

C. VIOLATIONS

C.1. Specific Violations

C.1.a. Violations Relating to Minors

C.1.a.1. Sale to Minor (ORS 471.410(2), ORS 471.315(1)(a)(G)) [(ORS 471.315(1)(a)(G), ORS 471.410(2), [ORS 472.180(1)(h)]]]

Minor was not produced at hearing. Licensee objected based on the lack of opportunity to assess first-hand the physical appearance and age of the minor, the Commission overruled the objection. Generally speaking, there is no requirement on a party with the burden of proof to call any witness in a civil proceeding, even if available to testify, if the party believes it can sustain its burden without the witness. While first-hand testimony might have been more probative of the minor's age and appearance, the absence of that testimony does not diminish the probative value of the evidence (photographs of the minor), upon which the agency relied in this proceeding. *Sugar Pine Inn*, OLCC-02-V-052, July 2003.

Where Applicant's nine-year-old daughter pushed the buttons on the cash register to ring up the sale, told the minor decoy the price of the beer, accepted payment, counted the change from the register and placed the change on the counter, the daughter made the sale of the alcohol, notwithstanding the fact that her mother told her the price of the beer, recounted the change, and bagged the beer. The sale was completed without verifying age. *Quincy Store*, OLCC-02-V-008/L-001, February 2003, affirmed at *Ban v. OLCC*, 196 Or App 545, 102 P.3d 744 (2004).

The second sentence of ORS 471.410(2) applies to sales of alcohol to adults and requires an element of knowledge on the part of the seller that the adult is buying the alcohol for a minor. The prohibition on sales to minors in the first sentence of ORS 471.410(2) does not require an element of knowledge for there to be a violation. The element of knowledge is imported into a violation for licensees through the administrative penalty statute, ORS 471.315(1)(a)(G). In order for a penalty to be imposed on licensees for sale to a minor under ORS 471.410(2), the licensee must make the sale "knowingly." It is not necessary to prove that the seller of alcoholic liquor to a minor knew that the purchase was a minor in order to violate ORS 471.410(2) when that statute is applied to OLCC agents. For agents, a negligent sale can also constitute a violation of the statute pursuant to Paragraph 11 of the Retail Sales Agent Agreement. *Agency No. 16*, OLCC-02-RO-004, December 2002.

No OLCC policies provide that a failure to give written notice that a licensed business is going to be referred to the minor decoy program establishes a basis to nullify the violation that may result from an OLCC "sting". *Cheryl A. Nelson*, OLCC-00-V-00, July 2000.

Due to the minor's youthful appearance, the clerk's examination of the minor's valid identification, showing him to be a "minor until," and the clerk's notation of the minor's birth date on the premises' log, the Commission infers that the clerk "knew" that minor O'Neil was a minor at the time of the sale of alcohol. *Peterson's on 4th*, OLCC-97-V-062, December 1999.

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C.1.a.1. Sale to Minor (ORS 471.410(2), ORS 471.315(1)(a)(G)) (continued) [(ORS 471.315(1)(a)(G), ORS 471.410(2), [ORS 472.180(1)(h)]]]

Where a liquor agent's employee sold liquor to a minor who, because of the similarity of appearance, the employee mistakenly believed to be a regular customer whose age was known, the Commission concluded that the employee negligently sold to the minor, even though the minor was very similar in appearance to the regular customer, because the minor patron objectively appeared to be his true age of 18 years. Agent received a Notice of Violation of the Retail Sales Agreement pursuant to Paragraphs (22)e and (23) of the Agreement for the employee's violation of ORS 471.410(2). *OLCC Agency No. 91, OLCC-98-RO-005, November 1999.*

Where licensee's clerk looked at minor's identification 2 times before making the sale and, after she made the sale, she realized she had made a mistake and left the store to try to find the minor to retrieve the beer, the Commission concluded that the clerk did not make a "knowing" sale to the minor, but, instead, made a mistake. *Food Sak Deli, OLCC-97-V-054, September 1999.*

Any crimes committed by the minor decoy by entering the business prohibited to minors and in purchasing an alcoholic beverage are not a defense to a charge of selling alcoholic beverages to minors. *OLCC Agency No. 193, OLCC-98-RO-001, August 1999.*

The Commission determined that a sale to a minor by an agent's employee under ORS 471.410(2) was a violation of the Retail Sales Agent Agreement where the sale was negligent, but not "knowing." The Retail Sales Agent Agreement subjects the agent to liability for the employee's act whether committed willfully or negligently. ORS 471.410(2) does not, by its own terms, require a "knowing" violation. [Note: ORS 471.410(2) does not contain a requirement that the sale to minor be "knowing"; the "knowing" requirement enters for licensees, permittees and clerks via ORS 471.315(1)(a)(G), the penalty provision for such sales. Subject licensees, permittees and clerks may only be sanctioned by the Commission for a "knowing" sale. For agents, the sanction is determined by the contract. The contract allows a sanction to agent for the acts or omissions of employees, within the course and scope of their duties, whether negligent or willful.] *OLCC Agency No. 193, OLCC-98-RO-001, August 1999.*

Where three patrons (two minors and one undercover police officer) were seated at a table and permittee heard the order for an alcoholic beverage, but did not see who ordered, and permittee served the adult police officer, permittee did not sell or serve an alcoholic beverage to a minor in violation of ORS 471.410(2), even though, in fact, it was one of the minors who ordered the beer. *Stuart Anderson's Cattle Company, OLCC-98-V-040 and OLCC-98-V-050, June 1999.*

The Commission's authority to sanction a licensee for a violation of OAR 845-006-0035(1) is found in ORS 471.315(1)(a)(A). OAR 845-006-0035(1) and ORS 471.315(a)(A) do not require proof of "knowledge" by the seller that the purchaser was a minor. On the other hand, ORS 471.410(2) and ORS 471.315(1)(a)(A) require that the seller have "knowledge" that the purchaser was a minor before a sanction can be imposed for the "knowing" sale of an alcoholic beverage to a minor. *Stuart Anderson's Cattle Company, OLCC-98-V-040 and OLCC-98-V-050, June 1999.*

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C.1.a.1. Sale to Minor (ORS 471.410(2), ORS 471.315(1)(a)(G)) (continued) [(ORS 471.315(1)(a)(G), ORS 471.410(2), [ORS 472.180(1)(h)]]]

In order for there to be a “knowing” violation of ORS 471.410(2), the record must include evidence that the trier of fact can assess when determining the state of mind of the seller from all of the circumstances in the case. *Handy Food Mart*, OLCC-98-V-029, April 1999.

A sale of alcohol to a minor decoy constitutes a prohibited sale to minor even though the minor decoy is acting as an agent of the police and the minor never intended to keep or to consume the alcohol. A sale occurred when the clerk took money from the minor decoy in exchange for the alcoholic liquor. Whether the minor intended to keep or use the alcoholic beverage or whether the minor used his own money is irrelevant. *Handy Food Mart*, OLCC-98-V-029, April 1999. *Murrayhill Thriftway*, OLCC-98-V-027 and OLCC-98-V-046, April 1999.

A clerk is required to verify whether the product s/he is selling is an alcoholic beverage. Knowledge that the product is an alcoholic beverage will be inferred where the label indicates in any way that the product contains alcohol (i.e., “alcoholic beverage,” “malt beverage”, Surgeon General’s warnings regarding the consumption of alcoholic beverages). *Murrayhill Thriftway*, OLCC-98-V-027 and OLCC-98-V-046, April 1999.

Relevant defenses to the crime of selling liquor to a minor include entrapment and outrageous conduct defenses. Under Oregon law, simply using decoys does not constitute entrapment. The use of decoys is a permissible method in the enforcement of criminal law. The use of decoys becomes invalid only when badgering or importuning takes place to an extent and degree that it is likely to induce an otherwise law abiding person to commit a crime. *Murrayhill Thriftway*, OLCC-98-V-027 and OLCC-98-V-046, April 1999.

The Commission reinterprets ORS 471.315 to require that an order to suspend or cancel a license for a sale of alcohol to a minor must be based on a finding that the sale was made knowingly. A “knowing” sale is not synonymous with “should have known.” State of mind is a question of fact to be determined in view of all the circumstances as shown by the evidence. *Plaid Pantry 55*, OLCC-98-V-063, October 1998.

The Commission concluded that a knowing violation of ORS 471.410(2) was proved where the minor decoy appeared to be her true age of 18 years and where minor was refused service at all of the other six premises where she attempted to purchase alcohol that evening. From these facts, the Commission inferred that the clerk “knew” the purchaser was a minor. *Capital Market*, OLCC-98-V-021, September 1998.

In a sale to minor case, the Commission inferred that licensee’s clerk “knew” the patron was a minor because of the patron’s youthful appearance and because the clerk examined the patron’s valid identification which showed the patron to be a minor until a certain future date. *Sunshine Market*, OLCC-97-V-091, July 1998.

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C.1.a.1. Sale to Minor (ORS 471.410(2), ORS 471.315(1)(a)(G)) (continued) [(ORS 471.315(1)(a)(G), ORS 471.410(2), [ORS 472.180(1)(h)]]]

The Commission concluded that the charge against Licensee for sale to minor should be dismissed because it determined by a preponderance of the evidence that the minor had presented convincing false identification. The Commission was persuaded that the minor presented convincing false identification where: (1) the clerk testified that the birth date on the authentic identification confiscated by OLCC did not match the birth date on the identification presented at the time of purchase; (2) the minor has had multiple licenses issued by DMV; (3) the minor's stories about the multiple licenses were improbable; (4) the minor was a college student at a place where the trend existed to alter the license birth date; (5) the minor took the authentic, confiscated identification from his wallet, while he took the identification used to purchase the alcohol from his pocket; (6) a neighboring business manager observed a young man hiding outside the store watching the transaction and arrest, who stated that he was watching his friend, who he thought was getting busted for his fake identification. *7-Eleven No. 15133A*, OLCC-97-V-066, April 1998.

The proscription of ORS 471.410(2) applies to every person not the parent or guardian of a minor, consequently it applies to liquor agents. Because Paragraph (7)(b) of the Retail Sales Agent Agreement mandates that an agent comply with and be subject to statutes of the state of Oregon, a violation of ORS 471.410(2) constitutes a violation of Paragraph (7)(b), subjecting the agent to a Notice of Violation pursuant to Paragraph (22)(e) of the Agreement. Additionally, the Retail Operations Manual is incorporated by reference into Paragraph (7)(b) of the Agreement. The Retail Operations Manual advises agents they must not sell alcoholic liquor to minors and must verify the age of customers who look younger than 26 years of age. The text of ORS 471.410 and OAR 845-006-0035(1) is recited in full in the Retail Operations Manual. Incorporation into the Retail Operations Manual, and, thereby, the Agreement itself, eliminates any doubt that the Commission intended that agents comply with liquor laws governing sales to minors and age verification. *OLCC Agency No. 155*, OLCC-97-RO-001, January 1998.

Licensees' employee sold alcoholic liquor to a minor in violation of ORS 471.410(2) where the minor objectively appeared to be under 21 years of age and the employee did not ask the minor for any proof of age prior to selling her the alcoholic beverage. *Burt Lee's Tahiti Restaurant/Lounge*, OLCC-97-V-022, December 1997.

The Commission concluded that Licensee violated ORS 471.410(2)(sale to a minor) where Licensee served a minor wine to taste and then served the minor a full glass of wine at a sea food festival. *Marquam Hill Vineyards*, OLCC-97-V-036, December 1997.

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C.1.a.1. Sale to Minor (ORS 471.410(2), ORS 471.315(1)(a)(G)) (continued) [(ORS 471.315(1)(a)(G), ORS 471.410(2), [ORS 472.180(1)(h)]]]

The Commission concluded that Licensee committed a violation of ORS 471.410(2) because Licensees' employee knowingly sold alcoholic liquor to a minor where the record showed that prior to selling beer to the minor, the employee asked the minor for identification, the minor showed her Oregon driver's license to the employee, the driver's license showed the minor's true age and stated "minor until 7/25/97", and the employee sold the minor the beer. The employee contended the minor showed her identification which showed the minor to be 21 years of age. The minor denied using false identification. The record showed that the minor was checked for identification prior to going out on the minor decoy operation to ensure that she was not carrying identification other than her Oregon Driver's License. Prior to going out on the sting operation, the minor did not have any identification other than her Oregon Driver's License. *Benny's Tavern*, OLCC-97-V-042, November 1997.

Those who serve an alcoholic drink will usually be held responsible for independently verifying the age of a patron of questionable age regardless of whether co-workers should have already verified a patron's age. The particular facts of a case may justify an exception to this rule where a bartender may reasonably infer that the preceding bartender had verified a patron's age. A bartender was excused from not checking a minor's ID where the premises were not crowded, there was an over-lapping shift, the preceding shift's bartender was still at the bar finishing his duties, the patron in question was seated at the bar and drank beer in plain view of the preceding bartender who had served her, and the preceding bartender had received Alcohol Server Education training and was skilled in age identification. *M & J Tavern*, OLCC-94-V-014, December 1994.

A violation of ORS 471.410(2) can occur when a licensee mistakenly fails to verify the age of young-looking patrons before selling them alcoholic beverages. Such unintentional violations are still violations if the patron appeared to be under 21 years old and licensee should have known that the patron was a minor. Proof of such violation need not include proof that the sale to a minor was made deliberately. Without regard to whether a licensee deliberately intended to disobey the law, violations can occur when licensees make mistakes. *Geno's Food Mart*, OLCC-93-V-054, May 1994.

The fact that two minors showed false identification was not a defense where: one identification, a driver's license, had expired, the photographs were of other people, and the heights and weights on the identifications did not match those of the minors. *Trapper's Lodge*, OLCC-93-V-018, July 1993.

Video-taped recordings of statements are properly offered as direct evidence of a person's youthful physical appearance or demeanor. However, video-taped statements are not admissible for the truth of their content unless the requirements for the taking of depositions have been satisfied. *Lowell Market*, OLCC-91-V-098, December 1991.

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C.1.a.1. Sale to Minor (ORS 471.410(2), ORS 471.315(1)(a)(G)) (continued) [(ORS 471.315(1)(a)(G), ORS 471.410(2), [ORS 472.180(1)(h)]]]

The burden of proving that the false identification was convincing false identification is on the licensee. Where the licensee failed to prove that the false identification was a motor vehicle operator's license or an identification card issued by the Oregon Motor Vehicles Division, the Commission concluded the licensee failed to meet the burden of proof for proving a defense of false identification. *17th & Lincoln Market*, OLCC-91-V-060, December 1991.

The minor's false identification was not a defense to the charge because the identification was not a motor vehicle operator's license or an Oregon Department of Motor Vehicle identification card as required by ORS 417.130. *John Dough's Pizza*, OLCC-90-V-161, August 1991.

Licensee failed to establish a defense in a sale to a minor case where the false identification shown by the minor was a hand lettered piece of identification stating "Idaho Operator." The Commission concluded that the identification failed to meet the requirements of ORS 471.130 and that a reasonable person would have determined that the identification was altered or false. *Golden Slipper*, OLCC-90-V-154, July 1991.

The Commission concluded it is an aggravating circumstance if a violation involves a person who objectively appears to be under 21 years old and that person is, in fact, under 18 years old. *Plaid Pantry No. 96*, OLCC-90-V-048, January 1991.

Grocery store committed violation for sale to minor where it was apparent another customer was buying beer for a minor. *East 20th Market*, OLCC-88-V-094, January 1989.

Licensee failed to establish a defense that buyer furnished acceptable identification where buyer displayed only a photocopy of a birth certificate and a student identification card, without completing an S-146 Form. *Master Mart*, OLCC-88-V-032, November 1988.

The Commission concluded that the charge against licensee for sale to a minor should be dismissed because the minor showed false identification that convincingly showed the minor to be over 21. The false identification was an Alaska drivers license. The date of birth on the Alaska driver's license indicated that the person was 21 years of age or older. The photograph on the license bore a close resemblance to the minor. *Handy Pantry*, OLCC-88-V-005, May 1988.

Seller's uncertain, uncorroborated testimony that minor had shown valid identification on a previous occasion was not sufficient to prove that the minor had, in fact, shown such identification. *TNT Market*, OLCC-87-V-054, February 1988.

Licensees established a defense where findings of fact based on credibility were that the minor had, on prior occasions, presented an Oregon driver's license that convincingly showed he was over 21 years old. Ralph and Pauline Conner, *Prefetto's Pizza*, OLCC-86-V-035, January 1987. *Superfine Food*, OLCC-90-V-001, February 1999.

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C. VIOLATIONS

C.1.a.1. Sale to Minor (ORS 471.410(2), ORS 471.315(1)(a)(G)) (continued) [(ORS 471.315(1)(a)(G), ORS 471.410(2), [ORS 472.180(1)(h)]]]

Charges for sale to a minor and failure to check identification were dismissed where findings, based on credibility, were that licensees did not sell or provide beer to the minor. Ralph and Pauline Conner, *Prefetto's Pizza*, OLCC-86-V-035, January 1987.

Where minor was 20 years old, six feet four inches tall, weighed approximately 185 pounds, and no one could describe his facial features, there was not sufficient evidence to prove that the minor appeared to be of questionable age. Brandy's Restaurants, Inc., *Brandy's Restaurant and Lounge*, OLCC-86-V-027, December 1986.

The Commission applied an objective standard to determine whether there were reasonable grounds to believe that a person was a minor. The test was how old the person would look to an impartial observer, rather than any particular individual's personal judgment. *David Littlejohn*, OLCC-85-V-076, September 1986.

It is not a defense that the licensee simply failed to look at the buyer of alcoholic beverages closely enough to determine if there were reasonable grounds to believe the buyer was under 21 years of age. Albert H. Grossman, *Handy Pantry*, OLCC-86-V-005, April 1986.

Reasonable grounds existed to believe that two minors were under 21 where one of the minors definitely looked under 21 and his companion's age appearance was questionable. The appearance of the one provided reasonable grounds to doubt the age of the other. Circle K Corporation, *Circle K, No. 541*, OLCC-85-V-060, March 1986.

There was reasonable doubt that a minor was at least 21 years old, despite the minor's success in buying alcohol without ID on other occasions, where the minor's youthful facial features indicated it was more likely than not that the minor was under 21. The close question of age was mitigating, however. Hans and Tina Unrau, *Shop N Go*, OLCC-85-V-025, November 1985.

The knowledge of the licensee's employee may be attributed to the licensee even where the licensee was in the hospital at the time of the violations for sale to minors. Young Mok Kim, *Day & Night Grocery*, OLCC-84-V-026, May 1985.

Licensee may be found guilty of "knowing sale to minor," even where facts clearly indicate seller believed buyer was over 21 years old, if there was reasonable ground to believe buyer was under 21 because of buyer's appearance. Plaid Pantry, Inc., *Plaid Pantry No. 13*, OLCC-84-V-040, March 1985.

Regardless of whether licensee charged with violation of ORS 471.410 or 471.315(1)(g), the sale must be knowing. Southland Corporation, and Raymond and Mary Haslebacher, *7-Eleven Store, No. 20806*, OLCC-84-V-022, November 1984.

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C.1.a.1. Sale to Minor (ORS 471.410(2), ORS 471.315(1)(a)(G)) (continued) [(ORS 471.315(1)(a)(G), ORS 471.410(2), [ORS 472.180(1)(h)]]]

Even if the Compliance Service's staff proves that the person was and looked under 21, the charge of selling alcoholic liquor to a minor will be dismissed if the licensee proves that the minor displayed a driver's license with a photo that convincingly showed the minor to be over 21 years of age. *Handy Pantry*, OLCC-88-V-005, May 1988; *Prefetto's Pizza*, OLCC-86-V-035, January 1987; *Hilyard Street Market*, OLCC-84-V-010, November 1984.

Although a licensee who requires a purchaser to produce a driver's license with a photograph or an Oregon Motor Vehicle Department identification card has a defense against a charge of sale to a minor, even if no S-146 card was taken, such licensee has the burden of proving that the identification was properly accepted under the standards stated in ORS 471.135(2). *Swartz Brothers Market, Inc., Hilyard Street Market*, OLCC-84-V-010, November 1984.

The Commission concludes that a fair reading of ORS 471.130 and 471.135(2) indicates that a licensee who requires a purchaser to produce a driver's license with a photograph or an identification card from the Department of Motor Vehicles has a defense against a charge of sale to minor, even if no S-146 card was taken, unless a reasonable person would have determined that the driver's license or identification card was altered or did not accurately describe the purchaser. *Hilyard Street Market*, OLCC-84-V-010, November 1984.

Licensee's sale to a minor was not knowingly made because the minor reasonably appeared to be 21 years of age at the time of the sale. There is no reasonable basis to conclude that licensee knew that minor was under 21 years. *Kuxeng and May Keu Yongchu, Mac's Market*, August 1983.

In order to be found to have sold to a minor, the sale must have been knowing, regardless of objective language of ORS 471.410. In order for sale to be knowing, there must have been reasonable ground for licensee to believe individual was under 21. *Plaid Pantries, Inc. v. OLCC*, 16 Or App 199, 517 P2d 1192 (1974).

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C. VIOLATIONS

C.1.a.2. Permitted Minor to Consume (OAR 845-006-0335(3)(a)) [(OAR 845-06-035(3)(a))]

Minor was not produced at hearing. Licensee objected based on the lack of opportunity to assess first-hand the physical appearance and age of the minor, the Commission overruled the objection. Generally speaking, there is no requirement on a party with the burden of proof to call any witness in a civil proceeding, even if available to testify, if the party believes it can sustain its burden without the witness. While first-hand testimony might have been more probative of the minor's age and appearance, the absence of that testimony does not diminish the probative value of the evidence (photographs of the minor), upon which the agency relied in this proceeding. *Sugar Pine Inn*, OLCC-02-V-052, July 2003.

Licensee's employees did not permit minor to consume where: (1) the bartender asked security to check his age as soon as he was detected in the premises (he had not been served alcohol and was not consuming alcohol when detected); (2) security recognized him as the person who had pointed a gun at security personnel in the premises parking lot on another occasion, and advised the bartender not to serve him, but to stall him; (3) employees called Licensee for instruction on removing the minor, given the security risk; (4) Licensee instructed employees not to attempt to remove the minor, but to call the police instead; (5) the police took 15 minutes to arrive; and (6) the minor was not sold alcohol, but was observed consuming alcohol from an unknown source when the police arrived. The Commission concluded that Licensee's employees acted reasonably to prevent the minor from consuming alcoholic beverages on the premises. *Chu's Eatery II*, OLCC-V-075, April 1998.

The Commission concluded that Permittee violated OAR 845-06-035(3)(a), allowing a minor to consume alcoholic beverages, because Permittee had sufficient opportunity to observe the minor under the following circumstances: the premises was not crowded; Permittee was not overly busy; the minor was on the licensed premises for over an hour; the minor was not attempting to hide himself although he was not visible to Permittee from where she worked behind the bar; Permittee was not overly busy and could have seen the minor if she had come out from behind the bar and walked around the premises. *Cherette Hoek*, OLCC-97-026, August 1997.

The Commission concluded that licensees' employees had ample opportunity to observe the minors even though neither of the minors was served by employees because the two minors were on the premises for one and one-half hours in an area of the premises that could be seen by the bartenders, and one of the minors was 16 years of age and looked very youthful. OAR 845-06-035(3)(a). *Leipzig Tavern*, OLCC-94-V-012, August 1994.

The Commissioners determined that the server did not have an adequate opportunity to observe that the minor was consuming alcohol under the following circumstances: the minor sat at the bar consuming beer for approximately 10 to 15 minutes, she was seated facing away from the bartender, and the bar area was very crowded. *E.L. Benders*, OLCC-93-V-016, October 1993.

C.1.a.2.

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C.1.a.2. Permitted Minor to Consume (OAR 845-006-0335(3)(a)) (continued) [(OAR 845-06-035(3)(a))]

Licensee's employee did not permit minors to consume where permittee was the only person on duty, the premises was very crowded, the two minors were seated in an area where they could not be seen by the permittee, the minors had not been served but drank beer that had been served to other persons, and the minors were on the premises for approximately 10 to 15 minutes. *Punjab Tavern*, OLCC-92-V-088, June 1993.

Permittee did not permit minor to consume because evidence failed to show permittee had sufficient opportunity to observe the minors consuming. Permittee was assigned to work in the service bar area and could not see the minors consuming because of the crowd of customers lined up in front of him. *Wayne J. Silveira*, OLCC-91-V-066, November 1991.

Licensees permitted a minor to consume even though the minor was attempting to hide the fact that he was drinking where the minor clearly appeared to be a minor, the minor was on the premises for approximately one hour sharing a pitcher of beer, and licensees had opportunity to observe both the minor's presence and consumption of beer because licensees had three or four employees on duty and the minor was seated 20 feet from the counter where the employees were working. *John Dough Pizza*, OLCC-90-V-161, August 1991.

Licensee's employee did not permit minor to consume where the employee did not have sufficient opportunity to observe the minor consuming because the minor attempted to conceal the fact that he was drinking by hurriedly drinking and then sliding the glass away from himself. *Trapper's Lodge*, OLCC-90-V-066, January 1991.

The Commission concluded that licensee permitted minor to consume where minor's youthful appearance made it possible for inspectors to single her out in a crowd and where minor was in premises drinking beer with another minor for approximately one hour and forty-five minutes. *O'Ryan's Irish Sports Pub*, OLCC-89-V-190, November 1990.

Licensee's employee permitted a minor to consume when the minor reasonably appeared to be a minor, the minor purchased beer two times, the minor was on the licensed premises for approximately one and one-half hours and the minor consumed beer. *Aloha Station*, OLCC-88-V-106, April 1989.

Licensees permitted a minor to consume in violation of OAR 845-06-035(2)(a) where they were aware the minor was drinking, and they took no corrective action, other than to remove the beer. Thus, licensee had ample time and opportunity to discover the minor was sneaking drinks on the premises. Ralph and Pauline Conner, *Prefetto's Pizza*, OLCC-86-V-035, January 1987.

Licensee permitted a minor to consume where minor drank beer on the premises over a 35-minute period. This was ample time for the licensee's employee to detect the minor and to determine his age. Brandy's Restaurants, Inc., *Brandy's Restaurant and Lounge*, OLCC-86-V-027, December 1986; I.C.B., Inc., *Murphy's Oyster Bar and Grill*, OLCC-85-V-046, December 1985.

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C. VIOLATIONS

C.1.a.3. Permitted Minor on Premises (OAR 845-006-0335(3)(b)) [(OAR 845-06-035(3)(b))]

It is not necessary to show that the licensee had knowledge of the presence of the minor on the premises; the licensee also permits a minor to remain if the licensee had sufficient time and opportunity to detect the minor. Thirty minutes is far more than sufficient time to detect a minor who is sitting at a booth waiting for service. The minor was not hiding or obscuring his presence. *Lava Lanes of Medford*, OLCC-04-V-007, February, 2005.

The administrative rule prohibiting minors on premises prohibited to minors, OAR 845-006-0335(3), makes no distinction between minors who enter on their own and minor decoys. It also does not include any requirement that the minor drink alcoholic beverages or mingle with persons consuming alcoholic beverages. The only relevant issues are whether the minor appears to be under the age of 26 (an issue not disputed here) and whether the licensee's employees permitted the minor to be on the premises. The Commission has interpreted the term "permitted" to mean that the Licensee had knowledge of the minor's presence or had sufficient time and opportunity to detect and determine the minor's presence. The fact that the minor decoy was allowed to remain in the prohibited premises for over thirty minutes is sufficient to conclude that the licensee should have known and had the opportunity to detect the minor's presence. *Lava Lanes of Medford*, OLCC-04-V-007, February, 2005.

Minor was not produced at hearing. Licensee objected based on the lack of opportunity to assess first-hand the physical appearance and age of the minor, the Commission overruled the objection. Generally speaking, there is no requirement on a party with the burden of proof to call any witness in a civil proceeding, even if available to testify, if the party believes it can sustain its burden without the witness. While first-hand testimony might have been more probative of the minor's age and appearance, the absence of that testimony does not diminish the probative value of the evidence (photographs of the minor), upon which the agency relied in this proceeding. *Sugar Pine Inn*, OLCC-02-V-052, July 2003.

The Commission reaffirmed that for purposes of OAR 845-006-0035(3)(b), proof is not required that minor both entered and remained; it is sufficient to prove that the minor was permitted to enter an area posted prohibited to minors. There was ample time for the licensee's employees to detect the minor and determine age where the minor was in the prohibited portion for 15 to 25 minutes, or as few as 10 minutes. *Sugar Pine Inn*, OLCC-02-V-052, July 2003.

Where minors were on the premises for several hours and were not trying to hide from Licensee's employees, but openly dancing and they looked their true ages, the Commission concluded Licensees had sufficient opportunity to detect them. However, because the minors presented convincingly false identification to gain entry and the Licensees had effective age identification procedures, and because the minors did not come into direct contact with Licensees' employees by attempting to purchase alcohol, there would have been little reason for Licensees' employees to check the minors' identification. Charge of violation of OAR 845-006-0035(3) was dismissed. *Kowloon's*, OLCC-99-V-088, November 2000.

C.1.a.3.

C. VIOLATIONS

C.1.a.3. Permitted Minor on Premises (OAR 845-006-0335(3)(b)) (continued) [(OAR 845-06-035(3)(b))]

The Commission determined that licensee had established a defense to the charge of permitting minor on premises where licensee or licensee's employees requested and were shown a valid-appearing driver's license with a photograph that showed the minor to be over 21 years of age. The following circumstances were determined to be sufficient to sustain licensee's burden of proof establishing that convincing false identification had been presented by the minors: (1) licensee had a strict policy for checking identification at the door, and employed four people to simultaneously staff the entrance door for this purpose – one employee was required to check the identification, while two employees watched to make sure all patrons were being checked; (2) patrons were required to enter in single file so that the identification of each could be checked; (3) licensee was watching the identification checker and observed both minors enter and present identification to the checker; (4) OLCC was responding to a detailed tip that two described minor females who used false identification were routinely on the premises; (4) when confronted, the minors attempted to avoid showing the OLCC inspector any identification -- one minor eventually showed him her authentic identification, the other showed no identification; (5) the two minors were accompanied by the adult sister of one; (6) the adult sister and one of the minors had been issued a number of licenses by DMV; (7) the minors had been on the premises a number of times previously after going through the identification checking process. *Kowloons*, OLCC-97-V-090, September 1998.

Where the presence of a crowd of patrons contributed to a licensee not detecting a minor on the premises, the licensee cannot claim surprise that the premises was crowded when the licensee scheduled live entertainment for the night in question. *M & J Tavern*, OLCC-94-V-014, December 1994.

The fact that a minor snuck past the "door checker," when a large number of patrons arrived at the door at the same time and provided a visual cover for the minor did not provide a defense, but rather pointed out that licensees need to have contingency plans for dealing with the arrival at one time of a large number of people. *M & J Tavern*, OLCC-94-V-014, December 1994.

The Commission overrules the portions of the *Drumstick Tavern*, OLCC-89-V-018, April 1989, and *Eola Inn*, OLCC-90-V-105, June 1991, which established precedents holding that mitigation is appropriate when minors did not attempt to consume alcohol or did not, in fact, consume alcohol when they were unlawfully on the licensed premises. The Commission concludes that the fact that a violation did not occur is not in itself a mitigating circumstance. *Beer Nutz*, OLCC-92-V-003, May 1992.

The charge that licensee permitted a minor to be on licensed premises was not proved where the evidence failed to establish characteristics of the minor's appearance from which an objective observer could conclude the minor was under 21 years of age. *Trapper's Lodge*, OLCC-90-V-066, January 1991.

C.1.a.3.

C. VIOLATIONS

C.1.a.3. Permitted Minor on Premises (OAR 845-006-0335(3)(b)) (continued) [(OAR 845-06-035(3)(b))]

“Permitting” is proved by establishing that the licensee or permittee had knowledge of or had sufficient time and opportunity to detect and determine the minor’s presence on the premises. *Phyllis J. Gorby*, OLCC-88-V-0009, June 1988; *Fish Grotto*, OLCC-88-V-021, July 1988. *Sparkles Tavern*, OLCC-88-V-107/127, September 1989.

Licensee permitted minors to enter and remain when minors waited inside the premises to act as drivers for two customers who had been consuming alcoholic liquor. Because the minors were not attempting to consume alcoholic liquor, there is a basis for mitigation of the penalty. *Drumstick Tavern*, OLCC-89-V-010, April 1989.

OAR 845-06-035(2)(b) does not require proof that minor both entered and remained. It is sufficient to prove that the minor was permitted to enter an area posted prohibited to minors. *Don Juan's*, OLCC-87-V-026, January 1988; *Brandy's Restaurant and Lounge*, OLCC-86-V-027, December 1986.

Permittee violated OAR 845-06-035(2)(b) where the permittee saw minors enter and permitted the minors to remain in the premises for ten minutes before she decided to contact them to check their ages. Ten minutes was more time than necessary or reasonable for the permittee to contact the minors. John and Nota Marcoules, *Tacoma Cafe*, OLCC-86-V-028, March 1987.

Licensee permitted a minor to enter and remain where the minor was in the prohibited portion for 15 to 25 minutes. This was ample time for the licensee's employees to detect the minor and determine his age. I.C.B., Inc., *Murphy's Oyster Bar and Grill*, OLCC-85-V-046, December 1985.

C.1.a.3.

C. VIOLATIONS

C.1.a.4. Age Verification (ORS 471.130, OAR 845-006-0335(1)) [(ORS 471.130, OAR 845-06-035(1))]

Even if licensee took payment for the beers from the deputy accompanying a minor decoy, the licensee still violated the law by serving a minor. *U-Licious Smokehouse & Grill*, OLCC-06-V-058, February, 2007.

The belief that a minor is with a responsible adult is not a defense to the charge of serving alcohol to a minor. *U-Licious Smokehouse & Grill*, OLCC-06-V-058, February, 2007.

Licensee required his employees to verify age as required by OAR 845-006-0335(1)(c), but Licensee's employee failed to follow Licensee's required procedures. Nonetheless, Licensee violated OAR 845-006-0335(1)(c) because he failed to ensure that his employee abided by the rule. *Thrifty Nifty Market*, OLCC-05-V-011, December 2005.

Given OLCC's policy and the minor's training and instructions as an agency decoy, it is unlikely that, if asked, he would falsely represent that he was 21 in lieu of presenting his identification. *Cozy Corner Tavern*, OLCC-05-V-028, December 2005.

The Commission found Permittee's testimony to be internally inconsistent. Permittee testified that he subjectively believed that the minor was 26 or older. If Permittee truly believed the minor was at least 26 years old, he would have had no reason to ask the minor if he was 21. Permittee would only have asked the minor if he was 21 if Permittee had some doubt about the minor having reached that age. *Cozy Corner Tavern*, OLCC-05-V-028, December 2005.

Both in person and in the photograph taken on the date of the violation, the minor had youthful, unlined facial features. He was clean shaven, with short cropped dark hair. Although the minor was relatively large in stature (6'2"), a person's height and/or weight are not a reliable indicator of whether the person is at least 21 years old. See *Quincy Store* (OLCC, Final Order, 02-L-001, December 2002), *aff'd Ban v. OLCC*, 196 Or App 545 (2004). Given the minor's youthful facial features, the Commission found that, on the date of the violation, he appeared his true age of 20. *Cozy Corner Tavern*, OLCC-05-V-028, December 2005.

Licensee contended that because more than half of the 17 premises checked on the date of the violation at issue sold an alcoholic beverage to the minor, he reasonably appeared to be over 21 on that date. The fact that several clerks or servers failed to verify the minor's age during this compliance check does not necessarily mean that he looked age 26 or older on that day. These clerks or servers who sold to the minor may simply have been negligent in their duty to verify his age. Of the 31 licensed premises that the minor entered as an agency minor prior to his 21st birthday, two thirds asked to see his identification. The Commission was persuaded that the minor appeared his true age of 20 at the time in issue. *Cozy Corner Tavern*, OLCC-05-V-028, December 2005.

C.1.a.4.

