

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

In the Matter of the Off-Premises Sales) FINAL FINDINGS OF FACT
License held by:) CONCLUSIONS OF LAW
) AND ORDER
)
Mt. Angel Market & Deli, LLC) OLCC-12-V-003
Lal Sidhu, Managing Member) OLCC-12-V-003A
Charanjit Singh, Member) OLCC-12-V-003B
dba MT. ANGEL MARKET & DELI)
395 N Main Street)
Mt. Angel, OR 97362)

HISTORY OF THE CASE

On January 11, 2012, the Oregon Liquor Control Commission (OLCC) issued a Notice of Proposed License Cancellation and Removal From the Responsible Vendor Program (Notice) to Mt. Angel Market & Deli, LLC, Lal Sidhu, Managing Member and Charanjit Singh, Member (collectively Licensee), doing business as Mt. Angel Market & Deli, 395 N Main Street, Mt. Angel, Oregon 97362. The OLCC alleged 1) that Licensee failed to comply with a license restriction when Licensee’s employee failed to use age verification equipment (AVE) when selling alcohol to a person who appeared to be under the age of 26; and 2) that Licensee’s employee failed to verify the age of the person who appeared to be under the age of 26. On March 7, 2012, OLCC issued an Amended Notice which included an additional issue: Proposed Refusal to Renew the License.¹

Licensee made a timely request for hearing. The OLCC referred the request to the Office of Administrative Hearings on February 17, 2012. The case was assigned to Rick Barber, Administrative Law Judge (ALJ), and was originally set for hearing on September 11, 2012. A prehearing conference was held instead on that date, and the hearing was reset for January 3, 2013.

The hearing was held as scheduled on January 3, 2013 before ALJ Barber. Licensee was represented by Attorney Michael Mills. OLCC was represented by Case Presenter Anna Davis. Witnesses for OLCC were: Volunteer minor decoy Priscilla Roth; retired Keizer Police officer Brian Hunter; and former OLCC inspector Stephen Berrios. LLC Member Charanjit Singh testified for Licensee. The record was held open for written closing arguments.

Notice Issue. OLCC issued a Second Amended Notice on January 29, 2013, after the evidentiary record closed and during the briefing period. Pursuant to OAR 137-003-0530(4), Licensee was given the opportunity to present additional evidence or argument. Other than delaying rebuttal arguments for one week, Licensee indicated a willingness to proceed on the record as it is. The record closed on February 8, 2013, following receipt of rebuttal arguments.

¹ A Second Amended Notice issued on January 29, 2013, and is addressed in this Order.

The Administrative Law Judge considered the record of the hearing and the applicable law and issued a Proposed Order mailed March 22, 2013.

Licensee filed Exceptions to the Proposed Order on April 26, 2013. Staff filed Comments on the Proposed Order on April 26, 2013. The Administrative Law Judge responded to Licensee's Exceptions and Staff's Comments on May 15, 2013.

On June 27, 2013, 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:

ISSUES

1. Whether Licensee violated OAR 845-006-0335(1)(a)(b)(c) when its employee failed to verify the age of Roth, a minor decoy.
2. Whether Licensee failed to require its employee, Galindo-Garcia, to use AVE equipment in the sale of an alcoholic beverage to Roth, a minor decoy, thereby violating OAR 845-005-0355(5).²
3. Whether, if one or both violations are proven, the Commission is required to remove Licensee from the Responsible Vendor's Program.
4. Whether OLCC should refuse to renew Licensee's license.

EVIDENTIARY RULING

Exhibits A1 through A13 were admitted into evidence without objection. Licensee identified Exhibits P1 through P79. The following exhibits were admitted: P1 through P5, P9, P11-P15, P17, P18, P21, P27, P51, P55, P56, P58-P60, P65-P68, and P75-P79.³

The Notices of January 11, 2012, March 7, 2012, and January 29, 2013 are hereby designated as procedural documents in the case, along with the written closing arguments.

FINDINGS OF FACT

1. On October 28, 2011, a Committed Enforcement and Responsible Vendor (CERV) Task Force conducted a minor decoy operation in Marion County. One of the teams

² In Staff's Comments on the Proposed Order, staff requested that Issue (2) be restated to more accurately reflect the allegation made by OLCC in the Notice of Violation. In his Response to Exceptions, the Administrative Law Judge (ALJ) agreed to a change substantially similar to that made in this Order.

³ Several of Licensee's exhibits were non-evidentiary in nature (e.g., case law, Final Orders), but were allowed to remain as exhibits over OLCC's objections. Licensee withdrew several exhibits, and the following exhibits were not admitted based upon the OLCC's objections: Exs. P31, P32, and P54.

focused on licensees in Mt. Angel. Included in that team were two minor decoys: 18-year-old Priscilla Roth, DOB May 2, 1993, and 17-year-old Brendan Corrigan, DOB June 16, 1994. Also on the team were Keizer Police Officer Brian Hunter and OLCC Inspector Steve Berrios. (Test. of Berrios, Ex. A4 at 2).

