!"

* * * * *

* * * I pretended as if I didn't hear Carpenter's statements. I turned back to Insp. Bell when I heard Carpenter say "DID YOU SEE THAT SHIT! I'M GONNA KILL THAT MOTHERFUCKER RIGHT THERE! WATCH THIS!"

(Ex. A4 at 2 and 3; emphasis in original.)

Surveillance Video

12. Licensee's surveillance video shows Mr. Carpenter and Mr. Adair enter the men's restroom at approximately 7:34 p.m. As the two men walk towards the men's restroom, both display normal gait. Neither Mr. Carpenter nor Mr. Adair appear to have difficulty walking. (Ex. P4 at 5.)

13. Licensee's surveillance video shows Mr. Carpenter and Mr. Adair exiting the men's restroom at 7:35 p.m. Neither Mr. Carpenter nor Mr. Adair exhibit difficulty walking out of the restroom and neither sways or stumbles while walking. (Ex. P4 at 5.)

14. The surveillance video shows Inspectors Bell and Luster approach the bar area after exiting the men's restroom. At approximately 7:37 p.m., when Inspector Luster alleges Mr. Carpenter threatened to kill him, the surveillance video shows several patrons in the area where Inspector Luster stood and Mr. Carpenter sat. The surveillance video does not show any of the nearby patrons look at Mr. Carpenter or Inspector Luster during that time. (Ex. P4 at 3.)

15. At approximately 7:43 p.m., the surveillance video shows Mr. Lemke walk without difficulty to the bar from the table that he, Mr. Carpenter, and Mr. Adair were sharing. At 7:46 p.m., the surveillance video shows Mr. Lemke walk from the bar to the table with three beers in hand. Mr. Lemke walks without difficulty. He does not bump into anyone or spill beer from the glasses as he makes his way back to the table. (Ex. P4 disc 3.)

16. The surveillance video shows Mr. Carpenter and Mr. Adair walk to the entrance of the establishment at 8:11 p.m. with the Inspectors and Officers. Neither patron exhibits a sway or difficulty while walking. (Ex. P4 disc 5.)

CONCLUSIONS OF LAW

1. Licensee's employee, Melissa Quillin, did not knowingly sell, serve, or otherwise make alcoholic liquor available to three visibly intoxicated patrons, in violation of ORS 471.410(1).

Alternatively, Licensee's employees, Melissa Quillin and Jeremy Grider, did not violate ORS 471.412(1) by allowing three visibly intoxicated patrons to consume alcoholic beverages on the licensed premises after observing that they were visibly intoxicated.

2. Licensee's employee, Jeremy Grider, did not fail to evict a patron, Ryan Carpenter, for disorderly activities.

3. No sanction should be imposed in this case.

OPINION

The Commission contends that Licensee's employee, Ms. Quillin, sold, gave, or otherwise made available alcoholic liquor to a person who was visibly intoxicated, in violation of ORS 471.410(1). Alternatively, the Commission contends that Licensee's employees, Ms. Quillin and Mr. Grider, violated ORS 471.412(1) by allowing three patrons to consume alcoholic beverages on the licensed premises after observing that they were visibly intoxicated. Finally, the Commission contends that Mr. Grider failed to evict a patron for disorderly activities, in violation of OAR 845-006-0347(4)(a). As the proponent of these contentions, the Commission bears the burden to prove its allegations by a preponderance of the evidence. ORS 183.450(2) ("The burden of presenting evidence to support a fact or position in a contested case rests on the proponent of the fact or position"); *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); *Metcalf v. AFSD*, 65 Or App 761, 765 (1983) (in the absence of legislation specifying a different standard, the standard of proof in an administrative hearing 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 than not true. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390, 402 (1987).

Service of Alcoholic Beverages to Visibly Intoxicated Persons

The Commission maintains that Licensee's employee, Ms. Quillin, knowingly sold alcoholic beverages to visibly intoxicated patrons. There are two issues to decide: 1) whether Mr. Carpenter, Mr. Adair, and Mr. Lemke were visibly intoxicated; and 2) if so, whether Ms. Quillin sold alcoholic beverages to them knowing they were intoxicated.

ORS 471.410(1) provides:

No person shall sell, give or otherwise make available any alcoholic liquor to any person who is visibly intoxicated.

The Commission has determined that persons who sell alcoholic beverages have an affirmative duty to observe whether individuals purchasing alcohol from them are visibly intoxicated. *Kelsey's Korner Market* (OLCC Final Order, 97-V-009, October 1997). The Commission has determined that signs of visible intoxication include, but are not limited to, the following: slurring; a heavy odor of alcohol; difficulty in handling money or lighting cigarettes; staggering, swaying, stumbling, or falling; bloodshot, watery, or glassy eyes; disruptive, loud, or argumentative behavior; clumsiness, such as spilling drinks or bumping into things; and extreme mood swings. *Jody's Restaurant & Lounge* (OLCC Final Order, 97-V-015, August 1977). The Commission has further 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).