C. VIOLATIONS

C.1.a.4. Age Verification (ORS 471.130, OAR 845-006-0335(1)) (continued) [(ORS 471.130, OAR 845-06-035(1))]

Where Applicant's nine-year-old daughter pushed the buttons on the cash register to ring up the sale, told the minor decoy the price of the beer, accepted payment, counted the change from the register and placed the change on the counter, the daughter made the sale of the alcohol, notwithstanding the fact that her mother told her the price of the beer, recounted the change, and bagged the beer. The sale was completed without verifying age. *Quincy Store*, OLCC-02-V-008/L-001, February 2003, affirmed at *Ban v. OLCC*, 196 Or App 545, 102 P.3d 744 (2004).

That the Commission issues citations for violations of OAR 845-006-0035(1) only when the alcohol purchaser is actually under 21 years of age, does not render the rule invalid as applied. The age verification rule is designed to further the underlying statutory policy of preventing the sale of alcoholic beverages to minors and, as the Commission has previously determined, the rule is within the OLCC's statutory authority. Under these circumstances, it is appropriate for the Commission to limit the rule's application to circumstances in which failure to verify age results in the sale to a minor. *Trails Inn Restaurant & Lounge*, OLCC-02-V-004, June 2002.

Permittee's reliance on Licensee to check identification at the stairwell was not justifiable because Permittee knew Licensee had failed to do so in the past when distracted and knew that Licensee was distracted on this occasion by an arrest downstairs in another business owned by Licensee. There is here no basis for an exception to the OLCC's general practice of holding those who serve alcoholic drinks responsible for independently verifying the age of a patron of questionable age, regardless of whether co-workers should have already verified the patron's age. See *M & J Tavern*, OLCC-94-V-014, December 1994. *Benjamin Soto Lopez*, OLCC-01-V-008, August 2001.

A trainee bartender trying out for a job, who had not yet been hired, was Licensee's servant agent, employee, or representative, for purpose of holding Licensee responsible under OAR 845-006-0025 for bartender's failure to verify the age of a minor. *Teri's Town Tavern*, OLCC-00-V-018, November 2000.

No OLCC policies provide that a failure to give written notice that a licensed business is going to be referred to the minor decoy program establishes a basis to nullify the violation that may result from an OLCC "sting". *Cheryl A. Nelson*, OLCC-00-V-00, July 2000.

Where a bartender relied upon minor's statement that another bartender had checked her identification and upon the word of the minor's adult boyfriend that minor was 21, and did not independently verify minor's age, bartender violated OAR 845-006-0035(1)(a), (b), and (c). *Stockman's Exchange*, OLCC-99-V-003, May 2000.

The Commission rejected Permittee's defense that he did not recheck minor patron's age identification, reasonably relying on the door checkers on duty to check the identification. The Commission concluded that OAR 845-006-0035(1) requires that licensees and permittees verify age identification before selling alcoholic beverages. *Troy McNeil*, OLCC-99-V-106, April 2000.

C.1.a.4.

C. VIOLATIONS

C.1.a.4. Age Verification (ORS 471.130, OAR 845-006-0335(1)) (continued) [(ORS 471.130, OAR 845-06-035(1))]

Licensee's daughter, who was not employed at the licensed premises, sold alcohol to a minor patron without first verifying minor's age. The Commission concluded that Licensee was responsible for the violation pursuant to OAR 845-006-0025, as daughter acted as Licensee's agent or representative when she sold the alcohol, notwithstanding that she was acting contrary to the express instruction of the Licensee when she sold alcohol. *Tharwat Mart*, OLCC-99-V-076, February 2000.

The Licensee's actions following the sale and the minor's departure from the store do not "undo" the lack of age verification before the sale or the resulting violation. Licensee's subsequent action to retrieve the alcoholic beverage and to refund the money should be considered in assessing a penalty, not in determining whether a violation occurred. The Commissioners determined that an appropriate penalty was a Letter of Reprimand. *Brother's Market & Deli*, OLCC-99-V-044, February 2000.

Where clerk mistakenly believed that minor was minor's older brother, known to be over 21 years of age, it was not a defense to charge of failing to check identification where at least 6 months had passed since clerk checked older brother's identification and the minor appeared youthful. *777 Deli Market*, OLCC-99-V-014, August 1999.

The Commission's authority to sanction a licensee for a violation of OAR 845-006-0035(1) is found in ORS 471.315(1)(a)(A). OAR 845-006-0035(1) and ORS 471.315(a)(A) do not require proof of "knowledge" by the seller that the purchaser was a minor. On the other hand, ORS 471.410(2) and ORS 471.315(1)(a)(A) require that the seller have "knowledge" that the purchaser was a minor before a sanction can be imposed for the "knowing" sale of an alcoholic beverage to a minor. *Stuart Anderson's Cattle Company*, OLCC-98-V-040 and OLCC-98-V-050, June 1999.

OAR 845-006-0035(1) serves the underlying policy of ORS 471.130, that is, to verify the age of young-looking customers so as to prevent the sale of alcohol to minors. The Commission concluded that the rule reasonably advances a statutory purpose and does not exceed the statutory authority of the Commission. *Handy Food Mart*, OLCC-98-V-029, April 1999.

The Commission concluded that the language "verify the age of a person" in OAR 845-06-035(1) means that the licensee or permittee must verify that the person seeking to buy alcoholic beverages is at least 21 years of age. The Commissioners determined that merely asking for identification is not sufficient to satisfy the requirement of this rule. The seller must verify that the person is at least 21 years of age. *Texaco Star Mart*, OLCC-97-V-051, April 1998.

The Commission concluded that a violation of OAR 845-06-035(1) (age verification) occurred in spite of the fact that the licensee's clerk asked for identification and looked at the identification before making the sale.

C.1.a.4.

C. VIOLATIONS

C.1.a.4. Age Verification (ORS 471.130, OAR 845-006-0335(1)) (continued) [(ORS 471.130, OAR 845-06-035(1))]

The requirements of OAR 845-006-0035(1) apply to retail sales agents because of the incorporation of its requirements into the Retail Operations Manual. The Retail Operations Manual is incorporated into Paragraph (7)(b) of the Retail Sales Agent Agreement by reference. Violation of OAR 845-006-0035(1) constitutes a violation of the Retail Sales Agent Agreement. *OLCC Agency No. 155, OLCC-97-RO-001, January 1998.*

OAR 845-006-0035(1) applies to licensees and to their employees. The Commission is persuaded that the rule applies to all sellers of alcoholic beverages, not just to licensees and permittees. However, only licensees and permittees can be charged with violating the rule. The Commission concluded that OAR 845-006-0035(1)(a), (b), and (c) apply to clerks who are employed by licensees as well as licensees and permittees and that a clerk's failure to verify the age of a customer who appears to be less than 26 years of age causes licensees to violate OAR 845-006-0035(1)(a). *Handy Food Mart, OLCC-98-V-029, April 1999.*

The Commission concluded that Licensees violated OAR 845-06-035(1)(a), (b), and (c) (failure to verify the age of a minor before selling alcoholic beverages to a minor) where the record showed that the Licensee sold beer to a minor and did not ask the minor his age or for any proof of identification before making the sale. The Licensee contended that the minor had previously purchased alcohol from him and had previously shown Licensee identification showing the minor to be 21 years of age. However, the Licensee was not able to prove that the minor showed him convincing false identification on previous occasions. *Mini Mart, OLCC-97-V-006, June 1997.*

Those who serve an alcoholic drink will usually be held responsible for independently verifying the age of a patron of questionable age regardless of whether co-workers should have already verified a patron's age. The particular facts of a case may justify an exception to this rule where a bartender may reasonably infer that the preceding bartender had verified a patron's age. A bartender was excused from not checking a minor's ID where the premises were not crowded, there was an over-lapping shift, the preceding shift's bartender was still at the bar finishing his duties, the patron in question was seated at the bar and drank beer in plain view of the preceding bartender who had served her, and the preceding bartender had received Alcohol Server Education training and was skilled in age identification. *M & J Tavern, OLCC-94-V-014, December 1994.*

Licensee did not violate ORS 471.130(1) by failing to request valid identification before selling or serving alcoholic liquor to person of questionable age where evidence showed no sale or service was made to the minor. The beer was ordered by, served to, and paid for by another customer. *Trapper's Lodge, OLCC-90-V-066, January 1991.*

Even assuming that a licensee had requested and had been shown reliable identification at an earlier date, if he did not remember at the time of a later sale that the minor had shown him reliable I.D. in the past, he could not use the earlier check of I.D. as a defense to failing to check the minor's I.D. at the later sale. *Beehive Grocery & Deli, OLCC-89-V-184, March, 1990.*

C.1.a.4.

C. VIOLATIONS

C.1.a.4. Age Verification (ORS 471.130, OAR 845-006-0335(1)) (continued) [(ORS 471.130, OAR 845-06-035(1))]

Licensees and permittees must verify the age of any person of questionable age who is in an area of the licensed premises prohibited to minors. Ed Muffley Enterprises, Inc., *Murphy's Tavern*, OLCC-86-V-062, April 1987.

C.1.a.4.

C. VIOLATIONS

- C.1.a.5. Minor Employee/Contractor in Prohibited Area (OAR 845-006-0335 (3)(b), (4), (5), (6))
[(OAR 845-06-035(3)(b), (4), (5), (6))]

For the purpose of nonalcoholic liquor employment, a minor, by rule, may be in an area prohibited to minors only for the purpose of performing. Minor dancers are performing only when actually dancing, and not when soliciting private dances from customers in areas prohibited to minors. Accordingly, licensees permitted four minor dancers to be in an area prohibited to minors when the minor dancers were not dancing or moving directly to and from dancing. *Boogie Woogies/Stars Cabaret*, OLCC-01-V-051, September 2002.

Under the principles governing statutory construction, the more specific provisions of OAR 845-006-0335(6) relating to the conduct of minor entertainers control the conduct of minor dancers over the more general provisions of OAR 845-006-0335(5) relating to minor contractors generally. Minor entertainers are allowed to be in areas prohibited to minors only to the extent allowed by OAR 845-006-0335(6); they may not also claim exception under OAR 845-006-0335(5). The exception in OAR 845-006-0335(5) is intended to apply to visits by contractors such as plumbers, who are on the premises for short periods and for reasons not related to Licensee's core business. Further, Licensees did not establish that the dancers involved in the case were independent contractors - an individualized determination - for purposes of OAR 845-006-0335(5). *Boogie Woogies/Stars Cabaret*, OLCC-01-V-051, September 2002.

Where restaurant portion of premises was closed when minor employee served drinks in the lounge portion with Number II minor posting, minor was not performing alcohol server duties in conjunction with food service. The Commission concluded that Licensee violated ORS 471.482 because Licensee's minor employee was serving and selling alcohol beverages in an area prohibited to minors. The Commission held Licensee responsible, notwithstanding his specific instructions to the minor employee to work in the dining room only. *City Slickers*, OLCC-99-V-097, September 2000.

The Commission found a violation where 3 minor entertainers were in areas prohibited to minors for over 20 minutes. When they were not performing, they did not move to an area reserved for minor entertainers. The Commission did not find a defense to the charge when an agent for the dancers testified that he had checked the minors' identification and each had presented convincing false identification. The Commission distinguished the situation where the agent for the dancers checks their identification from the typical situation where a licensee uses independent contractors or volunteers to check identification, whose primary or sole task is age identification. *Pop-A-Top Pub*, OLCC-96-V-049, August 1997.

The fact that a minor entertainer's wait in an area prohibited to minors was supervised and lasted far longer than the few moments originally anticipated provided no defense where the licensee had already designated to the Commission a dressing room as the area where minor entertainers would be required to wait when not actually performing. *Beer Nutz*, OLCC-92-V-003, May 1992.

C.1.a.5.

C. VIOLATIONS

C.1.a.5. Minor Employee in Prohibited Area (OAR 845-006-0335 (4), (5), (6)) (continued) [(OAR 845-06-035(3)(b), (4), (5), (6))]

Minor entertainer's presence in an area of the premises prohibited to minors fell within the OAR 845-06-035(4) "legitimate business purpose" exception where the visit was relatively brief and focused upon arranging the entertainer's hours of employment. *Beer Nutz*, OLCC-92-V-003, May 1992.

OAR 845-06-035(3)(a) and (b) do not constitute a basis for finding a violation separate from OAR 845-06-035(2)(b). Rather, this section of the rule contains an explanation of exceptions to the conduct prohibited in OAR 845-06-035(2)(b). *Sparkles Tavern*, OLCC-88-V-107, September 1989.

Licensees violated OAR 845-06-035(2)(b) where a minor employee mixed and served alcoholic beverages in portions of the premises that were prohibited to minors. *Log Cabin Inn*, OLCC-87-V-042, January 1988.

Licensees did not violate rules concerning minor employees being in a prohibited area of the licensed premises where the minor had shown the licensee a false Oregon driver's license or DMV identification card that convincingly showed her to be over 21 years of age. James & Patricia Lassell, *Red's Side Track*, September 1981.

C.1.a.5.

C. VIOLATIONS

- C.1.a.6. Unlawful Service/Sale By Minor (ORS 471.480(1), ORS 471.482(1); OAR 845-006-0335(4))
[[[ORS 472.215], ORS 471.482(1), OAR 845-06-035(4)]]

Where Applicant's nine-year-old daughter pushed the buttons on the cash register to ring up the sale, told the minor decoy the price of the beer, accepted payment, counted the change from the register and placed the change on the counter, the daughter made the sale of the alcohol, notwithstanding the fact that her mother told her the price of the beer, recounted the change, and bagged the beer. Because Licensee permitted her daughter to make the sale as her agent, Licensee violated ORS 471.480(1). *Quincy Store*, OLCC-02-V-008/L-001, February 2003, affirmed at *Ban v. OLCC*, 196 Or App 545, 102 P.3d 744 (2004).

Licensee committed violation for unlawful service of alcohol by a minor where the licensee's 17-year old waitress served alcoholic beverages. *Hart's Grille & Bar*, June 1983; *Montero's Authentic Mexican Restaurant*, OLCC-92-V-018, July 1992.

C.1.a.6.

C. VIOLATIONS

C.1.a.7. Minor Decoy Operation Standards (ORS 471.346, OAR 845-009-0200)

An inspector's opinion of age appearance, while not solely determinative, is relevant to assessing whether the decoy appeared to be under the age of 26 years to an objective observer. Inspectors who run decoy operations select decoys based, in part, on age appearance; regularly assessing the age appearance of minors from these operations makes the observations of inspectors in this regard somewhat more objective than many citizens without such widespread exposure to older minors. Such testimony is relevant to consider in determining the overall objective age appearance of the decoy. *Hunter's R.V. Park*, OLCC-06-V-068, February, 2007.

The proportion of premises in a series of minor decoy operations that ask for the decoy's ID before allowing the decoy to purchase alcohol is relevant to consider in determining the overall objective age appearance (e.g., age appearance under 26 years) of the minor decoy. *Hunter's R.V. Park*, OLCC-06-V-068, February, 2007.

Given OLCC's policy and the minor's training and instructions as an agency decoy, it is unlikely that, if asked, he would falsely represent that he was 21 in lieu of presenting his identification. *Cozy Corner Tavern*, OLCC-05-V-028, December 2005.

Both in person and in the photograph taken on the date of the violation, the minor had youthful, unlined facial features. He was clean shaven, with short cropped dark hair. Although the minor was relatively large in stature (6'2"), a person's height and/or weight are not a reliable indicator of whether the person is at least 21 years old. See *Quincy Store* (OLCC, Final Order, 02-L-001, December 2002), *aff'd Ban v. OLCC*, 196 Or App 545 (2004). Given the minor's youthful facial features, the Commission found that, on the date of the violation, he appeared his true age of 20. *Cozy Corner Tavern*, OLCC-05-V-028, December 2005.

Licensee contended that because more than half of the 17 premises checked on the date of the violation at issue sold an alcoholic beverage to the minor, he reasonably appeared to be over 21 on that date. The fact that several clerks or servers failed to verify the minor's age during this compliance check does not necessarily mean that he looked age 26 or older on that day. These clerks or servers who sold to the minor may simply have been negligent in their duty to verify his age. Of the 31 licensed premises that the minor entered as an agency minor prior to his 21st birthday, two thirds asked to see his identification. The Commission was persuaded that the minor appeared his true age of 20 at the time in issue. *Cozy Corner Tavern*, OLCC-05-V-028, December 2005.

From the plain language and legislative history of ORS 471.346, as well as the simultaneous amendments to ORS 471.430 and ORS 165.805, minor decoy operations are clearly permissible in this state. *Agency No. 16*, OLCC-02-RO-004, December 2002.

The provisions of ORS 471.346(3) do not apply to decoy operations in cities of populations of less than 20,000. Because Agent is located in a city with a population of less than 20,000, the statutory subsection does not apply in this case. *Agency No. 16*, OLCC-02-RO-004, December 2002.

C.1.a.7.

C. VIOLATIONS

C.1.a.7. Minor Decoy Operation Standards (ORS 471.346, OAR 845-009-0200) (continued)

The distinction in treatment drawn in ORS 471.346(3), between requiring uniform decoy operation standards for sellers located in areas of more than 20,000 people and exempting sellers from those standards in areas of less than 20,000 people, does not violate either Article I, Section 20 of the Oregon Constitution or the Equal Protection clause of the Fourteenth amendment to the U.S. Constitution. The legislature had the authority to act, the class distinction was based on personal characteristics (geographic location) that are not immutable and the disparate treatment occasioned by the distinction has a rational basis. *Agency No. 16*, OLCC-02-RO-004, December 2002.

C.1.a.7.

C. VIOLATIONS

C.1.b. Violations Relating to Visibly Intoxicated Persons

C.1.b.1. Sale to Visibly Intoxicated Person (ORS 471.410(1), ORS 471.315(1)(a)(G)) [(ORS 471.315(1)(a)(G); ORS 471.410(1); [ORS 472.180(1)(h)]]]

“Open and notorious signs of intoxication” is a flag factor of “rare applicability.” Slurred speech, animated gestures, and swaying in the seat are unlikely to be open and notorious. *Duffy’s Irish Pub*, OLCC-05-V-032, February, 2006.

Licensee handed a drink to a visibly intoxicated person (VIP) who subsequently handed the drink to another person. Licensee made the drink available to the VIP but Licensee reasonably believed that the drink was not for the VIP’s consumption. The Commission did not establish a knowing sale because the Licensee did not knowingly “make available” alcoholic liquor to a visibly intoxicated person. *Cabana Club Café & Grill*, OLCC-04-V-066, October 2005.

The permittee did not knowingly make alcohol available to an alleged VIP when another patron placed the order, paid for the drink, took the drink from the permittee, the permittee did not see the other patron hand the drink to the alleged VIP, and the permittee did not know that the drink was intended for him. *Justin Scriber*, OLCC-04-V-050, August, 2005.

Where the server knew the alleged VIP, had cut him off on previous occasions when she believed he was intoxicated, and where she did not identify signs of intoxication on the night in question, her testimony was credible as to whether she served a VIP. Patron had been coming to the premises about every two weeks for a year and the server had previously cut off patron when he had severely slurred speech, trouble standing at the bar, and could not recall that he had already ordered a beer. *Corey’s*, OLCC-04-V-038, August 2005.

The duration of time during which signs of intoxication were displayed is not a “flag factor” but is relevant to the server’s opportunity to observe the signs, and is distinct from the “knowing” element of selling, giving, or making alcohol available to a VIP. *Corey’s*, OLCC-04-V-038, August 2005.

The Administrative Law Judge concluded that the signs of visible intoxication the patron displayed could have been interpreted as his normal, over-the-top persona. Licensee and Permittee have the burden of showing that the appearance and actions of the visibly intoxicated person (VIP) that correspond to recognized signs of intoxication were in fact due to other causes. *Headless Horseman*, OLCC-94-V-001, October 1995. The VIP was known to be loud, hyperactive and overly demonstrative. His face was usually flushed. Permittee testified that he did not observe the slurring of the VIP’s speech or his bleary eyes until the VIP was seated in front of him later in the evening. However, there was no evidence presented that VIP normally staggers and sways when he walks or that he usually slurs his words when speaking. These behaviors are clearly signs of intoxication and there was no evidence to the contrary. *Omar’s*, OLCC-04-V-011, August 2005.

C.1.b.
C.1.b.1.

C. VIOLATIONS

- C.1.b.1. Sale to Visibly Intoxicated Person (ORS 471.410(1), ORS 471.315(1)(a)(G))
(continued)
[[ORS 471.315(1)(a)(G); ORS 471.410(1); [ORS 472.180(1)(h)]]]

The Commission finds that observing a patron for 15-20 minutes and interacting with the patron while the patron is showing signs of visible intoxication constitutes a knowing “flag factor” and shows that the sale by the Permittee was a “knowing” sale. During this time, the Permittee was on his cell phone several feet away while he displayed signs of visible intoxication. However, Permittee also interacted with the VIP regarding an ice-cube throwing incident and thus had the opportunity to observe him. *Omar’s*, OLCC-04-V-011, August 2005.

Where Permittee admitted to inspector on night of incident that the alleged VIP did not appear to be sober, a “knowing” flag factor was found to exist. The Commission found Permittee knowingly served alcohol to a visibly intoxicated person, in violation of ORS 471.410(1). *Synthia Smith & Teresa Oakes*, OLCC-03-V-012, October 2003.

During an undercover investigation of the licensed premises, the name of the alleged visibly intoxicated person was not obtained. In defense of charged violations of ORS 471.410(1) and, alternatively, ORS 471.412, citing *Cole v. DMV*, 172 Or App 132 (2001), licensee asserted it was a denial of due process to be charged with these offenses when it was unable to adequately defend itself because the name of the VIP was unknown (i.e., by possibly demonstrating that the signs attributed to the alleged VIP were not caused by excessive alcohol consumption). The Commission determined that licensee’s reliance on *Cole* for a due process argument was misplaced and that *Cole* was otherwise factually distinguishable, lending no support to any requirement that the identity of the VIP be preserved by the Commission.

The mere availability of a defense does not require the Commission to protect, obtain, or ensure the availability of a witness or other evidence to secure that defense. The Commission concluded, as a matter of law, that either of these alternative charges could be sustained without identifying the alleged VIP by name. *Sidetrack Tavern* (Amended Final Order), OLCC-00-V-075, February 2002.

Where VIP was showing many visible signs of intoxication at time of sale of final drink, Permittee knew, by virtue of her interaction with that patron (“knowing” flag factor), that the patron was visibly intoxicated at the time of sale, despite her assertion that she did not suspect the patron was intoxicated until after the sale. *Kozy Korner*, OLCC-01-V-003, November 2001.

Where police officer observed street drinker go inside a package store, observed that individual displaying signs of visible intoxication while interacting with the clerk to purchase the alcohol, and contacted the individual outside the store to confirm the signs were due to alcohol intoxication, the sale to the VIP was made knowingly. The clerk had the opportunity to observe the signs of visible intoxication displayed by the patron while interacting with him. Where signs of visible intoxication are displayed while a clerk or server is interacting with a patron and having the opportunity to closely observe the patron, a “knowing” flag factor exists and a knowing sale is demonstrated. See *Cheers To You*, OLCC-00-V-070, October 2001. *Smart Buy Market*, OLCC-00-V-111, November 2001.

C.1.b.1.

C. VIOLATIONS

- C.1.b.1. Sale to Visibly Intoxicated Person (ORS 471.410(1), ORS 471.315(1)(a)(G))
(continued)
[(ORS 471.315(1)(a)(G); ORS 471.410(1); [ORS 472.180(1)(h)]]]

The Commission announced its intention, in the future, to construe conditions under the control of the licensee, which interfere with compliance or the monitoring of compliance with Commission regulations or statutes (such as, for example, low lighting, under staffing, avoiding looking at patrons near closing time), as knowing “flag factors” under its analysis for violations of ORS 471.410(1), and, for purposes of ORS 471.412, as a presumption of observation. 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 violations will occur and may not claim those same conditions excuse liability for the foreseeable violations that do occur. Where there is conflict with convenient business practices and compliance, compliance has priority. See *Handy Pantry*, OLCC-86-V-005, April 1986; *The Silver Fox*, OLCC-89-V-050, September 1989. *TJ’s Fireside Dining*, OLCC-00-V-74 & 01-V-006, October 2001.

OLCC has authority to penalize for selling alcoholic beverages to only one visibly intoxicated person, even though ORS 471.315(1)(a)(G) authorizes a penalty for selling alcohol to visibly intoxicated persons. ORS 174.110 provides that, as used in Oregon statutes, the singular may include the plural and the plural number, the singular. *TJ’s Fireside Dining*, OLCC-00-V-74 & 01-V-006, October 2001.

In *Cheers To You*, OLCC-00-V-070, October 2001, the Commission clarified the analysis used in cases involving alleged violations of ORS 471.410(1). That same analysis does not strictly apply to alleged violations of ORS 471.412, as knowingly selling or serving alcoholic beverages to a VIP (for ORS 471.410(1)) does not necessarily require direct observation of the VIP, whereas knowingly allowing a person to consume after observing that the person is visibly intoxicated does (unless the failure to observe is due to conditions under the control of the permittee or licensee, as announced in the same Final Order). *TJ’s Fireside Dining*, OLCC-00-V-74 & 01-V-006, October 2001.

C.1.b.1.

C. VIOLATIONS

- C.1.b.1. Sale to Visibly Intoxicated Person (ORS 471.410(1), ORS 471.315(1)(a)(G))
(continued)
[(ORS 471.315(1)(a)(G); ORS 471.410(1); [ORS 472.180(1)(h)]]]

After surveying final orders involving over service of alcohol to visibly intoxicated persons issued since the higher “knowing” standard was first applied in *Aloha Station*, OLCC-99-V-034, August 1999, the Commission clarified the burden for proving a “knowing” sale to a visibly intoxicated person. The burden 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 or knew of circumstances from which knowledge of visible intoxication could be properly inferred (knowing “flag factors”). The Commission noted it would consider such components as proximity, time, and obstruction of view when determining opportunity to observe. The Commission identified a non-inclusive list of flag factors from its post-*Aloha Station* orders: interaction with the patron while the patron is displaying signs of visible intoxication; knowledge of the patron from prior occasions, including drinking patterns and alcohol tolerance; the number of drinks served during an identifiable time frame; notification at the time of service that the patron 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-00-V-070, October 2001.

Permittee sold an alcoholic beverage to a visibly intoxicated person. She later removed the drink. Citing *Brother’s Market & Deli*, the Commission determined that the attempt to cut off the patron from consuming additional alcoholic beverages did not undo the violation of selling and serving the alcoholic beverage to the patron. The attempt could, however, be considered in mitigation of the penalty. *Kelleen Maniscalco*, OLCC-99-V-105, June 2000.

Where Permittee twice refused to sell visibly intoxicated patron additional alcohol, but had unobstructed view of patron when patron subsequently consumed beer from the pitcher of another patron over 20 minutes, Permittee knowingly allowed the visibly intoxicated patron to consume alcohol, in violation of ORS 471.412. *Steven J. Fedder*, OLCC-99-V-111, June 2000.

Where Permittee sold an alcoholic drink to a visibly intoxicated patron and subsequently attempted to cut off the patron and remove the drink, the Commission concluded that the actions to cut off the patron did not undo the violation of serving alcohol to the visibly intoxicated patron. [Note: A good faith effort to remove the drink is a defense to the charge of allowing a visibly intoxicated person to consume alcoholic liquor in violation of ORS 471.412(1)]. The Commission considered Permittee’s efforts to cut off the patron to mitigate the penalty to a letter of Reprimand. *The Stagecoach Saloon*, OLCC-99-V-084/-085, April 2000.

C.1.b.1.

C. VIOLATIONS

- C.1.b.1. Sale to Visibly Intoxicated Person (ORS 471.410(1), ORS 471.315(1)(a)(G))
(continued)
[(ORS 471.315(1)(a)(G); ORS 471.410(1); [ORS 472.180(1)(h)]]]

The Commission has determined that a “knowing” sale of alcoholic beverages to a minor or a visibly intoxicated person under ORS 471.315(1)(a)(G) is not synonymous with “should have known.” State of mind is a question for the trier of fact to be determined in view of all the circumstances as shown by the evidence. *Plaid Pantry No. 55*, OLCC-98-V-063, October 1998. ORS 471.412(1) provides that the violation of allowing a visibly intoxicated person to consume alcoholic beverages must also be done “knowingly.” *Aloha Station*, OLCC-99-V-034, August 1999.

The Commissioners found the Licensee’s employee did not commit a violation where two police officers testified that the patron exhibited visible signs of intoxication prior to entering the store and exiting the store with beer, but the clerk denied the patron exhibited signs of intoxication and denied that a sale occurred. The Commissioners declined to infer that the patron exhibited signs of intoxication inside the store and declined to infer that a sale occurred. *McPier’s Grocery*, OLCC-97-V-035, December 1997.

Where the Licensee denied that the customer exhibited signs of visible intoxication inside the store, but the record showed that two police officers observed the customer exhibit obvious signs of intoxication on the street before entering the store, and obvious signs of intoxication after exiting the store, the Commission concluded that it could infer that the customer exhibited signs of visible intoxication while he was inside the store from the fact that the customer exhibited signs of visible intoxication both before he entered the store and again when he came out of the store. The Commission also stated that it views persons who sell alcoholic liquor as having an affirmative duty to observe anyone who purchases alcoholic liquor from them to ensure that the purchaser is not visibly intoxicated or a minor. The Commission concluded that Licensees violated ORS 471.410(1) by selling alcoholic liquor to a visibly intoxicated person. *Kelsey’s Korner Market*, OLCC-97-V-009, October 1997.

Where the Licensee denied that the customer exhibited signs of visible intoxication inside the store, but the record showed that two police officers observed the customer exhibit obvious signs of intoxication on the street before entering the store, and obvious signs of intoxication after exiting the store, the Commission concluded that the customer exhibited signs of visible intoxication while purchasing the beer inside the store and that, therefore, Licensees violated ORS 471.410(1) by selling alcoholic liquor to a visibly intoxicated person. *Kelsey’s Korner Market*, OLCC-97-V-009, October 1997.

C.1.b.1.

C. VIOLATIONS

- C.1.b.1. Sale to Visibly Intoxicated Person (ORS 471.410(1), ORS 471.315(1)(a)(G))
(continued)
[(ORS 471.315(1)(a)(G); ORS 471.410(1); [ORS 472.180(1)(h)]]]

The symptoms of intoxication that the Commission recognize include, but are not limited to, the following:

- Slurred Speech
- Staggering, swaying, stumbling, falling
- Bloodshot, water, glassy eyes
- Loud, noisy speech
- Clumsy, spilling drinks, bumping into things
- Extreme mood swings, crying
- Argumentative behavior

Jody's Restaurant & Lounge, OLCC-97-V-015, August 1997.

The Commission concluded that Licensee committed a violation of selling alcoholic liquor to a visibly intoxicated person where the evidence showed that the customer exhibited signs of diminished physical control which included leaning against a cigarette machine and swaying back and forth, gesturing and talking to himself as people walked by, and where his eyes were half closed and droopy. ORS 471.410(1). *Jody's Restaurant & Lounge*, OLCC-97-V-015, August 1997.

ORS 471.410(1). Violation of sale to a visibly intoxicated person was proved under following circumstances. Visibly intoxicated person exhibited signs of intoxication at the premises; licensee said he knew the customer and the customer always acts that way-- it is his normal behavior; the Regulatory staff contacted the customer later at his place of employment and established that his behavior was different (lacking in signs of intoxication) than it was at the time of the incident. *Scott's*, OLCC-96-V-059, April 1997.

The Commission overturned precedent and established a new standard which will be applied to all future cases involving visibly intoxicated persons. Under this new standard, the Commission will find a violation of sale or service to a visibly intoxicated person where the evidence establishes that the patron exhibited visible signs of intoxication. The Commission will no longer require proof that the patron consumed alcohol prior to exhibiting the signs of intoxication. The Commission concludes that it is not necessary for the server to have observed that the patron ingested alcohol in order to prove a violation. The burden will shift to the licensee to show that the signs of visible intoxication were not caused by alcohol consumption. If the patron displays symptoms of visible intoxication and the licensee fails to establish that the patron's behavior was attributable to a cause other than alcohol or drugs, the Commission will find a violation. *Headless Horseman*, OLCC-94-V-001, October 1995.

C.1.b.1.

C. VIOLATIONS

- C.1.b.1. Sale to Visibly Intoxicated Person (ORS 471.410(1), ORS 471.315(1)(a)(G))
(continued)
[(ORS 471.315(1)(a)(G); ORS 471.410(1); [ORS 472.180(1)(h)]]]

The Commission has concluded that the alleged VIP must, in fact, be intoxicated before a violation can be proved. Where the customer's behavior (loud, slurred speech, swaying from side to side, unsteady on his feet, watery eyes, and some consumption of alcoholic liquor) which led the Inspector to conclude that the customer was intoxicated was really the result of the customer's attempt to clown and to be humorous, the Commission held there was no violation because the evidence failed to establish that the customer was visibly intoxicated when he was served alcoholic liquor by the permittee. *Manila Express*, OLCC-91-V-055, March 1992.

Licensee committed a violation of knowingly allowing a visibly intoxicated person to consume where the customer exhibited signs of intoxication and licensee's bartender had opportunity to observe the behavior while the customer was seated at the bar for 15 to 20 minutes, and the bartender talked to the customer two times during this period of time. *La Mesa*, OLCC-92-V-038, December 1992.

Employee had reasonable grounds to believe customer was visibly intoxicated where customer was seated near bar where employee was working, she went to his table to take his first drink order, and she looked over at him when his friend ordered another drink for him. *Candy and Jeans*, OLCC-91-V-192, June 1992.

Permittee's contention that she did not see the customer's signs of visible intoxication because he had been in the premises for only a short time and she was too busy was not a defense where the evidence showed the customer had been served two beers by the permittee earlier in the evening, left, and returned for another drink. Permittee had an opportunity to observe the customer when she took his drink order. *Old Town Club*, OLCC-90-V-168, November 1991.

Where the server had reasonable grounds to believe that the customer's unusual walk and speech were due to physical and mental handicaps rather than alcohol consumption, the charge was dismissed. *Chuck Wagon*, OLCC-90-V-101, March 1991.

It is not a defense to the violation of serving a visibly intoxicated person that the permittee was preoccupied with serving other patrons. *The Silver Fox*, OLCC-89-V-039, September 1989.

Where the licensee contended that the signs of visible intoxication were due to emotional upset rather than intoxication, the Commission concluded that the person's loss of balance, slurred speech, and odor of alcoholic beverages, were more likely caused by intoxication rather than emotional upset. *Mark's Tavern*, OLCC-89-V-030, July 1989.

Permittee had reasonable grounds to know customer was visibly intoxicated because customer exhibited numerous signs of visible intoxication for over one hour prior to the sale that were in clear view of the permittee. *The Frontier Room*, OLCC-88-V-074, January 1989.

C.1.b.1.

C. VIOLATIONS

C.1.b.1. Sale to Visibly Intoxicated Person (ORS 471.410(1), ORS 471.315(1)(a)(G))
(continued)
[(ORS 471.315(1)(a)(G); ORS 471.410(1); [ORS 472.180(1)(h)]]]

Charge for sale to a visibly intoxicated person was dismissed where evidence proved licensee had reasonable grounds to conclude patron's odd appearance and behavior was due to mental illness rather than intoxication, and evidence did not prove, in any case, that licensee had a reasonable opportunity to observe patron's diminished control. *Sundown Station Restaurant & Lounge*, OLCC-88-V-102, February 1989.

It was not a defense to a charge for sale to a visibly intoxicated person that it was the permittee's first night on the job and he was relying on the other bartender to warn him of potential violations. *Thomas Dearth*, OLCC-88-V-055, September 1988.

Permittee knowingly made alcohol available to a visibly intoxicated person where, after the permittee had reasonable grounds to believe that patrons were providing alcohol to a visibly intoxicated person, the permittee failed to take reasonable steps to prevent the patrons from providing further alcohol to the visibly intoxicated person. *Robert Rabbie*, OLCC-88-V-024, August 1988.

A seller had reasonable grounds to know that a patron was visibly intoxicated where the seller had adequate opportunity to observe the patron's signs of diminished control showing intoxication, even where the seller did not actually see such diminished control. *Flight 99 Tavern*, OLCC-87-V-033, February 1988.