2. On October 28, 2011, Roth and Corrigan entered Mt. Angel Market & Deli. Rubin Galindo-Garcia was working at the counter at the time. Roth walked to the back of the store, selected a six-pack of Heineken beer, and then went to the checkout. Corrigan was standing with her. Roth placed the beer and a \$10.00 on the counter. Galindo-Garcia completed the sale and did not ask to see Roth's identification or ask how old she was. He did not use licensee's AVE equipment. Roth collected the beer and her change and began to walk away. Galindo-Garcia said "Wait." Roth said, "What?" Galindo-Garcia then said, "No, you're good." (Test. of Roth; Ex. A4 at 3).

3. After Roth and Corrigan left the premises, Officer Hunter entered and spoke with Galindo-Garcia about the beer he had sold to Roth. Galindo-Garcia told Hunter he did not check Roth's identification before he sold the beer to her. Hunter issued a criminal citation to Galindo-Garcia. (Test. of Hunter; Ex. A4 at 3). Galindo-Garcia entered into a plea bargain with the District Attorney's office to plead guilty to a violation based upon stipulated facts. One of the stipulated facts stated:

At that time, and under the circumstances then and there existing, Defendant had an objectively reasonable belief that Ms. Roth appeared to be at least 26 years of age.

(Ex. P4).

4. Licensee has AVE equipment on the premises and some of the employees use it. (Ex. P79). Galindo-Garcia did not use the AVE equipment in the sale to Roth. (Ex. A4; Test. of Hunter).

2007 Incident

5. On June 15, 2007, the former Licensee's employee, Jimenez-Juarez, was cited for failing to verify the age of an alcohol purchaser who appeared to be under the age of 26. Mr. Singh (the sole proprietor Licensee at that time) exercised the option to install AVE equipment in lieu of paying a penalty for the offense. (Ex. A2). On September 18, 2007, Singh and Lal Sidhu formed an LLC (Mt. Angel Market & Deli, LLC), the business entity that was the Licensee at the time of the 2011 decoy operation. (Ex. A3).⁴

⁴ Licensee, in its Exceptions, requested that it be clarified that the licensee in 2007 (Charanjit Singh) was a different legal entity than Mt Angel Market & Deli, LLC, managing member Lal Sidhu and member Charanjit Singh, the licensees in 2011. Because it is a different legal entity, Jimenez-Juarez was the employee of the former licensee, not the current licensee. The ALJ, in his Response to Exceptions, agreed to the insertion of the words "the former" following the date "June 15, 2007" and before the words "Licensee's employee" in the first sentence of FOF #5.

6. On March 19, 2008, as part of a settlement involving several different licensees owned by the members of this LLC and other owners, Licensee agreed to the following:

An investigation by the Commission's Public Safety Program resulted in the Commission placing or proposing to place the following two restrictions on the Off-Premises Sales licenses of each of the premises listed above. The restrictions were imposed on the basis of OAR 845-005-0355(1)(c) and (2)(b).

Licensee will install age verification equipment, as defined in OAR 845-009-0140(1)(b), and will utilize the equipment to verify the age of every person who reasonably appears to be under 26 years of age and who attempts to purchase alcohol.

Licensee will join and maintain eligibility in the Responsible Vendor Program

* * * * *

The Public Safety Program and Licensees agreed to seek an informal disposition of this contested case through a settlement agreement. * * *

TERMS OF AGREEMENT

Licensees and the Executive Director of the Oregon Liquor Control Commission agree as follows:

1. The Commission agrees to modify the two proposed restrictions and to issue an Off-Premises Sales license to the Licensees at each of the premises named in this case with the following two restrictions:

Licensee will comply with the program standards for the Responsible Vendor Program as set forth in OAR 845-009-0135(4).

Licensee has Age Verification Equipment, as defined in OAR 845-009-0140(1)(b), installed at all of its locations and will install Age Verification Equipment at any new locations at the time of licensure. Licensee will require that all individual employees or licensees use Age Verification Equipment to verify the age of any patron who reasonably appears under the age of 26 who attempts to purchase alcoholic beverages.

(Ex. A11 at 8-9).

7. In a picture taken on the date of the minor decoy operation, and in person at hearing, Roth appears to be under the age of 26 years old. (Ex. A6 at 1). In a picture taken near the time of the minor decoy operation, Corrigan looked younger than 26 years of age. (Ex. A12).

8. Licensee trains its employees how to sell alcohol to customers. A training session on the use of AVE was held on November 17, 2010 for some of the stores owned by the members of this LLC and other similarly owned stores. Galindo-Garcia was not there, and neither were other of Licensee's employees. (Ex. A13; Test. of Berrios). On February 9, 2010, Galindo-Garcia signed a "clerk store brochure" concerning not selling alcohol to minors or intoxicated persons. That brochure does not contain any information about the use of AVE equipment. Berrios requested copies of documents involving the Responsible Vendor Program, including policies and all training schedules. Licensee told Berrios that all of the documents were in Salem and not on the premises. Licensee never provided those documents to Berrios.⁵ (Test. of Berrios).

9. In June 2012, Galindo-Garcia was again cited for selling alcohol to a minor while working for Licensee. On this occasion, he attempted to use the AVE equipment. (Testimony of Hunter)⁶.