The *prima facie* elements of a violation of ORS 471.410(1) are as follows: (1) the sale, service or making available alcoholic liquor; (2) by an on-duty licensee, permittee or agent of licensee; (3) to a person who was showing visible signs of intoxication before the service; (4) the licensee, permittee or agent knew the person was visibly intoxicated; and (5) the person was actually intoxicated. "A 'knowing' sale to a visibly intoxicated person is met where, prior to the sale or service of alcohol, the patron demonstrated signs of visible intoxication, the server had the opportunity to observe the signs, and the server either actually observed the signs (*i.e.*, interaction with patron while displaying signs) or knew of the presence of a circumstance from which knowledge could be inferred." *Cheers to You* (OLCC Final Order, 00-V-070, October 2001). The OLCC calls these latter circumstances knowing "flag factors." The server's state of mind is a question for the trier of fact to be determined in view of the circumstances as shown by the evidence. *Aloha Station* (OLCC Final Order, 99-V-034, August 1999); *Plaid Pantry No. 55* (OLCC Final Order, 98-V-063, October 1998).

The Commission has the burden to prove that the employee knowingly allowed a visibly intoxicated person to consume alcoholic beverages. *Aloha Station* (OLCC, Final Order, 99-V-034, August 1999). A licensee cannot escape the duty to comply with the liquor laws by turning a blind eye and not monitoring compliance, or by maintaining conditions which make effective monitoring of compliance difficult or impossible. When either is done, a licensee assumes the risk that the violations will occur and may not claim those same conditions excuse liability for the foreseeable violations that do occur. *T.J.'s Fireside Dining* (OLCC, Final Order, 00-V-074, October 2001).

At hearing, the parties presented conflicting evidence as to whether Mr. Carpenter, Mr. Adair, and Mr. Lemke were visibly intoxicated. In their reports, the Inspectors allege that Mr. Carpenter and Mr. Adair had difficulty standing, that they swayed, and that each urinated on the floor and/or their shoes while in the men's restroom. In his report, Inspector Luster described Mr. Carpenter stumbling forward into the men's restroom and nearly falling face first into a urinal.

The surveillance video does not show either Mr. Carpenter or Mr. Adair swaying or staggering when entering or exiting the men's restroom. Consequently, the video surveillance does not support Inspector Bell or Luster's accounts that Mr. Carpenter and Mr. Adair were showing these signs of intoxication.

The surveillance video shows Mr. Lemke walking from the table to the bar at 7:43 p.m. to order another round of drinks. The Commission characterizes Mr. Lemke's walk as being completed in a careful manner, "showing the studious determination of an intoxicated person to complete a simple task * * *." (The Commission's Closing Argument at 2.) The surveillance video does not corroborate this characterization. Rather, it shows Mr. Lemke walking from the bar at 7:46 p.m. with three pints of beer in hand and without difficulty maintaining his balance. His care in walking back to the table could be explained as taking caution not to spill the three pints of beer he carried in his hands.

While the police officers who interviewed Mr. Carpenter and Mr. Adair testified that both men were clearly intoxicated, the conditions upon which the officers interviewed both men were different than when Mr. Grider spoke to the men and when Ms. Quillin served Mr. Lemke the final round of drinks at 7:46 p.m. The officers interviewed both men more than 20 minutes after they had been served the final drinks. The officers also had a greater opportunity to observe the men, to speak with them for a longer period of time, and to notice signs of visible intoxication, such as slurred speech.

For the above reasons, the Commission failed to establish that Ms. Quillin knowingly sold, gave, or otherwise made available alcoholic liquor to visibly intoxicated patrons.

Alternate charge

As discussed above, the surveillance video does not show Mr. Carpenter, Mr. Adair, or Mr. Lemke swaying or stumbling while walking, or showing other signs of obvious intoxication in the presence of Ms. Quillin or Mr. Grider. Ms. Quillin and Mr. Grider did not have the opportunity to observe Mr. Carpenter and Mr. Adair in the men's restroom. To the extent either man urinated on the floor, braced himself against the wall to stand, or otherwise experienced difficulty standing or walking while in the restroom, Ms. Quillin and Mr. Grider did not have knowledge of these conditions. The other signs noted by the officers, bloodshot and glassy eyes and the odor of alcoholic beverage on the men's breath cannot be refuted or substantiated by the video, but there is also no evidence indicating that Ms. Quillin or Mr. Grider actually observed these signs during their contact with the men.