The permittee committed a violation of serving to a VIP where there were reasonable grounds for the permittee to believe that the customer was a visibly intoxicated person, the customer was in the permittee's plain view, and the permittee had the opportunity to observe the customer. *Staffords on Broadway*, OLCC-87-V-039, January 1988.

The Commission concluded that a customer who exhibited the following signs was a visibly intoxicated person: having difficulty walking, standing, and maintaining his balance; not playing pool with the level of skill normal for him; being argumentative; speaking alternately louder or softer than the circumstances warranted; and, after the incident, having a poor memory about what occurred on the night of the incident. *Staffords on Broadway*, OLCC-87-V-039, January 1988.

To show a violation, it must be proved that the server had actual knowledge that he was making alcoholic liquor available to a visibly intoxicated person, or that there were reasonable grounds for the seller to know that the person was visibly intoxicated. *214 Tavern*, OLCC-87-V-031, November 1987.

A permittee violated ORS 471.410(1) for knowingly making alcoholic liquor available to a visibly intoxicated person, where it was reasonable to infer that the permittee would have seen the patron's intoxicated behavior prior to service, because the patron was in plain view of the permittee. *214 Tavern*, OLCC-87-V-031, November 1987.

C.1.b.1.

C. VIOLATIONS

- C.1.b.1. Sale to Visibly Intoxicated Person (ORS 471.410(1), ORS 471.315(1)(a)(G))
(continued)
[[ORS 471.315(1)(a)(G); ORS 471.410(1); [ORS 472.180(1)(h)]]]

The Commission dismissed the charge of selling to a visibly intoxicated person against a permittee who knew, that under normal circumstances, the customer's eyes are watery and glazed, and his speech is slow and deliberate. The Commission concluded that although the customer exhibited some traits that made him appear to be visibly intoxicated to someone who did not know him, the permittee did know him, and a reasonable person knowing what the permittee knew about the customer's appearance would not have reasonable grounds to believe that the customer was visibly intoxicated. The Commission concluded that the customer was not a visibly intoxicated person at the time of the sale. *Brenda Lee Lovell*, OLCC-87-V-006, June 1987 and *The Meet Market*, OLCC-87-V-007, June 1987.

Charge for sale to a visibly intoxicated person was dismissed despite the fact that the subject had unclear speech, an odor of alcoholic beverages, and leaned against the counter for support, because the licensee reasonably believed that these signs were attributable to other causes or were normal actions of the alleged VIP. *Three Brothers Market*, OLCC-86-V-016, December 1986; *Frenchie's Tavern*, OLCC-88-ES-001, June 1988. See also: *Recreation Cafe & Hideaway Lounge*, OLCC-88-V-095, April 1989.

Server had a reasonable opportunity to observe the signs of visible intoxication where the alleged visibly intoxicated person was in the bartender's plain view while exhibiting intoxicated behavior. *Charlie's Tavern*, OLCC-86-V-001, June 1986.

There must be proof of visible intoxication prior to sale, not after, to find violation. *Mark Edward Hess*, OLCC-85-V-057, February 1986.

A person is visibly intoxicated whose physical and mental control is diminished by alcohol or a drug to a point where such diminished control can be seen or observed. Examples of diminished physical and mental control are slurred speech, swaying and staggered walking, talking loudly, spilling beer. Ogden Food Service Corp., *Portland Civic Stadium*, OLCC-85-V-032, January 1986.

Where permittee was out of earshot and did not observe any unusual behavior of alleged visibly intoxicated person, permittee did not have knowledge or reasonable grounds to believe that purchaser was visibly intoxicated. *Portland Civic Stadium*, OLCC-85-V-032, January 1986.

A sale of alcoholic beverage was completed when the beverage was delivered to the purchaser, although the purchaser paid for the beverage at an earlier time. Francis and Doris Ellis, Loyd and Dianne Garoutte, *Clide's Frolic Inn*, OLCC-84-V-041, March 1985.

Evidence of visible intoxication was strong where customer's face was flushed, his head drooped, he drooled, and he spilled beer out of the corners of his mouth. Francis and Doris Ellis, Loyd and Dianne Garoutte, *Clide's Frolic Inn*, OLCC-84-V-041, March 1985.

C.1.b.1.

C. VIOLATIONS

- C.1.b.1. Sale to Visibly Intoxicated Person (ORS 471.410(1), ORS 471.315(1)(a)(G))
(continued)
[(ORS 471.315(1)(a)(G); ORS 471.410(1); [ORS 472.180(1)(h)]]]

Odor of alcohol alone insufficient to prove visible intoxication, but should alert licensee to evaluate condition of buyer more carefully. Southland Corporation, and Raymond and Mary Haslebacher, *7-Eleven Store, No. 20806*, OLCC-84-V-022, November 1984.

Regardless of whether licensee charged with violation of ORS 471.410 or 471.315(1)(g), the sale must be knowing. Southland Corporation, and Raymond and Mary Haslebacher, *7-Eleven Store, No. 20806*, OLCC-84-V-022, November 1984.

Charges for sale to visibly intoxicated person were dismissed, despite the subject's high blood alcohol reading shortly after leaving the licensed premises, because there was no reliable eyewitness testimony that the subject was visibly intoxicated in the licensed premises and the subject was likely under the influence of stimulant drugs capable of wholly masking visible intoxication. Copperstone Restaurant and Lounge, Inc., *The Outrigger*, June 1984.

Words "visibly intoxicated" are not too vague to inform licensees of what is meant, and do not require experts to define or interpret them. *Parker v. OLCC*, 18 Or App 339, 525 P2d 187 (1974).

C.1.b.1.

C. VIOLATIONS

C.1.b.2. Allowing Visibly Intoxicated Person to Consume (ORS 471.412, ORS 471.315(1)(a)(G))
[(ORS 471.412, ORS 471.315(1)(a)(G), [ORS 472.180(1)(h)]]

When Licensee spoke to an OLCC inspector during the “VIP interview,” Licensee acknowledged that the patron appeared intoxicated. Further, Licensee’s rating of the patron’s intoxication as a “5” on a scale of 1 to 10 and his assertion that the patron had been “cut-off” suggest that he observed signs of intoxication on the patron while the patron drank his beer. Licensee also acknowledged that the club was understaffed that night, so the crowd could not be adequately monitored. Under these circumstances, i.e., Licensee’s direct interactions with the patron, his unobstructed view of the patron while the patron was consuming an alcoholic beverage and exhibiting visible signs of intoxication, and his later admission that the patron was visibly intoxicated, the record establishes that Licensee knowingly allowed a visibly intoxicated person to consume an alcoholic beverage in violation of ORS 471.412. *Cabana Club Café & Grill*, OLCC-04-V-066, October 2005.

When determining whether the permittee knowingly allowed the alleged VIP to drink, the issue is the permittee’s state of mind as opposed to the state of mind of the inspectors. The ALJ weighed whether the signs of intoxication were so obvious that the permittee could not be found credible; the ALJ found in this case that the permittee’s testimony was credible. *Justin Scriber*, OLCC-04-V-050, August, 2005.

The Commission has applied generally the same precedents for allowing VIPs to consume and selling to VIPs, but it has not applied the “knowing flag factors” identified in the analysis of ORS 471.410(1) violations to ORS 471.412. Furthermore, it is not enough to show one or more signs of intoxication were present and that Permittee had the opportunity to observe these signs. The evidence of intoxication must prove, more likely than not, a diminished physical and mental control that is perceptible to the server. In this case there were signs of intoxication present, Permittee credibly testified that he did not observe Bill to be visibly intoxicated and the testimonies of the inspectors were not persuasive enough to impeach Permittee’s credibility. *Justin Scriber*, OLCC-04-V-050, August, 2005.

Inspectors reported observing a VIP drink from a bottle of beer three times in two locations in the bar. Two of these occurred in an area of the bar serviced by a cocktail server who was not cited. The bartender, who was cited, did not observe the VIP or the consumption in that area. The third consumption was alleged to have occurred at the bar, near the bartender. The videotape recording which captured the VIP at the bar and the bartender’s testimony that she served the VIP water negated that the VIP was consuming from a bottle of beer. No violation of ORS 471.412 was proven. *Cabana Club*, OLCC-01-V-065, March 2002.

C.1.b.2.

C. VIOLATIONS

- C.1.b.2. Allowing Visibly Intoxicated Person to Consume (ORS 471.412, ORS 471.315(1)(a)(G)) (continued)
[(OR
S 471.412, ORS 471.315(1)(a)(G), [ORS 472.180(1)(h)]]]

During an undercover investigation of the licensed premises, the name of the alleged visibly intoxicated person was not obtained. In defense of charged violations of ORS 471.410(1) and, alternatively, ORS 471.412, citing *Cole v. DMV*, 172 Or App 132 (2001), licensee asserted it was a denial of due process to be charged with these offenses when it was unable to adequately defend itself because the name of the VIP was unknown (i.e., by possibly demonstrating that the signs attributed to the alleged VIP were not caused by excessive alcohol consumption). The Commission determined that licensee's reliance on *Cole* for a due process argument was misplaced and that *Cole* was otherwise factually distinguishable, lending no support to any requirement that the identity of the VIP be preserved by the Commission. The mere availability of a defense does not require the Commission to protect, obtain, or ensure the availability of a witness or other evidence to secure that defense. The Commission concluded, as a matter of law, that either of these alternative charges could be sustained without identifying the alleged VIP by name. *Sidetrack Tavern* (Amended Final Order), OLCC-00-V-075, February 2002.

In *Cheers To You*, OLCC-00-V-070, October 2001, the Commission clarified the analysis used in cases involving alleged violations of ORS 471.410(1). That same analysis does not strictly apply to alleged violations of ORS 471.412, as knowingly selling or serving alcoholic beverages to a VIP (for ORS 471.410(1)) does not necessarily require direct observation of the VIP, whereas knowingly allowing a person to consume after observing that the person is visibly intoxicated does (unless the failure to observe is due to conditions under the control of the permittee or licensee, as announced in the same Final Order). *TJ's Fireside Dining*, OLCC-00-V-74 & 01-V-006, October 2001.

The Commission announced its intention, in the future, to construe conditions under the control of the licensee, which interfere with compliance or the monitoring of compliance with Commission regulations or statutes (such as, for example, low lighting, under staffing, avoiding looking at patrons near closing time), as knowing "flag factors" under its analysis for violations of ORS 471.410(1), and, for purposes of ORS 471.412, as a presumption of observation. 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 violations will occur and may not claim those same conditions excuse liability for the foreseeable violations that do occur. Where there is conflict with convenient business practices and compliance, compliance has priority. See *Handy Pantry*, OLCC-86-V-005, April 1986; *The Silver Fox*, OLCC-89-V-050, September 1989. *TJ's Fireside Dining*, OLCC-00-V-74 & 01-V-006, October 2001.

C.1.b.2.

C. VIOLATIONS

C.1.b.2. Allowing Visibly Intoxicated Person to Consume (ORS 471.412, ORS 471.315(1)(a)(G)) (continued) [(ORS 471.412, ORS 471.315(1)(a)(G), [ORS 472.180(1)(h)]]

The Commission has determined that a “knowing” sale of alcoholic beverages to a minor or a visibly intoxicated person under ORS 471.315(1)(a)(G) is not synonymous with “should have known.” State of mind is a question for the trier of fact to be determined in view of all the circumstances as shown by the evidence. *Plaid Pantry No. 55*, OLCC-98-V-063, October 1998. ORS 471.412(1) provides that the violation of allowing a visibly intoxicated person to consume alcoholic beverages must also be done “knowingly.” *Aloha Station*, OLCC-99-V-034, August 1999.

Charge of allowing a visibly intoxicated person to consume was dismissed against permittee where customer was visibly intoxicated, but permittee did not have the opportunity to observe customer's signs of visible intoxication. Permittee was cooking food in the kitchen and serving other customers. *Candlelight Cafe & Bar*, OLCC-93-V-025, October 1993.

Licensee had a defense to the charge of permitting a visibly intoxicated person to consume where licensee made a good-faith effort to remove the drink by putting his hand on the bottle of beer and trying to remove it, but the customer would not let go of the beer. The charge was dismissed. *La Mesa*, OLCC-92-V-038, December 1992.

The Commission determined that the licensees did not establish the defense set out in ORS 471.412(2) where one and one-half hours passed between the time the patron first displayed signs of intoxication and the time the alcoholic drink was removed. The time period was too long to establish a “good-faith effort” to remove the alcoholic drink. *Whiskey Gulch Gang*, OLCC-91-V-128, May 1992.

ORS 471.412(4) provides that the penalty for the first three violations within two years of knowingly allowing a visibly intoxicated person to consume alcoholic beverages is a Letter of Reprimand. The Commission infers that this penalty applies to the same prohibition in ORS 472.180(8). *Rimrock Restaurant & Lounge*, OLCC-91-V-019, September 1991.

The Commission found that a permittee allowed a visibly intoxicated person to consume alcoholic beverages where: 1. the patron showed signs of diminished physical or mental control; 2. the server had actual knowledge or reasonable grounds to believe the person was visibly intoxicated because the server had a reasonable opportunity to observe the signs of diminished control showing intoxication; and 3. the server had an opportunity to discover that the person was consuming alcoholic beverages. *Grand Stark Tavern*, OLCC-90-V-136, March 1991.

C.1.b.2.

C. VIOLATIONS

C.1.c. Employee Without Service Permit (ORS 471.360, ORS 471.375(1); OAR 845-009-0010) [(ORS 471.360, ORS 471.375(1))]

Licensee permitted employee to work without a valid service permit by failing to adhere to OLCC's application process which required licensee to transmit the application, transmit it immediately, and transmit the appropriate fee after receiving notice that the fee received was insufficient. Licensee had returned the first application to employee to mail, and employee did not mail the application. The second application was not mailed immediately and had the wrong fee, which licensee should have known because licensee knew employee did not need a replacement and instead needed a new permit. *Oregon Beverage Service*, OLCC-07-V-037, April, 2008.

It is reasonable to conclude that the employee served or sold when licensee asked her about the status of her service permit, had her fill out a second application, and did not testify that employee did not serve or sell. No direct evidence is necessary when there is no assertion that employee did not serve or sell alcoholic beverages. *Oregon Beverage Service*, OLCC-07-V-037, April, 2008.

Employee should not have served or sold alcoholic beverages after learning that the application she sent lacked the proper fee. She could only resume service after paying the remaining balance and sending it with her application back to OLCC. *Oregon Beverage Service*, OLCC-07-V-037, April, 2008.

The inspector did not see the waitress serve or sell alcoholic beverages, so there was no direct evidence that she had served, but the licensee acknowledged that alcohol service was part of the waitress' duties and expected her to have a service permit as part of the job; therefore, it is reasonable to infer that the waitress mixed, sold, or served alcoholic beverages during the six months she worked as a waitress at the premises. Direct evidence that she sold or served alcoholic beverages is not necessary to establish a violation in these circumstances. *Sunseri Dutch Mill*, OLCC-07-V-024, December, 2007.

Alterations on a service permit were clearly visible and the licensee should have known to inquire further. Licensee's knowledge that the employee had served at other licensed establishments is not a defense; licensee still needed to ensure that the employee had a valid service permit and when that did not happen the licensee permitted his employee to sell or serve alcoholic beverages without a valid service permit. *Sunseri Dutch Mill*, OLCC-07-V-024, December, 2007.

Licensee's only contact with the premises is to manage money. Although she hires and fires employees, they are directly supervised on a daily basis by the head bartender. The owner, while listed as the manager on official documents, performs no duties as manager with respect to alcohol. The owner is not required in this situation to have a service permit, but she should be knowledgeable about OLCC laws. *The Raven Inn*, OLCC-07-V-021 and OLCC-07-V-026, November, 2007.

C.1.c.

C. VIOLATIONS

C.1.c. Employee Without Service Permit (ORS 471.360, ORS 471.375(1); OAR 845-009-0010) (continued) [(ORS 471.360, ORS 471.375(1))]

The negligent failure to transmit a service permit application to OLCC is not a mitigating factor. Furthermore, the licensee must take reasonable steps to verify that the employee has a valid service permit, and there is no mitigation where the licensee allowed the employee to continue serving and supervising alcohol servers after learning that the employee did not have a valid service permit. *H2O Martini Bar & Restaurant*, OLCC-06-V-014, December.

Licensee's obligation to verify the service permit had yet to ripen because the 45 days between when the OLCC receives the application and the end of time for the alcohol server education had not passed; therefore there was no violation yet. In this case neither the employee nor the licensee knew that the employee's service permit application had not arrived at OLCC and licensee had made several inquiries about its status. *McPeets*, OLCC-06-V-026, November, 2006.

By failing to follow up on employee's server status for several months, licensee failed to prevent the employee from serving without a valid service permit; therefore, licensee permitted him to serve without a service permit. Licensee did not take sufficient reasonable steps to verify that employee had actually gotten a service permit; licensee did not ask to see a copy of the permit. Also, the employee's knowledge that he had no service permit was imputed to the licensee. *Tony's Tavern*, OLCC-06-V-012, August, 2006.

The mere fact that there are differences in how cases are prosecuted does not of itself constitute prohibited discrimination. An Article I, section 20 selective enforcement claim arises only if there is no coherent, rational, or systematic policy for choosing to enforce in some cases, but not others, without any attempt to strive for consistency among similar cases. Where policy memo establishes current policy for the treatment of service permit violations, the policy has a rational basis and establishes systematic treatment for similarly situated licensees, and licensees have not shown they have been treated differently than similarly situated licensees, there is no Article I, section 20 violation. *The Blue Parrot*, OLCC-03-V-043, June 2004.

Where a cashier takes order for alcohol to be consumed on the premises and simultaneously takes payment for it, the sale of alcohol to the patron is complete, notwithstanding another employee will serve the alcohol. The cashier is required to have a service permit (as well as the server). *Giovanni's Mountain Pizza*, OLCC-03-V-013/018, February 2004.

In the instances where alcohol is ordered and served for consumption on the premises without simultaneous payment and there is an open tab or bill, the Commission considers as a separate sale each new entry to the tab. *Giovanni's Mountain Pizza*, OLCC-03-V-013/018, February 2004.

The Commission found that the preponderance of the evidence failed to prove that a service permit application had been mailed a week before the alleged violation, when the application did not reach the Commission until several days after the violation and where applicant could not produce the retained yellow copy on the night of the violation. *City Slickers* OLCC-99-V-097, September 2000.

C.1.c.

C. VIOLATIONS

C.1.c. Employee Without Service Permit (ORS 471.360, ORS 471.375(1); OAR 845-009-0010) (continued) [(ORS 471.360, ORS 471.375(1))]

The Commissioners reversed the ALJ and found that there was no violation of ORS 471.360(1) and OAR 845-009-0010 where the Regulatory Program failed to prove the date the denial letter was issued and the server could have had an application that was still in effect. *McAnulty & Barry's*, OLCC-99-V-006, August 2000.

There was no violation of ORS 471.360(1)(b) where the Licensee, who was a corporate principal, lacked a service permit, but the evidence proved that he did not mix, sell, or serve any alcoholic beverages. *Blue Willow*, OLCC-99-V-051, January 2000.

The Commission concluded that the licensee violated ORS 471.360(1)(b) (permitted employee to serve without a valid service permit,) where the licensee had knowledge that the employee was selling and serving alcoholic liquor and the licensee had previously been warned about service permit requirements in connection with another employee who was working without a service permit. *The Royal Esquire*, OLCC-97-V-045, December 1997.

Licensee committed a violation of permitting an employee to serve without a valid service permit under the following circumstances: On the employee's first night of work, the employee was unable to produce a goldenrod copy to show OLCC inspectors; licensee subsequently mailed an application but failed to include the required fee; licensee made a second mailing with the appropriate fee which was received by the Commission ten days after the inspectors had seen the employee serving alcohol. The Commission concluded that licensee's good-faith efforts were a basis to mitigate the penalty. *Punjab Tavern*, OLCC-92-V-088, June 1993.

The Attorney General has advised the Commission that in order for an applicant to serve alcoholic beverages before he or she receives a service permit, under ORS 471.375, the applicant must complete an application and the employing licensee must immediately send the application and fee to the Commission. A licensee's failure to ensure that both steps are completed may result in a violation of ORS 471.360(1)(b). *Silver Palace*, OLCC-91-V-189, July 1992.

Licensee failed to immediately transmit service permit applications where there was anywhere from one and one-half months to three months between the time the applicants signed the application and the time that the applications were received by the Commission. *The Hide Out*, OLCC-89-V-062, October 1989; *New Max's Tavern*, OLCC-91-V-087, December 1991; *Tumble Inn*, OLCC-90-V-170, December 1991.

The clear language of ORS 471.375(1) provides that it is the licensee, not the applicant, who is responsible for transmitting the application to the Commission. It is not a defense to the charge that the licensee told the employee to pay the fee and mail the service permit application. *New Max's Tavern*, OLCC-91-V-087, December 1991.

C.1.c.

C. VIOLATIONS

C.1.c. Employee Without Service Permit (ORS 471.360, ORS 471.375(1); OAR 845-009-0010) (continued)
[(ORS 471.360, ORS 471.375(1))]

The charge that licensee violated ORS 471.360(1)(b) was dismissed where the notice of violation ticket was issued by mistake because the inspector believed that the permittee had not applied for a permit and had not complied with ASE requirements, when in fact, the permittee had complied with ASE requirements. *Dillinger's Pub*, OLCC-90-V-003, September 1990.

Principals of licensed corporations are required to have service permits in order to sell or serve alcoholic beverages, even though the principal may be a licensee under OAR 845-06-120. *Spigot Tavern*, OLCC-89-V-022, September 1989.

Licensee permitted employees without service permits to mix, sell, or serve alcoholic liquor for consumption on the licensed premises in violation of ORS 471.360(1)(b). The Commission infers that the employees knew they were serving alcoholic beverages and the knowledge of the employees is imputed to licensee. *Spigot Tavern*, OLCC-89-V-022, September 1989.

Licensee permitted his employee to sell alcoholic beverages without a service permit where it would have been evident to persons working in the premises that the employee was selling alcohol and licensee failed to take reasonable steps to prevent the employee from selling before a service permit application was submitted. *Casa Del Rio*, OLCC-88-V-033, August 1988.

A licensee violated ORS 471.360(1)(b) where the licensee relied on his employee to send in a service permit application and the employee failed to do so for two months. *Don Juan's*, OLCC-88-V-003, May 1988.

Licensee violated ORS 471.360 where bartender sold and served alcoholic beverages without a service permit and without having completed a service permit application. *Sportsman Club*, OLCC-86-V-023, March 1987.

C.1.c.

C. VIOLATIONS

C.1.c.1. Failure to Make Service Permit Available (ORS 471.360(1)(c))

Permittee's failure to make his service permit available for immediate inspection is not mitigated by the decision of the inspectors to not contact OLCC dispatch for verification of permittee's status. It is not acceptable to allow verification of permittee's status through OLCC dispatch to substitute for compliance with the statutory requirement to produce the service permit. *Michael Reese*, OLCC-06-V-067, December, 2007.

Inspectors did not see the service permit until 90 minutes after they first requested it. The service permit was not on site and had to be brought to the premises during that time. A 90 minute delay is not "immediately available" for purposes of ORS 471.360(1)(c). *Michael Reese*, OLCC-06-V-067, December, 2007.

C.1.c.1.

C. VIOLATIONS

C.1.d. Drinking on Duty (OAR 845-006-0345(1)) [(OAR 845-06-045(1)(a))]

Permittee was observed by a deputy sheriff and impartial witness with poor balance, a sway while standing, slurred speech, poor enunciation, and the odor of alcoholic beverages on her breath and on her person. Permittee attributed her appearance and condition to gastrointestinal distress and whiskey spilled on her shirt. The Commission did not deny her gastric problems but determined that these problems did not explain the slurred speech, poor enunciation, and swaying balance, which are commonly associated with intoxication. *Voodoo Lounge Bar & Grill*, OLCC-06-V-041 and service permittee *Leanne B. Swigart*, OLCC-06-V-053, February, 2007.

There is nothing to suggest that the permittee lacked the authority to put herself back on duty. The acts that the permittee performed involved the mixing, sale, or service of alcoholic beverages, and were done on the licensee's behalf. Even if the permittee considered herself to be helping out, and did not clock back in or charge licensees for these services, she nevertheless put herself back on duty while she consumed an alcoholic beverage. Licensee was responsible for permittee's actions in putting herself back on duty. *Duffy's Irish Pub*, OLCC-05-V-032, February, 2006.

Even if the licensee did not drink from his beer between serving beers and pouring others, it would not change the outcome where, as here, a licensee or off duty employee drinks an alcoholic beverage on the premises and then voluntarily performs services that put him back on duty. It is not necessary that the person continue to drink the alcoholic beverage during the performance of those duties. The determinative factor for purposes of OAR 845-006-0345(1) is whether the person was drinking an alcoholic beverage (or was under the influence of intoxicants) *at the time* he or she returned to duty. (Emphasis original). *The Foghorn Sports Pub & Grill*, OLCC-05-V-027, February, 2006.

Licensee placed himself on duty when monitoring the bartender and helping him break up a fight, and by escorting and/or ejecting three patrons. Licensee was under the influence of intoxicating liquor when he placed himself on duty, based on the number of drinks he had that night (five mixed drinks), the obvious signs of intoxication observed by the police officers (slow, deliberate movements; staggering; red/watery eyes; slurred speech; distinct odor of alcohol on breath; loud and animated actions; dazed state of mind); and his admission he was feeling the effects of alcohol. *Cactus Bar & Grill*, OLCC-03-V-014, June 2004.

The Commission could find no precedent for establishing the defense of "choice of evils" to excuse putting oneself on duty while intoxicated in order to control the premises. Were there such a defense, licensee has not established the necessity for putting himself on duty to control the premises as the bartender and off-duty bouncer had the conflict under control before the licensee interceded. *Cactus Bar & Grill*, OLCC-03-V-014, June 2004.

C.1.d.

C. VIOLATIONS

C.1.d. Drinking on Duty (OAR 845-006-0345(1)) (continued) [(OAR 845-06-045(1)(a))]

Permittee went off duty, clocked out, and began drinking beer at the premises. When the crowd picked up, permittee resumed checking identification. The bartender did not recheck identification when permittee resumed this function. Permittee did not clock back in and considered herself merely to be "helping out." The Commission concluded that permittee was back on duty. The definition of "on duty" does not require payment for the time. Permittee had the authority to put herself back on duty because she did so and the on-duty bartender did nothing to prevent her from checking identification again. Also, she was in effect put back on duty by the on-duty bartender when the bartender allowed her to perform service activities on behalf of the licensee. *Cascade West Grub & Ale House*, OLCC-01-V-071/-076, February 2002.

Licensee violated OAR 845-06-045(1)(a) because his clerk drank alcoholic liquor and was under the influence of intoxicants when he was on duty in the store. *7-Eleven Food Store No. 29526*, OLCC-96-V-034, March 1997. [As the result of this same incident, licensee also violated ORS 471.260(1) which prohibits consumption on the premises of a package store.]

Licensee placed himself back on duty, while consuming alcohol, by overruling the bartender's decision not to serve a patron a large quantity of wine in a beer glass. Licensee's acts of going behind the bar to adjust the thermostat and signaling the bartender that a customer was waiting for service were not, themselves, acts sufficient to place the Licensee back on duty. *Mac Club*, OLCC-99-V-110, December 2000.

By allowing the off-duty service permittee to voluntarily perform server activities on behalf of the licensee, the on-duty Bartender, in effect, put permittee on duty. *Edi's Fireside Cantina*, OLCC-93-V-063, May 1994.

To determine whether an employee is "on-duty" for purposes of OAR 845-06-045(1)(a), the Commission has concluded that the basic questions to decide are whether the person has the authority to put himself or herself on duty and whether the acts which were performed were on behalf of the licensee. (See *The Sportsman Club*, OLCC-87-V-002, June 1987; *Mark's Tavern*, OLCC-89-V-030, July 1989.) If the answers are yes, then one must decide whether the acts involved the mixing, sale, or service of alcoholic beverages and whether permittee was consuming or under the influence of alcohol when performing those acts which voluntarily placed permittee on duty. (See *The Sportsman Club*, *supra*, at 10; *Trocadero Inn*, OLCC-88-V-058, December 1988.) *Edi's Fireside Cantina*, OLCC-93-V-063, May 1994.

Where the service permittee was not performing the function of a scheduled "on duty" employee, had no authority to put herself on duty at will, and was not acting for licensee, the Commission concluded that the service permittee was not on duty. Employees cannot create the authority to act on behalf of an employer where the employer has expressly prohibited it and the employee is not furthering the interest of the employer. *Mark's Tavern*, OLCC-89-V-030, July 1989.

C.1.d.

C. VIOLATIONS

C.1.d. Drinking on Duty (OAR 845-006-0345(1)) (continued) [(OAR 845-06-045(1)(a))]

Evidence failed to prove that licensee was drinking or under the influence of alcoholic beverages while on duty where the evidence showed only that licensee, who was playing in the band and drinking beer, served one order of alcoholic beverages that evening. *Trocadero Inn*, OLCC-88-V-058, December 1988.

A person is "under the influence of intoxicating liquor" when that person displays not only well-known and easily-recognized conditions and degrees of intoxication, but any abnormal mental or physical condition which is the result of indulging in any degree in intoxicating liquors, and which tends to deprive one of that clearness of intellect and control of himself which he would otherwise possess. *Bill's Place*, OLCC-88-V-001, July 1988.

Whether or not a permittee was scheduled to be on duty, he was on duty within the meaning of OAR 845-06-045(1) where he served beer to himself and two other patrons. *Frenchie's Tavern*, OLCC-88-ES-001, June 1988.

Alcohol on bartender's breath and bartender's state of intoxication was persuasive evidence that bartender was drinking while on duty. *Eagle's Nest*, OLCC-85-V-052, February 1986.

C.1.d.

C. VIOLATIONS

C.1.e. Open Container Carried Out of Premises (OAR 845-006-0345(5)) [(OAR 845-06-045(5))]

To “permit” as used in OAR 845-006-0345(5), requires that the licensee or permittee be aware of the prohibited activity. *Cougar Lane Lodge*, OLCC-01-V-066, February 2002.

C.1.f. False Statements (ORS 471.315(1)(a)(B))[ORS 471.425(1), ORS 472.180(1)(b))]

Licensees’ contention that they did not violate the statute because Licensee Kruger later admitted that he had lied and corrected his false statements was not persuasive. Licensee Kruger tried to mislead the inspectors initially because he knew that he was prohibited from drinking in the premises. The fact that he corrected his false statements when an OLCC inspector confronted him with other contrary evidence does not obviate the earlier violation. *Mac Club*, OLCC-04-V-065, July 2005.

ORS 471.425 does not require that a misrepresentation be intentional. All that is required is that the misrepresentation be made “in order to induce or prevent action by the commission.” As the court explained in *Von Weidlein/NW Bottling v. OLCC*, 16 Or App 81, 95 (1973) the evil aimed at by the statute is the possibility that the Commission may be misinformed. It is not required that the inspectors actually believe the erroneous information, and the statute is not circumscribed by the elements of common law fraud. Intent to deceive is not an implicit requirement of the statute. In this case, Licensee denied having any minors on the premises that night, yet his minor sister had been there for approximately two hours at a family gathering. Licensee was aware that minors are prohibited from the licensed premises, and his false statement was made to prevent the Commission from charging him with a violation of OAR 845-006-0335(3)(b). *H2O Martini Bar & Restaurant*, OLCC-05-V-012, December 2005, *affirmed without opinion*, *Capital Asset Holdings, Inc., et al v. OLCC*, 213 Or. App. 240 (2007).

Citing *Von Weidlin/N.W. Bottling v. OLCC*, 16 Or App 81 (1973), holding that OLCC need not prove that a material false statement was made intentionally to sanction a licensee, the Commission sanctioned Licensee for two misrepresentations about a material fact (change in ownership) without regard to intent. *Couch Street Fish House*, OLCC-00-V-021, June 2001.

In applications to renew, where Licensee referred to the corporate entity as “Couch Street Fish and Steakhouse,” rather than “Couch Street Fish House,” the actual corporate entity, the statements were false, but not material. Based on the context, OLCC knew Licensees were referring to Couch Street Fish House. *Couch Street Fish House*, OLCC-00-V-021, June 2001.

C.1.e.
C.1.f.

C. VIOLATIONS

C.1.f. False Statements (ORS 471.315(1)(a)(B))[ORS 471.425(1), ORS 472.180(1)(b))] (continued)

The ultimate intent of the parties does not control whether Licensee made false statements or allowed parties to obtain interests in the licensed business without prior approval. The express terms or legal effect of the documents which make up the transactions of acquisition and transference of part ownership must also be considered when deciding whether Licensee provided false statements or allowed parties to obtain unapproved interests in the licensed business. *Stars Cabaret & Steak House*, OLCC0-96-V-077, and *Jazz de Opus*, OLCC-96-V-078, Feb 1998.

The Commission concluded that Licensee did not intentionally withhold information that Licensee had obtained a different funding source from the bank where: (1) The bank loan commitment letter Licensee provided to Regulatory staff stated the loan would be secured; (2) attorney for Licensee attempted to negotiate with the bank to use the collateral for the loan intended by Licensee (Certificate of Deposit of third party), and, when the bank refused, advised his client to borrow the money directly from the third party and withdraw the loan application; (3) conditional approval of the license had already been given by OLCC; (4) the third party was known to be licensable; and (5) Licensee didn't intentionally withhold the information, but relied on agent to send the information to OLCC and agent delayed sending the information until the deal closed.

Therefore, the preponderance of the evidence did not show that Licensee provided an intentional and material false representation by not telling the OLCC that his loan application had been withdrawn from the bank and that he had obtained funding from a third party instead. *Stars Cabaret & Steak House*, OLCC0-96-V-077, and *Jazz de Opus*, OLCC-96-V-078, Feb 1998.

Licensee received a confirmation letter for a loan for funding from the bank which stated the loan was to be secured by a Certificate of Deposit. Licensee requested a second letter from the bank which stated only that the loan was to be secured in order to provide to the seller of the business a copy of the second letter to OLCC. Licensee submitted a copy of the second letter to OLCC. The Commission found that there was no evidence to show that Licensee provided the second version of the letter to OLCC in an attempt to conceal that his loan was to be secured by a Certificate of Deposit so as to withhold that the true source of funding was to be the third party holding the Certificate of Deposit, given, particularly, that the third party was known to be licensable.

The Commission concluded that Licensee did not provide a false statement to OLCC when, in explanation for why he didn't go through with the bank loan, Licensee stated that the bank had changed its terms for the loan. The bank refused to accept a third party Certificate of Deposit to secure the loan, when it was Licensee's intention from the beginning to submit a third party Certificate of Deposit, and not a personal Certificate of Deposit. *Stars Cabaret & Steak House*, OLCC0-96-V-077, and *Jazz de Opus*, OLCC-96-V-078, Feb 1998.

C.1.f.

C. VIOLATIONS

C.1.f. False Statements (ORS 471.315(1)(a)(B))[ORS 471.425(1), ORS 472.180(1)(b))] (continued)

Prior to final approval of the license application, Licensee filed plans with OLCC to do minor remodeling of the premises at a cost of \$5,000. After approval, Licensee did major remodeling, including the building of three stages, at a cost of approximately \$40,000. The Commission concluded that the plan submitted by Licensee was true when made. Licensee subsequently was convinced, for economic reasons, to accelerate the plan to move to nude dancing, and, consequently, to begin more extensive remodeling, including building stages. The Commission further concluded that Licensee was not required, under OLCC rules, to seek approval for remodeling changes of the type made here (stages). Spending more money than proposed for remodeling, absent proof of specific impropriety or violation of any rule, does not constitute a false or misleading statement. The change in plans was made after license approval. *Stars Cabaret & Steak House*, OLCC0-96-V-077, and *Jazz de Opus*, OLCC-96-V-078, Feb 1998.

The Commission concluded that Licensee did not make a false statement to Regulatory staff that he would not change the operation where he subsequently did not change the business operation to one more dependent on alcohol sales and on entertainment. *Stars Cabaret & Steak House*, OLCC0-96-V-077, and *Jazz de Opus*, OLCC-96-V-078, Feb 1998.

