

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

IN THE MATTER OF

**Kwi Chun Park,
dba 9th Street Grocery
1210 E. 9th Street
Newberg, OR 97132**

) **FINAL FINDINGS OF FACT**
) **CONCLUSION OF LAW**
) **AND ORDER**
)
) OLCC-13-V-058
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)

HISTORY OF THE CASE

On May 28, 2013, the Oregon Liquor Control Commission (OLCC or the Commission) issued a Notice of Proposed License Suspension/Civil Penalty to Licensee Kwi Chun Park, dba 9th Street Grocery, 1210 E. 9th Street, Newberg, OR 97132. The Commission alleged that Licensee made a false representation or statement to the Commission on her application in order to induce or prevent action by the Commission, and also alleged that Licensee committed a misdemeanor on the licensed premises.

Licensee, through her attorney Michael Mills, made a timely request for hearing. The Commission referred the request to the Office of Administrative Hearings (OAH) on July 3, 2013. The OAH assigned the case to Administrative Law Judge (ALJ) Rick Barber.

A contested case hearing was held on November 20, 2013 in Salem, Oregon, before ALJ Barber. Licensee appeared and testified, and was represented by Attorney Michael Mills. Case Presenter Anna Davis represented the Commission. Korean interpreter Mira Wymer interpreted for Licensee. Witnesses for the Commission included OLCC Inspector Chris Nolte and the following Newberg-Dundee Police Department personnel: Sgt. Eric Ronning, Detective Michael Clark, Detective Sheldon Clay, and Detective Ryan Simmons. Licensee did not call any other witnesses. The record closed at the end of the hearing.

The Administrative Law Judge considered the record of the hearing and the applicable law and issued a Proposed Order mailed January 9, 2014.

Licensee filed Exceptions to the Proposed Order on January 31, 2014. The Administrative Law Judge responded to Licensee's Exceptions on March 4, 2014.

On April 24, 2014, 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 and the Administrative Law Judge's Response to Licensee's Exceptions. Based on this review and the preponderance of the evidence, the Commission enters the following:

ISSUES

1. Whether Licensee made a false representation or a statement to the Commission in order to induce or prevent action by the Commission, in violation of ORS 471.425(1).
2. Whether Licensee committed a misdemeanor on the licensed premises, in violation of ORS 471.315(1)(a)(J).
3. If one or more of the above violations are established, what is the proper sanction?

EVIDENTIARY RULINGS

Exhibits A1 through A11, (excluding Exhibit A5)¹ offered by the Commission, were admitted into evidence. Licensee objected to Exhibits A2 through A7 on the basis of relevance but the documents were admitted over the objection. Licensee's Exhibits P1 through P3 were also admitted into evidence without objection.

FINDINGS OF FACT

1. Licensee Kwi Chun Pak, operates a business known as 9th Street Grocery, located at 1210 East 9th Street, Newberg, Oregon. Licensee has held an Off Premises sales license in Oregon since August 14, 2001, and has renewed her license yearly. (Ex. A1; Test. of Nolte). On January 31, 2012, Licensee began to fill out her License Renewal Application to send to the Commission. The application included Operational Question 2, which states:

(2) Please list all arrests or convictions for any crime, violation, or infraction of any law during the last 18 months even if they are not liquor related for anyone who holds a financial interest in the licensed business. Attach additional sheet of paper to back of form if needed.

Licensee answered all of the questions on the form except Question 2, which she did not answer. Licensee submitted the application to the Commission and the Commission received it on February 7, 2012. (Ex. A8 at 1).

2. On November 8, 2011, three months prior to when Licensee filled out the application, the Newberg-Dundee Police Department began an undercover operation in the Newberg area to determine whether local stores were selling "Spice," a substance containing synthetic cannabinoids (*i.e.* artificial marijuana). On November 8, 2011, an undercover officer purchased a container of "Clown Loyal", a brand of Spice, from Licensee. Licensee kept the containers of Spice in a bag behind the counter in the front of the store. While Licensee was rummaging through the bag of Spice, the officer also saw a container of "Green Grenade," another brand of Spice also known to contain synthetic cannabinoids. (Ex. A2). The officer sent the Spice he had purchased to the Oregon State Police Forensics Lab, where testing indicated

¹ There is no Exhibit A5.

that, as suspected, it contained synthetic cannabinoid, a schedule 1 controlled substance. (Ex. A3).