CONCLUSIONS OF LAW

1. Licensee violated OAR 845-006-0335(1)(a)(b)(c) when its employee failed to verify the age of Roth, a minor decoy appearing under the age of 26 years.

2. Licensee failed to require its employee, Galindo-Garcia, to use AVE equipment in the sale of an alcoholic beverage to Roth, a minor decoy appearing under the age of 26 years, thereby violating OAR 845-005-0355(5).⁷

3. The Commission is required to remove Licensee from the Responsible Vendor's Program.

4. The OLCC should refuse to renew Licensee's license.

OPINION

The OLCC contends that Licensee's employee, Galindo-Garcia, failed to verify the age of minor decoy Priscilla Roth on October 28, 2011. The OLCC further contends that Licensee failed to require Galindo-Garcia to use AVE equipment on that date. As the proponent of those positions the OLCC must present evidence in support of its claim. ORS 183.450(2). It must prove its case by a preponderance of the evidence. *Sobel v. Board of Pharmacy*, 130 Or App 374, 379 (1994), *rev den* 320 Or 588 (1995) (standard of proof under the Administrative Procedures Act is preponderance of evidence absent legislation adopting a different standard).

⁵ In response to Licensee's Exceptions, the ALJ, in his Response to Exceptions, agreed to change the last sentence of this FOF as set out above.

⁶ In response to Licensee's Exceptions, the ALJ, in his Response to Exceptions, agreed to change the attribution of the testimony from Berrios to Hunter.

⁷ In Staff's Comments on the Proposed Order, staff requested that the statement of Conclusion (2) be restated to more accurately reflect the allegation made by OLCC in the Notice of Violation and to accurately track the requested change to Issue (2). In his Response to Exceptions, the ALJ agreed to a change substantially similar to that made in this Order.

Proof by a preponderance of the evidence means that the fact finder is persuaded that the facts asserted are more likely true than not. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390 (1987).

Motion to Dismiss

After the OLCC staff presented its evidence in the hearing, Licensee moved to dismiss the allegation that it violated a license restriction when Galindo-Garcia failed to use the AVE equipment during the sale to Roth. The motion was taken under advisement at that time.

Subsequent to the hearing, but prior to a proposed order, OLCC amended the Notice of Violation to allege that Licensee violated the license restriction when it “failed to require employee Ruben Galindo-Garcia to use age verification equipment . . . “. This amendment was permitted by the version of OAR 137-003-0530(4) in effect at the time of issuance of the initial Notice of Violation on January 11, 2012.⁸ When ruling on the motion in the Proposed Order, the Notice of Violation had been appropriately amended to allege the restriction violation occurred because Licensee failed to require employee Ruben Galindo-Garcia to use age verification equipment. As a legal matter, it was proper to deny the motion to dismiss under those circumstances.

Having reviewed all of the evidence presented by OLCC at the time the motion was made, the motion to dismiss is properly denied from an evidentiary perspective, as well. As discussed in more detail concerning the second violation below, OLCC showed that Galindo-Garcia failed to use the AVE equipment, and further showed that Licensee, when requested, was unable to provide any evidence to show that Galindo-Garcia had ever been trained on or required to use the equipment.

The motion to dismiss was properly denied.

Violation 1

Failing to verify Roth’s age. OAR 845-006-0335(1) states:

Age Verification; Minors on Licensed Premises

(1) Age Verification:

⁸ OAR 137-003-0530(4) (version in effect from 1/1/04 until 12/31/12):

Notwithstanding any other provision of these rules, at any time after the issuance of the notice required by ORS 183.415, an agency may issue an amended notice. * * *. If the agency files an amended notice after the evidentiary record has been closed, the agency shall inform the administrative law judge, who will reopen the record and conduct any further hearing or listen to additional argument required by new matters in the amended notice.

(a) ORS 471.130 requires a licensee or permittee to verify the age of a person who wants to buy or be served alcoholic beverages when there is "any reasonable doubt" that the person is at least 21 years old. The Commission requires a licensee or permittee to verify the age of anyone who wants to drink alcoholic beverages, or is in an area prohibited to minors, if there is reasonable doubt that the person is at least 21 years old. "Reasonable doubt" exists if the person appears to be under the age of 26;

(b) Whenever a licensee or permittee verifies age, he/she must verify it as ORS 471.130 requires (statement of age card or the specified items of identification) and must reject any obviously altered document or one which obviously does not identify the person offering it;

(c) Licensees must require all their employees who sell, serve, oversee or control the sale or service of alcoholic beverages to verify age as subsection (a) of this section requires.

A violation occurs when a licensee sells alcohol to a minor without checking the minor's identification to verify that he or she is over the age of 21 years. *Teri's Town Tavern*, OLCC-00-V-018 (November 2000). Licensee's employee violated this standard because he failed to ask for identification and failed to use the AVE equipment during the sale to Roth. Licensee may be held responsible for any violation made by a servant, agent or employee. OAR 845-006-0362.