The Commission concluded that Licensee did not make a false representation or statement about the type of entertainment he intended to present when, at the time of making the statement, Licensee intended to have live bands and, subsequent to OLCC final approval, he changed his mind regarding the form of entertainment, providing nude dancing instead. No rule or statute requires a licensee who has been approved to have entertainment to get OLCC approval if he or she wishes to change the type of entertainment that they intend to offer. *Stars Cabaret & Steak House*, OLCC0-96-V-077, and *Jazz de Opus*, OLCC-96-V-078, Feb 1998.

The Commission concluded that Licensee did not make false representations or statements to Regulatory staff throughout the application process as part of an ongoing scheme to mislead the staff about the "true intended ownership," management and financing of Stars Cabaret & Steak House. The concept of "true intended ownership" is not a concept that has been defined in OLCC statutes, rules, or prior cases and the Commission declined to adopt or define the concept, relying, instead, on existing laws, rules and case law. OAR 845-006-0020 and OAR 845-006-0120 define owners and individuals who have an interest in a licensed business. Licensee was not engaged in a sham application process. Licensee was engaged in and intended two separate legal transactions, each subject to OLCC approval. Moreover, factually, Licensee was not found to have engaged in misrepresentations during the application process. *Stars Cabaret & Steak House*, OLCC0-96-V-077, and *Jazz de Opus*, OLCC-96-V-078, Feb 1998.

C.1.f.

C. VIOLATIONS

C.1.f. False Statements (ORS 471.315(1)(a)(B))[ORS 471.425(1), ORS 472.180(1)(b))] (continued)

Licensee challenged the Commission's 1996 decision on *AM/PM Market No. 756*, which adopted an additional test of materiality, concluding that an intentional false statement was a material false statement because the Commission must be able to rely on the honesty of licensees in dealing with the Commission and enforcing alcoholic liquor laws and rules. Licensee argued that the decision in *AM/PM Market No. 756* effectively eliminated the materiality requirement which is imperative to ensure the licensee's rights are preserve; and constituted unlawful rulemaking.

The Commission concluded, based on advice of the Attorney General in an earlier case, that the interpretation of "material" in *AM/PM Market No. 756* was reasonable and permissible as honesty in dealing with government directly relates to the Commission's license refusal criterion "not of good moral character" in ORS 471.295(4)(f). Additionally, the Commission concluded, based on Attorney General advice, that in *AM/PM Market No. 756*, the Commission had interpreted the legislative policy contained in the statutory language "material false statement or misleading information" by final order in a contested case, based on ORS 183.355(5). Such an interpretation was authorized and did not require prior rulemaking. *Stars Cabaret & Steak House*, OLCC0-96-V-077, and *Jazz de Opus*, OLCC-96-V-078, Feb 1998.

ORS 471.315(1)(a)(B). The evidence failed to establish that licensee made a false statement to the Commission. The charge was dismissed. *H-Market No. 2*, OLCC-96-V-008, December 1997.

ORS 471.315(1)(a)(B). The Commission cancelled the license where licensee committed multiple violations of making false statements on his application form which included: failure to list other names used; false social security number; failure to disclose a previous criminal conviction; failure to disclose that he was formerly a licensee; failure to disclose that he had a prior violation history. *W.M. Costless*, OLCC-96-V-063ES, March 1997.

The Commission has concluded that a false statement must be material to be a basis for a violation. The Commission determined that it will consider as material those false statements which inhibit the Commission's ability to conduct an investigation into a person's eligibility for a license. *Punjab Tavern*, OLCC-91-L-015, April 1992. (In this case licensee failed to disclose that he had used another name.)

Statements about financial interests in the licensed premises are material to the determinations the Commission must make under ORS 472.160(h) (undisclosed interests) and ORS 471.757 (statements of financial interest). *Harry's Stagecoach Inn*, OLCC-91-V-102, February 1992.

The Commission concluded that applicant's failure to list a DUII arrest was not a material false statement because an arrest is not a conviction, and therefore is not a basis to refuse a license, and at the time applicant filled out the application, he had not been convicted of the charge. *Richard Robitaille*, OLCC-90-S-002, March 1991.

C.1.f.

C. VIOLATIONS

C.1.f. False Statements (ORS 471.315(1)(a)(B))[ORS 471.425(1), ORS 472.180(1)(b))] (continued)

Intentional false statements are a basis to aggravate the penalty to cancellation of the license. *Sparkles Tavern*, OLCC-88-V-107, September 1989; *Lori Scott*, OLCC-89-V-166, March 1990. Where licensee told the Commission that the money she used to purchase the tavern was money she earned working as a waitress, but in fact she obtained the money from another person, the Commission cancelled the license because licensee's false statement was intentionally made. *Trocadero Inn*, OLCC-90-V-055, February 1991.

A false statement is material if the subject of the false statement is a basis for refusal, cancellation, or suspension of a license by the Commission. *Trocadero Inn*, OLCC-90-V-055, February 1991.

The Commission concluded the licensee's false statements were material because the false statements were about the source of the funds licensee used to purchase the business. The Commission has the right to know the source of a licensee's financial resources. OAR 845-05-011. The licensee must be able to demonstrate financial responsibility sufficient to adequately meet the requirements of the business proposed to be licensed. ORS 471.295(4)(i). *Trocadero Inn*, OLCC-90-V-055, February 1991.

The Commission concluded that applicant's failure to list three felonies was a material omission because the failure to list a violation for which there is a separate statutory basis for license refusal is a material omission. There is a separate statutory basis for license refusal if a person has been convicted of a felony. *Loretta J. Clayton*, OLCC-88-SP-002, September 1988.

The Commission concluded that an applicant's failure to list two gambling-related misdemeanors and five traffic-related misdemeanors were not material omissions because there is no Commission rule or statute which makes convictions of these misdemeanors a basis for denial of a license. *Albert Diss II*, OLCC-86-SP-019, March 1987.

False statement must be material to be basis for violation. A false statement is material if it has a logical connection to whether the licensee committed a violation. *Jiggles*, OLCC-85-V-016, February 1987; *Frenchie's Tavern*, OLCC-88-ES-001, June 1988. Licensee's false statement that his son was 21 when in fact he was under 21 was material because it had a logical connection to whether licensees committed a violation of having a minor on the premises. *Sparkles Tavern*, OLCC-88-V-107, September 1989.

False statement that hidden owner had no interest in the premises other than as an employee manager was material because it prevented staff from investigating and discovering a hidden ownership interest. *Fast Stop Market No. 2*, OLCC-86-V-065, September 1987.

C.1.f.

C. VIOLATIONS

C.1.f. False Statements (ORS 471.315(1)(a)(B))[ORS 471.425(1), ORS 472.180(1)(b)]] (continued)

The standard of proof for violation charges under ORS 471.315(1)(b) for false statements is the general standard of proof that would apply under ORS Chapter 183. This general standard is probably by a preponderance of the evidence. *Jiggles*, OLCC-85-L-013, February 1987, affirmed *7455 Inc. v. Oregon Liquor Control Commission*, 94 Or App 780, 767 P2d 116 (1989); affirmed on other grounds, 310 Or 477, 800 P2d 781 (1990).

Unlike licensing cases, a false statement may constitute a violation even if it was not intended to mislead the Commission. *Maynard's Place*, OLCC-85-V-018, November 1985.

A false statement must be material, but need not be intentional, to constitute a violation of ORS 472.180(2). *American Legion LaPine Post No. 45*, OLCC-84-V-023, February 1985.

False statement made by service permittee three years earlier on permit application may be mitigated by permittee's subsequent good record in following Commission's rules and regulations. *Theresa Lee Gerber*, OLCC-84-V-031, January 1985.

The Commission, as the trier of fact, decides the weight to be given to the applicant's explanation of the reason for the false statements. *Smith v. OLCC*, 31 Or App 167, 570 P2d 90 (1977).

Under ORS 471.315(1)(b), which authorizes the Commission to cancel or suspend a license for a false statement made in order to induce or prevent Commission action, the false statement must be material but need not be intentional. *Hart v. OLCC*, 181 Or 406, 409, 182 P2d 364 (1947); *Von Weidlein/N.W. Bottling v. OLCC*, 16 Or App 81, 95, 517 P2d 295 (1973).

C.1.f.

C. VIOLATIONS

C.1g. Hidden Ownership (ORS 471.757, OAR 845-005-0311(4))
[(ORS 471.757, OAR 845-05-011(4))]

C.1.g.1. Receipt of Profits (OAR 845-005-0311(3)(a))
[(ORS 471.757, OAR 845-05-011(3)(a); [OAR 845-06-010(3)(a)]]

Licensee's son obtained an interest in the business pursuant to OAR 845-005-0011(3)(a) (receipt of profits) where he was entitled to profits to be collected from the cover charge, as "entertainment consultant," over and above his entitlement to profits as a 5% shareholder. As "entertainment consultant," the son performed management or ownership functions which included hiring and firing employees, making decisions about premises' trade name and type of entertainment, conducting weekly employee meetings, supervising premises' managers, receiving all money collected at the premises, determining employee salaries, and incurring and paying the expenses of the business. The son performed more duties, had greater authority, and exercised greater control than someone with the status of a 5% shareholder would be entitled to exercise. His role at the business was much more consistent with that of a sole or majority owner. The Commission concluded the son had an interest in the business because he received or was entitled to receive profits for his management and control of the licensed premises over and above his entitlement to profits as a 5% shareholder. His entitlement to 5% of the profits as a shareholder was based on his investment of property and equipment, and was exclusive of any work performed on behalf of the business. *La Gran Cantina*, OLCC-00-V-024/-L-009/-L-010, June 2002.

Licensee was charged with allowing persons to obtain an unapproved interest as defined in OAR 845-005-011(3)(a), (c), (d), and (e), in his transaction with a limited liability corporation (LLC), giving the LLC an option to acquire Licensee. The Commission concluded that the LLC had not acquired an unapproved interest in the licensed business when the exercise of the option was conditioned on approval of the change of ownership by OLCC; the Investment and Indemnity Agreement, Promissory note and Loan and Security Agreement did not create present interests in Licensee; the loan was bona fide, entitling the lender to a return of only the principal and interest; the LLC was not entitled to receive profits of Licensee, directly or indirectly; individuals managing Licensee were not members of the LLC, but contract employees of Licensee; and the LLC was not a contract purchaser of Licensee unless or until OLCC gave approval. *Stars Cabaret & Steak House*, OLCC-96-V-077, and *Jazz de Opus*, OLCC-96-V-078, Feb 1998.

OAR 845-06-020(2)(a). The evidence failed to establish that two other persons received or were entitled to receive profits from the business because the evidence failed to establish what the profits from the business were. Profits are the excess of the selling price of goods over their cost. *H-Market No. 2*, OLCC-96-V-008, December 1997.

A landlord does not have a financial interest in the licensed premises solely by virtue of being an applicant's landlord. *Buff N Brew*, OLCC-94-L-019, July 1995.

C.1.g.1.

C. VIOLATIONS

C.1.g.1. Receipt of Profits (OAR 845-005-0311(3)(a)) (continued)
[(ORS 471.757, OAR 845-05-011(3)(a); [OAR 845-06-010(3)(a)]]]

The Commission concluded that ORS 471.757 and OAR 845-05-011(4) which regulate persons who have a financial interest in the business, and apply to persons who invest in or manage property on behalf of or "for" a licensed business. The statute does not apply to persons who rent or loan property or money "to" the licensed business and do not share in the profits or management of the business. *Bill's Place*, OLCC-91-L-024, September 1992.

The Commission found that a negligent violation (for failure to obtain prior Commission approval before allowing a former manager to purchase inventory and receive profits) was a mitigating factor. The record did not show willful hidden ownership. *Bandon's Old City Hall*, OLCC-89-V-191, October 1990.

Violation for unapproved interest as a result of receipt of profits was not mitigated where the unapproved owner's interest in the licensed premises was partial rather than total. *Sunset Tavern*, OLCC-89-V-142, December 1989. (OAR 845-06-010(3)(a)).

Persons who were not paid wages but were allowed to keep all monies in excess of expenses, were entitled to profits and, thus, had a prohibited undisclosed interest in the business under OAR 845-06-010(3)(a). William A. Thompson, *Columbia Cafe & 3 C's Club*, OLCC-86-V-034, January 1987.

Licensee violated OAR 845-06-010(4) who allowed another person to be entitled to receive profits from the licensed business. OAR 845-06-010(3)(a). John and Ethyl Kochis, *Old Town Eatery*, OLCC-86-V-042, December 1986.

C. VIOLATIONS

C.1.g.2. Compensation Out of the Ordinary (OAR 845-005-0311(3)(b)) [(OAR 845-05-011(3)(b))]

The Commission concluded that licensee violated OAR 845-05-011(3)(b) by allowing other persons to obtain an unapproved interest in the business where the individuals wanted to purchase the business and worked nine hours a day, seven days a week, for a five month period at the premises and did not receive any payment for their work. The Commission concluded that this was under compensation and compensation that was out of the ordinary. *H-Market No. 2*, OLCC-96-V-008, December 1997.

Evidence would be insufficient to prove an interest under OAR 845-06-035(3)(b) for receiving compensation out of the ordinary for services rendered if the evidence did not show what level of compensation is ordinary for the services in question. *7455 Incorporated, Jiggles*, OLCC-85-V-016, January 1987, affirmed *7455 Inc. v. Oregon Liquor Control Commission*, 94 Or App 780, 767 P2d 116 (1989); affirmed on other grounds, 310 Or 477, 800 P2d 781 (1990).

An interest was not shown under OAR 845-06-010(3)(b) where money paid to a person from a licensed business was a distribution of profits to a part-owner. *7455 Inc. v. Oregon Liquor Control Commission*, 94 Or App 780, 767 P2d 116 (1989); affirmed on other grounds, 310 Or 477, 800 P2d 781 (1990).

C.1.g.2.

C. VIOLATIONS

C.1.g.3. Contract to Manage (OAR 845-005-0311(3)(c)) [(OAR 845-05-011(3)(c))]

The requirement that there be evidence of an agreement or contract does not necessarily require a written contract. (See, e.g., *Woahink Landing*, OLCC-86-V-052, January 1987; *Columbia Café & 3C's Club*, OLCC-86-V-034, January 1987.) *La Gran Cantina*, OLCC-00-V-024/-L-009/-L-010, June 2002.

Licensee was charged with allowing persons to obtain an unapproved interest as defined in OAR 845-005-011(3)(a), (c), (d), and (e), in his transaction with a limited liability corporation (LLC), giving the LLC an option to acquire Licensee. The Commission concluded that the LLC had not acquired an unapproved interest in the licensed business when the exercise of the option was conditioned on approval of the change of ownership by OLCC; the Investment and Indemnity Agreement, Promissory note and Loan and Security Agreement did not create present interests in Licensee; the loan was bona fide, entitling the lender to a return of only the principal and interest; the LLC was not entitled to receive profits of Licensee, directly or indirectly; individuals managing Licensee were not members of the LLC, but contract employees of Licensee; and the LLC was not a contract purchaser of Licensee unless or until OLCC gave approval. *Stars Cabaret & Steak House*, OLCC-96-V-077, and *Jazz de Opus*, OLCC-96-V-078, Feb 1998.

An owner who managed a licensed business did not have an interest under OAR 845-06-010(3)(c) where the owner received profits, rather than a salary that would be considered an expense of the business, and where the owner's management was not pursuant to any contract. Remedios M. Acosta, *Junction Inn*, OLCC-86-V-073, May 1987.

People contracted to operate a business other than as employees, creating a prohibited undisclosed interest under OAR 845-06-010(3)(c), where they were in complete control of the day-to-day operation of the premises, they made hiring and wage decisions, and they determined how the expenses of the business were to be paid. William A. Thompson, *Columbia Cafe & 3 C's Club*, OLCC-86-V-034, January 1987.

A person has a contract to operate a business and, thus, a prohibited undisclosed interest in a business under OAR 845-06-010(3)(c) where control is exercised by the contractor over the daily operation of the business. All decisions concerning operation and management were made by that person and the licensee exercised no supervision or control over the operation and management of the premises. David H. Seitzinger, *Woahink Landing*, OLCC-86-V-052, January 1987.

Licensee violated OAR 845-06-010(4) who: contracted with other person to operate or manage the licensed premises as a "full-time working partner," which is other than as an employee. OAR 845-06-010(3)(c). John and Ethyl Kochis, *Old Town Eatery*, OLCC-86-V-042, December 1986.

Entity had contract to manage other than as an employee (under OAR 845-06-010(3)(a),(c)) where it had control over the daily operation and supervision of the premises, there was no provision for salary or terms of employment and where the licensee did not routinely supervise its operation of the premises. Multorpor, Inc., *Ski Bowl Beer Stube*, OLCC-85-V-024, August 1985.

C.1.g.3.

C. VIOLATIONS

C.1.g.4. Investment in Licensed Business (OAR 845-005-0311(3)(d)) [(OAR 845-05-011(3)(d))]

Where son of primary licensee invested equipment and property in order to become a 5% stockholder in the corporation holding the liquor license at the licensed business, he did not obtain an interest in the business which requires prior Commission approval. *La Gran Cantina*, OLCC-00-V-024/-L-009/-L-010, June 2002.

Licensee was charged with allowing persons to obtain an unapproved interest as defined in OAR 845-005-011(3)(a), (c), (d), and (e), in his transaction with a limited liability corporation (LLC), giving the LLC an option to acquire Licensee. The Commission concluded that the LLC had not acquired an unapproved interest in the licensed business when the exercise of the option was conditioned on approval of the change of ownership by OLCC; the Investment and Indemnity Agreement, Promissory note and Loan and Security Agreement did not create present interests in Licensee; the loan was bona fide, entitling the lender to a return of only the principal and interest; the LLC was not entitled to receive profits of Licensee, directly or indirectly; individuals managing Licensee were not members of the LLC, but contract employees of Licensee; and the LLC was not a contract purchaser of Licensee unless or until OLCC gave approval. *Stars Cabaret & Steak House*, OLCC-96-V-077, and *Jazz de Opus*, OLCC-96-V-078, Feb 1998.

OAR 845-05-011(3)(d). Licensee committed a violation by allowing other persons to obtain an interest in the business without prior approval of the Commission. The two persons paid approximately \$45,000 to licensee to purchase the business, paid \$4,000 toward the purchase of a surveillance camera and \$3,000 for a beer cooler for the premises. *H-Market No. 2*, OLCC-96-V-008, December 1997.

The evidence failed to establish that the money loaned to licensee by a friend was an investment in the business. The money was a bona fide loan because, although there was no written documentation of the loan, this type of loan was a normal practice between licensee and her friend, licensee was expecting to receive money from an insurance settlement and when she did she began repaying the amount she had borrowed, and the parties intended the money to be a loan. *Trocadero Inn*, OLCC-90-V-055. February 1991.

Money given by a friend to licensee was a bona fide loan rather than a prohibited investment when, although the loan had no specific terms, the circumstances, including that the money was paid back within one month, indicated that the parties intended the transaction to be a loan. *Pastime Tavern*, OLCC-88-V-089, March 1989.

A person had a prohibited investment in a licensed business rather than a bona fide loan to the business where the terms of repayment were nonexistent or unclear at best. *Fast Stop Market No. 2*, OLCC-86-V-065, September 1987; *Seven Star Market*, OLCC-88-L-003, July 1988.

C.1.g.4.

C. VIOLATIONS

C.1.g.4. Investment in Licensed Business (OAR 845-005-0311(3)(d)) (continued) [(OAR 845-05-011(3)(d))]

Licensee's explanation that he thought the purchaser of the business informed the Commission of the change of ownership was not credible. It is licensee's responsibility as a reasonable owner to insure that the Commission remain informed of who owned and was running the premises. *Columbia Cafe & 3 C's Club*, OLCC-86-V- 034, January 1987.

An investment under OAR 845-06-010(3)(d) exists where a person puts money or property into the business and intends to share in the increase in equity that results. *Columbia Cafe & 3 C's Club*, OLCC-86-V-034, January 1987.

Licensee violated OAR 845-06-010(4) who: allowed other person to obtain an interest in the business by paying licensee \$6,600 for a 50 percent interest in all assets of the licensed premises. OAR 845-06-010(3)(d). *Old Town Eatery*, OLCC-86-V-042, December 1986.

Licensee violated OAR 845-06-010(4) where licensee sold food and liquor inventory of licensed premises to another party. Ownership of inventory goes beyond role as employee. Purchase of inventory constituted an investment in the business. *Northwoods Inn*, OLCC-85-V-075, June 1986.

C.1.g.4.

C. VIOLATIONS

C.1.g.5. Contract Purchaser (OAR 845-005-0311(3)(e)) [(OAR 845-05-011(3)(e))]

Licensee was charged with allowing persons to obtain an unapproved interest as defined in OAR 845-005-011(3)(a), (c), (d), and (e), in his transaction with a limited liability corporation (LLC), giving the LLC an option to acquire Licensee. The Commission concluded that the LLC had not acquired an unapproved interest in the licensed business when the exercise of the option was conditioned on approval of the change of ownership by OLCC; the Investment and Indemnity Agreement, Promissory note and Loan and Security Agreement did not create present interests in Licensee; the loan was bona fide, entitling the lender to a return of only the principal and interest; the LLC was not entitled to receive profits of Licensee, directly or indirectly; individuals managing Licensee were not members of the LLC, but contract employees of Licensee; and the LLC was not a contract purchaser of Licensee unless or until OLCC gave approval. *Stars Cabaret & Steak House*, OLCC0-96-V-077, and *Jazz de Opus*, OLCC-96-V-078, Feb 1998.

Licensee violated OAR 845-06-010(3)(e) where other persons entered into a contract to purchase the licensed premises and paid licensee a portion of the contract price prior to Commission approval. The Commission determined that mitigation of the penalty was appropriate where the violation was negligent and where the persons with the unapproved interest were licensable by the Commission. *Yet Chip*, OLCC-91-V-033, October 1991.

Contract purchaser of a licensed premises is someone who has entered into an agreement to purchase a licensed premises. OAR 845-06-010(3)(e) prohibits a contract purchaser from making a payment of money to other than an escrow account prior to Commission approval. *Fast Stop Market No. 2*, OLCC-86-V-065, September 1987.

Violation was mitigated where the hidden ownership was negligent rather than willful. The licensee had always intended to obtain Commission approval of the sale. *Fast Stop Market No. 2*, OLCC-86-V-065, September 1987.

Aggravated violation found because applicant had knowledge of hidden ownership rule and took affirmative steps to conceal sale of business from Commission. Robert Kufus, *Your Inn Tavern*, September 1983.

C. VIOLATIONS

C.1.g.6. Waiver of Prior Approval (OAR 845-005-0311(5)) [(OAR 845-05-011(5))]

Where the record did not indicate there were any unusual circumstances and licensee did not argue any circumstances that would constitute good cause for the Commission to waive the requirement of obtaining prior approval, the Commission concluded there was no good cause to waive the requirement. *Yet Chip*, OLCC-91-V-033, October 1991.

The Commission has concluded that a licensee's lack of business experience and misunderstanding of the Commission's requirements do not provide good cause to waive the requirement of prior Commission approval. *Bandon's Old City Hall*, OLCC-89-V-191, October 1990.

The record did not set forth a basis for waiver of the prior approval requirement where an application was not submitted for an unapproved owner until ten months after the owner's interest was created and the record did not set forth any reasonable explanation for the delay. *Sunset Tavern*, OLCC-89-V-142, December 1989.

OAR 845-06-010(5) provides that a licensee may show good cause to waive requirement of obtaining prior Commission approval before a person obtains an interest in the business.

OAR 845-06-010(5) provides that the Commission may waive requirement that licensee obtain prior approval of a person's interest in business when there are unusual or extraordinary circumstances. Commission found good cause to waive requirement of obtaining prior approval when person's interest was disclosed to Commission at all relevant times, licensee intended to apply for change of ownership, but was slow to apply due to uncertainties caused by pending bankruptcy. *The Embers Supper Club*, OLCC-88-V-075, March 1989.

The Commission did not waive the requirement of obtaining prior Commission approval under OAR 845-06-010(4) when the record did not show good cause for a waiver. A one-year delay provided ample time to submit an application and there was no reasonable explanation for licensee's failure to do so. *Whaler Restaurant & Lounge*, OLCC-88-V-119, March 1989.

C. VIOLATIONS

- C.1.h. Habit of Using Alcohol or Controlled Substances to Excess
(ORS 471.315(1)(a)(F))
[(ORS 471.315(1)(a)(F), [ORS 472.180(1)(g)]]
Note: See cases under B.1.b.8.

Permittee had four convictions for DUII during the period of a year. Three of the four incidents occurred within a week and one-half. The Commission concluded that at the time of the convictions, permittee had a habit of using alcohol to excess pursuant to ORS 471.315(1)(a)(F). Where there was no evidence that permittee had consumed alcohol to excess within the two years preceding the hearing, the Commission concluded that permittee's habit was not current and that permittee was entitled to mitigation. *Deborah I Standley*, OLCC-99-V-020, December 1999.

Given a permittee's commitment to abstinence and the fact that she was not in denial that she has a problem with alcohol and her present abstinence, the Commission concluded that restrictions prohibiting her from serving, selling, or managing the sale or service of alcohol were more appropriate than cancellation of the service permit and were more in keeping with the legal requirements of the Americans with Disabilities Act (ADA). *Gatehouse Pizza*, OLCC-95-V-019, July 1996.

The Commission concluded that even though a former licensee no longer held a license, the Commission could conclude that the former licensee had a violation for being in the habit of using alcohol to excess where the former licensee had that habit when licensed. The habit need not be current at the time of the charge or hearing as long as it was current during the time that the former licensee held a license. *The Homestead*, OLCC-94-V-074, August 1996.

The Commission concluded that there was a basis to cancel the service permit under ORS 471.315(1)(a)(F) for a habit of using alcoholic liquor to excess where the permittee had seven documented incidents of drinking alcoholic liquor to excess over a span of approximately 14 years, and she continued to consume alcoholic liquor while on probation, in spite of the fact that she had been ordered by the court to abstain from consuming while she was on probation. *Becky L. Williamson*, OLCC-96-V-009, June 1996.

The Commission concluded that the permit should be cancelled because the permittee has a current habit of using alcoholic liquor to excess. Although the permittee's record of compliance of 34 years without a violation weighed in favor of mitigation, the permittee's continued consumption of alcoholic liquor in violation of the conditions on her DA license showed that she would be a poor risk for compliance with alcoholic liquor laws. *Paula Gustafson*, OLCC-90-V-158, July 1991.

C.1.h.

C. VIOLATIONS

- C.1.i. Conviction of Felony, Liquor Laws or Violation on Licensed Premises
(ORS 471.385(1)(b), ORS 471.315(1)(a)(I), ORS 670.280)
[(ORS 471.315(1)(a)(I), ORS 471.385(1)(b), [ORS 472.180(1)(j)], ORS 670.280]
Note: See cases under B.1.b.7.

As a matter of law, the Commission cannot sanction a licensee for a violation of OAR 845-006-0047(3)(a) (permitted an unlawful activity) when the alleged unlawful activity was a crime that was committed on the licensed premises and there has been no conviction (at the time of the motion to dismiss, Licensees had been cited criminally and were pending trial). This is because where the unlawful activity is commission of a crime on the licensed premises, the authority for sanctioning licensees is ORS 471.315(1)(a)(I), not ORS 471.315(1)(a)(A). Upon a motion for a legal ruling, the charging documents were dismissed without prejudice, pending disposition of the criminal prosecution. *Best Buys Food Market, et al*, OLCC-00-V-077 et seq., Ruling, January 2001.

In Oregon, the result of a plea of "no contest" is a conviction of a crime. ORS 135.345; *In re Jacob*, 318 Or 10, 860 P2d 811 (1993).

"Convicted of a felony" means not only a determination of guilt but also an entry of judgment. *State v. Dintelman*, 112 Or App 350, 829 P2d 719 (1992).

The Commission concluded that the permittee's felony conviction should be treated as a conviction until such time as it is reversed or set aside. *A.J.'s Homestead Restaurant*, OLCC-90-V-021, December 1990. This followed the decision in *Sportservice Corp. v. OLCC*, 15 Or App 226, 229, 515 P2d 731 (1973) where the court concluded that the Commission properly treated licensee as convicted, even though licensee had appealed the conviction, reasoning that the conviction is a conviction until such time as it is reversed or set aside.

The Commission has authority to sanction a corporate licensee pursuant to ORS 472.180(1) for a felony committed by a corporate principal. *Kingston Saloon*, OLCC-89-V-080, December 1989; *A.J.'s Homestead_Restaurant*, OLCC-90-V-021, December 1990.

Until a conviction has been reversed, vacated or set aside, the statute (ORS 657.176(3)) mandates that if the same act results in employment dismissal and "conviction," unemployment compensation benefits shall be cancelled regardless of a pending appeal. *Corvallis Tool Co. v. Employment Div.*, 102 Or App 463, 469, 795 P2d 5576 (1990).

C.1.i.

C. VIOLATIONS

- C.1.i. Conviction of Felony, Liquor Laws or Violation on Licensed Premises
(ORS 471.385(1)(b), ORS 471.315(1)(a)(I), ORS 670.280) (continued)
[(ORS 471.315(1)(a)(I), ORS 471.385(1)(b), [ORS 472.180(1)(j)], ORS 670.280]
Note: See cases under B.1.b.7.

The Commission treated a licensee's conviction as a felony, even though the court indicated that it would reduce the classification of the offense to a misdemeanor after 18 months if the licensee successfully completed his probation, where the 18-month period had not yet elapsed and the conviction had not yet been reduced. *Kingston Saloon*, OLCC-89-V-080, December 1989.

A licensee's felony conviction was related to the licensee's fitness as a liquor licensee where the licensee committed the offense under the influence of alcohol, the licensee committed the offense on a licensed premises, and the offense was violent and resulted in physical injury to another person. *Kingston Saloon*, OLCC-89-V-080, December 1989.

In order to prove that a licensee "permitted" criminal activity (OAR 845-06-045(3)) by someone other than the licensee or one of the licensee's employees, the licensee must have had knowledge of the criminal activity and must have failed to take reasonable steps to prevent the activity. Licensee's failure to bar former shareholder in licensee corporation from the premises in the face of strong indications that former shareholder was engaged in criminal activities at the premises was unreasonable. *Tacoma Cafe*, OLCC-86-V-036, August 1987; *Spigot Tavern*, OLCC-89-V-022, September 1989.

The Commission received legal advice from its attorney on June 4, 1987, that ORS 670.280 is applicable to situations where the conviction of a crime is the basis for agency action. Therefore, the Commission must show a relationship between a permittee's felony conviction and the ability of the permittee to dispense alcoholic liquor in proving a violation of ORS 471.385(1)(b). *John O. Myshak*, OLCC-88-V-002, May 1988. See also: *Cynthia Carpenter*, OLCC-88-V-097, March 1989.

The legal effect of a plea of no contest is a conviction of the offense to which the plea is entered. ORS 135.345. Therefore, the licensee's plea of no contest was a conviction for purposes of ORS 472.180(10). *Parker's Place*, OLCC-88-V-035, October 1988.

The Commission concluded that a permittee's felony convictions for delivery and conspiracy to deliver a controlled substance are related to his fitness to dispense alcoholic liquor. The Commission reasoned that because cocaine and alcoholic liquor are both controlled substances, the fact that the permittee violated controlled substance laws with regard to cocaine indicates that he might also exercise poor judgement with regard to alcoholic liquor laws. *John O. Myshak*, OLCC-88-V-002, May 1988.

C.1.i.

C. VIOLATIONS

- C.1.i. Conviction of Felony, Liquor Laws or Violation on Licensed Premises
(ORS 471.385(1)(b), ORS 471.315(1)(a)(I), ORS 670.280) (continued)
[(ORS 471.315(1)(a)(I), ORS 471.385(1)(b), [ORS 472.180(1)(j)], ORS 670.280]
Note: See cases under B.1.b.7.

In deciding whether service permit cancellation is appropriate, the Commission should consider whether the person has reformed and is not likely to be a poor risk for compliance with the alcoholic beverage laws. One important factor is how much time has passed since the felony conviction. The greater the length of time without other problems, the more persuasive the evidence the person has reformed. *John Myshak*, OLCC-88-V-002, May 1988.

Where conviction of a crime is the basis for agency action, ORS 670.280 applies and the Commission must show the relationship between the conviction and the person's fitness to sell or serve alcoholic liquor. ORS 670.280; 6/4/87 letter from AAG Mussell to Director of Hearings.

Where one co-licensee convicted of a felony, license cancelled as to that co-licensee, and continued in the name of the remaining licensee, subject to the conditions that the convicted felon divest himself of any interest in the licensed premises, and, that a Letter of Reprimand be issued. Vince Hart and Fay E. Ladd, *Tony's Tavern*, OLCC-86-V-003, February 1987.

License cancellation was not appropriate against a corporate licensee whose officer had committed a felony on the licensed premises, because the officer had completely divested himself of any interest in the licensed premises, and management control now rested with other corporate officers. A fine or suspension was appropriate instead of cancellation. K & M Club, Inc., *The Frontier*, OLCC-86-V-032, December 1986.

The Commission cancelled the service permit of a permittee who was convicted of a second felony, where the permittee had a prior felony conviction at the time he received his permit, and the Commission had cautioned him against further convictions. *Mark Victor Anderson*, OLCC-84-SP-008, January 1985.

Trial court felony conviction is sufficient ground on which to base license cancellation conviction, regardless of fact conviction was on appeal at the time of license cancellation. *Sportservice Corp. v. OLCC*, 15 Or App 226, 515 P2d 731 (1973).

C.1.i.

C. VIOLATIONS

C.1.j. Noisy Activities (ORS 471.425(2), OAR 845-006-0347(1)(b), (2)(a)) [(ORS 471.425(2), OAR 845-06-047(1)(c), (2)(a))]

Licensee's manager turned down the volume of music in response to direction of an OLCC inspector, given after the inspector visited the apartment of a neighbor whose sleep was disturbed by the volume of the music. When the volume was again raised within minutes of the inspector's visit, Licensee permitted noisy activities, in violation of OAR 845-006-0047(1)(c), knowing, as the manager did, that the increased volume was interfering with someone's normal living activities. *EJ's*, OLCC-00-V-083, May 2001.

The standard for excessive noise in ORS 471.329(1)(a) (exceeds local noise ordinance) does not apply to alleged violations of ORS 471.425(2) (maintain noisy establishment) and/or OAR 845-006-0047(2)(a) (permit noisy activities). When the 1999 Oregon legislature promulgated ORS 471.329(1)(a), it specifically set the standard for excessive noise under ORS 471.315(1)(c) and ORS 471.313(5). Rules of statutory construction do not allow judicial expansion of ORS 471.329 to extend its definition/standard to ORS 471.425(2) and OAR 845-006-0047(2)(a). *Italian Riviera Restaurant*, OLCC-00-V-059, April 2001.

Bass music vibrations that are "felt" rather than "heard" are covered by the prohibition against noisy activities under OAR 845-006-0047(1)(c). *Italian Riviera Restaurant*, OLCC-00-V-059, April 2001.

Licensee did not "permit" noisy activity on the night in question because licensee and her employees did not have actual knowledge that the recorded music played at the licensed premises was disturbing a neighbor until after the recorded music was finished. The Commission declined to infer such knowledge from prior noise interventions where prior complaints by neighbors misidentified the premises from which the noise emanated; licensee's employees made efforts to find the source of the disturbing music noise, soundproofed the building, and monitored the noise level in patrolling the parking lot; licensee's employees immediately took action to stop escaping music noise by soundproofing the air vents when they discovered air vents had been left open during repair work. Because licensee and her employees did not know that the recorded music was disturbing a neighbor that evening, they could not take additional steps to prevent or control the activity. *Yun's Garden*, OLCC-98-V-034, February 1999.

Licensee permitted noisy activities where loud music prevented a neighbor from going to sleep and where OLCC inspectors had talked with licensee or licensee's employees on three occasions prior to this incident regarding loud music. *Punjab Tavern*, OLCC-92-V-088, June 1993.

In order to show that licensee "maintained" a noisy establishment, the evidence must prove that licensees "permitted" noisy activities in a sufficient number of instances to show a continuity of such activities. One incident of noise was not sufficient to prove a violation. *Don Juan's Mexican Cuisine*, OLCC-89-V-169, September 1990.

C.1.j.