3. On December 14, 2011, another undercover officer made a second controlled purchase from Licensee, buying two grams of Green Grenade Spice. (*Id.*).

4. On December 19, 2011, Newberg-Dundee Police arrested Licensee, presented her with a search warrant, and executed a search of the premises. Licensee told the officers that she did not sell Spice any more, and had not sold any for months because someone had told her it was illegal. Licensee denied having or selling Green Grenade. (Ex. A6). In a later interview the same day, Licensee told a different officer she did not know Spice was illegal and did not know she could not sell it. (Ex. A7). Officers found six containers of Spice, both Clown Loyal and Green Grenade, behind Licensee's front counter. (Ex. A4).

5. Licensee was charged with Delivery and Possession of a controlled substance (synthetic cannabinoid). These charges were pending at the time Licensee filled out the 2012 License Renewal Application. On June 18, 2012, Licensee pled guilty to a Class C Felony: Attempt to Commit a Class B Felony. Pursuant to statute, the court entered the Judgment of Conviction as a Misdemeanor rather than a Felony. (Ex. A9).

6. Licensee remembered the December 2011 arrest at the time of filling out and signing her 2012 License Renewal Application. She did not list her arrest on the application because she "did not think [she] was a criminal." If a 30-to-40 day suspension is imposed on Licensee, she will be forced to close the business. (Test. of Park).

CONCLUSIONS OF LAW

1. Licensee made a false representation or a statement to the Commission in order to induce or prevent action by the Commission, in violation of ORS 471.425(1).

2. Licensee committed a misdemeanor on the licensed premises, in violation of ORS 471.315(1)(a)(J).

3. Licensee should serve a 40-day suspension, or alternatively a 30-day suspension and pay a civil penalty of \$1,650.00, for the violations.

OPINION

Commission staff contends that Licensee made a false representation in her February 2012 License Renewal Application in order to induce or prevent action by the Commission, and further contends that Licensee committed a misdemeanor on the licensed premises. As the proponent of those contentions, OLCC bears the burden of proof. 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). 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).

False Representation

Licensee made a false representation on her application. The underlying facts of this alleged violation are straightforward. Licensee was arrested on felony possession charges on December 19, 2011, and eventually pled guilty to a lesser charge, as described below, on June 18, 2012. On February 7, 2012, after her arrest and while the felony charges were still pending, Licensee submitted her yearly License Renewal Application for the Commission but failed to provide information about her December 2011 arrest on drug charges on the application. This omission—the failure to answer question two on the application—was a false representation.

Commission staff contends that Licensee violated ORS 471.425, which states in part:

(1) No person shall make false representations or statements to the Oregon Liquor Control Commission in order to induce or prevent action by the commission.

The Commission agrees with staff.

The false representation was material. Although admitting that she failed to apprise the Commission of her 2011 arrest, Licensee argues that the omission was not intentional. Inspector Nolte apparently agreed, at least initially, because he stated it was unintentional in his report:

On Licensee’s 2012 renewal application she failed to [disclose] the arrest as identified in Question #2, Renewal Application. *A subsequent investigation determined the omission was not intentional* and she was advised to disclose the arrest on future renewal applications.

(Ex. A11 at 1; emphasis added).

Although the inspector concluded that Licensee’s false statement on the application was not intentional, the evidence at hearing was not as clear. Licensee testified that she left the section blank because she did not think she was a “criminal.” That thought process suggests some intentionality. Licensee also showed some level of deception when she was arrested, telling one officer that she had not sold Spice for months because she had been told it was illegal, and telling another that she was unaware selling Spice was illegal. She told an officer she did not have and had not sold Green Grenade, but the results of the search warrant showed she had Green Grenade and had sold some the day before. She also kept the Spice behind the counter rather than putting it on the shelves for customers to purchase. This evidence suggests Licensee had knowledge that Spice was illegal, and was attempting to avoid responsibility for selling it. That same intent could explain why she failed to inform the Commission of her arrest.