The record establishes that Galindo-Garcia sold a six-pack of Heineken beer to Roth, who was 18 years old at the time of the decoy operation and reasonably appeared to be under 26 years of age. He did not ask Roth for any identification or for her age, did not use the AVE equipment, and did not attempt to verify her age in any other way. Galindo-Garcia admitted to Officer Hunter that he had not asked Roth for her identification.

Licensee argues that Galindo-Garcia did not check Roth's identification or use the AVE equipment because he thought Roth was older than 26 years of age. However, there is no evidence to support that theory. Galindo-Garcia did not testify at the hearing, and the record contains only two references to statements made by Galindo-Garcia.

The first statement occurred after making the sale to Roth. As Roth was leaving the store, Galindo-Garcia said "Wait." Roth stopped and said, "What?" Galindo-Garcia then said, "No, you're good." While Licensee contends that this colloquy shows Galindo-Garcia believed Roth was over 26 years old, that argument is speculative. Galindo-Garcia's comments are cryptic; there is no indication why he asked Roth to wait. Furthermore, even if he was checking her age at that point, the conversation took place *after* the sale. The violation had already occurred.

The only other comment made by Galindo-Garcia in this record was his admission, to Officer Hunter, that he had not checked Roth's identification. Hunter does not record any other statements by Galindo-Garcia.

Licensee also contends that the stipulated facts leading to a plea bargain in Galindo-Garcia's criminal case establish that he believed Roth was over the age of 26. The stipulated facts between Galindo-Garcia and the District Attorney include:

At that time, and under the circumstances then and there existing, Defendant had an objectively reasonable belief that Ms. Roth appeared to be at least 26 years of age.

(Ex. P4). While Galindo-Garcia and the DA stipulated to a specific set of facts in the context of a criminal proceeding—apparently to lower the charge to a violation—that recitation of facts is of no consequence in this proceeding.⁹ Neither the Licensee nor the Commission was a party to that criminal proceeding, the issue was not actually litigated in the criminal proceeding, Galindo-Garcia did not have both full opportunity and incentive to contest the allegation, and a plea bargain is not the sort of proceeding to which the court will give preclusive effect. Further, neither Galindo-Garcia nor the DA was present at this hearing to testify about how the stipulation of facts in the criminal matter came about.

Mr. Singh testified that he reviewed the video of the transaction and could tell that Galindo-Garcia believed Roth was older than 26 years of age. Absent any evidence from Galindo-Garcia, however, Mr. Singh's testimony on this point is purely speculative and is not persuasive. The OLCC has established that Galindo-Garcia failed to verify the age of Roth, a minor, before selling an alcoholic beverage to her.

Violation 2

Failing to require use of AVE equipment. The OLCC's second contention in this case is that Licensee failed to require its employee to use AVE equipment, in violation of the license restriction that Licensee agreed to in March 2008. The restriction states:

Licensee will comply with the program standards for the Responsible Vendor Program as set forth in OAR 845-009-0135(4).

Licensee has Age Verification Equipment, as defined in OAR 845-009-0140(1)(b), installed at all of its locations and will install Age Verification Equipment at any new locations at the time of licensure. *Licensee will require*

⁹ Issue preclusion arises in a subsequent proceeding when an issue of ultimate fact has been determined by a valid and final determination in a prior proceeding. Five elements are required to preclude relitigation of an issue in a subsequent proceeding:

- (1) The issue in the two proceedings is identical.
- (2) The issue was actually litigated and was essential to a final decision on the merits in the prior proceeding.
- (3) The party sought to be precluded has had a full and fair opportunity to be heard on that issue.
- (4) The party sought to be precluded was a party or was in privity with a party to the prior proceeding.
- (5) The prior proceeding was the type of proceeding to which the Oregon Supreme court will give preclusive effect.

Nelson v. Emerald People's Utility District, 318 Or 99, 104, 862 P2d 1293 (1993).

that all individual employees or licensees use Age Verification Equipment to verify the age of any patron who reasonably appears under the age of 26 who attempts to purchase alcoholic beverages.

(Ex . A11 at 8-9; emphasis added).

If Licensee is found to have violated this license restriction, it is a Category I violation per OAR 845-005-0355(5)¹⁰ and could lead to cancellation of the license and impact Licensee's ongoing participation in the Responsible Vendor Program.

Once again, the OLCC has the burden of presenting evidence in support of its contentions. However, what must be proved is a matter of some disagreement between the agency and Licensee. Licensee argues:

The OLCC must prove by a preponderance of the evidence that prior to the time of the sale, that the Licensee did **not** require that all individual employees (including Garcia) use age verification equipment to verify the age of any patron who reasonably appeared under the age of 26 who attempt to purchase alcoholic beverages before selling them such alcoholic beverages.

(Closing Memorandum at 3; emphasis in original).

In essence, Licensee argues that OLCC must prove a negative. In response, OLCC argues:

Licensee was mandated by the restriction to require its employees to use age verification equipment for every sale of alcohol to a person who reasonably appeared to be under the age of 26. The testimony of the Commission's witnesses, combined with Licensee's post-violation, unsigned and undated training documents, and vague testimony regarding training efforts establish that Licensee did not require employees to use the equipment. Licensee's own documentation shows the failure to require the use of the equipment. Licensee was unable to present any training documents signed by the employee.