Mr. Grider briefly spoke with the three men shortly before they were served the final round of drinks. Mr. Grider persuasively testified that none of the men exhibited obvious signs of intoxication at that time.

For these reasons, I am not persuaded that Mr. Carpenter, Mr. Adair and/or Mr. Lemke were displaying signs of intoxication so "open and notorious" that they could not be reasonably missed by Ms. Quillin and Mr. Grider. As such, the Commission failed to show that Ms. Quillin

and/or Mr. Grider allowed three visibly intoxicated patrons to consume alcoholic beverages on the premises after observing that they were visibly intoxicated.

Failure to Evict

The Commission alleges Mr. Grider should have evicted Mr. Carpenter for disorderly conduct. Specifically, the Commission alleges that Mr. Grider should have evicted Mr. Carpenter after he hit Inspector Luster in the back with the bathroom door and after he twice threatened to kill Inspector Luster.

OAR 845-006-0347 provides, in part:

(4) Eviction of Patrons:

- (a) A licensee or permittee who knows that a patron has engaged in noisy, disorderly or unlawful activities must evict that patron from the premises for at least a 24-hour period. The 24-hour period begins at the time the licensee evicts the patron.

The preponderance of the evidence fails to establish that Mr. Grider knew Mr. Carpenter engaged in disorderly conduct.⁵ First, Mr. Grider was not present when Mr. Carpenter forcibly entered the men's restroom. Second, Mr. Grider followed-up with Mr. Carpenter, Mr. Adair, and Mr. Lemke immediately after Mr. Quillin brought Inspector Luster's concerns to Mr. Grider's attention. Mr. Grider spoke to Mr. Carpenter, Mr. Adair, and Mr. Lemke, and nothing during his interaction with the three men led him to believe that Mr. Carpenter had or continued to engage in noisy, disorderly, or unlawful activities.

Moreover, the Commission has not persuasively shown that Mr. Carpenter threatened to kill Inspector Luster. The surveillance video shows Inspector Bell standing in close proximity to Inspector Luster when Mr. Carpenter twice allegedly threatened to kill Inspector Luster. Despite his close proximity to Inspector Luster, Inspector Bell did not hear either of these alleged threats. Ms. Quillin, who was also in close proximity, did not hear the alleged threats. In his report, Inspector Luster wrote that Mr. Carpenter "loudly shouted" that he was going to kill Inspector Luster. The surveillance video shows other patrons standing in close proximity to the area where the alleged threats were made; however, no patron turned to look at Mr. Carpenter or Inspector Luster. The preponderance of the evidence does not support a conclusion that Mr. Carpenter made such threats on the inspector's life. If Mr. Carpenter had done so, especially in the manner described by Inspector Luster in his report, it is likely that Inspector Bell, Ms. Quillin or another patron in the proximity would have heard it.

For these reasons, the Commission has failed to establish by a preponderance of the evidence that Mr. Grider violated OAR 845-006-0347(4).

⁵ "Disorderly activities" are those that harass, threaten or physically harm another person. OAR 845-006-0347(1)(a).

Conclusion

The preponderance of the evidence fails to show that Licensee's employee made alcoholic liquor available to three visibly intoxicated patrons on December 6, 2012. Alternatively, the preponderance of the evidence also fails to show that Licensee's employees allowed three visibly intoxicated patrons to consume alcoholic beverages on the licensed premises after observing that they were visibly intoxicated. Finally, the preponderance of the evidence fails to establish that Licensee's employee failed to evict a patron for disorderly activities. Therefore, the charges against Licensee should be dismissed.

FINAL ORDER

The Commission orders that the charge that Casa Diablo, LLC, and Carol Lee, Managing Member, doing business as CASA DIABLO, located at 2839 NW St. Helens Rd., Portland, Oregon, violated ORS 471.410(1), and the alternate charge of violating ORS 471.412(1), are DISMISSED.

It is also ordered that the charge that Casa Diablo, LLC, and Carol Lee, Managing Member, doing business as CASA DIABLO, located at 2839 NW St. Helens Rd., Portland, Oregon violated OAR 845-006-0347(4)(a) on December 6, 2012 is DISMISSED.

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

Dated this 23rd day of July 2013.

/s/ Merle Lindsey

Merle Lindsey

Interim Executive Director

OREGON LIQUOR CONTROL COMMISSION

Mailed this 23rd day of July 2013.

THIS ORDER IS EFFECTIVE ON THE DATE MAILED.

NOTICE: You are entitled to judicial review of this Order. Judicial review may be obtained by filing a petition for judicial review within 60 days from the service of this Order. Judicial review is pursuant to the provisions of ORS Chapter 183.