C. VIOLATIONS

C.1.j. Noisy Activities (ORS 471.425(2), OAR 845-006-0347(1)(b), (2)(a)) (continued)
[(ORS 471.425(2), OAR 845-06-047(1)(c), (2)(a))]

Licensees maintained a noisy establishment where licensees had knowledge that the music was loud enough to interfere with neighbor's normal living activities because the volume of music was such that it would have been evident to persons working in the establishment, and where licensees failed to take reasonable steps to control the music noise. Even though licensees were in the process of remodeling to reduce sound, music from the premises interfered with a neighbor's sleep. *Don Juan's Mexican Cuisine*, OLCC-89-V-169, September 1990.

A licensee had knowledge of noisy activities in his parking lot and, therefore, permitted the noisy activities where neighbors had complained to licensee about such noise during the previous two years and where the noise was loud enough that it should have been evident to licensee's employee. *Don Juan's*, OLCC-88-V-003, May 1988.

Licensee's violation for permitting noisy activities was not mitigated by the fact that the premises was located in a dense residential neighborhood. Licensee had responsibility to prevent activity that would be noisy to that neighborhood. *Don Juan's*, OLCC-88-V-003, May 1988.

OAR 845-06-045(2), prohibiting noisy conduct on the licensed premises, is not unconstitutionally vague. *Stagecoach Saloon*, OLCC-85-V-035, October 1986.

Licensee maintained a noisy establishment where noise from music at the licensed premises interfered with sleep, drowned out normal TV volume sound and was loud enough to be disturbing to nearby residents in their homes. *Stagecoach Saloon*, OLCC-85-V-035, October 1986.

Licensee maintained noisy establishment when music noise regularly disturbed residents of hotel located in same building as licensee, regardless of fact that licensee's lessor refused to install noise insulation. *Mediterranean Tavern*, January 1984.

C. VIOLATIONS

C.1.k. Lewd Activities (ORS 471.425(2), (2)(a)) (continued)
[(ORS 471.425(2), OAR 845-06-047(1)(b), (2)(a)), OAR 845-006-0347(1)(b)]

Oregon law which makes it a crime to direct, manage, finance, or present a live public show in which participants engage in sexual conduct violates the free expression rights guaranteed by Article I, section 8, of the Oregon Constitution and does not fall under a well-established historical exception to the constitutional prohibition on enactment of such laws. *State v. Ciancanelli*, 339 OR 282, 121 P.3d 613 (2005).

A law is unconstitutional on its face if it is directed, by its terms and its actual focus, on restraining a particular variety of expression and does not fall within a well-established historical exception to the prohibition against such laws in Article I, section 8 of the Oregon Constitution. The court will continue to use the *Robertson* framework to analyze restrictions on expression. The city ordinance that was struck down in this case prohibited nude dancers from being within four feet of patrons. *City of Nyssa v. Dufloth*, 339 OR 330, 121 P.3d 639 (2005).

To establish that an activity is protected by the Oregon Constitution, a licensee must first establish that the performance was intended as a form of expression. If so, then the conduct may be protected, unless it is sexual intercourse or masturbation, which may be prohibited in any event. If the activity was not intended as a form of expression, it is not protected by the constitutional provision. Based on the record, the Commission found that the dancers' conduct was not protected symbolic or communicative acts. *Pop-A-Top Pub*, OLCC-96-V-049, August 1997.

The Court of Appeals held that dancers were not employees, as defined in wage and hour laws. *State ex rel Roberts v. Acropolis McLoughlin Inc.*, 150 Or App 180, 945 P2d 647 (1997).

It is not necessary that the dancers be the licensee's employees, agents, or representatives for a violation of permitting lewd activities to be proved. A violation can be proved regardless of the dancer's employment status, for example, even if the dancers are independent contractors. *The Bank, Division Branch*, OLCC-94-V-046, April 1995.

The licensee permitted lewd activities where the dancers who were engaged in the lewd activities were licensee's employees. The employees had knowledge of the lewd activities because they were the persons engaged in the conduct. The knowledge of these employees is imputed by law to the licensee. *Sparkles Tavern*, OLCC-88-V-107, September 1989.

Activities were lewd where patrons touched the dancer's genital areas, dancers massaged their own genital areas, and a dancer sat in a male patron's lap. *Sparkles Tavern*, OLCC-88-V-107, September 1989.

Male patrons' touching of female dancers' genitals, and the dancers massaging their own genitals, was lewd. *Sandy Jug Tavern*, OLCC-87-V-022, OLCC-87-V-023, January 1988; affirmed without opinion *Sahli v. Oregon Liquor Control Commission*, 94 Or App 575, 767 P2d 934 (1989).

C.1.k.

C. VIOLATIONS

C.1.k. Lewd Activities (ORS 471.425(2), (2)(a)) (continued)
[(ORS 471.425(2), OAR 845-06-047(1)(b), (2)(a)), OAR 845-006-0347(1)(b)]

There was sufficient continuity to prove that licensee "maintained" a lewd establishment where lewd activity occurred on two different dates that were two months apart. *Sandy Jug Tavern*, OLCC-87-V-022, OLCC-87-V-023, January 1988; affirmed without opinion *Sahli v. Oregon Liquor Control Commission*, 94 Or App 575, 767 P2d 934 (1989).

The Commission construes ORS 471.315(1)(d) (maintained lewd establishment) and OAR 845-06-045(2) (permitted lewd activities) to prohibit only lewd activities that are not protected or communicative acts under Article 1, Section 8 of the Oregon Constitution, and that are otherwise within the Commission's proper regulatory authority over conduct in liquor-licensed establishments. *Sandy Jug Tavern*, OLCC-87-V-022, OLCC-87-V-023, January 1988; affirmed without opinion *Sahli v. Oregon Liquor Control Commission*, 94 Or App 575, 767 P2d 934 (1989).

The term "lewd" as used in ORS 472.180(5) is not void for vagueness. *Korgan v. OLCC*, 72 Or App 31, 695 P2d 81 (1985); *LaMar's Enterprises, Inc. v. OLCC*, 18 Or App 77, 524 P2d 336 (1974); *Palm Gardens, Inc. v. OLCC*, 15 Or App 20, 514 P2d 888 (1973).

OLCC may interpret the statutory term "lewd" either by rulemaking or in contested case order. *Korgan v. OLCC*, 72 Or App 31431, 695 P2d 81 (1985)

Lewd means lustful, indecent, lascivious or lecherous. Licensees maintained a lewd establishment where female patrons touched or caressed the buttocks or genital area of male dancers and the licensee made comments of a sexual nature to the audience. Milton and Carol Korgan, *The Chase Restaurant & Lounge*, June 1983.

There must be proof of more than a single incident to establish that lewd establishment is being "maintained." *Taylor's Coffee Shop v. OLCC*, 28 Or App 701, 560 P2d 693 (1977); *Palm Gardens, Inc. v. OLCC*, 15 Or App 20, 514 P2d 888 (1973); *Neptune's Restaurant v. OLCC*, 15 Or App 16, 514 P2d 900 (1973); *Starview, Inc. v. OLCC*, 15 Or App 11, 514 P2d 898 (1973).

C. VIOLATIONS

C1.I. Disorderly Activities (ORS 471.425(2), (OAR 845-006-0347(1)(a), (2)(a)) [(ORS 471.425(2), (OAR 845-06-047(1)(a), (2)(a))]

Based on one patron's specific warning to the bartender about the activity of a second patron, the bartender had knowledge that the second patron posed a threat of engaging in disorderly activity, but did not take effective steps to avoid the disorderly activity. The bartender therefore permitted the disorderly activity of the second patron which followed. *Cactus Bar & Grill*, OLCC-03-V-014, June 2004.

The Licensees violated both OAR 845-006-0047(2)(a)(permitting disorderly activities) and ORS 471.425(2)(maintaining a disorderly establishment.) The corporate principal assaulted his girlfriend in the restroom of the the licensed premises. In addition, there were four previous incidents in which the Licensee and his girlfriend fought inside the licensed premises. *Trail's Inn Restaurant & Lounge*, OLCC-00-V-033, November 2000

The Licensee did not permit disorderly activities where the manager was not on duty at the time of a brief fight between patrons, the bartender took action to stop the brief fight, and there was no evidence that a later assault on another patron occurred in the licensed premises or in areas the Licensee controlled or that the on-duty employee had any knowledge of the later assault. *Vera's*, OLCC-99-V-089, October 2000.

A licensee's responsibility for not permitting disorderly activities under this rule does not extend to an area that is down the street, around the corner, and further down a cross street. *Watertrough Saloon*, OLCC-94-V-030, December 1994.

The server did not permit disorderly activities where he intervened directly in a fight between patrons. The server did not permit disorderly activities where there was no warning that an assault would occur. *The Old Hitch'en Post Restaurant & Lounge*, OLCC-93-V-043, March 1994.

Permittee did not commit a violation of permitting disorderly activities under the following circumstances: permittee did not have reason to know that a fight was about to occur; when a fight started outside the premises he remained inside to help customers get out safely because he had reason to believe that his co-bartender was in control of the fight outside. *Portsmouth Club*, OLCC-93-V-034, October 1993.

C.1.I.

C. VIOLATIONS

C.1.I. Disorderly Activities (ORS 471.425(2), (OAR 845-006-0347(1)(a), (2)(a)) (continued) [(ORS 471.425(2), (OAR 845-06-047(1)(a), (2)(a))]

Licensees permitted disorderly activities where an off-duty licensee threatened an inspector and did nothing to prevent patrons from threatening the inspector. The on-duty licensee did not permit disorderly activities because she intervened when a patron attempted to harm the inspector. *Central Desert Inn*, OLCC-92-V-059, July 1993.

Licensee permitted disorderly activities where there was a threat of physical harm or actual physical harm occurred; licensee had knowledge of the conditions that resulted in the disorderly activities, and licensee did not take reasonable steps to prevent the disorderly activities. *Corral Pastime*, OLCC-89-V-165, June 1990.

Licensee permitted disorderly activities where police officers were approached in a threatening and hostile manner by licensee and licensee's customers. *Reston Red's Tavern*, OLCC-89-V-155, April 1990.

Licensee did not permit disorderly activities where the record was insufficient to show that the bartender had knowledge of the conditions that resulted in a fight between two patrons. The bartender was waiting on customers and she was not aware that there was a problem between the two patrons. When she became aware of the problem, she immediately took steps to do something about it, but she was too late. *Beaver's Inn*, OLCC-89-V-055, August 1989.

Permittee did not permit disorderly activities where, during a brief fight, permittee intervened directly in the fight rather than calling the police. *Reston Red's Tavern*, OLCC-89-V-059, August 1989.

Permittee was not relieved of her responsibility to take reasonable steps to control disorderly activity when the doorman took steps to prevent an actual fight but did not take steps to prevent threatening behavior. *Vickie Shafer*, OLCC-88-V-133, May 1989.

Licensee permitted disorderly activities where, during a short altercation, licensee failed to at least state to fighters that licensee would phone the police if fight did not stop. *Red Garter Family Pizza*, OLCC-88-V-057, January 1989.

Licensee did not permit disorderly activities where a fight occurred when licensee's employees were removing a patron from the premises. *Dublin Pub*, OLCC-88-V-068, December 1988.

Licensee argued that the term "disorderly premises" in ORS 471.315(1)(d) and other terms in OAR 845-06-045 were unconstitutionally vague, not that they could be applied only after being defined by agency rules. Because the issue of rulemaking was not raised below, the court did not consider it for the first time on appeal. [Citing] *Hughes v. Adult & Family Services*, 58 Or App 478, 484, 648 P2d 1324 (1982); *Marcoules v. OLCC*, 91 Or App 573, 756 P2d 661 (1988).

C.1.I.

C. VIOLATIONS

C.1.I. Disorderly Activities (ORS 471.425(2), (OAR 845-006-0347(1)(a), (2)(a))
(continued)
[(ORS 471.425(2), (OAR 845-06-047(1)(a), (2)(a))]

A bartender shouting to patrons to encourage them to interfere with a Commission inspector was a disorderly activity. *Frenchie's tavern*, OLCC-88-ES-001, June 1988.

An argument that involved two patrons shouting at each other angrily, with their fists clenched and raised, was disorderly activity. *Frenchie's tavern*, OLCC-88-ES-001, June 1988.

A licensee did not permit disorderly activities where a patron began firing a gun without any prior warning and the licensee's employees did not fail to take reasonable steps to prevent or stop the gun firing. *Don Juan's*, OLCC-88-V-003, May 1988.

A licensee permitted disorderly activities where the licensee had reasonable grounds to believe that patrons would be disorderly because the patrons had been disorderly in the premises before. *Don Juan's*, OLCC-88-V-003, May 1988.

A charge for the violation of ORS 471.315(1)(d) (maintained disorderly establishment) is not separate or discreet from the violation of OAR 845-06-045(2) (permitted disorderly activities) and OAR 845-06-045(3) (permitted criminal activities), because the two rules interpret the statute. *214 Tavern*, OLCC-87-V-045, December 1987; *Tacoma Cafe*, OLCC-86-ES-001, October 1986.

Licensee and permittee permitted and tolerated disorderly activity by serving a drink to a patron and failing to eject him after he had been fighting. *Lloyd's Cafe*, OLCC-86-V-041, January 1987.

Licensee participated in offensive physical contact on the licensed premises by pushing and shoving his co-licensee, by yanking the phone out of her hand so that she was struck in the temple by the receiver, and by pushing a customer in order to take a phone from her. *Trail's End Lounge & Cafe*, OLCC-86-V-055, January 1987.

To not be able to control a premises, and the patrons who enter, is to permit and tolerate the activity proscribed by OAR 845-06-045(2) and (4). John and Nota Marcoules, *Tacoma Cafe*, OLCC-86-ES-001, October 1986.

ORS 471.315(1)(d) (maintaining a disorderly establishment) is not unconstitutionally vague nor violative of the Oregon or U.S. Constitutions. John and Nota Marcoules, *Tacoma Cafe*, OLCC-86-ES-001, October 1986.

OAR 845-06-045(2), which proscribes the licensee from permitting or tolerating boisterous conduct, etc., is not vague because it is capable of being consistently administered. The Commission maintains a digest of contested case opinions, and any deviation from prior treatment must be identified and rationally explained. Contested case orders are also reviewed and adopted or amended by the five OLCC Commissioners. John and Nota Marcoules, *Tacoma Cafe* OLCC-86-ES-001, October 1986.

C.1.I.

C. VIOLATIONS

C.1.I. Disorderly Activities (ORS 471.425(2), (OAR 845-006-0347(1)(a), (2)(a))
(continued)
[(ORS 471.425(2), (OAR 845-06-047(1)(a), (2)(a))]

Licensee permitted threatening or disorderly conduct by grabbing inspector's arm in attempt to wrest evidence from him, failing to stop employee from also grabbing inspector's arm, and by failing to take steps to stop threats made to the inspector outside the premises. Sherman F. and Zelda Egger, *Town & Country Tavern*, OLCC-85-V-047, April 1986.

By serving alcohol to individuals who had just assaulted another patron, bartender indicated permission and tolerance of physical assault. Richard and Sunya Porter, *Porterhouse*, October 1984.

When licensee sells drinks at greatly reduced price, dangerous conduct by patrons is foreseeable. *Ollison v. Weinberg Racing Assoc.*, 69 Or App 653, 688 P2d 847, (1984).

"Permit" means to expressly assent to or to agree to something. "Disorderly conduct" requires a showing of more than merely strong or even angry words. Floyd W. Zimmerman, *Shamrock Tavern*, January 1983.

In order to show licensee "maintained" lewd or disorderly establishment, OLCC must prove more than one incident. *Taylor's Coffee Shop v. OLCC*, 28 Or App 701, 560 P2d 693 (1977); *Palm Gardens, Inc. v. OLCC*, 15 Or App 20, 514 P2d 888 (1973); *Starview, Inc. v. OLCC*, 15 Or App 11, 514 P2d 898 (1973).

C.1.I.

C. VIOLATIONS

C.1.m. Unlawful Activity at Licensed Premises (OAR 845-006-0347(3)) [(OAR 845-06-047(3), [OAR 845-06-045(3)])]

The Commission relies upon its authority in ORS 471.030, 471.040, and 471.730(1) & (5) for adoption of OAR 845-006-0347(3). In these statutes, the Commission is given broad authority to make rules to regulate the operation of premises that serve or sell alcoholic beverages. This broad grant of authority provides the necessary authority for promulgation of OAR 845-006-0347(3). *The Table*, OLCC-03-V-026, May 2004.

Between August 2002 and October 2002, the following unlawful activities occurred inside or immediately outside the licensed premises:

1. Four sales of marijuana (3 sales by an on-duty employee; 1 sale by a non-employee who obtained the marijuana from inside the premises, and transacted the sale in the presence of an employee)
2. Marijuana and cocaine were confiscated from inside the premises, admitted to be that of an employee, and under the employee's constructive possession.

The commission concluded that Licensees permitted these five unlawful activities. *Dekum Market*, OLCC-03-V-002, August 2003.

The sidewalk immediately outside and adjacent to the licensed premises was an area controlled by Licensees. Licensees exercised control over the area by undertaking to keep the sidewalk free of loiterers. Licensees had a history of monitoring the sidewalk area outside the *Dekum Market* store, which also could be observed from inside the premises by way of plate glass windows. *Dekum Market*, OLCC-03-V-002, August 2003.

Cancellation of the license is the appropriate penalty for licensees permitting unlawful activities associated with the sale or possession of drugs within a 2-month period, particularly where Licensees know drug sales occurring just outside the premises and drug paraphernalia was being sold at the premises. Licensees were not vigilant in making efforts to prevent or control illegal activity in or around their store. *Dekum Market*, OLCC-03-V-002, August 2003.

As a matter of law, the Commission cannot sanction a licensee for a violation of OAR 845-006-0047(3)(a) (permitted an unlawful activity) when the alleged unlawful activity was a crime that was committed on the licensed premises and there has been no conviction (at the time of the motion to dismiss, Licensees had been cited criminally and were pending trial). This is because where the unlawful activity is commission of a crime on the licensed premises, the authority for sanctioning licensees is ORS 471.315(1)(a)(I), not ORS 471.315(1)(a)(A). Upon a motion for a legal ruling, the charging documents were dismissed without prejudice, pending disposition of the criminal prosecution. *Best Buys Food Market, et al*, OLCC-00-V-077 et seq., Ruling, January 2001.

License restrictions were inadequate to control unlawful activity where a co-licensee conducted numerous illegal drug sales on the licensed premises. *Don Juan's Mexican Restaurant*, OLCC-94-V-002, October, 1994.

C.1.m.

C. VIOLATIONS

C.1.m. Unlawful Activity at Licensed Premises (OAR 845-006-0347(3)) (continued) [(OAR 845-06-047(3), [OAR 845-06-045(3)])]

The Commission concluded that licensees committed a violation of permitting unlawful activities when an incident of someone drinking in the parking lot occurred. The Commission concluded licensees had reasonable grounds to know about persons drinking in the parking lot from the prior warnings they had received about others drinking in their parking lot. *Capital Market*, OLCC-92-L-003, May 1993.

It is not necessary to prove that licensees had actual knowledge of the unlawful activity to prove a violation of permitting unlawful activities. *El Mirador Mexican Restaurant*, OLCC-91-V-150, May 1992. The Commission has concluded that there is the requisite knowledge where the licensee has reasonable grounds to know of the unlawful activity and failed to take steps to prevent or control it. *Capital Market*, OLCC-92-L-003, May 1993.

Generally, a licensee's knowledge of an illegal activity is proved by showing that the licensee or on-duty employee knew of the specific illegal activity charged. Nevertheless, where there is an on-going criminal enterprise in the licensed premises, the Commission has found the licensee had knowledge of the illegal activity where the licensee knew about the ongoing criminal enterprise by a specific person, but did not know about the specific illegal act charged. *El Mirador Mexican Restaurant*, OLCC-91-V-150, May 1992.

Licensee permitted unlawful activities on the premises where she had actual knowledge of the unlawful drug sale and did nothing to prevent it. *Rastafarian Private Club*, OLCC-90-V-085, April 1991.

The Commission concluded licensee did not permit criminal activities on the premises where:

- a) the employee who committed the drug sale was not on duty;
- b) there was no charge that any on-duty employees permitted the activity; and
- c) licensee did not have any knowledge of the drug sale.

Trapper's Lodge, OLCC-90-V-066, January 1991.

A licensee's statement that he would not tolerate a repeat of criminal activity on the premises did not constitute a reasonable effort to control the activity. *The Winema*, OLCC-90-V-117, May 1990.

A licensee permitted criminal activity when two of his employees knowingly used methamphetamine on the premises while they were on duty serving alcoholic beverages. *The Winema*, OLCC-90-V-117, May 1990.

A licensee permitted criminal activity when an employee, who served alcohol and who was on duty, observed a cook use marijuana on the premises and did not take any action to control the activity. *The Winema*, OLCC-90-V-117, May 1990.

C.1.m.

C. VIOLATIONS

C.1.m. Unlawful Activity at Licensed Premises (OAR 845-006-0347(3)) (continued) [(OAR 845-06-047(3), [OAR 845-06-045(3)])]

The Commission imposed a lesser penalty than cancellation on a permittee who engaged in illegal drug activity on a licensed premises, where the permittee did not engage in the sale of the illegal drug to others on the premises. However, the Commission noted it may reconsider this policy in future cases. *Samuel E. Waller*, OLCC-89-V-069, November 1989.

Licensee failed to take reasonable steps to prevent or control a patron's criminal activities at the licensed premises. Even though the licensee informed the district attorney and the Commission of the patron's activities and the licensee told the patron to take the patrons criminal activities outside, the licensee allowed the patron to continue the activities in the premises' parking lot for over one year and took no steps to bar the patron. *Spigot Tavern*, OLCC-89-V-022, September 1989.

When the licensee's employee who engaged in criminal conduct was not on duty or otherwise acting on behalf of the licensee, the licensee was not responsible for the off-duty employee's criminal act. *Reston Red's Tavern*, OLCC-89-V-058, August 1989.

Where the licensee's employee is engaged in the criminal conduct, the Commission need not consider whether the wrongdoer took steps to prevent their own wrongful act. *Jiggles*, OLCC-88-V-004, August 1988.

"Permitting" involves two elements. First the evidence must prove that the licensee had knowledge of the proscribed activity. The Commission may infer knowledge where the nature of the proscribed activity was such that it would have been evident to persons working in the establishment. The Commission may impute to the licensee the knowledge of the licensee's employees. *Taylor's Coffee Shop v. OLCC*, 28 OR App 701, 706, 560 P2d 693 (1977). Second, the evidence must prove that the licensee failed to take reasonable steps to prevent or control the proscribed activity. *Tacoma Cafe*, OLCC-86-ES-001, October 1986; *Don Juan's*, OLCC-88-V-003, May 1988.

ORS 471.770 confers automatic immunity from subsequent criminal prosecutions for witnesses who testify pursuant to an OLCC subpoena on a matter that is the subject of the criminal prosecution. *State v. Strance*, 95 Or App 488, 769 P2d 793 (1989).

Licensee did not permit criminal activity where someone other than licensee's employee committed the criminal activity and neither licensee nor his employees had knowledge of the activity. *Satyricon*, OLCC-88-V-060, December 1988.

The charge that licensee committed criminal activity on the licensed premises was dismissed where the activity took place in the office of the premises. The clear language of the statute provides that "licensed premises" refers only to the area where refreshments or food are served. The licensee's office is not an area where refreshments or food are served. *Parker's Place*, OLCC-88-V-035, October 1988.

C.1.m.

C. VIOLATIONS

C.1.m. Unlawful Activity at Licensed Premises (OAR 845-006-0347(3)) (continued) [(OAR 845-06-047(3), [OAR 845-06-045(3)])]

The Commission has amended and renumbered its criminal activity rule several times. [OAR 845-06-045(2)(c) effective July 1, 1986 to March 31, 1987; OAR 845-06-045(3) effective April 1, 1987, to current.] The correct version of the rule for the violation charged is the version of the rule that was in effect on the date of the incident charged. *Parker's Place*, OLCC-88-V-035, October 1988.

The most common limitation on employer liability under the doctrine of respondeat superior is that the intentional act must have been undertaken with the intent of furthering the business purposes of the employer, however misguided that intent might seem. Court did not impose tort liability on a hospital for the criminal conduct of an employee outside the scope of employment. *G.L. v. Kaiser Foundation Hospitals, Inc.*, 306 Or 54, 757 P2d 1347 (1988).

Licensee permitted criminal activity on the licensed premises where the licensee was convicted of Promoting Gambling in the Second Degree on the licensed premises. The "knowingly" element of the criminal offense established that the licensee "permitted" the criminal activity. *Gold Hill Tavern & Restaurant*, OLCC-87-V-050, February 1988; *Sportsman Tavern*, OLCC-87-V-051, March 1988.

Neither ORS 472.180(5), OAR 845-06-045(2), (3), which proscribe lewd activity and criminal activity, nor any other provision of the Liquor Control Act, forbids or allows nude dancing or nudity in establishments that serve liquor. Thus, Portland City Ordinances proscribing such activity are not superseded or repealed by virtue of the Act or regulations. *Sekne v. City of Portland*, 81 Or App 630, 726 P2d 959 (1986).

Licensees permitted criminal conduct to occur on the licensed premises where, over the course of an evening, licensees' employee committed numerous violations of a criminal statute prohibiting sexual conduct in a live public show. *Red's Side Track*, September 1981.

C.1.m.

C. VIOLATIONS

C.1.n. Operating During Prohibited Hours (OAR 845-006-0425)) [(OAR 845-06-030)]

OAR 845-006-0030(1) does not include “permitting” as an element of the violation. A violation of OAR 845-006-0030(1) occurs when alcoholic beverages are dispensed, served, or consumed on a licensed premises by anyone after authorized hours. Licensees are held responsible for violations of this rule whether or not they “permitted” the act. See *McAnulty & Barry’s*, OLCC-93-V-048, October 1993. Similarly, “allowing” the act need not be proven in order to hold Licensee responsible for the violation. *Balzer’s Pub & Grill*, OLCC-99-V-019, March 2001.

Evidence was insufficient to show patrons were served or consumed alcoholic beverages after 2:30 a.m. where at 2:45 a.m. the juke box was on, there were four dirty glasses on a corner counter, and there were four persons in the back bar area. Service permittee did violate this provision by consuming beer behind the front bar after 2:30 a.m. *Coot’s Blue Tin Tavern*, OLCC-88-V-029, November 1988.

Licensee violated OAR 845-06-030(1) where its employee stole beer and removed the beer from the premises after 2:30 a.m. *The Pink Elephant*, OLCC-88-V-054, November 1988.

Licensee did not violate OAR 845-06-030(1) as a result of licensee's employee consuming alcohol in an upstairs office area after 2:30 a.m., where the office was not open to the public, was not part of a hotel, and food and refreshments were not served to the public in that area. *The Peacock Tavern*, OLCC-88-V-048, October 1988.

The Commission concluded that a customer, who was sitting at the bar with a cold can of beer and a glass of beer in front of him at 2:50 a.m., consumed beer after 2:30 a.m. because it is unlikely that he would not have consumed some beer between 2:30 and 2:50 a.m. *River Road House*, OLCC-88-V-018, June 1988.

The Commission concluded that permittee dispensed and served herself a beer after 2:30 a.m. because at 2:50 a.m., her beer was almost completely full and was cold to the touch, and she admitted that she had opened a can of beer to drink while cleaning up. The evidence was not sufficient to prove that the permittee served the customer after hours where, at 2:50 a.m., the customer's beer was two-thirds empty, indicating that customer may have been served his beer prior to 2:30 a.m. *River Road House*, OLCC-88-V-018, June 1988.

Licensee's argument that alcoholic beverages were sold between 2:30 a.m. and 7:00 a.m. to employees and friends, rather than the general public, was not a defense to charges of operating during prohibited hours. Terry L. Loeser, *The Amber Inn*, OLCC-85-V-014, July 1985.

C.1.n.

C. VIOLATIONS

C.1.o. Hindering Investigation

C.1.o.1. Failure to Phone Police (OAR 845-006-0345(2))
 [(OAR 845-06-045(2), [OAR 845-06-045(4)])]

The licensee violated OAR 845-06-045(4) where there was no reason why he could not have called the police immediately. Licensee called within a few minutes of the request. *Bill's Place*, OLCC-88-V-001, July 1988.

The evidence failed to establish a violation of failure to call the police where the record showed the employee did not hear the inspector's first request that she call the police; and, the employee did call the police after hearing the inspector's second request. *Trapper's Lodge*, OLCC-90-V-068, December 1990.

C.1.o.
C.1.o.1.

C. VIOLATIONS

C.1.o.2. Destruction of, or Refusal to Provide, Evidence (OAR 845-006-0345(3))
 [(OAR 845-06-045(3), [OAR 845-06-045(5))]]

Licensee's attempt to grab evidence from inspector's hand constituted an attempt to destroy, damage, alter, remove or conceal potential evidence. Sherman F. and Zelda Egger, *Town & Country Tavern*, OLCC-85-V-047, April 1986.

RMB licensee hindered OLCC investigation by pouring unauthorized liquor into sink.
Hoehne v. OLCC, 37 Or App 621, 588 P2d 87 (1978).

C.1.o.2.

C. VIOLATIONS

C.1.o.3. Failure to Admit Inspector/Police Officer (OAR 845-006-0345(4)) [(OAR 845-06-045(4), [OAR 845-06-045(6)]]

The Commission found that Licensee did not commit a violation of ORS 845-006-0045(4)(a) (access to premises) when Licensee told enforcement officers to leave the premises while officers were citing Licensee's wife. This section of the rule prohibits a licensee from asking an officer to leave before the officer has had an opportunity to conduct a reasonable search to ensure compliance with the alcoholic beverage laws. The Commission concluded that this section of the rule was not violated where no search was being contemplated or conducted. *Three Seven Market*, OLCC-99-V-099, September 2000.

Violation for refusing investigator request to examine business records was mitigated where licensee was under the sincere, albeit incorrect, belief that the Commission was required to give 72 hours notice before examining records and where licensee's intent was simply to have the investigator wait to look at the records until the licensee arrived. The licensee was expected to arrive momentarily. *A & Q Distributing Company, Inc., A & Q Distributing Company*, January 1984.

It was not a violation of OAR 845-06-045(6) (requirement to promptly admit OLCC personnel) to refuse to admit OLCC until police arrived, where licensee had been burglarized several times and the police arrived five minutes after inspectors demanded entry. Dennis L. Heilig, *Petticoat Junction*, July 1983.

ORS 472.170 (authorizing Commission inspectors to examine at any time the books and premises of a licensee) is not unconstitutional as a warrantless search. *Eddie's Supper Club v. OLCC*, 23 Or App 493, 543 P2d 19 (1975).

C.1.o.3.

C. VIOLATIONS

C.1.o.4. Physical Interference (ORS 471.675)

The licensee did not physically interfere with the investigation where the licensee grabbed the inspector's arm to get his attention and ask for identification. The record did not show that the licensee intended to interfere with the investigation. *Central Desert Inn*, OLCC-92-V-059, July 1993.

Licensee's attempt to grab beer glass from inspector's hand was not excused by licensee's desire to prevent inspector from carrying open container outside, where inspector had identified himself and said that he was seizing the glass as evidence. Shur-Cut Forest Products, Inc., *Candy Store Tavern*, OLCC-86-V-053, February 1987.

Licensee's grabbing of inspector to attempt to stop him from leaving tavern and to attempt to grab evidence from inspector was a violation of ORS 471.675. Sherman F. and Zelda Egger, *Town & Country Tavern*, OLCC-85-V-047, April 1986.

C.1.o.4.

C. VIOLATIONS

C.1.p. Improper Food Service (OAR 845-006-0460, -0461, -0462, -0463, -0464, -0465, -0466, -0467, -0468, -0469)
[OAR 845-06-032; [OAR 845-08-015(2), (3), (4), and (6)]]

Food service rules are consistent with legislative direction regarding licensing and regulating commercial establishments and are within statutory authority. The ALJ's proposed order had said that OLCC's food service rules exceeded the Commission's statutory authority. *Felipe's Finest Mexican & Seafood Restaurant*, OLCC-06-V-016, February, 2007.

While the food services requirement of OAR 845-006-0460(3) is directed to "businesses," licensees with Full On-Premises sales licenses violate the rule when, as a business, they do not make available at least five different substantial minimum food items prepared on the licensed premises. Because a service permittee can be sanctioned for any act which would constitute a violation if performed or permitted by a licensee, (ORS 471.385(1)(c)), a permittee may also be cited for a violation of this rule, especially, as in this case, where such food items were made available by the Licensee, but not offered by Permittee. *Linda Lee Estes*, OLCC-02-V-006 & 007, August 2002.

Because ORS 471.385(1)(c) authorizes penalizing for any act that would be a violation if performed or permitted by a licensee, a permittee may also be cited for a violation of OAR 845-006-0466(3) (requiring Full On-Premises Sales licensees to make food service menus available to patrons), especially where, as in this case, Licensee made menus available but they were not offered by the Permittee. *Linda Lee Estes*, OLCC-02-V-006 & 007, August 2002.

There is no requirement in OAR 845-08-015 that regular meals be served in any particular place. When the dining room was not open, but the evidence failed to prove that meals were not available in the bar area, the Commission did not find a violation.

"Discouraging" meal service means that the employee hindered the patron from ordering regular meals by attempting to dissuade him from ordering regular meals. *Union Club*, OLCC-88-V-113, May 1989.

There is no requirement in OAR 845-08-015 that regular meals be served in any particular place. When the dining room was not open, but the evidence failed to prove that meals were not available in the bar area, the Commission did not find a violation. "Discouraging" meal service means that the employee hindered the patron from ordering regular meals by attempting to dissuade him from ordering regular meals. *Union Club*, OLCC-88-V-113, May 1989.

Failure to operate as proposed under OAR 845-08-015(6) refers specifically to food service. Evidence that the doors to the restaurant were locked, without evidence of what food service was available elsewhere inside the premises, was not sufficient to prove a violation of OAR 845-08-015(6). *PNJ's Tippin Inn*, OLCC-88-V-040, January 1989.

C.1.p.

C. VIOLATIONS

C.1.p. Improper Food Service (OAR 845-006-0460, -0461, -0462, -0463, -0464, -0465, -0466, -0467, -0468, -0469) (continued)
[OAR 845-06-032; [OAR 845-08-015(2), (3), (4), and (6)]]

OAR 845-08-015(6) requires that a licensee provide the number of meals, hours of meal service, and type of cuisine last approved. However, the rule does not require that meal service be provided in any particular portion of the premises. Evidence that the dining room was closed was not proof, by itself, of a violation of this provision where licensee may have been providing approved meal service in other portions of the premises. *PNJ's Tippin Inn*, OLCC-88-V-040, January 1989.

Licensee violated OAR 845-08-015(6) when licensee proposed that it would be open and serving lunch from noon until 3 p.m., but failed on four occasions to be open and serving lunch at times between noon and 3 p.m. *The Frontier*, OLCC-87-V-052, March 1988.

Licensee violated OAR 845-08-015(3)(a) because licensee had only one hot dish available to patrons. The fact that licensee had sufficient food supplies on hand to meet minimum food service requirements was not sufficient to overcome the violation because the employee on duty failed to offer the food to the patron or tell the patron that the food was available. The fact that licensee had sufficient food supplies on hand and intended to provide minimum food service was a basis for mitigation. *J.B.'s Paradise Room*, OLCC-87-V-005, July 1987.

It is not a defense that the licensee had food available on the licensed premises that would have met the minimum requirements of OAR 845-08-015(3)(a), where the licensee's employee failed to tell undercover officers about the food. The employee's actions rendered the food items unavailable. *REB Corporation, Miller's Cave*, OLCC-86-V-069, February 1987.

Although licensee had instructed employee to provide regular meals, the licensee was guilty of failure to provide regular meals where licensee did not have sufficient employees on duty to prepare the meals. *Patricia J. Williams, Patty Jean's*, OLCC-85-V-037, January 1986; *Marracco, Inc., Pink Pearl Restaurant & Lounge*, OLCC-85-V-026, September 1985.

A hamburger basket and chicken basket do not constitute a "variety of regular meals" because hamburgers are not regular meals as defined under OAR 845-08-015(2)(b) and one regular meal alone is not a variety of regular meals. *North's Restaurants, Inc., Fred's Good Times*, OLCC-85-V-001, OLCC-85-V-002, April 1985.