(Agency Rebuttal at 2).

The disagreement is resolved by the wording of the restriction, which requires that "all individual employees" be required to use the AVE equipment. The focus of OLCC's evidence in the case is not whether others were required to use the AVE, but specifically whether Licensee required Galindo-Garcia to do so. Under the license restriction, the failure to require even one employee to use the AVE is a violation of the requirement that "all individual employees" be so required. With that understanding of OLCC's burden in mind, the Commission examines the evidence.

¹⁰ OAR 845-005-0355(5) states:

(5) A licensee or permittee who has a restricted license or permit must exercise license or permit privileges only in compliance with the restriction(s). Failure to comply with the restriction(s) is a Category I violation.

First, the evidence establishes the Galindo-Garcia did not use the AVE equipment when he sold the beer to Roth. The fact that Galindo-Garcia failed to use the AVE to verify the age of a patron appearing under the age of 26 years may be some evidence that he was not required to do so, but does not by itself establish that Licensee failed to require the use of the AVE.

However, the totality of the other evidence establishes that Licensee did not require Galindo-Garcia, and possibly others, to use the AVE equipment. The OLCC sought information from Licensee to show that Galindo-Garcia was required to use the AVE. The clearest evidence that Galindo-Garcia had been trained in the use of AVE, and that it was required to be used, would have been training documents or sign-up sheets showing that he underwent the training. Berrios requested copies of documents involving the Responsible Vendor Program, including policies and training schedules. Licensee told Berrios that all of the documents were in Salem and not on the premises. Licensee never provided training documents to Berrios.

Galindo-Garcia began working for Licensee in approximately February 2010, and signed a clerk brochure at that time. That brochure did not mention AVE, or require its use. Licensee and several other stores had a joint training session in October 2010, and a list of employees from various stores signed in. However, there is no evidence to show that Galindo-Garcia was present at the training. In summary, the OLCC relies upon the fact that Galindo-Garcia did not use the AVE equipment to verify the age of a patron appearing under the age of 26 years, the absence of Galindo-Garcia from the joint training session, and the complete lack of any credible, affirmative evidence to show that he was trained and required to use the equipment, to prove its case.

In response, Licensee presents both factual and legal arguments. Factually, Singh testified that he personally trained Galindo-Garcia in the use of the AVE. His testimony is unreliable for two reasons. First, other than this testimony at the hearing in late 2012, there is no indication in the training records that Singh or anyone else trained Galindo-Garcia to use the AVE equipment. The written contemporaneous training records (showing that trainings were held but Galindo-Garcia was not present) are more persuasive than Singh's vague testimony.¹¹

Second, Singh's testimony was somewhat unclear about whether he was claiming that he did the actual training or whether someone else did. The record shows that he often confused the words "I" and "we," so it was not always clear whether he was speaking personally or on behalf of the Licensee. This strengthens the conclusion that the written records are more reliable than Singh's testimony at hearing.

There is no dispute that the AVE equipment was being used at times in Licensee's store. Exhibit P79 is a sample of an AVE tape showing its use. However, the license restriction requires that *all* employees be trained in its use, and be required to use it. The preponderance of the credible evidence shows that Galindo-Garcia did not use the AVE to verify the age of a patron appearing under the age of 26 years, and was not trained to do so.

¹¹ Likewise, the timing of the alleged training by Singh is unclear. If it did occur, it could have been after the incident in October 2011.

Legally, Licensee contends that OLCC is misinterpreting the restriction language, arguing that the Court of Appeals' reversal of two cases¹² necessitates a dismissal of this allegation from the Commission's Notice in this case. For the reasons that follow, the Commission disagrees.

In both *US Market #180* and *US Market #109*, *supra* at 10, fn 12, the cases relied upon by Licensee, the Court considered alleged violations of the AVE license restriction. The licensees in those cases, like Licensee in this case, were signators of the 2008 settlement with the Commission. Licensee is correct that the restriction language is exactly the same in this case as it was in those cases.

In *US Market #180*, the Court concluded that the restriction language, by its terms, imposes an obligation on licensee only to require that licensee's employees use age verification equipment when the employee, during a sale of alcoholic beverages, is fulfilling his or her freestanding age verification obligation under OAR 845-006-0335(1)(a). The restriction does not require that the equipment be used to successfully verify that the patron is old enough to purchase the alcohol. The equipment was used, albeit unsuccessfully, in *US Market #180*; accordingly, the court found no violation of the restriction. On remand, the Commission entered an amended final order consistent with the Court's opinion.¹³ Factually, *US Market #180* is inapposite to the current case.

In *US Market #109*, the employee did not use the age verification equipment because the scanning feature was not operative. The keypad feature of the age verification equipment could be used to manually enter the relevant identifying information into the equipment when the scanning feature was not working. The court opined that employees must be appropriately trained on the use and features of the equipment as a concomitant of "requiring" its use. The court determined that Licensee failed to comply with the license restriction by failing to train (and, therefore, to require) employees to use the keypad function of the age verification equipment, if the scanning function was not available, to verify a patron's age before an alcohol sale. On remand, the Commission entered an amended final order consistent with the Court's opinion.¹⁴

In his analysis in the proposed Order herein, the ALJ distinguished the outcomes in *US Market # 180* and *US Market 109* on the grounds that the clerk used the AVE equipment in *US Market #180* and the clerk in *US Market #109* did not. This was not the distinction upon which the outcomes turned. The precise distinction was that the licensee in *US Market #180* required the employee to use the equipment whereas the licensee, by failing to train adequately, did not. *US Market #109*, Amended Final Order at 7.