However, even if the omission was unintentional, the more important question is whether the omission was material. Intentionality is only one of the factors used to determine whether an omission (or false representation) was material. As the Commission stated in *Shell Food Mart*:

* * * Prior Commission cases have held that a false statement need not be intentional, but must be material. *See Shan Creek Café* (OLCC, Final Order, 05-L-005, February 2006); *H2O Martini Bar & Restaurant* (OLCC, Final Order, 05-V-012, December 2005). A false statement is material if the subject of the false statement is a basis for the Commission to refuse, cancel or suspend a license. *Trocadero Inn* (OLCC, Final Order, 90-V-055, February 1991). Material false statements are those which inhibit the Commission's ability to investigate a person's eligibility for a license. *Punjab Tavern* (OLCC, Final Order, 91-L-105, April 1992). The Commission has also held that a false statement is material if it was made intentionally. *AM/PM Market No. 756* (OLCC, Final Order, 95-L-031, July 1996). A false statement is intentional when the person making the statement intended to mislead the Commission. *Thomas Creek Steak and Seafood* (OLCC, Final Order, 00-L008, April 2001).

Shell Food Mart (OLCC Final Order, 08-V-060, September 2009). Under the Commission's cases, then, one of the key questions is whether the false statement or representation concerned a matter which could lead to refusal, suspension or cancellation of a license.

Misdemeanor on the Licensed Premises

ORS 471.315(1) states in part:

471.315 Grounds for cancellation or suspension of license or imposition of civil penalty. (1) The Oregon Liquor Control Commission may cancel or suspend any license issued under this chapter, or impose a civil penalty in lieu of or in addition to suspension as provided by ORS 471.322, if the commission finds or has reasonable ground to believe any of the following to be true:

(a) That the licensee:

* * * * *

(J) Since the granting of the license, has been convicted of a felony, of violating any of the liquor laws of this state, general or local, or of *any misdemeanor or violation of any municipal ordinance committed on the licensed premises.*

(Emphasis added). Licensee's crime in this case was committed on the licensed premises. Under the statute quoted above, any crime or even ordinance violation that occurs on the licensed premises is a basis upon which the Commission could cancel or suspend Licensee's license. Licensee's failure to include the December 2011 arrest was a material omission. *Trocadero Inn, supra.*

Licensee committed a misdemeanor on the licensed premises. At hearing, Licensee admitted that she had been convicted of a misdemeanor that she committed on the licensed premises. The rest of the record, including the previous discussion, bears out the accuracy of her

admission: Licensee sold synthetic cannabis to undercover officers of the Newberg-Dundee Police Department, was charged with felony possession and distribution of controlled substances, pleading guilty to a lesser charge. (Ex. A9). Commission staff has proved Violation number two in this case.

Sanction

The sanction alleged by Commission staff is appropriate. Commission staff has recommended that Licensee’s license be suspended for 40 days, or that Licensee pay a civil penalty of \$1,650 in lieu of ten days of the suspension and serve a 30-day mandatory suspension.

The false statement violation is a Category II violation and the governing rules recommend a 30-day suspension for a first violation. OAR 845-006-0500(7)(a). The misdemeanor violation is a Category III violation, with a ten day suspension or a \$1,650 civil penalty in lieu of the suspension.

Licensee does not present any evidence or argument against the proposed sanctions other than a plea to reduce the penalty because of the effect a 30 to 40-day suspension would have on Licensee’s business. While recognizing the importance of keeping businesses going in the economy, and without questioning the impact the suspension will have on Licensee’s business, the Commission is not required to ignore or reduce sanctions based upon economic hardship. *The Crown Room* (OLCC Final Order, 11-V-071 October 2012).

The sanctions set forth in the Commission’s Notice are appropriate.

FINAL ORDER

The Commission concludes as follows:

For the violations of ORS 471.425(1) and ORS 471.315(1)(a)(J), the Off Premises Sales License held by Kwi Chun Park, dba 9th Street Grocery, located at 1210 E. 9th Street, Newberg, OR 97132 should be suspended for 40 days or, alternatively, that Licensee’s license be suspended for 30 days and Licensee pay a civil penalty in the amount of \$1,650 in lieu of ten days’ suspension.

If Licensee chooses to pay the fine, it must be paid within twenty (20) days of the date of this Order. The suspension will begin within twenty-five (25) days of the date of this Order.

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

Dated this 2nd day of May 2014

/s/ Steven Marks
Steven Marks
Executive Director
OREGON LIQUOR CONTROL COMMISSION

Mailed this 5th day of May 2014

THIS ORDER IS EFFECTIVE ON THE DATE MAILED. Any monetary fine or civil penalty set out in the order shall be due and payable 20 days after the date of mailing; and the suspension begins 25 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.