Tacos are not "regular meals" as defined in OAR 845-08-015(3). Tacos are in the nature of a sandwich rather than a complete meal. *Il Trovatore Restaurant, Inc., Annah's Corner*, February 1984.

Service of unpalatable food and preparation of food in a microwave oven not a violation of minimum food service rule. *Haviland Hotels v. OLCC*, 20 Or App 105, 108, 530 P2d 1257 (1975).

"Stewart sandwich" held not to constitute providing "regular meals." *Haviland Hotels v. OLCC*, 20 Or App 115, 117, 530 P2d 1261 (1975).

C.1.p.

C. VIOLATIONS

C.1.p. Improper Food Service (OAR 845-006-0460, -0461, -0462, -0463, -0464, -0465, -0466, -0467, -0468, -0469) (continued)
[OAR 845-06-032; [OAR 845-08-015(2), (3), (4), and (6)]]

OLCC regulation requiring that a commercial establishment provide regular meals during usual business hours when such meals are regularly served and provide short orders or other cooked foods at other times is not void for vagueness. *Haviland Hotels v. OLCC*, 20 Or App 115, 530 P2d 1261 (1975).

The Commission has the authority to promulgate a regulation requiring that a dispenser outlet must sell at least 25 percent food. *Van Ripper v. OLCC*, 228 Or 581, 365 P2d 109 (1961).

C.1.p.

C. VIOLATIONS

C.1.q. Failure to Maintain or Produce Records (OAR 845-006-0435) [(OAR 845-06-071 [OAR 845-08-010])]

Licensee's failure to provide monthly privilege tax reports was a violation of ORS 473.070. The sanctions provided in ORS Chapter 473 for violation of the privilege tax reporting requirements do not provide for a suspension of licensee's winery license or a fine. ORS 473.080 allows the Commission to impose a tax on unpaid privilege taxes, and ORS 473.990 provides criminal sanctions for failure to comply with the privilege tax reporting requirements. *La Casa De Vin*, OLCC-87-V-004, July 1987.

Licensee's failure to provide monthly privilege tax reports was not a violation of OAR 845-10-170(4) because the reporting requirements of that rule do not relate to the privilege tax reporting requirements of ORS 473.070. *La Casa De Vin*, OLCC-87-V-004, July 1987.

Licensees have failed to maintain records where records were kept so haphazardly as to fail to reliably report food sales. Gerold L. Hodges and Marcia R. Buck, *Maynard's Place*, OLCC-85-V-018, November 1985.

OAR 845-08-005 requires a licensee to both maintain records and have such records available for inspection by the Commission. In this case, the Commission found the licensee in violation despite the fact that the licensee maintained the records, because the licensee failed to reasonably communicate to the Commission inspector where the records could be found. Roberto and Benita Davila, *Davila's Mexican Food Restaurant*, August 1984.

Violation for refusing investigator's request to examine business records was mitigated where licensee was under the sincere, albeit incorrect, belief that the Commission was required to give 72 hours notice before examining records on a licensed premises and the licensee's intent was simply to have the investigator wait to look at the records until the licensee arrived. The licensee was expected to arrive momentarily. A & Q Distributing Company, Inc., *A & Q Distributing Company*, January 1984.

Commission's staff recommended that an application be refused because applicant neglected or refused to provide a written lease. The Commission concluded that, as there was no written lease, applicant could not be said to have neglected or refused to provide one. Copper Still, Inc., *Copper Still Eating and Gathering Place*, October 1983.

"Depletion allowance reports," a will, a trust document, invoices, and a notification to the OLCC of a change in corporate officers do not come within the requirement of OAR 845-10-170(5) pertaining to maintenance and production of records. Al C. Giusti Wine Company, Inc., *Al C. Giusti Wine Company*, February 1983.

ORS 472.170 (authorizing Commission inspectors to examine at any time the books and premises of a licensee) is not unconstitutional as a warrantless search. *Eddie's Supper Club v. OLCC*, 23 Or App 493, 543 P2d 19 (1975).

C.1.q.

C. VIOLATIONS

C.1.r. Failure to Reopen Premises (OAR 845-006-0481) (OAR 845-06-105)

The Commission found mitigation where the licensee's failure to reopen or submit a written request for further closure was due more to oversight or negligence than an attempt to disregard the Commission's requirement that closures of dispenser outlets be authorized. Jack and Kaye Briggs, *The Towne House*, March 1984.

Licensee's failure to reopen by Commission deadline, after a six-month closure, constituted a failure to reopen. Love's Enterprises, Inc., *Love's*, November 1983.

C.1.r.

C. VIOLATIONS

C.1.s. Unapproved Change in Operation (OAR 845-006-0480) [(OAR 845-06-100, OAR 845-08-015(6))]

Failure to notify OLCC of menu changes is an on-going violation that continues as long as the menu changes are in effect. *Dad's Restaurant & Lounge*, OLCC-06-V-029, December, 2007.

Food service violation and failure to notify OLCC of changes in food service do not need a separate penalty where the license is cancelled on other grounds, but it does provide additional grounds to cancel or not renew the license. *Felipe's Finest Mexican & Seafood Restaurant*, OLCC-06-V-016, February, 2007.

The subject licensed premises consisted of a lounge (Number II minor posting) separated from a restaurant (Number III minor posting) by a waiting room and hallway. Licensee removed four booths and constructed a parquet floor in a portion of the restaurant without OLCC approval. Subsequently, Licensee submitted a revised Operating Data Questionnaire, with the request to hold all age dancing with live bands on weekends in the restaurant area of the premises (after restaurant closed). Following OLCC's formal denial of permission to hold all-age dances, Licensee honored a contractual commitment and held two within days of the denial.

Licensee was charged, in the alternate, with a violation of ORS 471.405(1), sale in manner other than the license permits and OAR 845-006-0100(2)(b), changing the principal use of any room or area without prior OLCC permission. Because there was no proof that alcoholic beverages were sold or offered for sale at the dances, a necessary element, the Commission concluded that Licensee did not violate ORS 471.405(1). The Commission concluded that Licensee violated OAR 845-006-0100(2)(b) by changing the principal use of her dining room to hold two all-age dances on two dates, after approval from the OLCC had been denied. *Yen Ha Coast*, OLCC-99-L-005, May 2000.

The Commission has concluded that a premises failed to operate as proposed where the premises was not open and not serving lunch on four occasions during hours approved by the Commission. *The Frontier*, OLCC-87-V-052, March 1988.

A licensee who originally represented a certain banquet room capacity is not required to continually have that number of tables and chairs set up in the banquet room when banquets are not taking place. As long as the licensee is able to seat the number of banquet guests originally represented and has the room available for banquet use, the licensee meets the requirements of OAR 845-06-100(5). *Stansby Way Corporation, Willey's Restaurant and Dance Hall*, February 1984.

C.1.s.

C. VIOLATIONS

C.1.t. Connections Between Wholesalers and Retailers

C.1.t.1. Tied-House (ORS 471.394(2), ORS 471.396(2)(a)) [[([ORS 471.455]; ORS 471.394(2); ORS 471.396(2)(a))]]

A tied-house violation exists where a wholesaler loans, or sells on credit, a cooler to a retailer. Gardner Enterprises, Inc., *Coca Cola Bottling*, OLCC-85-V-071, April 1987.

C.1.t.
C.1.t.1.

C. VIOLATIONS

- C.1.t.2. Financial Assistance (ORS 471.398, ORS 471.400(3), OAR 845-006-0365, OAR 845-013-0020 and other rules)
[[([ORS 471.465], OAR 845-06-065 [OAR 845-10-121 through 10-131
Renumbered - See Rules], OAR 845-13-020)]

OAR 845-006-0365, which implements ORS 471.398 (prohibiting financial assistance by wholesalers to retailers), is a valid exercise of the Commission's authority. *Savannah Restaurant & Catering*, OLCC-04-V-058, March 2005.

Licensees issued checks to three different liquor agencies on six separate occasions and those checks were returned NSF. By the plain language of OAR 845-006-0365(4), each time Licensees issued an NSF check, they violated the rule. The Commission therefore concludes Licensees violated OAR 845-006-0365(4) six times. The Commission found that a three-day license suspension or \$495 fine for violation of OAR 845-006-0365(4) would be the standard penalty for a first Category V violation, and a Letter of Reprimand was appropriate in this case because the license had already expired. *Savannah Restaurant & Catering*, OLCC-04-V-058, March 2005.

Licensees issued three NSF checks to a wine wholesaler and three NSF checks to malt beverage wholesalers on the dates alleged by OLCC. Each time Licensees issued an NSF check, they violated OAR 845-006-0365(1). *Savannah Restaurant & Catering*, OLCC-04-V-058, March 2005.

OAR 845-10-127, effective January 1, 1987, exceeded the intent and scope of the enabling statute, ORS 471.465, which was in effect at the time the rule was adopted. However, amendments to ORS 471.465, which became effective on September 22, 1987, now provide the necessary statutory authority for the rule. *Administrative Rule Review Report No. 7608*, by the Legislative Council, September 18, 1987.

A financial assistance violation occurs where a wholesaler loans or sells on credit a cooler to a retailer. Gardner Enterprises, Inc., *Coca Cola Bottling*, OLCC-85-V-071, April 1987.

The financial assistance statutes and regulations apply to non-alcoholic products that a wholesaler provides a retailer. Gardner Enterprises, Inc., *Coca Cola Bottling*, OLCC-85-V-071, April 1987.

Licensee violated OAR 845-06-065(1) where he refused to honor check he issued to wholesale licensee in payment for malt beverage and wine. Eldon Wayne P. Hoyt, *Hoyt's Boulevard Cafe*, OLCC-85-V-054, February 1986.

The Commission's price-posting rule (OAR 845-10-210) advances the anti-discriminatory thrust of Article 1, Section 39(2), of the Oregon Constitution, by ensuring that beer and wine prices will be the same for all retailers. *Miller v. OLCC*, 42 Or App 555, 600 P2d 954 (1979).

C.1.t.2.

C. VIOLATIONS

C.1.u. Wholesaler Delivery to Unlicensed Premises (ORS 471.235)

ORS 471.235 lists the exclusive privileges of a wholesale malt beverage and wine license. The salvage sale of more than 55 gallons of wine to a non-licensee is not listed as a type of sale allowed under ORS 471.235 and thus was a sale in a manner other than the license permits. Potter Distilleries, Inc., *Potter Distilleries, Inc.*, OLCC-84-V-042, March 1985.

The Commission concluded that delivery of beer by a market research company to homes of participants is not an illegal delivery to an unlicensed premises by a wholesaler because the market research company was not an agent of the wholesaler or manufacturer. Miller Brewing Company, *Miller Brewing Company*, May 1984.

Wholesaler delivery to unlicensed premises not excused, despite fact that retailer's employee said at time of delivery that license was current, where wholesaler failed to check retailer's license certificate. Miller Brands, Inc., *Miller Brands, Inc.*, November 1983.

C.1.u.

C. VIOLATIONS

C.1.v. Private Club Sale to Nonmember (OAR 845-008-0045(2)) [(OAR 845-08-045(2))]

DB licensee's sale of alcohol to person who is not a member or guest held to be sale to person other than license permits, in violation of ORS 472.310(1). Elks, Inc., BPO Condon Lodge No. 1869, *Elks Club*, No. 1869, May 1984.

There is a general and valid prohibition against private clubs serving alcohol to nonmembers. *Corvallis Lodge No. 1411 v. OLCC*, 67 Or App 15, 667 P2d 76 (1984).

Licensee was charged with allowing a person other than a member or a guest to purchase and consume distilled spirits on the licensed premises. Although the Commission concluded that a violation had occurred, the violation was excused because the only person served who was not a member or guest was an OLCC inspector who had indicated to the Elks employees that he was there to attend a party. Elks BPO No. 336, *Elks Club*, April 1983.

C.1.v.

C. VIOLATIONS

C.1.w. Prohibited Advertising (OAR 845-007-005(3)) [(OAR 845-07-005)]

Two of the Commission's purposes in regulating advertising of alcoholic beverages are to minimize misuse and encourage moderation in the use of alcoholic beverages. OAR 845-07-005(1)(a) and (b). Licensee violated OAR 845-07-020 by using the phrase "happy hour" in a newspaper advertisement where the evidence showed that both food and alcoholic beverages were sold at reduced prices during the advertised period. The Commission concluded that the advertisement promoted misuse and discouraged moderation. *Murphy's Oyster Bar & Grill*, OLCC-87-V-008, July 1987.

C.1.w.

C. VIOLATIONS

- C.1.x. Unauthorized Alcoholic Beverages Sold or Offered for Sale in a Manner other than the License Permits Licensee to Sell (ORS 471.405, OAR 845-006-0345(6))
[(ORS 471.405, [ORS 472.310(1)], OAR 845-06-045(6), [OAR 845-06-045(8)]]

OLCC inspectors' lack of personal consumption does not excuse or otherwise negate the fact that licensee's employees violated the restriction on serving more than one drink per patron. The violation occurred when licensee's employees served the inspectors alcoholic beverages for personal consumption, without any requirement that alcoholic beverages actually be consumed. The restriction is focused on allowing a patron to *have* more than one drink that is available for that patron's personal consumption, not on whether the patron actually consumes the drink. (Emphasis original) *Bettie Ford's*, OLCC-06-V-021, OLCC-06-L-006, June, 2007. Amended Final Order on Reconsideration *Bettie Ford's*, OLCC-06-V-021, OLCC-06-L-006, August, 2007.

By finding that any substantial failure to comply with restrictions on the license is a violation of ORS 471.405(1), the Commission has broadly interpreted the phrase "sell[ing] or offer[ing] for sale any alcoholic beverage in a manner other than the license permits the license to sell" to mean "*operating* in a manner other than the license permits." Notwithstanding the Commission's broad interpretation of this provision, ORS 471.405(1) cannot reasonably be read to regulate business operations or activities on the licensed premises other than the sale or offering for sale of alcoholic beverages. For a violation of ORS 471.405(1) to arise out of licensee's failure to comply with a restriction on the license, the prohibited conduct must involve selling alcoholic beverages in a manner other than the licensee is permitted to sell. Licensee's failure to contact the police in the event of a fight on the premises or licensee's failure to have the requisite number of managers or security personnel at a particular time does not necessarily mean that licensee sold or offered for sale alcoholic beverages in a manner other than the license permits. *9 Ball Sports Bar*, OLCC-05-V-020, June, 2006.

The four *Oceanside* factors are considered in evaluating whether a breach or breaches of a condition or restriction is/are substantial, such that cancellation is warranted. The fourth factor - whether the hardship the restriction causes a licensee outweighs the importance the restrictions has in ensuring licensee's compliance with alcoholic liquor laws - requires an analysis of the condition or restriction imposed on the license. This factor weighs in favor of cancellation where the breach strikes at the very heart of the condition placed on the license, as the licensee would not be a good risk for compliance with alcoholic beverage law without the condition. *La Macarena*, OLCC-00-V-116, August 2002.

Where Licensee breached two terms of his settlement agreement in substantial fashion, Licensee has violated ORS 471.405(1). The terms of the settlement agreement, including utilizing a minimum number of security personnel and ensuring employees had service permits, were conditions placed on the license. *La Macarena*, OLCC-00-V-116, August 2002.

Where violation of dancing restriction was not substantial, no violation of ORS 471.405(1) occurred. *Cisco & Pancho's*, OLCC-99-V-080-ES, September 2000.

C.1.x.

C. VIOLATIONS

- C.1.x. Unauthorized Alcoholic Beverages Sold or Offered for Sale in a Manner other than the License Permits Licensee to Sell (ORS 471.405, OAR 845-006-0345(6))
(continued)
[(ORS 471.405, [ORS 472.310(1)], OAR 845-06-045(6), [OAR 845-06-045(8)]]

The subject licensed premises consisted of a lounge (Number II minor posting) separated from a restaurant (Number III minor posting) by a waiting room and hallway. Licensee removed four booths and constructed a parquet floor in a portion of the restaurant without OLCC approval. Subsequently, Licensee submitted a revised Operating Data Questionnaire, with the request to hold all age dancing with live bands on weekends in the restaurant area of the premises (after restaurant closed). Following OLCC's formal denial of permission to hold all-age dances, Licensee honored a contractual commitment and held two within days of the denial.

Licensee was charged, in the alternate, with a violation of ORS 471.405(1), sale in manner other than the license permits and OAR 845-006-0100(2)(b), changing the principal use of any room or area without prior OLCC permission. Because there was no proof that alcoholic beverages were sold or offered for sale at the dances, a necessary element, the Commission concluded that Licensee did not violate ORS 471.405(1). The Commission concluded that Licensee violated OAR 845-006-0100(2)(b) by changing the principal use of her dining room to hold two all-age dances on two dates, after approval from the OLCC had been denied. *Yen Ha Coast*, OLCC-99-L-005, May 2000.

Licensee violated a restriction prohibiting her from allowing her former husband to work in the licensed business, when husband was observed performing tasks on the licensed premises on 8 occasions in 2 months. The Commission concluded that mitigation of penalty short of cancellation was appropriate as Licensee did not want her former husband working on the premises and asked him not to do so, but did not press the matter because of fear of assault by him; former husband did not commit any violations of liquor laws during the time he worked; Licensee has had no previous violations during the six years she has been licensed at the premises; following the events constituting the violation, Licensee obtained a restraining order against her former husband; and Licensee has since enforced the restraining order and her former husband was jailed. *A Taste of Thai*, OLCC-99-V-015, February 2000.

Licensees committed a violation of ORS 471.405(1) because Mr. Crabtree drank alcoholic liquor on the premises when there was a restriction on the license prohibiting him from drinking on the premises. *Crabtrees Pub & Deli*, OLCC-96-V-037, March 1997.

ORS 471.405(1). The Commission canceled the license where the licensee drank alcoholic liquor on multiple occasions in violation of a restriction on his license that he not consume alcoholic liquor. The Commission concluded that by drinking in violation of the restriction on the license, the licensee sold alcoholic liquor in a manner other than the license permits. *Idle Hour Tavern*, OLCC-94-V-085, January 1996.

C.1.x.

C. VIOLATIONS

- C.1.x. Unauthorized Alcoholic Beverages Sold or Offered for Sale in a Manner other than the License Permits Licensee to Sell (ORS 471.405, OAR 845-006-0345(6))
(continued)
[(ORS 471.405, [ORS 472.310(1)], OAR 845-06-045(6), [OAR 845-06-045(8)]]

The Commission canceled the permit of a permittee who drank alcoholic liquor in violation of a restriction prohibiting him from consuming, in spite of significant good cause factors which included two years of abstinence and recommendations from his alcohol treatment counselor, employer, and probation officer. In making the decision to cancel the permit, the commission concluded that the violation was substantial because the service permit would not have been granted to permittee in the first place without the restriction that he abstain from consuming alcoholic liquor and that the requirement of abstinence went to the heart of the restriction. The Commission also considered the fact that persons were injured by permittee in a traffic accident that resulted when permittee drove after drinking the alcoholic liquor. *John E. Schuberg*, OLCC-94-V-064, April 1995.

A permittee who consumes alcoholic liquor in violation of a restriction on his permit that he not consume commits a violation of ORS 471.405(1) for selling alcoholic liquor in a manner other than the license permits. *John E. Schuberg*, OLCC-94-V-064, April 1995.

Licensee violated ORS 472.310(1), selling alcoholic liquor other than as authorized, when he violated a license restriction. The restriction required him or an approved manager to be on the licensed premises during the hours the premises were open to the public. *Lung Fung*, OLCC-92-V-012, February 1993.

The Commission has concluded that a licensee's failure to comply with a restriction on the license may be considered a sale in a manner other than the license permits, in violation of ORS 471.405(1). *Strawberry Fields*, OLCC-85-L-022, December 1985. The Commission concluded licensee violated ORS 471.405(1) because licensee had only one employee on duty instead of two as required by a restriction on his license. *Donn's Den*, OLCC-89-V-099, December 1989.

Licensee's failure to comply with a license restriction that she will not consume alcoholic beverages on the licensed premises violated ORS 471.405(1). Licensee sold or offered for sale alcoholic liquor in a manner other than the license permits because at a time the premises was open for business, licensee was performing an act prohibited by the restriction. *Union Gap Tavern*, OLCC-89-V-005, April 1989.

Neither package store nor restaurant licenses allow the sale of 15-gallon kegs for off-premises consumption. *Howard's Northwest Deli*, OLCC-88-V-101, February 1989.

Licensee did not sell wine only for consumption on his premises where licensee failed to take reasonable steps to ensure customers would not take wine from the premises to consume. *Drive N' Save Markets*, OLCC-87-V-049, March 1988.

RMB licensee committed violation for unauthorized alcoholic beverages on the licensed premises where there was distilled liquor on the premises. *Pub Tavern*, OLCC-87-V-016, November 1987.

C.1.x.

C. VIOLATIONS

- C.1.x. Unauthorized Alcoholic Beverages Sold or Offered for Sale in a Manner other than the License Permits Licensee to Sell (ORS 471.405, OAR 845-006-0345(6))
(continued)
[(ORS 471.405, [ORS 472.310(1)], OAR 845-06-045(6), [OAR 845-06-045(8)]]

Winery licensee violated ORS 471.405 where she had signs inside the premises and an advertisement in a local newspaper promoting the sale of beer at the premises. *Valley View Vineyards*, OLCC-87-V-014, November 1987.

Winery licensee violated OAR 845-06-045(6) [Now (8)] because she had beer on the premises in a reach-in cooler. *Valley View Vineyards*, OLCC-87-V-014, November 1987.

C.1.x.

C. VIOLATIONS

C.1.y. Violation of Restrictions on License (OAR 845-005-0355(5))

Where there are two separate violations charged, Oceanside factors must be applied to each violation because the substantiality of the separate restriction violation directly impacts the penalty to be imposed. *Dad's Restaurant & Lounge*, OLCC-06-V-029, December, 2007.

Licensee's employee was aware of the restrictions and voluntarily and intentionally stacked drinks in at least one instance by serving a couple with three drinks. In another instance, Licensee's employee served a second drink to an undercover inspector who already possessed a can of beer, without checking whether the beer had been consumed. Voluntarily serving the second drink without insuring adherence to the anti-stacking restriction constitutes a willful violation of the restriction by the bartender. Finally, voluntarily free pouring drinks without insuring adherence to the 1.0 ounce limit for distilled spirits constitutes a willful violation of the restriction by the bartender. See *Bettie Ford's* (OLCC-06-V-021, OLCC-06-L-006, August, 2007). Further, these violations occurred after Licensee had received notice from the Commission for the previous violations of the same restriction, a circumstance that goes toward demonstrating willfulness. See *Garcia's Gas & Mini Mart* (OLCC Final Order, 04-V-005) October 2004. *Dad's Restaurant & Lounge*, OLCC-06-V-029, December, 2007.

Where restrictions prohibited license applicant from selling certain products and licensee removed those products from the cooler and shelves but left them in boxes on the floor and customers were allowed to take them out of the boxes and purchase them license applicant made the products available for purchase. Keeping the items in the store was a willful act as was making them available for sale. While license applicant did not intentionally and knowingly sell the products in violation of the restriction, she willfully failed to prohibit those sales from taking place. The violation of the restriction was then willful in the analysis of factors described in *Oceanside Restaurant & Lounge*, OLCC-87-L-014, February 1988. *JR's Convenience Store*, OLCC-06-V-084, December, 2007.

In applying the Oceanside factors to determine whether a violation is substantial, the violation of restrictions, even if they were the result of negligence rather than willful conduct, would still weigh against licensee and cancellation would be the appropriate penalty. Here the violation occurred after licensee received notice of prior violations which goes towards willfulness. *Bettie Ford's*, OLCC-06-V-021, OLCC-06-L-006, June, 2007. Amended Final Order on Reconsideration *Bettie Ford's*, OLCC-06-V-021, OLCC-06-L-006, August, 2007.

C.1.y.

C. VIOLATIONS

- C.1.z. Failure to Maintain Bond or Insurance (ORS 471.155, ORS 471.168; OAR 845-005-0400)
[Failure to Maintain Bond (ORS 471.210(1) and (2))
Failure to Maintain Insurance (OAR 845-05-100(1) and (2))]

WMBW licensee did not submit monthly reports or pay privilege tax to OLCC. Licensee's bond was cancelled and he continued to operate for six months. Licensee had no excuse for his failure to comply with OLCC rules and had not responded to the Commission's attempts to help him comply. Cancellation is this appropriate penalty in this situation. *Maestro Wines*, OLCC-06-V-024 and OLCC-06-V-081, March 2007.

No Liquor Liability Insurance. Licensees committed a violation of OAR 845-05-100(1) and (2) because they failed to have liquor liability insurance for an approximate six-month period. The record showed that Licensees had insurance, but their insurance policy was canceled by their insurance company, and Licensees did not obtain new insurance companies until six months later. The Commission concluded that mitigation of the penalty was appropriate because Licensees made good faith efforts to comply because they had obtained the required insurance coverage before the violation, the policy was canceled against their wishes by the insurance company, and Licensees attempted to obtain coverage after their policy was canceled but were not able to find coverage for six months. The Commission concluded that this was a basis to mitigate the penalty from cancellation to a suspension or fine. *Evil Sister Saloon*, OLCC-97-V-012, October 1997.

It is not a defense to the violation of failing to maintain a bond where licensee's bond ended on September 22, 1988, and licensee obtained a new bond on October 31, 1988, that was retroactive to September 22, 1988, because licensees failed to keep the bond in existence. However, the fact that the bond was retroactive was a basis for mitigation. *Jonicle Vineyards*, OLCC-89-V-065, September 1989.

Licensees violated ORS 471.210(1) because when licensees' Assignment of Cash Certificate expired, licensee did not make another deposit for the next license year. *Century Home Wines*, OLCC-88-V-105, May 1989.

Licensee failed to maintain its bond where it neither held the required \$1,000 bond nor obtained an acceptable equivalent. *Nehalem Bay Wine Co.*, OLCC-88-V-081, December 1988.

C.1.z.

C. VIOLATIONS

C.1.aa. Unauthorized Exercise of License Privileges (OAR 845-05-060)

Licensees violated OAR 845-05-060 when licensees' license expired and licensees continued to serve alcoholic beverages during a two-week period before they submitted a renewal application. *Alpine Restaurant & Deli*, OLCC-88-V-139, May 1989.

C.1.aa.

C. VIOLATIONS

C.1.bb. History of Serious and Persistent Problems (ORS 471.315(1)(c)) [ORS 472.180(1)(k)]

With a history of 23 serious incidents over a two-year period and five additional non-serious incidents, a subsequent four-month period without incidents is insufficient to prove that the problems were not persistent over the two-year period. The number of incidents over the two-year period established a history of serious and persistent problems. *Felipe's Finest Mexican & Seafood Restaurant*, OLCC-06-V-016, February, 2007.

Obtrusive or excessive noise is a specific example of a "serious" problem that can give rise to a violation of ORS 471.315(1)(c). Noise from inside the licensed premises violated ordinances of the City of Salem as excessive noise on eleven occasions. Pursuant to ORS 471.329(1)(a), these eleven instances of excessive noise within a 10-month period are to be counted among those comprising a history of serious and persistent problems. *DiMarco's Restaurant aka Club Miami*, OLCC-04-V-043, OLCC-04V-062, October 2005.

The Commission proved a licensed premises had a history of serious and persistent problems where the record established 11 excessive noise violations at the licensed premises over the course of 10 months, nine disturbances involving violence or the threat of violence in 13 months, and at least three other instances of unlawful activity, including interfering with police officers inside the premises on two occasions and public drunkenness linked to Licensees' establishment. *DiMarco's Restaurant aka Club Miami*, OLCC-04-V-043, OLCC-04V-062, October 2005.

Licensees' on-duty security personnel were involved in five of the nine disturbances at the licensed premises. Although security staff may have acted appropriately in seeking to eject disruptive patrons from the licensed premises, they did not act appropriately by beating and injuring patrons in the course of doing so. These incidents show that Licensees' security staff tended to escalate problematic situations rather than diffuse them. They do not demonstrate an ability to control problems at the premises during the time period in issue. *DiMarco's Restaurant aka Club Miami*, OLCC-04-V-043, OLCC-04V-062, October 2005.

A history of serious and persistent problems was found to exist at the licensed premises. Licensee demonstrated a willingness and ability to control the licensed premises and patrons' behavior in the immediate vicinity of the premises based on the following: (1) the relative number of problem incidents constituting the history of serious and persistent problems that arose from Licensee's appropriate steps to deal with problem persons; (2) the steps licensee has taken since the most recent serious incident to control future problems; and (3) Licensee's 24-year compliance history as it evidences the willingness and ability to control problems at the premises. *New Copper Penny Restaurant*, OLCC-04-V-040, October 2005.

C.1.bb.

C. VIOLATIONS

C.1.bb. History of Serious and Persistent Problems (ORS 471.315(1)(c)) (continued) [ORS 472.180(1)(k)]

In less than seven months, there were eight incidents at the licensed premises involving violence or threat of violence directed toward persons. Four incidents involved fights inside the premises. Four incidents involved intoxicated persons and altercations and/or the threat of violence against persons outside the premises. Fights, altercations and public drunkenness are specific examples of "serious" problems set out in ORS 471.315(1)(c). Four incidents arose out of Licensee's security staff taking appropriate steps to deal with problem persons by denying them entry or reentry into the licensed premises, these incidents still count as related to the sale or service of alcohol under the exercise of the license privilege. A fifth incident, involving the death of a patron arose out of security's attempt to control the premises rather than a shooting or stabbing among patrons, but it occurred due to the criminally negligent conduct of Licensee's security. Each of these instances is appropriately considered as evidence of a history of serious and persistent problems. *New Copper Penny*, OLCC-04-V-040, October 2005.

In addition to continuation of existing security practices (dress code, security camera/surveillance system, recording of all persons entering the premises, photographing of the identification cards of all patrons, searches of patrons upon entry, employment of DPSST certified security staff, clearly identifiable security personnel), Licensee made significant changes to its operation after the last incident. Licensee changed its radio advertising practice, discontinued live music events, modified its hours on weekends, and developed a new late-night food menu to offer more food during the late night hours. *New Copper Penny*, OLCC-04-V-040, October 2005.

A lack of warning or verbal instruction after a specific incident does not mean that that the Commission does not or can not consider the incident to be a serious problem for purposes of establishing a history of serious and persistent problems. There were nine serious problems at the premises over a six and a half month period; the ninth incident was a fatal stabbing. Police were involved in all of the incidents. Prior to the relevant time period the commission had met with the licensee numerous times, given verbal instructions, and helped formulate a compliance plan. *Helena's Place*, OLCC-04-V-024, June, 2005

A history of serious and persistent problems was found to exist at Licensees' premises. Licensees then sought to demonstrate a willingness and ability to control the premises. The Commission concluded that where Licensees had previously agreed in writing to implement three successive compliance plans over three years, but had not implemented many parts of the plans, Licensees were found to be unwilling to control the premises if allowed to reopen following an emergency suspension. Licensees had also not established an ability to control the problems. The license was cancelled. *Formosa Café*, OLCC-02-V-016, October 2002.

The Commission concluded that the nature and number of problems demonstrated a history of serious and persistent problems where, in addition to 13 incidents or violations between 1991 - 1999 established in a settlement agreement, there were an additional eight serious incidents in a ten-month period in 2000. Counted among the eight serious incidents are violations charged separately in the instant charge letter and proven at the same hearing. *La Macarena*, OLCC-00-V-116, August 2002.

C.1.bb.

C. VIOLATIONS

C.1.bb. History of Serious and Persistent Problems (ORS 471.315(1)(c)) (continued) [ORS 472.180(1)(k)]

The Commission further disavowed the rationale in *La Linda's*, OLCC-95-L-021ES, June 1996, to the extent the rationale relies upon precedent (i.e., *Dublin Pub*, OLCC-88-V-068, December 1988) related to the compliance violation of permitting disorderly activities, to determine which incidents should be counted to establish a history of serious and persistent problems. *The Hydrant*, OLCC-00-L-006, Amended Final Order, October 2001.

The Commission resolved, for the future, conflicts in precedent regarding the treatment of those incidents resulting from a licensee's appropriate steps to deal with problem persons by refusing them service and/or by removing them from the licensed premises, when assessing a history of serious and persistent problems. The Commission adopted the approach taken by it in *Cisco & Pancho's*, OLCC-99-V-080ES, September 2000; and overruled *La Linda's*, OLCC-95-L-021ES, June 1996, *La Brisa*, OLCC-95-L-018/-V-009, December 1996, and any progeny of either, to the extent inconsistent with the *Cisco & Pancho's* approach. Consistent with the *Cisco & Pancho's* approach, the Commission intends to count all incidents resulting from a licensee's appropriate steps to deal with problem persons (by refusing them service and/or by removing them from the premises) among those incidents comprising a history of serious and persistent problems. Each incident will be weighed according to its seriousness, as determined by the presence or absence of violence or the threat of violence directed toward persons (serious) or property (less serious). These security efforts will be considered in evaluating willingness and ability to control the problems associated with the licensed premises. *The Hydrant*, OLCC-00-L-006, Amended Final Order, October 2001.

Where, in a violation case based on a history of serious and persistent problems (Category I), Licensee's willingness and ability to adequately control the premises (mitigation) and the extensive nature and degree of efforts to prevent violations were noted, the Commission mitigated the penalty from cancellation to a \$975 fine or a license suspension of 15 days. *300 Club*, OLCC-99-V-060, April 2001.

Approximately 20 incidents occurred over a 12 month period. Of these, 14 involved violence or the threat of violence. In these 14 serious incidents, 5 injuries occurred. There were approximately 4 additional incidents that were not of a serious nature. This record of incidents is sufficient to establish a history of serious and persistent problems at the licensed premises. *300 Club*, OLCC-99-V-060, April 2001.

Incidents listed in "background" section of charging document will not be considered among those alleged incidents comprising the history of serious and persistent problems, absent notice and adequate proof. *Balzer's Pub & Grill*, OLCC-99-V-019, March 2001.

C.1.bb.

C. VIOLATIONS

C.1.bb. History of Serious and Persistent Problems (ORS 471.315(1)(c)) (continued) [ORS 472.180(1)(k)]

The Commission concluded there was a history of serious and persistent problems where the record showed five incidents within six months, including two fights outside the licensed premises, an assault on a security guard and the display of a gun by a patron denied entry to the premises, an assault and robbery upon a waitress by patrons inside the premises, and a visibly intoxicated patron on the street outside the premises. The two fights outside the premises and the assaults on Licensees' staff by patrons distinguished this history from a series of less serious incidents. The Commission concluded that the number and severity of incidents at Balzer's established a history of serious and persistent problems pursuant to ORS 471.315(1)(c). *Balzer's Pub & Grill*, OLCC-99-V-019, March 2001.

There was a history of serious and persistent problems when the record showed that 18 incidents, including 10 serious incidents, occurred inside the licensed premises or involved patrons in the immediate vicinity within 15 months. Eight of the 18 incidents were serious in that they involved violence or the threat of violence, including a homicide inside the premises. Two of the ten were serious because they involved minors. Eight less serious incidents occurred during the same time frame, involving visibly intoxicated persons in the vicinity who drank at the premises (5), property damage, theft, and a patron throwing food at Licensee. Licensees did not show they had the willingness and ability to control the premises and patrons' behavior in the immediate vicinity and that mitigation was warranted. Licensee's efforts to control the premises prior to the emergency suspension were ineffective. Serious incidents persisted. Following the emergency suspension, Licensee made certain changes to the business in an attempt to draw a different clientele; none, however, were adequate to address the serious security problems involving physical violence and the threat of violence which occurred within the licensed premises. *Cisco & Pancho's*, OLCC-99-V-080ES, September 2000.

Incidents of visibly intoxicated patrons in the vicinity of the premises should be counted among serious and persistent incidents, but given little or lesser weights because of lack of certain causal links between public drunkenness and Licensee's establishment. *Cisco & Pancho's*, September 2000.

Under ORS 471.315(1)(c), "unlawful activities" may be counted for determining whether serious and persistent problems exist, independent of whether a licensee "permitted" the unlawful activity. The Commission will consider whether a licensee "permitted" the unlawful activities found for purposes of ORS 471.315(1)(c) in determining willingness and ability to control the premises. *Cisco & Pancho's*, September 2000.