In the present case, as in *US Market #109*, there is a failure to train appropriately. Licensee failed to train Galindo-Garcia on the use of the age verification equipment (as well, perhaps, as the existence of the restriction), and, as a consequence, has failed to require Galindo-

¹² Licensee relies upon *US Market #109 v. OLCC*, 250 Or App 335 (2012), and *US Market #180, LLC v. OLCC*, 249 Or App 666 (2012).

¹³ *US Market #180*, (OLCC Amended Final Order, 08-V-043/08-L-007, October 2012)

¹⁴ *US Market #109*, (OLCC Amended Final Order, 08-V-112, October 2012)

Garcia to use such equipment when verifying the age of a patron wanting to purchase alcohol who appears under the age of 26 years.

The OLCC has established that Licensee violated its license restriction when it failed to require Galindo-Garcia to use the AVE equipment.

Penalties

OLCC staff contends that Licensee should be subject to various sanctions and penalties. For failing to comply with the license restriction, the OLCC seeks (1) cancellation of Licensee's license privileges and (2) removal of Licensee from the Responsible Vendor Program. For failing to verify Roth's age and selling her an alcoholic beverage, the OLCC seeks (3) a ten-day license suspension or a \$1650 civil penalty.

Cancellation. Pursuant to OAR 845-005-0355(5), Licensee's failure to comply with the license restriction is a Category I violation. OAR 845-006-0500, the Commission's penalty rule, states in part:

(7) Violation Categories:

(a) The Commission has the following violation categories:

(A) I -- Violations that make licensee ineligible for a license;

(B) II -- Violations that create an immediate threat to public health or safety;

(C) II(a) -- Violations for unlawful drug activity;

(D) III -- Violations that create a potential threat to public health or safety OR violations of the tied house or financial assistance prohibitions;

(E) III(a) -- Violations for the sale of alcohol to a minor or failure to check identification when the retail licensee qualifies under the Responsible Vendor Program;

(F) IV -- Violations that create a climate conducive to abuses associated with the sale or service of alcoholic beverages;

(G) V -- Violations inconsistent with the orderly regulation of the sale or service of alcoholic beverages.

Under this rule, a Category I violation makes Licensee ineligible for a license. Cancellation of the license only occurs, however, when there has been a substantial violation of the license restrictions. *Oceanside Restaurant & Lounge* (OLCC Final Order, 88-V-123, August 1989). One of the reasons that general legal requirements are elevated to a license restriction is to

provide stronger accountability, including the possibility of license cancellation. *La Macarena*, OLCC-00-V-116, August 2002.

In *Oceanside*, the Commission set forth several factors to consider when determining whether a violation is substantial. Those factors include:

- The timing of the violation, with breaches early in the contract considered more likely to be substantial;
- Whether the violation was willful;
- The number of violations; and
- Whether the hardship on the Licensee outweighs the importance of the condition in ensuring compliance with the license condition.

Each of the *Oceanside* factors will be examined to determine whether Licensee's violation of the license restriction was substantial.

The timing of the violation. More than three years passed between the imposition of the license restrictions in 2008 and the events of October 28, 2011. This factor weighs against a finding that the violation is substantial.¹⁵

Willfulness of the violation.¹⁶ The Commission has found that a restriction is willfully violated if the restriction is known and an act is voluntarily taken in violation of the restriction. *Bettie Ford's*, OLCC-06-V-021 (August 2007). Similarly, where a licensee knows of a restriction and fails to act in a way that makes compliance with the restriction possible, the violation is willful. Licensee knew about the restriction and knew that not all employees had been trained on the use of the age verification equipment, including Galindo-Garcia. Licensee failed to require his employee Galindo-Garcia to use the age verification equipment by failing to train him on its use. The violation was willful. *See, e.g., US Market #109* Amended Final Order, *supra*, at 9. This factor weighs in favor of a finding that the violation is substantial.

The Number of Violations. This was the first license restriction violation for Licensee. This factor weighs against a finding that the violation is substantial.

Hardship on the Licensee. The Commission has previously determined that this fourth *Oceanside* factor goes against Licensee when "the breach strikes at the very heart of the restriction or condition placed on the licensee, as the licensee would not be a good risk for

¹⁵ The *Oceanside* factors either weigh in favor of or against a determination that the violation is substantial. *US Market #145*, OLCC-11-V-009, fn 8 (February 2012). The Administrative Law Judge misread or misinterpreted footnote 8 in *US Market # 145* as suggesting that *Oceanside* factors either weigh against a licensee or are neutral. Licensee correctly excepted to the ALJ's interpretation.

¹⁶ In the Proposed Order, the ALJ analyzed this factor in terms of the culpability of employee's action or inaction. It was actually licensee who breached the restriction because Licensee did not require all employees to use the AVE equipment when verifying the age of a patron appearing under the age of 26 years. It is appropriate, then, to evaluate the culpable state of mind of the Licensee as the actor, rather than that of the employee.

compliance with alcoholic beverage laws without the restriction.” *Dad’s Restaurant & Lounge*, (OLCC Final Order, 06-V-029, December 2007). In this case, the Commission argues:

The Commission has previously held that a restriction requiring the use of age verification equipment for person appearing under the age of 26 who attempt to purchase alcoholic beverages is not onerous and is easily followed. *South Salem Food & Gas*, OLCC 10-V-030, March 2011. In this case, the restriction was even less onerous than in *South Salem, supra*, because the restriction did not require use of the equipment, but merely required Licensee to require use of the equipment. Licensee did not require the use of the equipment; therefore, the breach in this case strikes at the very heart of the restriction[.]

(Closing Statement at 8). Commission staff correctly concludes that this factor weighs in favor of a finding that the violation is substantial.

Aggravation and Mitigation. Commission staff concedes that the “combined weight of the *Oceanside* factors in this case may not by itself merit cancellation.” (Closing Statement at 8). Where, as here, only two of the four *Oceanside* factors are present, the presence of other aggravating or mitigating circumstances can be considered in determining whether or not a penalty of cancellation is warranted. In *US Market #109*, the Commission specifically found that no mitigation was warranted; the licensee did not make a good faith effort to comply with the restriction when it did not provide its employees with the training they needed to comply with the restriction. *US Market #109* Amended Final Order, *supra*, at 8.

The violation was aggravated due to licensee’s personal involvement in the restriction violation. Only Licensee could “require” the use of the AVE equipment and Licensee did not do so, resulting in the violation.

Although not termed as such, some of Licensee’s arguments could be construed as an attempt to mitigate the substantiality of the license restriction violation. Licensee argues that it took all reasonable measures to train its employees in the use of AVE, and has presented evidence to show that the equipment was present and actually used.

As noted previously, the fact that the AVE was used at times on Licensee’s premises does not establish that Licensee required its employees to use the AVE equipment. In fact, the evidence establishes that Galindo-Garcia did not use it, and that he was not trained in its use or required to use it. The fact that AVE was present does not prove that Licensee required its use. *Monmouth Market* (OLCC-05-V-045, October 2006).

Weighing all of the evidence, including aggravation and the absence of mitigation, cancellation of the license is warranted.

Responsible Vendor Program. OAR 845-009-0135(7) states in part:

(7) Licensee Removal from Program and Reinstatement. The licensee is removed from the program in the following circumstances:

* * * * *

(b) For a sale to a minor or failure to properly verify identification by a licensee or employee, if aggravating circumstances (as referenced in subsection (3)(g)) are present. The licensee may reapply for the program in one year.

* * * * *

(d) For a Category I or II violation by the licensee personally. The licensee may not reapply for the program. For a Category I or II violation by an employee, the licensee is removed from the program, but may reapply for the program in one year.

Because of Licensee's Category I violation, as well as the sale to a minor with aggravating circumstances, Licensee must be removed from the Responsible Vendor Program.

Penalties for the Class III Violation. Ordinarily, such a violation would lead to a ten-day suspension or a civil penalty of \$1,650.00. However, with the cancellation of the license due to Violation number one, the OLCC seeks no penalty for the Class III violation in Violation number two.

License Renewal

In both the Amended Notice and the Second Amended Notice, the OLCC informed Licensee of its intent to not renew its license based upon a poor record of compliance, shown by both adjudicated and pending violations (Violations One and Two in this case). ORS 471.313 states in part:

Grounds for refusing to issue license. The Oregon Liquor Control Commission may refuse to license any applicant under the provisions of this chapter if the commission has reasonable ground to believe any of the following to be true:

* * * * *

(4) That the applicant:

* * * * *

(g) Did not have a good record of compliance with the alcoholic liquor laws of this state and the rules of the commission when previously licensed.

When reviewing Licensee's record of compliance in a license renewal context, only the compliance record for the premises seeking renewal is relevant. *US Market #260*, (OLCC Final Order, 11-L-003, March 2013). That review can include violations addressed for the first time in this proceeding, as long as Licensee is aware that License renewal is an issue and Licensee is

allowed to contest the charges. *Riverside Restaurant & Lounge*, (OLCC Final Order, 95-L-008, December 1996).

The Commission has previously found that one Category I violation is sufficient to establish a poor record of compliance. *Lotsa Luck*, (OLCC Final Order, 08-V-054, April 2009). The evidence in this case shows a poor record of compliance, based upon the Category I and Category III violations in 2011.

An applicant with a poor record of compliance may show good cause to overcome a license refusal under ORS 471.313(4)(g). In determining whether good cause exists, the Commission will consider the following factors:

- (a) Lengthy period(s) of time without violations as a licensee;
- (b) The nature/seriousness of the violation;
- (c) Personal involvement by the licensee;
- (d) Whether the licensee took immediate corrective steps following the violation;
- (e) Time passage since latest violation;
- (f) Whether the incident was isolated;
- (g) Whether the violation is aggravated or mitigated;
- (h) Willingness to have a permanent restriction;
- (i) Acceptance of responsibility versus evasion of responsibility for the violation.