C.1.bb.

C. VIOLATIONS

C.1.bb. History of Serious and Persistent Problems (ORS 471.315(1)(c)) (continued) [ORS 472.180(1)(k)]

During an 18-day period, ten sales of cocaine or heroin were made by patrons on the licensed premises of *Tequila Peppers* to other patrons. The manager observed one of these transactions and another employee observed two of these transactions. They were thus aware that drug trafficking was occurring on the premises. Licensee and employees of the premises did not take any effectual action to reduce or halt the drug sales. The record established that heroin and cocaine use presents a serious danger to the public health and safety. The Commission concluded that the number of unlawful activities involving sales of cocaine and heroin establishes that the premises has a history of serious and persistent problems involving drug sales, in violation of ORS 471.315(1)(c). *Tequila Peppers Bar & Grill* and *Pepita Express*, OLCC-99-V-011-ES & OLCC-99-L-012, December 1999.

The Commission issued a letter of reprimand to a former licensee due to a history of serious and persistent problems with illegal drug sales. *Tequila Peppers Bar & Grill* and *Pepita Express*, OLCC-99-V-011-ES & OLCC-99-L-012, December 1999.

Ten drug sales by patrons on the licensed premises to undercover police officers or informants during an 18-day period is sufficient to constitute a "history" of unlawful activities. The Commission concluded that no definition of the terms "history" or "a history" refers to a defined period of time. The Commission determined that persistence of the unlawful activities over 18 days is a sufficient period of time to constitute "a history." *Tequila Peppers Bar & Grill* and *Pepita Express*, OLCC-99-V-011-ES & OLCC-99-L-012, December 1999.

There was a history of serious and persistent problems when the record showed that eleven incidents, including ten fights, occurred inside the licensed premises or involved patrons in the immediate vicinity within 10 months. The incidents were severe because several patrons were injured and because in one incident gun shots were fired inside the licensed premises when patrons and employees were present. Licensees did not show they had the willingness and ability to control the premises and patrons' behavior in the immediate vicinity and that mitigation was warranted. Licensee's compliance efforts were not effective and licensee failed to follow through on key elements of the compliance plan. Extremely serious incidents continued to occur, including a person leaving and reentering the premises with a gun and shooting into a crowd. On two occasions when police were investigating serious crimes at the premises, groups of patrons were hostile to the police officers and refused to leave the area as the officers had requested. *Mulligan's*, OLCC-99-V-045, August 1999.

The Commission concluded that the premises had a history of serious and persistent problems where there were 20 noise-related incidents within a nine-month period. *Trail Creek Tavern*, OLCC-94-V-003, August 1994.

In examining whether problems under ORS 471.315(3) are no longer serious and persistent, the Commission looked at activity during the time the license privileges were exercised, rather than what occurred when the licensed premises was closed. *Ace's Yellow Rose Saloon*, OLCC-91-V-051, September 1991.

C.1.bb.

C. VIOLATIONS

C.1.bb. History of Serious and Persistent Problems (ORS 471.315(1)(c)) (continued) [ORS 472.180(1)(k)]

The Commission concluded the premises had a history of serious and persistent problems pursuant to ORS 471.315(3) and canceled the license where there were unlawful drug sales and violent incidents involving physical harm and threats of physical harm. The Commission found that the licensee had not shown good cause to outweigh the denial criteria because she had committed crimes on the licensed premises. *Rastafarian Private Club*, OLCC-90-V-085, April 1991.

C.1.bb.

C. VIOLATIONS

C.1.cc. Failure to Pay State Taxes (ORS 305.385(4)(c) and (d))

Where the licensees did not file income tax returns, pay taxes due, or file appeals, the Commission suspended the licensees' RMB license under ORS 305.385(4)(c) and (d). *Primo's Place*, OLCC-92-V-058, September 1992.

C.1.cc.

C. VIOLATIONS

C.1.dd. Service of Alcohol without Food
[(472.100(4)(b))]

No Food Service. The Commission concluded that Licensee violated ORS 472.100(4)(b) (served alcoholic beverages without food service) where the record showed that, on two occasions, Licensees' employees served alcoholic liquor to customers without also serving them food. *San Jang*, OLCC-97-V-033, September 1997.

C.1.ee. Failure to Read / Sign and/or Retain Training Brochure (845-009-0130)
(OAR 845-006-0026(2), (5)(6))]

Licensees failed to have employees who sell alcoholic liquor read and sign a training brochure. That OLCC inspector offered to deliver copies of brochure as a favor to Licensees on an earlier occasion did not excuse Licensees' failure to procure them on their own and use them. *21st Street Quick Stop Market*, OLCC-97-V-025 and OLCC-97-V-060, August 1999.

C.1.dd.
C.2.ee.

C. VIOLATIONS

C.1.ff. Operating While Suspended ([OAR 845-006-0361])

To “permit” the service of alcoholic liquor during the period of time that the license is under suspension for purposes of OAR 845-006-0361, requires that licensee be aware of the activity. *Shanghai Restaurant*, OLCC-01-V-074, April 2002.

Where licensee did not notify all employees of the license suspension, beer was available for sale on the premises during the suspension period, and the beer sign was lit, licensee did not do what a reasonable person would do to make sure the sale of alcoholic liquor was stopped, he permitted the sale and service of alcoholic liquor during the period of license suspension. *Shanghai Restaurant*, OLCC-01-V-074, April 2002.

C.1.gg. Failure to Maintain Records (OAR 845-010-0170)

WMBW licensee did not submit monthly reports or pay privilege tax to OLCC. Licensee’s bond was cancelled and he continued to operate for six months. Licensee had no excuse for his failure to comply with OLCC rules and had not responded to the Commission’s attempts to help him comply. Cancellation is this appropriate penalty in this situation. *Maestro Wines*, OLCC-06-V-024 and OLCC-06-V-081, March 2007.

C.1.hh. Change in Corporate Structure Without Notice (OAR 845-006-0475)

Licensee’s assertion that OAR 845-006-0475 does not apply because the addition of John Tzantarmas as Secretary did not constitute a “change in an officer or director” is not persuasive. The term “change” means “different from what it is or from what it would be if left alone” and/or “to become altered or modified.” It also means “to transform” or “to replace with another.” Webster’s Unabridged Dictionary (1996) at 344. Licensee altered or changed its corporate structure in 1992 when John Tzantarmas became the secretary, a principal officer. Licensee therefore violated the Commission’s regulations in 1992 by failing to immediately notify the Commission in writing of this change. *New Copper Penny Restaurant*, OLCC-04-V-040, October 2005.

C.1.ff.
C.2.gg.
C.2.hh.

C. VIOLATIONS

C.2. Defenses

C.2.a. Estoppel

Licensees provided live music entertainment at their licensed premises. Between Fall 1998 and September 1999, a number of complaints of loud music noise were received by OLCC and the local sheriff. In October 1999, a notice was issued by OLCC, alleging that Licensee maintained a noisy premises in violation of ORS 417.425, or, in the alternative, that Licensees permitted noisy activities in violation of OAR 845-006-0047. A settlement agreement was entered into, based upon a draft OLCC policy on noisy premises (approved by the Commission in May 1999) which identified noise issues as a local concern subject to local noise ordinances. A second pending violation for noise was not pursued. The draft policy was subsequently adopted formally by the Commission in April 2000.

Some time later, OLCC determined that its policy on noisy premises would only apply to cases in which OLCC was seeking license cancellation due to a history of serious and persistent problems with noise under ORS 471.315(1)(c), and that it would not be used to regulate all noise; that it would still use the noise standard in OAR 845-006-0047(1)(c) for enforcement of that rule and ORS 471.425(2). Licensees again received a citation for excessive noise in May 2000. Among other defenses, Licensees asserted that OLCC was equitably estopped from finding a violation based on a definition of noise different from that in the settlement agreement, relied upon by Licensees to their detriment.

The Commission concluded that because Licensees were misled by the agency into believing the standard for excessive noise for all noise violations would be that of exceeding the local noise ordinance, and Licensees relied on good faith on that standard to their detriment, the Commission is equitably estopped from imposing a violation of OAR 845-006-0047(1)(c) based on the lower standard, until the Licensees receive clear written direction that OLCC is no longer defining noise, for all purposes, as a violation of the local ordinance, as stated in the settlement agreement. *Italian Riviera Restaurant*, OLCC-00-V-059, April 2001.

Where licensee relies upon faulty information provided by agency staff, but does not make a material change in his position because of that information, estoppel does not apply and the agency is not estopped from asserting the proposed penalty in the matter. *Blue Bird Tavern*, OLCC-96-V-045, January 1997.

Detrimental reliance for purposes of equitable estoppel requires a material change in position. It can include reliance on misleading information that results in the loss of a benefit. *Simons v. City of Portland*, 132 Or App 74, 84, 887 P2d 824 (1994). To prove estoppel, there must be evidence that the party asserting estoppel acted on the representations made and changed his or her position to his or her detriment by reason of the conduct of the party to be estopped. Id.

C.2.
C.2.a.

C. VIOLATIONS

C.2.a. Estoppel (continued)

Proof of intent to mislead is not a prerequisite to estoppel. Affirmative misconduct is not a prerequisite to the application of estoppel. The doctrine may be applied when conduct is misleading, even if it is innocent. It may be applied where an agency's action was not intended to be misleading, but was ambiguous enough to mislead a reasonable person. *Swift & McCormick Metal Processors v. Durbin*, 117 Or App 605, 845 P2d 931 (1993).

County is not estopped from enforcing a procedural requirement by its failure to advise petitioner of the requirement, which is set forth in an ordinance. *Breivogel et al. v. Washington County, et al.*, 117 Or App 195, 843 P2d 982 (1992).

The Commission was not estopped from revoking a license where the letter of authority to operate was issued in error. Estoppel did not apply because the element of knowledge of the facts was not present since the letter was issued by mistake. *La Brisa*, OLCC-91-L-037, December 1992.

The applicant is collaterally estopped from relitigating the facts surrounding her felony convictions because the issues underlying the convictions were fully litigated before a Circuit Court jury which found applicant guilty of the three felonies. *Hanson v. Dept. of Rev.*, 294 Or 23, 30, 653 P2d 964 (1982); *John O. Myshak*, OLCC-88-V-002, May 1988; *Loretta J. Clayton*, OLCC-88-SP-002, September 1988.

Licensee was estopped from arguing that her settlement agreement with the Commission was not valid because her husband had signed the agreement for her, where she acted as though she had signed the agreement and operated under the agreement. *First Avenue Market*, OLCC-87-V-040, July 1988.

The Commission's temporary PS license approval was not a final approval, and the applicant should not have relied on that approval, or the opinion of a liquor investigator, before making improvements to the marina. Consequently, the Commission would not be estopped from denying the application if it found that license refusal was appropriate. *Staff Jennings*, OLCC-87-L-009, February 1988.

A state agency may not be estopped from reneging on a commitment to take a certain action, where that action violated the agency's own rules. *Harsh Investment Corp. v. State Housing Authority*, 88 Or App 151, 744 P2d 588 (1987), rev. den. 305 Or. 273 (1988).

Equitable estoppel did not apply as a defense where the Commission advised a licensee that its practices were illegal as soon as the Commission discovered the licensee was committing the practices. *Gardner Enterprises, Inc., Coca Cola Bottling*, OLCC-85-V-071, April 1987.

Licensee's dismissal of a lawsuit without prejudice in reliance on Commission representation did not give rise to estoppel defense. The licensee's action was not detrimental, because the licensee had the opportunity to refile the lawsuit. *Gardner Enterprises, Inc., Coca Cola Bottling*, OLCC-85-V-071, April 1987.

C.2.a.

C. VIOLATIONS

C.2.a. Estoppel (continued)

Equitable estoppel will be applied against a state agency only if the person asserting it detrimentally relied on the agency's misleading conduct. *Employment Div. v. Western Graphics Corp.*, 76 Or App 608, 710 P2d 788 (1985).

The Commission is not estopped from disapproving a change in hours, even where the licensee has operated with the unapproved hours for two years and the Commission has renewed the license since the unapproved hours took effect, where there is no evidence that the Commission was specifically aware of, considered and approved the change in hours. Daniel P. Gallagher, and Mau and Cloutier, Inc., *Crab Pot*, OLCC-85-L-003, June 1985.

Ethics Commission not estopped by advice given by employee of another state agency to appellant, where statute provided procedure by which appellant could have requested an advisory opinion from the Ethics Commission. *Davidson v. Oregon Government Ethics Comm.*, 300 Or 415, 712 P2d 87 (1985).

Commission is not estopped from denying application of individual on grounds of past convictions, a list of which was submitted to License Division five years previously, even though applicant's license had been routinely renewed each year since the record was submitted. Family Zoo, Inc., *Family Zoo Tavern*, August 1984; Robert D. Hoblit, *Family Zoo Tavern*, July 1984.

Commission is not estopped to apply its rules even though staff member orally advised licensee to act in way that would be a rule violation. Licensee cannot reasonably rely on such an oral statement when rules, which licensees are imputed to know, state otherwise. Lola B. Ripa, *B & R Mercantile*, June 1984.

While equitable estoppel is applicable to governmental entities, it only applies to persons who, due to agency action, lose a benefit to which they otherwise would have been entitled. *Thrift v. Adult & Family Services Div.*, 58 Or App 13, 646 P2d 1358 (1982).

The grounds for equitable estoppel are generally as follows: (1) there must be a false representation; (2) it must be made with knowledge of the facts; (3) the other party must have been ignorant of the truth; (4) it must have been made with the intention that it should be acted upon by the other party; (5) the other party must have been induced to act upon it. *Shiloh Youth Revival Center v. Emp. Div.*, 44 Or App 81, 605 P2d 704 (1980).

OLCC is not estopped to revoke a license for violations of liquor laws merely because it renewed the license several days after the violations occurred. Licensee had no right to rely on license renewal to defeat enforcement of liquor laws. *Palm Gardens, Inc. v. OLCC*, 15 Or App 20, 514 P2d 888 (1973).

C.2.a.

C. VIOLATIONS

C.2.b. Laches

Where there was a substantial delay in the matter and witnesses crucial to a full and fair record were no longer available, the Commission determined that the charge should be dismissed. *Mountain View Market*, OLCC-91-V-119, August 1992.

Delay in notice to licensee was not unreasonable where the violation was issued approximately 6 weeks after the Commission received the complaint. Licensee did not show substantial prejudice where licensee had a full opportunity to cross-examine the witnesses and examine the documentary evidence, even though licensee did not personally recall the incident. *Alder Street Market*, OLCC-89-V-102, November 1989.

Commission was not barred by defense of laches from terminating agency agreement because agent submitted late deposits, the last of which occurred two years prior to the hearing. Agent had not taken any significant disadvantageous change in position since the Commission could have first asserted the late deposits as a termination ground. Further, the passage of time since the violations had not been shown to result in the loss of any critical evidence. Carl Shoemaker, *OLCC Agency No. 169*, OLCC-86-RO-003, March 1987.

The defense of laches has three elements: (1) the plaintiff must delay asserting his claim for an unreasonable length of time; (2) with full knowledge of relevant facts; (3) resulting in such substantial prejudice to the defendant that it would be inequitable to grant relief. *Rise v. Steckel*, 59 Or App 675, 652 P2d 364 (1982).

The harm or prejudice to a defendant necessary to the laches defense can be either a disadvantageous change in position or loss of witnesses or critical documentary evidence caused by plaintiff's delay. *Rise v. Steckel*, 59 Or App 675, 652 P2d 364 (1982).

C.2.b.

C. VIOLATIONS

C.2.c. Entrapment

Licensee was not subjected to “penalty entrapment” when OLCC did not notify licensee of two sales to minors until approximately five weeks after the second sale (and nine weeks after the first sale). Licensee asserted that this delay in notification prevented licensee from taking measures to avoid the second sale, resulting in a greater penalty for the two violations. *United Gas & Food Mart*, OLCC-01-V-047/-048, February 2002.

“Penalty entrapment” occurs when a defendant, although predisposed to commit a minor or lesser offense, is entrapped into committing a greater offense subject to greater punishment. The Commission determined that the elements of penalty entrapment had not been established: (1) Licensee was not entrapped; (2) Licensee did not commit a greater offense, because the offenses were the same; and (3) Licensee was not subjected to a greater punishment because OLCC charged both violations at the same, lower penalty level applicable to first violations due to the lack of intervention between the violations, rather than imposing the greater penalty allowed by the penalty rule for the second violation. *United Gas & Food Mart*, OLCC-01-V-047/-048, February 2002.

Relevant defenses to the crime of selling liquor to a minor include entrapment and outrageous conduct defenses. Under Oregon law, simply using decoys does not constitute entrapment. The use of decoys is a permissible method in the enforcement of criminal law. The use of decoys becomes invalid only when badgering or importuning takes place to an extent and degree that it is likely to induce an otherwise law abiding person to commit a crime. *Murrayhill Thriftway*, OLCC-98-V-027 and OLCC-98-V-046, April 1999.

Licensee was charged with allowing a person other than a member or a guest to purchase and consume distilled spirits on the licensed premises. Although the Commission concluded that a violation had occurred, the violation was excused because the only person served who was not a member or guest was an OLCC inspector who had indicated to the Elks employees that he was there to attend a party. Elks BPO No. 336, *Elks Club*, April 1983.

C. VIOLATIONS

C.2.d. Immunity

Under ORS 471.770, a person must assert her right not to testify without a grant of immunity and then be ordered to testify before she is entitled to statutory immunity. *7455 Inc. v. OLCC*. 310 Or 477, 800 P2d 781 (1990).

ORS 471.770 confers automatic immunity from subsequent criminal prosecutions for witnesses who testify pursuant to an OLCC subpoena on a matter that is the subject of the criminal prosecution. *State v. Strance*, 95 Or App 488, 769 P2d 793 (1989).

The Assistant Attorney General advised the Hearings Examiner that ORS 471.770 will operate to immunize a person only if the person is ordered to testify over a claim of privileges. Although the provider was subpoenaed to a deposition, testified there, and at the hearing, the provider never refused to testify. *William Strance, Alcohol Programs*, OLCC-87-MS-002, February 1988.

The AAG advised the Hearings Examiner that loss of provider certification is not a punishment, penalty, or forfeiture subject to the protection of ORS 471.770. *Jiggles*, OLCC-85-L-013, OLCC-85-V-016, February 1987, affirmed *7455 Inc. v. Oregon Liquor Control Commission*, 94 Or App 780, 767 P2d 116 (1989); affirmed on other grounds, 310 Or 477, 800 P2d 781 (1990); *J.J.'s*, OLCC-85-L-014, OLCC-85-V-017, February 1987. *William Strance, Alcohol Programs*, OLCC-87-MS-002, February 1988.

C.2.d.

C. VIOLATIONS

C.2.e Conflict of Interest

A violation of OAR 845-004-0001 is not intended by OLCC to provide an affirmative defense for a licensee to a Notice of Violation, but is to be used strictly as a basis for employment eligibility or discipline. *Cactus Bar & Grill*, OLCC-03-V-014, June 2004.

C.2.e

C. VIOLATIONS

C.3. Responsibility for Violation

C.3.a. Licensee v. Permittee/Employee

An employee's effort to conceal a service permit violation is not attributed to the licensee for penalty purposes, but it could be an aggravating factor in the service permit violation charge against the employee. In this case the employee did not have a service permit, told licensee and inspector that he had one, and gave the licensee a forged one. *H2O Martini Bar & Restaurant*, OLCC-06-V-014, December, 2006.

Where permittee failed to have his service permit immediately available it is not mitigating that the employer had taken the service permit home for safe-keeping because it is the permittee's responsibility to have the service permit immediately available. The duty lies with the permittee and not the employer. *Michael Reese*, OLCC-06-V-067, December, 2007.

Individual had a history of performing services for licensee in return for rent. The services previously included working in the store and making sales transactions. On the date in question the individual opened the store for licensee's benefit and notified licensee's employee that he had done so. The employee did not instruct him to close the store. While the licensee did not specifically authorize the individual to open the store, licensee had a practice of accepting services and retaining the right to control the manner in which they were performed. The individual was the licensee's servant or representative and the licensee is responsible for the individual's opening of the store and making the sale to the minor decoy. *Hunter's R.V. Park*, OLCC-06-V-068, February, 2007.

Licensee was held responsible for a sale to minor based on OAR 845-006-0362, which provides that a licensee may be held responsible for violations of law committed by servants, agents, employees, or representatives. Licensee argued that use of the permissive "may" required OLCC to exercise discretion in holding licensees responsible, and because OLCC routinely holds all licensees responsible, it has abused its discretion. The Commission determined that because it had exercised discretion not to hold licensees responsible under OAR 845-006-0362 in those instances where employees are not on duty and not acting on licensee's behalf, it has not abused its discretion in applying OAR 845-006-0362. *Cal-Sport*, OLCC-03-V-008, December 2003.

ORS 471.385(1)(c) authorizes sanctioning a service permittee for any act which would constitute a violation if the act were performed or permitted by a licensee. *Linda Lee Estes*, OLCC-02-V-006 & 007, August 2002.

Unless an employee is both not on duty and not acting on licensee's behalf, the licensee is responsible for an employee's violations of the alcoholic liquor laws, even when the licensee had no knowledge of the employee's acts, the licensee had express policies against the acts, and when the employee disregarded specific instructions of the licensee. *Main Street Texaco & Mini Mart*, OLCC-00-V-069, October 2001.

C.3.
C.3.a.

C. VIOLATIONS

C.3.a. Licensee v. Permittee/Employee (continued)

The Court of Appeals held that dancers were not employees, as defined in wage and hour laws. *State ex rel Roberts v. Acropolis McLoughlin Inc.*, 150 Or App 180, 945 P2d 647 (1997).

An agent's knowledge may be imputed to the principal even if the agent does not communicate the information to the principal. However, the knowledge of an agent is imputable only if it is about matters within the agent's authority as agent. *Tri-Met, Inc. v. Odighizuwa*, 112 Or App 159 (1992).

Licensees were held responsible under OAR 845-06-025 for the acts of their sublessee and his employee where the sublessee was providing food service for the licensed premises. *Harry's Stagecoach Inn*, OLCC-91-V-102, February 1992.

An employee who is convicted of unlawful conduct is held to have knowledge of that unlawful conduct. This knowledge is also imputed to the licensee who may then be found responsible for that employee's violation. *PDQ Mini Market No. 4*, OLCC-90-V-153, July 1991.

When the licensee's employee who engaged in criminal conduct was not on duty or otherwise acting on behalf of the licensee, the licensee was not responsible for the off-duty employee's criminal act. *Reston Red's Tavern*, OLCC-89-V-058, August 1989.

The Commission concluded that licensee was not responsible under OAR 845-06-025 for actions of alleged employee, because preponderance of evidence failed to prove that person was licensee's employee. The evidence did not show that licensee had the power or right to control or direct the person in how his work was to be performed. *Satyricon*, OLCC-88-V-060, December 1988.

Licensee received a Letter of Reprimand for violation of OAR 845-06-045(4) [now OAR 845-06-045(3)] because knowledge of criminal acts held by wrongdoer employees is imputed by law to the licensee. It is not a defense that the wrongdoers were disobeying the licensee's instructions when they sold drugs on the licensed premises. *Jiggles*, OLCC-88-V-004, August 1988.

Permittee held not responsible for failing to provide regular meals where licensee did not have enough employees on duty to allow someone to go to the kitchen to fix a regular meal. *Patty Jean's*, OLCC-85-V-037, January 1986; *Pink Pearl Restaurant & Lounge*, OLCC-85-V-026, September 1985.

The knowledge of the licensee's employee may be attributed to the licensee even where the licensee was in the hospital at the time of the violations for sale to minors. *Day & Night Grocery*, OLCC-84-V-026, May 1985.

Licensees are responsible for their employees' acts regardless of whether employee disregards specific instructions, although those instructions may provide mitigating circumstances. *Prefetto's Pizza*, OLCC-85-V-006, April 1985; *Captain Kidd's*, OLCC-88-V-027, August 1988; *Minute Market No. 10*, OLCC-86-V-056, January 1987.

C.3.a.

C. VIOLATIONS

C.3.a. Licensee v. Permittee/Employee (continued)

Dismissal of charge against permittee was not inconsistent with sustaining the charge against the licensee. Although not stated in the order, there was a rational basis for the different treatment because the permittee was not at the premises during the time of the alleged violations. *Taylor's Coffee Shop v. OLCC*, 28 Or App 701, 560 P2d 693 (1977).

Licensee is responsible for acts of employee even though employee's unlawful act of selling whiskey on premises (sale of liquor by glass) took place outside licensee's presence and without her knowledge and against her instructions. *Perry v OLCC*, 180 Or 495, 177 P2d 406 (1947); *Palm Gardens, Inc. Oregon Liquor Control Commission*, 15 Or App 20, 514 P2d 888 (1973).

C.3.a.

C. VIOLATIONS

C.3.b. Co-licensees

The Commission found a violation and imposed a penalty on the corporation and the individual corporate officers and shareholders as licensees in this matter. Under OAR 845-006-0301, a "licensee" includes officers and directors of a corporation and certain shareholders. The Commission issues licenses to both the corporate (or other business) entity and the individuals who qualify under the rule as licensees. The corporation and individuals are licensees under a single license, with equal responsibility for violations committed by any licensee (corporate or individual) holding the license. The Commission reaffirmed in this order that both the corporate entity and its individual corporate principals are licensees and are jointly and severally liable for violations of their servants, agents, employees or representatives. OAR 845-006-0362. The individual licensees are personally liable not on the basis of their status as corporate principals, but because their license has been issued to them directly in their personal capacity. *Lava Lanes of Medford*, OLCC-04-V-007, February, 2005; *Jiffy Mart*, OLCC-04-V-027, February 2005.

Although license privileges of co-licensee who was not involved in violations or management of premises would otherwise be canceled under the reasoning of *Rip City Pub*, Commission was bound to continue co-licensee's privileges where he reasonably relied upon and spent significant time and money in responding to Regulatory staff's representation that his license privileges would not be canceled if he removed other co-licensee's interest in premises. *Mountain Inn*, OLCC-90-V-099, April 1991.

Where one corporate principal was convicted of a felony, the license was canceled as to that individual and continued in the name of the remaining non-wrongdoing corporate licensee, subject to the condition that the convicted felon divest himself of shares in the licensed corporation, that he resign as director and officer of the corporation, and that a Letter of Reprimand be issued to the remaining licensee. *A.J.'s Homestead Restaurant*, OLCC-90-V-021, December 1990.

Where violations involve the sale and service of alcoholic beverages, the Commission holds all co-licensees equally responsible for any aggravating circumstances and for aggravated sanctions, regardless of the individual culpability or participation in the violations or aggravating circumstances. The licensee is presumed to have legal ability to participate in the management or control of the licensed premises. The licensee may show circumstances which affirmatively show a lack of legal ability to participate in the management or control of the licensed premises. *Rip City Pub*, OLCC-89-V-181, December 1990.

The Commission may penalize a licensed corporation where the president and 50 percent stockholder of the corporation, who is a licensee under OAR 845-06-120, commits a violation as a result of being convicted of a felony. *Kingston Saloon*, OLCC-89-V-080, December 1989.

C.3.b.

C. VIOLATIONS

C.3.b. Co-licensees (continued)

It is not fair or reasonable to attribute a violation resulting from one corporate principal's felony conviction to the records of the other corporate principals who are licensees under OAR 845-06-120, unless the felony was committed on the premises or was related to the operation of the premises where the principals are licensed. However, it is fair and reasonable to attribute a violation to the record of the principal who has been convicted, even if such a relationship to the licensed premises is not present. *Kingston Saloon*, OLCC-89-V-080, December 1989.

Where one co-licensee was convicted of a felony, license was canceled as to that co-licensee, and continued in the name of the remaining licensee, subject to the conditions that the convicted felon divest himself of any interest in the licensed premises. A Letter of Reprimand was issued to the remaining licensee. Vince Hart and Fay E. Ladd, *Tony's Tavern*, OLCC-86-V-003, February 1987.

License was not canceled where the licensee's corporate officer, who committed a felony on the licensed premises, completely divested himself of any legal interest in the licensed premises. K & M Club, Inc., *The Frontier*, OLCC-86-V-032, December 1986.

Commission declined licensee's request to apportion responsibility for fine among co-licensees. Meldon Investment Corporation, Wayne and Judy Curtis, *Bayou Inn*, OLCC-85-V-067, March 1986.

Fact that licensee's contract manager failed to ensure that employees had service permit, without licensee's knowledge or approval, not exculpatory. Lowell's Lounge, Inc., *Lowell's*, October 1984.

A prospective franchisee who had been issued an "Authority to Operate" by the OLCC, but who had no access to the premises, had no control over employees, and had no right to profits, was exonerated from responsibility for the violation. Charles D. Bronson, Southland Corporation, *7-Eleven*, No. 23007, August 1983.

A violation by one or more joint licensees is imputed to all licensees in that it is a violation of license privileges. *Hoehne v. OLCC*, 37 Or App 621, 588 P2d 87 (1978).

C.3.b.

C. VIOLATIONS

C.4. Penalties

C.4.a. Aggravation/Mitigation

C.4.a.1. Prior Warnings or Violations

Licensee's previous history of compliance at a different location is not worthy of as much weight in determining her risk for future compliance with liquor laws, including restrictions, where the previous history comes from a different type of operation, clientele, and location. Licensee had previously run a Chinese restaurant where alcoholic beverages were available but not a significant part of the business, and the new business was a bar in a different part of town. *Dad's Restaurant & Lounge*, OLCC-06-V-029, December, 2007.

Aggravation is warranted where the licensee had previously been warned about service permit violations and there was more than one employee working without a service permit. *H2O Martini Bar & Restaurant*, OLCC-06-V-014, December, 2006, *affirmed without opinion*, 213 Or. App. 240 (2007).

The Commission concluded that the evidence did not establish that the licensee received multiple prior instructions under OAR 845-06-200(7)(c). The record indicated the types of instructions generally given on preventing sales to minors, but the record did not include the specific instructions provided to the licensee. *Justin Market*, OLCC-90-V-174, December 1991.

Prior warnings given to licensee concerning the subject matter of the violation are generally a reason to aggravate the penalty. However, a warning given approximately six and one-half years ago is not entitled to weight because it was given so long ago. *Yet Chip*, OLCC-91-V-033, October 1991.

The Commission concluded that there was a basis to aggravate the penalty where a licensee had received multiple warnings regarding the subject matter of the violation prior to the violation. One warning was not sufficient to establish an aggravating circumstance. An instruction given as an educational tool, where there was no wrongdoing on the part of the licensee, was not a basis for aggravation. *Corral Pastime*, OLCC-89-V-165, June 1990.

The extreme youth of the minor purchaser (age 14) was a basis for aggravation. However, this was outweighed by the 20 year violation-free record of the licensee. *Old Pine Market*, OLCC-89-V-194, April 1990.

It is not fair or reasonable to attribute a violation resulting from one corporate principal's felony conviction to the records of the other corporate principals who are licensees under OAR 845-06-120, unless the felony was committed on the premises or was related to the operation of the premises where the principals are licensed. However, it is fair and reasonable to attribute a violation to the record of the principal who has been convicted, even if such a relationship to the licensed premises is not present. *Kingston Saloon*, OLCC-89-V-080, December 1989.

C.4.
C.4.a.
C.4.a.1.

C. VIOLATIONS

C.4.a.1. Prior Warnings or Violations (continued)

Where a licensee had no violations on its record in the previous seven years, the Commission found sufficient mitigating circumstances to reduce the penalty from cancellation to a 15-day suspension or \$975 fine. Licensee's violation resulted from a felony conviction. *Kingston Saloon*, OLCC-89-V-080, December 1989.

Violation for service to a visibly intoxicated person was mitigated where the licensee's previous violation (for failure to maintain records) is no longer a major violation under the Commission's penalty schedule and this was the licensee's first violation for sale to a visibly intoxicated person. *Magic Garden*, OLCC-89-V-122, December 1989.

Commission reduced a penalty based on good compliance history where, although licensee had only been licensed at the location of the violation for one year, licensee and its president had been licensed at four other locations for a number of years without any violations. *Howard's Northwest Deli*, OLCC-88-V-101, February 1989.

Service permittee with a 34-year record without violations received half the suspension normally prescribed by the penalty schedule. *Mustang Lounge*, OLCC-88-V-085, January 1989.

Once the Commission's staff has made a decision to work with licensees, short of issuing citations, that decision should not lead to aggravation of a penalty because of the many contacts the staff had with the licensee. While those contacts may weigh against mitigating factors, the staff's decision to wait until this incident to issue a violation ticket was not a basis for aggravation of the penalty. *Capital Market*, OLCC-88-V-030, 031, September 1988. *Beehive Grocery & Deli*, OLCC-89-V-184, March 1990 (six verbal instructions over three and one-half years, and the two current violations were the first violations in over two years).

The fact that a permittee had no prior violations on his record was not mitigating where the permittee had only been working as a bartender for six months. *Robert Rabbie*, OLCC-88-V-024, August 1988.

Where the licensee had no prior violations, and because the two violations occurred within hours of one another, without the benefit of any instruction or education by staff in the intervening period, and without the ability to be able to achieve compliance, the Commission concluded that licensee was entitled to mitigation of the penalty. *John's Food Mart*, OLCC-88-V-008, July 1988.

Penalty was aggravated where licensee had two prior record keeping violations and had received an additional two warnings from the Commission on the same issue prior to the violation. *J. B.'s Paradise Room*, OLCC-86-V-023, April 1987. See also: *Doc's Golden West Tavern*, OLCC-88-V-112, March 1989 (six instructions on VIP's given in prior two years); *East 20th Market*, OLCC-88-V-094, January 1989 (four instructions on avoiding sales to minors given in the three months prior to the violation).

Licensees' prior record of four years without a violation was mitigating. *Beehive Grocery & Deli*, OLCC-86-V-064, April 1987.

C.4.a.1.

C. VIOLATIONS

C.4.a.1. Prior Warnings or Violations (continued)

Violation for employee without service permit was mitigated where licensee had not had previous problems involving employees without service permits and where the employee in question worked only a short time without a service permit. *Sportsman Club*, OLCC-86-V-054, March 1987.

False statement made by service permittee three years earlier on permit application may be mitigated by permittee's subsequent good record in following Commission's rules and regulations. *Theresa Lee Gerber*, OLCC-84-V-031, January 1985.

C.4.a.1.

C. VIOLATIONS

C.4.a.2. Intent/Good Faith Effort

Compliance with some restrictions is not a mitigating factor in determining the penalty for violation of other restrictions. *Dad's Restaurant & Lounge*, OLCC-06-V-029, December, 2007.

Additional trainings and required meetings for staff to make sure they know and understand restrictions are not mitigating when they do not begin until six months after the first violation and when a second violation occurs despite the training. *Dad's Restaurant & Lounge*, OLCC-06-V-029, December, 2007.

Where permittee failed to have his service permit immediately available it is not mitigating that the employer had taken the service permit home for safe-keeping because it is the permittee's responsibility to have the service permit immediately available. The duty lies with the permittee and not the employer. *Michael Reese*, OLCC-06-V-067, December, 2007.

The administrative law judge proposed additional mitigation for immediate action to comply with the service permit requirement following the violation. While it was an action to prevent future violations, mitigation is not justified when the action taken is simply what is required to comply with law. *Tony's Tavern*, OLCC-06-V-012, August, 2006, followed in *Downtown Delicatessen*, OLCC-04-V-022 August, 2007, amended final order following *Papas v. OLCC*, 213 Or. App. 369 (2007).

Licensee's contention that mitigation was warranted for his continuing good faith efforts to prevent a violation of failing to verify the age of a minor was not persuasive. Following the analysis in *Circle K Store #468*, OLCC-03-V-107 (October 2003), Licensee is not entitled to mitigation for an upgrade in age verification equipment. Licensee had received the benefit of OAR 845-009-0140(3) after the previous violation and is not entitled to additional mitigation for the more recent upgrade. In addition, no mitigation is provided based on the circumstance that Licensee's employee failed to follow Licensee's procedures. *Thrifty Nifty Market*, OLCC-05-V-011, December 2005.