US Market #145, (OLCC Final Order, 11-V-009, February 2012).

Applying these factors to the current case, the results follow below:

(a) *Lengthy period of time without violations as a licensee.* The violations in this case occurred on October 28, 2011, less than two years ago. Prior to these violations, Licensee, while previously licensed as an individual at the same premises, had a sale-to-minor violation in 2007. Given the short period of time since 2011, this factor weighs against good cause.

(b) *The seriousness of the violation.* The violation of the license restriction is a Category I violation, the most serious type of violation. The seriousness of the violation weighs against good cause.

(c) *Licensee's personal involvement.* Licensee was not personally involved in the Category III violation. As individually named licensees, Charanjit Singh and Lal Sidhu had a personal obligation to require employees to use AVE equipment. The individual licensees personally failed to fulfill this obligation under the restriction, causing the Category I violation. This factor weighs against good cause.

(d) *Immediate corrective steps.* Although Licensee presented some documents to show what it required its employees to do to remedy the violation, it is not clear when those documents

were created, or to whom they were provided. Thus, it is not clear that Licensee took immediate corrective steps to remedy the situation. This factor weighs against good cause.¹⁷

(e) *Time passage since latest violation.* At the time of hearing, fourteen months had passed since the October 2011 violations. Also, there is some evidence of another possible sale-to-minor violation at this premises, again involving Galindo-Garcia, in June 2012. The June 2012 incident is still under investigation, but suggests that the events of October 2011 may not be the latest violation. Because the 2012 alleged violation has not yet been adjudicated, this factor neither weighs for or against good cause.

(f) *Whether the incident was isolated.* There is some evidence of another possible sale-to-minor violation at this premises, again involving Galindo-Garcia, in June 2012. The June 2012 incident is still under investigation, but suggests that the events of October 2011 may not be isolated. This factor neither supports nor weighs against good cause.¹⁸

(g) *Whether there is aggravation or mitigation.* As noted above, the Category I violation was aggravated. This factor weighs against good cause.

(h) *Willingness to have a permanent restriction.* Other than the permanent restrictions set forth in the 2008 agreement, there is no evidence to show Licensee's willingness to have a permanent restriction. Undermining any meaningful "willingness", Licensee failed to abide by that permanent restriction, leading to the violations at issue here. This factor weighs against good cause.

(i) *Acceptance/evasion of responsibility.* OLCC staff contends that Licensee has failed to accept responsibility for the violations in this case, but the record is not clear on that point. Licensee admitted culpability for the Category III violation, and for the facts that led to the sale to a minor decoy. Licensee primarily contests the Category I violation on a legal basis which, although inapplicable in this case, is presented in good faith. This factor neither weighs for or against good cause.

Reviewing all of the good cause factors, six weigh against good cause and three are neutral. None of the factors weigh in favor of good cause. Licensee has failed to establish good cause to overcome its poor record of compliance, and its license renewal must be refused.

¹⁷ The ALJ, in his Proposed Order, concluded that this factor neither supported nor weighed against good cause. Because the burden to demonstrate that corrective steps were immediate rests with Licensee, and Licensee failed to so demonstrate, this factor has not been met and weighs against good cause.

¹⁸ The Administrative Law Judge determined that this factor, given the posture described above, weighed against Licensee. The Commission, however, is mindful that the alleged violation has not yet been adjudicated, so it will not weigh against Licensee. However, the violation is pending and so it cannot be said that the current violation was isolated. The Commission chooses to treat this factor as neutral, just as it treated the similar circumstance (accounting for the effect of the same pending violation) in factor (e), above.

Summary

In summary, the Commission has established that Licensee committed both violations set forth in the Second Amended Notice, that the appropriate penalties are cancellation of the license and removal from the Responsible Vendor Program, and that the penalty for the Category III violation, which would normally be a ten-day suspension or a civil penalty of \$1650.00, is subsumed into the cancellation. The Commission has also established that Licensee's license should not be renewed.

FINAL ORDER

The Commission orders that the Off Premises Sales License held by Mt. Angel Market & Deli, LLC, Lal Sidhu, Managing Member and Charanjit Singh, Member, dba Mt. Angel Market & Deli, 395 N. Main, Mt. Angel, Oregon, be CANCELLED.

It is further ordered that Licensee be removed from the Responsible Vendor Program.

It is further ordered that the application to renew the Off Premises Sales License held by Mt. Angel Market & Deli, LLC, Lal Sidhu, Managing Member and Charanjit Singh, Member, dba Mt. Angel Market & Deli, 395 N. Main, Mt. Angel, Oregon, be REFUSED.

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

Dated this 2nd day of July 2013

/s/ Merle Lindsey

Merle Lindsey

Interim Executive Director

OREGON LIQUOR CONTROL COMMISSION

Mailed this 2nd day of July 2013

THIS ORDER IS EFFECTIVE AT 7:00 AM ON THE 7TH DAY OF JULY, 2013.

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.