Licensees' inexperience in running a night club is not equal to a good-faith effort at compliance where instructions, suggestions and advice from the Commission and/or the police on how to avoid serious problems at the licensed premises go unheeded. *DiMarco's Restaurant aka Club Miami*, OLCC-04-V-043, OLCC-04V-062, October 2005.

The licensee's later admission to lying when confronted with other evidence does not provide a basis for mitigating the penalty for a violation of ORS 471.425. There is no evidence that Licensee acted in good faith to avoid the violations. *Mac Club*, OLCC-04-V-065, July 2005.

C.4.a.2.

C. VIOLATIONS

C.4.a.2. Intent/Good Faith Effort (continued)

In the past, a seller's effort in checking the identification was viewed as constituting a good faith effort to prevent a violation because the seller who asks for identification of a youthful-looking purchaser was seen as doing more to avoid a violation than a seller who did not even ask for the identification. The Commission reconsidered its prior position and concluded that asking for identification and incorrectly reading or interpreting the age-related information does not constitute a good faith effort to prevent a violation. For example, in-state drivers' licenses, in addition to the minor's date of birth, contain an entry on the license identifying in red that the holder is a minor until a given date. When a seller asks for the identification but does not take note of this date and heed its import, the seller is being inattentive and cannot be said to be making a good faith effort to avoid a violation. Such inattention to obvious data is no better than not asking for the identification at all, and cannot be rewarded without encouraging such behavior. In the future, no such mitigation will be awarded. *The New Market*, OLCC-04-V-016, January 2005.

Licensee was found to have violated OAR 845-009-0015 by allowing his employee to sell alcoholic beverages without licensee having mailed or delivered the completed service permit application and fee to the Commission by the end of the first work day following the employee's first shift. Licensee was not entitled to the benefit of the employee's effort to comply (employee timely completed the service permit application and gave it to the employer) in mitigation of licensee's penalty. *Sugar Pine Inn*, OLCC-00-V-108, April 2002.

Flight 99 Tavern, OLCC-87-V-033, February 1988, does not stand for the proposition that if either licensee or permittee has made good faith efforts to achieve compliance, both benefit, independent of who performed the acts. Each is entitled to mitigation for their own individual acts, not for the acts of the other. *Sugar Pine Inn*, OLCC-00-V-108, April 2002.

Where the licensed premises has the reputation of selling alcohol to minors, such reputation constitutes an aggravation factor. By itself, it does not warrant imposition of a mandatory suspension. A mandatory suspension was imposed in *Neighbor's Market*, OLCC-87-V-009, September 1987, because the reputation was combined with licensee's willful intent to sell to minors (higher prices charged to minors and secretive sales in the back of the store) and with a prior violation. *Jiffy Mart*, OLCC-01-V-053, December 2001.

Where Licensee put herself back on duty by getting up from her table where she was consuming beer to stop a patron from leaving the premises with a drink in his hand, Licensee was acting in good faith to prevent a violation. If this were the only act performed when Licensee put herself back on duty, Licensee would be entitled to mitigation of the penalty for the violation of drinking on duty. However, where Licensee also served beer to individuals, the act of stopping the patron cannot be viewed in isolation from the other on-duty acts to provide mitigation. *Teri's Town Tavern*, OLCC-00-V-018, November 2000.

C.4.a.2.

C. VIOLATIONS

C.4.a.2. Intent/Good Faith Effort (continued)

The Commission concluded that the following circumstances were mitigating and reduced a third level Category III violation from a mandatory 30 day suspension to a 12 day suspension under the following circumstances:

- a. Licensees' employee made a good-faith effort to comply with the requirements of the law by requesting identification;
- b. Before the violation, Licensees' employee attended an OLCC education class;
- c. Before the violation, Licensees educated employees about properly checking identification;
- d. Licensees implemented a bonus program for employees who call the police when an underage patron attempts to purchase alcohol;
- e. After the violation, Licensees and employees attended another OLCC education class that Licensees scheduled;
- f. Licensee Lite attended a Victim Impact Panel;
- g. Licensees have instructed all employees to use Statement of Age cards;
- h. Licensees fired their clerk after the incident;
- i. Licensees have double employee coverage now at the busy times at their store, so clerks have more time to check age identification; and
- j. Licensees are at their store more often to oversee their employees' compliance with all liquor laws.

7-Eleven No. 20806, OLCC-97-V-081, May 1998.

The Commission concluded that a Licensees good faith efforts to comply were a basis to mitigate the penalty to a Letter of Reprimand in a violation case involving permitting an employee to serve without a valid service permit where the record showed that the employee had taken and passed the Alcohol Server Education class prior to being hired and had filled out several service permit application forms in an attempt to obtain a valid service permit. *The Royal Esquire, OLCC-97-V-045, December 1997.*

The fact that licensee mistakenly believed that his license suspension for a prior violation had not yet begun was not a mitigating circumstance for a violation involving the sale of alcohol while suspended, because the mistaken belief was not reasonable or held in good-faith. This is because the licensee knew his suspension would begin soon, received verbal notice of the dates of the suspension from Regulatory staff whose knowledge and authority he doubted, and failed to call Regulatory staff he trusted to verify the suspension dates. *Everybody's Market, OLCC-90-V-090, March 1992.*

Permittee's reliance upon a door checker to screen out minors did not rise to the level of a good-faith error that would justify mitigation. *William P. Montgomery, OLCC-91-V-094, February 1992.*

C.4.a.2.

C. VIOLATIONS

C.4.a.2. Intent/Good Faith Effort (continued)

Even though the false identification shown by the minor was not convincing enough to provide a defense to the charge, the fact that the licensee did require the minor to show identification before she served him is a reason to mitigate the penalty for licensee's good-faith efforts to comply before the violation occurred. *Golden Slipper*, OLCC-90-V-154, July 1991. See also *John Dough's Pizza*, OLCC-90-V-161, August 1991.

Licensee's mistaken, but good-faith belief that the minor is 21 is a basis to mitigate the penalty. *John Dough's Pizza*, OLCC-90-V-161, August 1991.

Letter of Reprimand was an appropriate penalty where permittee had over 15 year good compliance record, permittee and licensee had taken significant preventive and remedial steps, and evidence showed that permittee's service to a visibly intoxicated person was an uncharacteristic lapse in judgment that was not likely to happen again. *The Trap Restaurant*, OLCC-90-V-118, May 1991.

The Commission concluded it is an aggravating circumstance if a violation involves a person who objectively appears to be under 21 years old and that person is, in fact, under 18 years old. *Plaid Pantry No. 96*, OLCC-90-V-048, January 1991.

Mitigation was appropriate where licensee made good faith effort to avoid violations by planning to have enough employees on hand to handle the crowd, but due to circumstances beyond licensee's control, two persons whom he had anticipated being able to work were not able to work, and a sale to minor resulted. *O'Ryan's Irish Sports Pub*, OLCC-89-V-190, November 1990.

Mitigation was appropriate where the permittee mistakenly, but in good faith, believed that the minor was 21 because she had earlier checked the identification of a person of similar appearance who provided identification showing that he was 21. *Dillinger's Pub*, OLCC-90-V-003, September 1990.

Penalty was aggravated where licensee unreasonably retained employees who were likely to engage in additional unlawful activity at the premises and who then in fact did so. *The Winema*, OLCC-90-V-117, May 1990.

Licensee's failure to react more firmly to illegal drug use on the premises was not sufficient in itself to show that licensee was a poor risk for future compliance [and should have its license canceled]. Since the violations licensee had demonstrated a greater appreciation of the seriousness of permitting illegal drug use on the premises, licensee had fired a number of employees for drug use, and licensee had hired a more capable on-the-premises manager. *The Winema*, OLCC-90-V-117, May 1990.

The extreme youth of the minor purchaser (age 14) was a basis for aggravation. *Old Pine Market*, OLCC-89-V-194, April 1990.

There was a basis to mitigate the penalty where the licensee took some steps to alleviate the disorderly activities. *Corral Pastime*, OLCC-89-V-165, June 1990.

C.4.a.2.

C. VIOLATIONS

C.4.a.2. Intent/Good Faith Effort (continued)

Although licensee could have taken more steps to control a disorderly situation, the penalty is mitigated where licensee was a victim of circumstances and his conduct was motivated by his concern over maintaining compliance with OLCC laws. *Reston Red's Tavern*, OLCC-89-V-155, April 1990.

The Commission canceled the service permit where the permittee made an intentional false statement on her application. The intentional act was an aggravating factor that outweighed mitigating factors (felony conviction was two years old and the applicant had a good recommendation from her employer). *Lori Scott*, OLCC-89-V-166, March 1990.

There was a basis to mitigate the penalty where circumstances beyond the licensee's control occurred in his personal life that resulted in his paying less attention to compliance than he would have under normal conditions. *Diamond Sports Center*, OLCC-89-V-167, January 1990.

The repeated and intentional nature of a permittee's sale of illegal drugs while on duty on a licensed premises indicated that the permittee was a poor risk for compliance and her permit should be canceled, notwithstanding good faith compliance efforts that she had made. *Tamara Garrett*, OLCC-89-V-077, December 1989; *Alexis Poppa*, OLCC-89-V-158, December 1989; *Samuel E. Waller*, OLCC-89-V-069, November 1989.

Only slight mitigation was appropriate when licensee was distracted by talking with a Commission inspector because licensee still had a reasonable opportunity to prevent the violation. The facts fail to show that the violation would not have occurred but for the presence of the inspector. *Union Gap Tavern*, OLCC-89-V-079, September 1989.

Where the managing licensee had actual knowledge of criminal activities on the licensed premises and the absentee licensee did not have actual knowledge, the Commission imposed a lesser penalty than license cancellation, subject to the conditions that the managing licensee divest his interest in the business within six months and that the managing licensee be restricted from the licensed premises. *Spigot Tavern*, OLCC-89-V-022, September 1989.

Intentional false statements are a basis to aggravate the penalty. *Sparkles Tavern*, OLCC-88-V-107, September 1989.

Violation was aggravated where licensee intentionally violated a licensed restriction and lied about the violation to a Commission inspector. *Stagecoach Saloon*, OLCC-89-V-043, August 1989.

The Commission concluded that the licensee's penalty should be aggravated to license cancellation where licensee committed a substantial breach of condition. Licensee consumed alcoholic liquor multiple times in violation of condition that she abstain from consuming alcoholic liquor during the duration of the license. *Oceanside Restaurant & Lounge*, OLCC-88-L-123, August 1988.

C.4.a.2.

C. VIOLATIONS

C.4.a.2. Intent/Good Faith Effort (continued)

Penalty against licensee was not aggravated when evidence failed to prove that licensee knew of illegal drug sales by employees and patrons. *The Pump House Tavern*, OLCC-89-V-014, June 1989.

Penalty against licensee was aggravated to a six-month suspension when licensee failed to instruct a new employee regarding visibly intoxicated persons after a prior violation involving a fatal car accident; licensee's uncooperative actions threatened the inspector's ability to maintain control of a sensitive situation; and licensee was unwilling to discuss compliance measures with the Commission. *Rip City Pub*, OLCC-88-V-131, June 1989.

Aggravation circumstances offset any mitigation when the licensee knew that after hours sales were prohibited and willfully attempted to hide the violation. *Roma Pizza*, OLCC-89-V-002, April 1989.

Letter of Reprimand appropriate where licensee did as much as it reasonably could have to ensure that its employee would follow the law and the violation occurred because the employee failed to follow the licensee's instructions. *Howard's Northwest Deli*, OLCC-88-V-101, February 1989; *Jackpot Food Mart*, OLCC-88-V-088, January 1989; *The Pink Elephant*, OLCC-88-V-054, November 1988; *River Road House*, OLCC-88-V-018, June 1988; *Minute Market No. 10*, OLCC-86-V-056, January 1987.

While the Commission has considered language and cultural differences to be mitigating when these differences result in the licensee making good faith errors in computing a patron's age, the Commission did not find this argument persuasive where the Commission had given instructions to the licensees regarding how to properly calculate a person's age. *Sandy Market*, OLCC-88-V-090, February 1989; *Star Market*, OLCC-88-V-073, January 1989.

A violation for permitting an employee without a service permit to serve alcoholic beverages was mitigated where licensee mistakenly, but reasonably, assumed the employee held a permit. *Trocadero Inn*, OLCC-88-V-058, December 1988.

Mitigating circumstances were offset where violation for sale to a visibly intoxicated person was blatant because the patron had told the bartender that the patron was drunk. *King-Wah Restaurant*, OLCC-88-V-050, December 1988.

The Commission found a licensee's continuing good-faith compliance efforts to be mitigating, even though the Commission had previously recognized the licensee's compliance efforts by imposing a reduced penalty in a prior case. *Master Mart*, OLCC-88-V-032, November 1988.

The Commission found it mitigating where licensee had been cooperative with the local Commission inspector and the licensee had made other good faith compliance efforts in the past. *Captain Kidd's*, OLCC-88-V-027, August 1988; *Casa Del Rio*, OLCC-88-V-033, August 1988.

C.4.a.2.

C. VIOLATIONS

C.4.a.2. Intent/Good Faith Effort (continued)

Mitigation due to licensee's good compliance and prior good faith compliance efforts were partially offset where licensee could have reasonably done more to prevent the violations. *Casa Del Rio*, OLCC-88-V-033, August 1988.

Licensee's compliance efforts were not mitigating where, although licensee took some steps to address problems, licensee's efforts were lacking in many respects. *Don Juan's*, OLCC-88-V-003, May 1988.

Mitigating factors were offset where licensees had ample opportunity to detect and correct a violation, but failed to do so. *Log Cabin Inn*, OLCC-87-V-042, January 1988.

Mitigation is appropriate where permittee with a 17-year good record of compliance showed that it was her normal practice to refuse service to VIP's and that she had made good faith effort to comply by refusing service to a VIP just prior to receiving the ticket in the instant case. *Sandra C. Dugger*, OLCC-87-V-044, January 1988.

The licensee's employment of two door checkers showed a good faith effort to try to keep minors out of the premises and, thus, was mitigating. *Rodeo Inn*, OLCC-87-V-037, December 1987.

Licensee's intentional commission of a number of serious violations provided a basis for license cancellation. *Pub Tavern*, OLCC-87-V-016, November 1987.

The licensee's good faith, honest, albeit mistaken belief that the minor was 21 was a basis for mitigation and not outweighed by the fact that licensee received instructions on preventing sales to minors one week prior to the violation. *Top Value Market*, OLCC-87-V-018, October 1987.

Violation for sale to minor was aggravated where licensee exploited the situation by charging a higher price than normal and where licensee tried to conceal the sale by accepting the money in back of the store. *Neighbor's Market*, OLCC-87-V-009, September 1987.

License suspension without the option of a fine is appropriate where the licensee has a reputation as someone who sells alcohol to minors. The suspension will discourage minors from attempting to purchase from the licensee. *Neighbor's Market*, OLCC-87-V-009, September 1987.

Violation was mitigated where the hidden ownership was negligent rather than willful. The licensee had always intended to obtain Commission approval of the sale. *Fast Stop Market No. 2*, OLCC-86-V-065, September 1987.

Violation was mitigated where licensee had shown exceptional cooperation with the local police and had requested a training class from the Commission in order to prevent recurring violations. Ed Muffley Enterprises, Inc., *Murphy's Tavern*, OLCC-86-V-060, April 1987.

C.4.a.2.

C. VIOLATIONS

C.4.a.2. Intent/Good Faith Effort (continued)

Violation for false statements was aggravated because the statements were part of an intentional, continuing, long-term effort to hide a hidden owner's interest. 7455 Incorporated, *Jiggles*, OLCC-85-L-013, February 1987, affirmed *7455 Inc. v. Oregon Liquor Control Commission*, 94 Or App 780, 767 P2d 116 (1989); affirmed on other grounds, 310 Or 477, 800 P2d 781 (1990).

Some mitigation existed for violation for sale to visibly intoxicated person where permittee was making some effort to comply. Permittee had cut VIP off twice, earlier in the day, and finally served VIP after repeated requests, only after VIP gave permittee his car keys and promised to walk next door to sleep after the drink. Friar Tuck's Tavern, Inc., *Water'n Hole*, OLCC-86-V-057, February 1987.

Failure to disclose hidden ownership interest was willful and warranted license cancellation where licensee failed to disclose the hidden ownership interests of several persons, and where a complete sale of the premises and business occurred without Commission approval. William A. Thompson, *Columbia Cafe & 3 C's Club*, OLCC-86-V-034, January 1987.

Mitigation was appropriate where the violation of permitting a minor to consume occurred as a result of a deliberate attempt to "set up" and discredit the licensees in an unrelated court matter. Ralph and Pauline Conner, *Prefetto's Pizza*, OLCC-86-V-035, January 1987.

Mitigation for permitting a minor to enter was appropriate where licensee was at the door training a new employee and left only because an OLCC inspector asked to speak with him. Evidence showed the licensee was interested in preventing sales to minors and took numerous steps prior to this incident to prevent violations regarding minors. Brandy's Restaurants, Inc., *Brandy's Restaurant and Lounge*, OLCC-86-V-027, December 1986.

In a sale to minor case, the Commission concluded that mitigation was appropriate where the minor appeared to be mature and close to 21, and where licensee had taken steps to avoid future violations by hiring an English-speaking clerk. Su Yong Kim, *Owl Grocery*, OLCC-86-V-022, December 1986.

Mitigation was appropriate for three violations where the first violation had no mitigating circumstances, the second was the result of a sale made after a minor argued with the licensee, and the third occurred because the licensee made a mistake in calculating the minor's age. The first violation was not mitigated, the second violation was slightly mitigated, and the third violation had no penalty. Sang Chol and Yun Il Han, *Circle J Market*, OLCC-86-V-014, OLCC-86-V-025, OLCC-86-V-026, December 1986.

Mitigation was appropriate where the licensee asked the purchaser his age and the compliance inspector observed the licensee demonstrate good faith efforts on two subsequent occasions to verify the age of youthful-appearing persons and observed licensee refuse service to one of them. Khanagha K. Kuassimi, *Neighbor's Market*, OLCC-86-V-010, August 1986.

C.4.a.2.

C. VIOLATIONS

C.4.a.2. Intent/Good Faith Effort (continued)

Special circumstances which led licensee to believe a minor purchaser's false representation that he was of legal age were basis for mitigation of penalty in sale to minor case. Michael and Vicki Phillips, *Mick's Mini Mart*, OLCC-85-V-056, June 1986.

Aggravated violation found because applicant had knowledge of hidden ownership rule yet took steps to conceal hidden ownership from Commission. Robert Kufus, *Your Inn Tavern*, September 1983.

There was sufficient reason for aggravating the penalty to cancellation where licensees intentionally sold alcoholic beverages to minors by passing beer out a drive-in window in order to avoid detection. Michael and Chrysoula Taramas, *Tualatin Heights Market*, May 1982.

C.4.a.2.

C. VIOLATIONS

C.4.a.3. Extent of Licensee's/Permittee's Participation

While the fact that a violation was committed by licensee personally is cause for aggravation, the fact that a violation was committed by employees is not cause for mitigation. *Dad's Restaurant & Lounge*, OLCC-06-V-029, December, 2007.

An employee's effort to conceal a service permit violation is not attributed to the licensee for penalty purposes, but it could be an aggravating factor in the service permit violation charge against the employee. In this case the employee did not have a service permit, told licensee and inspector that he had one, and gave the licensee a forged one. *H2O Martini Bar & Restaurant*, OLCC-06-V-014, December, 2006.

Licensee's assertion that the penalty for covering a minor posting sign should be mitigated because he did not direct anyone to cover the sign and did not know that it had been covered was not persuasive. The fact that Licensee was unaware that the sign had been covered does not provide a basis for reducing the sanction. *H2O Martini Bar & Restaurant*, OLCC-05-V-012, December 2005, *affirmed without opinion*, *Capital Asset Holdings, Inc., et al v. OLCC*, 213 Or. App. 240 (2007).

The Commission concluded that aggravation was appropriate where, after the violation had occurred, the Permittee called the police emergency dispatcher and told her not to send police to the premises without Permittee's approval. The commission expects permittee's and licensees to call the police when requested to do so by Regulatory staff and to request police assistance whenever it is necessary to prevent unlawful activities. Moreover, the penalty schedule rule recommends aggravation when there has been an effort to conceal a violation. OAR 845-06-200(7)(c). Permittee's demands that she be contacted before any police are sent to the premises could be an attempt to conceal a violation and also could be an unreasonable interference with protecting the public safety. *Sharon Ann Purcell*, OLCC-96-V-031, July 1997.

A permittee must be on duty, engaged in work activities related to the serving of alcoholic beverages, before the Commission may suspend the permit for actions that would be violations. *Samuel E. Waller*, OLCC-89-V-069, November 1989; *Mark's Tavern*, OLCC-89-V-030, July 1989. *The Sportsman Club*, OLCC-87-V-002, June 1987.

Where the licensee personally commits a violation, there is a basis for aggravation. *P-Mart*, OLCC-92-V-098, April 1993.

Where licensee's employees disregarded licensee's instructions and engaged in lewd activities, there was a basis to mitigate the licensee's penalty. *Sparkles Tavern*, OLCC-88-V-107, September 1989.

The Commission concluded that cancellation of a service permit was too severe a sanction and mitigated the penalty because of the permittee's youth and because the permittee was unduly influenced by his father. *Sparkles Tavern*, OLCC-88-V-107, September 1989.

C.4.a.3.

C. VIOLATIONS

C.4.a.3. Extent of Licensee's/Permittee's Participation (continued)

The Commission concluded that mitigation was appropriate where the licensee had taken over management only six days before the incident, was forced to work with some personnel from prior management, had a very limited time to enact his own rules, and did not have the support of the permittee who committed the violation. *Donn's Den*, OLCC-89-V-003, July 1989.

In assessing a penalty for a sale of illegal drugs, the Commission has distinguished between the penalty given an employee who commits criminal acts on the licensed premises and the penalty given the licensee. When the licensee did not participate in the criminal activity, the Commission has found that mitigation is appropriate. In contrast, the offending employee's service permit could be canceled because of aggravating circumstances. *The Pump House Tavern*, OLCC-89-V-014, June 1989.

A complete change of stockholders is analogous to a complete change of ownership. Where the individuals who own or control the corporation were no longer the same as those at the time of the violation, the Commission found a violation, but did not impose a penalty or count the violation as a prior violation on the licensee's record. *Grove Tavern & Cafe*, OLCC-88-V-104, May 1989.

Aggravating circumstances exist when a corporate principal is directly involved in criminal activities in the licensed premises. License cancellation was the appropriate penalty because the licensee did not show that the imposition of license conditions would ensure future compliance. *T-Bombadil's*, OLCC-88-V-129, April 1989.

Licensee's violation for its employee's unauthorized sale of a keg was not aggravated by the fact that purchaser provided the keg to a minor, where the employee had no reason to suspect purchaser would do so. *Howard's Northwest Deli*, OLCC-88-V-101, February 1989.

Mitigating circumstances were offset because licensee was present when his employees served visibly intoxicated persons. *Trocadero Inn*, OLCC-88-V-058, December 1988.

Where a licensee was responsible for a violation because of the actions of its employee, a mitigating circumstance that led the Commission to not cite the employee was considered mitigating concerning the licensee's penalty. *Master Mart*, OLCC-88-V-032, November 1988.

The most common limitation on employer liability under the doctrine of respondeat superior is that the intentional act must have been undertaken with the intent of furthering the business purposes of the employer, however misguided that intent might seem. Court did not impose tort liability on a hospital for the criminal conduct of an employee outside the scope of employment. *G.L. v. Kaiser Foundation Hospitals, Inc.*, 306 Or 54, 757 P2d 1347 (1988).

C.4.a.3.

C. VIOLATIONS

C.4.a.3. Extent of Licensee's/Permittee's Participation (continued)

In stating a colorable tort claim against an employer for the tort of an employee, three requirements must be met to conclude the employee was acting within the scope of employment. 1) Whether the act occurred substantially within the time and space limits authorized by the employment; 2) whether the employee was motivated, at least partially, by a purpose to serve the employer; and 3) whether the act was of a kind which the employee was hired to perform. *Chesterman v. Barman*, 305 Or 439, 305, 753 P2d 404 (1988).

Licensee received a Letter of Reprimand for violation of OAR 845-06-045(4) [now OAR 845-06-045(3)] because knowledge of criminal acts held by wrongdoer employees is imputed by law to the licensee. It is not a defense that the wrongdoers were disobeying the licensee's instructions when they sold drugs on the licensed premises. However, the Commission imposed a Letter of Reprimand where there was no evidence that the corporate licensee's principal or management was involved in the illegal activity. *Jiggles*, OLCC-88-V-004, August 1988.

Mitigation was appropriate in "sale after hours" case where the licensee took steps to insure her employees would follow the law by instructing her regular bartender to go to the tavern to assist a new employee in closing the tavern after 2:30 a.m. and both employees then failed to follow those instructions. *River Road House*, OLCC-88-V-018, June 1988.

The Commission does not have the authority to suspend a service permittee for actions unrelated to the mixing, selling, or serving of alcoholic liquor. However, the Commission held the licensee responsible for the actions of the person as an employee. ORS 471.360(1)(a); *Ivan Smith*, OLCC-86-V-075 and *The Sportsman Club*, OLCC-87-V-002, June 1987.

Violation for sale to minor was mitigated for licensee where licensee did as much as it reasonably could have to ensure that its employee would follow the law in checking identification and where the violation occurred because employee failed to follow the licensee's instructions. *Minute Market No. 10*, OLCC-86-V-056, January 1987.

Permittee's penalty for allowing minor to remain and consume was mitigated where licensee failed to fix back door that minors could sneak through and where licensee had no other employees on duty to help permittee serve crowd of 100 persons. *Clifford Simpson*, OLCC-85-V-031, September 1985.

Licensees are responsible for their employees' acts regardless of whether employee disregards specific instructions, although those instructions may provide mitigating circumstances. *Prefetto's Pizza*, OLCC-85-V-006, April 1985; *Don Juan's*, OLCC-88-V-003, May 1988.

The Commission found mitigation in a "sale to minor" case with respect to the licensee, but not with respect to the permittee who made the sale. The licensee had taken affirmative steps to police the premises and prevent sales to minors. The violations were primarily a result of the permittee's failure to follow the licensee's instructions. *Trazarra's Pub*, February 1984.

C.4.a.3.

C. VIOLATIONS

C.4.a.4. Others' Penalties

The licensee's proposed fine of \$455 should not be mitigated simply because the minor involved in the violation was fined only \$55 for possessing alcohol. Albert H. Grossman, *Handy Pantry*, OLCC-86-V-005, April 1986.

The fact that the employee who committed the violation received a lesser penalty than the licensee is not a basis for mitigation of the licensee's penalty. The basis for reducing a penalty is to prevent inequity or to take into account extraordinary circumstances. OAR 845-06-200(3). Trident Enterprises, Inc., *Spigot Tavern*, OLCC-85-V-068, June 1986.

Licensee's argument that proposed fine of \$650 was too high because of disparity with penalty in criminal case involving same incident was not persuasive where criminal penalty also included six months' probation. *Sportsman Tavern*, OLCC-87-V-051, February 1988.

Attorney General advised that aggravation of penalty based on incidents occurring at or post-hearing improper as a matter of law. Misrepresentations (reason for proposed aggravation) could be basis of new charge. Above not reflected in Final Order; determination made during consideration of Ochoco Inn, Inc., *Ochoco Inn & Cinnabar Lounge*, OLCC-84-V-003, November 1984.

DB licensee committed a violation by falsely telling the Commission in its application that it had over 200 members, which were required for the licensee to qualify for a DB license. The Commission did not cancel the license where the licensee had attained at least 200 members by the date of the hearing. *American Legion LaPine Post No. 45*, OLCC-84-V-023, February 1985.

In a sale to minor case, the Commission concluded that mitigation was appropriate where the minor appeared to be mature and close to 21, and where licensee had taken steps to avoid future violations by hiring an English-speaking clerk. *Owl Grocery*, OLCC-86-V-022, December 1986.

Some mitigation was shown where the Commission amended its rules, so that the licensee's actions would no longer be a violation under the amended rules. *Coca Cola Bottling*, OLCC-85-V-071, April 1987.

Some mitigation was shown where the Commission inadvertently misled licensee to incur unnecessary costs in a lawsuit related to the violation charges. *Coca Cola Bottling*, OLCC-85-V-071, April 1987.

Licensee's remedial efforts after the violation occurred are mitigating where licensee fired the employee who disregarded licensee's instructions. *Captain Kidd's*, OLCC-88-V-027, August 1988.

Licensee's efforts after a violation to discourage minors from attempting to purchase alcohol were mitigating. *Penny Saver Market & Deli*, OLCC-88-V-087, January 1989.

C.4.a.4.

C. VIOLATIONS

C.4.a.5. Actions/Events After Violation

Additional trainings and required meetings for staff to make sure they know and understand restrictions are not mitigating when they do not begin until six months after the first violation and when a second violation occurs despite the training. *Dad's Restaurant & Lounge*, OLCC-06-V-029, December, 2007.

The negligent failure to transmit a service permit application to OLCC is not a mitigating factor. Furthermore, the licensee must take reasonable steps to verify that the employee has a valid service permit, and there is no mitigation were the licensee allowed the employee to continue serving and supervising alcohol servers after learning that the employee did not have a valid service permit. *H2O Martini Bar & Restaurant*, OLCC-06-V-014, December, 2006.

The administrative law judge proposed additional mitigation for immediate action to comply with the service permit requirement following violation. While it was an action to prevent future violations mitigation is not justified when the action taken is simply what is required to comply with law. *Tony's Tavern*, OLCC-06-V-012, August, 2006, followed in *Downtown Delicatessen*, OLCC-04-V-022 August, 2007, amended final order following *Papas v. OLCC*, 213 Or. App. 369 (2007).

After the violation, Licensee purchased age verification equipment to prevent sales to minors in the future. The Commission mitigated the sanction by two days for this circumstance. *Ararat Restaurant & Lounge*, OLCC-04-V-070, August 2005

Where Licensee did not know of the store's reputation for selling beer to minors and took remedial steps suggested by OLCC after the violation to prevent future violations by minors, mitigation is appropriate. *Jiffy Mart*, OLCC-01-V-053, December 2001.

Where a co-worker reported the illegal sale to a minor to the police, mitigation is available to the Licensee. The Commission wishes to encourage and reward such efforts by licensees and their employees, assisting, as it does, the Commission's goal of keeping alcohol out of the hands of minors, and assisting in its retrieval once such a transaction has occurred. *Main Street Texaco & Mini Market*, OLCC-00-V-069, October 2001.

Licensee violated a restriction prohibiting her from allowing her former husband to work in the licensed business, when husband was observed performing tasks on the licensed premises on 8 occasions in 2 months. The Commission concluded that mitigation of penalty short of cancellation was appropriate as Licensee did not want her former husband working on the premises and asked him not to do so, but did not press the matter because of fear of assault by him; former husband did not commit any violations of liquor laws during the time he worked; Licensee has had no previous violations during the six years she has been licensed at the premises; following the events constituting the violation, Licensee obtained a restraining order against her former husband; and Licensee has since enforced the restraining order and her former husband was jailed. *A Taste of Thai*, OLCC-99-V-015, February 2000.

C.4.a.5.

C. VIOLATIONS

C.4.a.5. Actions/Events After Violation (continued)

The Commission has no jurisdiction to sanction a former licensee when the license is no longer in existence. The Attorney General has advised the Commission that it retains jurisdiction to issue a Letter of Reprimand to a former licensee in order to establish the licensee's record of compliance. *Rod's Old Town*, OLCC-92-V-073, February 1993.

The Commission has no jurisdiction to impose a fine or suspension on a former license when the license is no longer in existence. However, the Commission retains jurisdiction to issue a Letter of Reprimand to a former licensee in order to establish the licensee's record of compliance. *Rod's Old Town*, OLCC-92-V-073, February 1993; *300 Liberty Place*, OLCC-97-V-023, March 1998; *Sawyer Market*, OLCC-98-V-004, June 1998.

Where a permittee committed violations as a result of felony convictions, the fact that she had been subsequently convicted of additional felonies beyond those for which she was charged indicated she was a poor risk and that her service permit should be canceled. *Alexis Poppa*, OLCC-89-V-158, December 1989.

The Commission mitigated the penalty to a Letter of Reprimand. The Commission concluded that the reasons to mitigate the penalty outweighed the multiple prior instructions about disturbing noise where the licensee discontinued the live music after receiving the violation ticket and there had been no compliance problems since then. *The Hide Out*. OLCC-89-V-061, October 1989.

The Commission concluded that the licensee's action to prevent future violations of lewd activities was a basis to mitigate the penalty where the licensee moved the doorman inside the premises where the doorman could watch the dancers to ensure that the dancers were not getting too close to customers. *Sparkles Tavern*, OLCC-88-V-107, September 1989.

The Commission concluded that the licensee's effort to avoid future violations by firing the permittee who committed the violation was a basis for mitigation. *Mark's Tavern*, OLCC-89-V-030, July 1989.

Licensee's violation for unauthorized sale of a keg was not aggravated because purchaser provided keg to a minor, where licensee was not involved and had no reason to suspect purchaser would do so. *Howard's Northwest Deli*, OLCC-88-V-101, February 1989.

C. VIOLATIONS

C.4.a.6. Inability to Pay Fine

The Commission declined to reconsider its policy that low profits and an inability to pay a fine set in the penalty schedule are not persuasive reasons for mitigation because the schedule already provides relief for the licensee of a low-profit business by allowing a choice between a fine or suspension. *7-Eleven Store No. 2352-14501*, OLCC-90-V-122, April 1991.

Low profits and an inability to pay the fine set in the penalty schedule are not persuasive reasons for mitigation because the schedule already provides relief for the licensee of a low-profit business by allowing for a choice between a fine or suspension. *Duk Ki Park, New Arirang Tavern*, OLCC-84-V-036, February 1985; *Union Gap Tavern*, OLCC-89-V-005, April 1989.

C.4.a.6.

C. VIOLATIONS

C.4.a.7. Death of Licensee

The death of the licensee after the violations for sales to minors but before the licensee's contested case hearing does not moot or provide a basis to dismiss the charges. The licensee's death does, however, provide a basis for mitigation. Young Mok Kim, *Day & Night Grocery*, OLCC-84-V-026, May 1985.

C.4.a.8. Failure to Use Age Verification Equipment

Where age verification equipment was bought to offset the penalty for a previous sale to a minor and is not used to prevent the current violation then the failure to use the equipment is an aggravating factor. *Hunter's R.V. Park*, OLCC-06-V-068, February, 2007.

C.4.a.7.
C.4.a.8.

C. VIOLATIONS

C.4.a.9. Miscellaneous

No aggravation is warranted for an employee working for more than six months without a service permit when the employee only worked at three specific, special events which were only a few days long. This case is distinguishable from *Rick's White Horse Restaurant & Lounge* (OLCC-04-V-036, April 2005) based on the fact that employee worked only at a few special events during the time she was without a permit. *Oregon Beverage Service*, OLCC-07-V-037, April, 2008.

Posting the restrictions and telling the employees to follow them are not mitigating as Licensee is required to do both. *Dad's Restaurant & Lounge*, OLCC-06-V-029, December, 2007.

That other restrictions were not violated is not mitigating of the penalty for the restriction that was violated repeatedly; that there have not been separate violations for visibly intoxicated persons is not mitigating for the violations which did occur; and voluntary reporting of unconnected patron events is not mitigating of bartender conduct in willfully failing to follow the key over service restriction. *Dad's Restaurant & Lounge*, OLCC-06-V-029, December, 2007.

Financial investment is not a basis for mitigation, it is a step taken by licensees for business reasons. *Dad's Restaurant & Lounge*, OLCC-06-V-029, December, 2007.

Support of a local business representative is a neutral consideration, not a factor mitigating the penalty. *Dad's Restaurant & Lounge*, OLCC-06-V-029, December, 2007.

Licensee's limited English proficiency is not cause for mitigation. Licensee understood the restrictions and is required to comply with liquor laws regardless of English proficiency. Licensee's English was sufficient for her to engage in ordinary conversation, but she needed help reading documents, composing letters in English, and accurately conveying her ideas in English. *Dad's Restaurant & Lounge*, OLCC-06-V-029, December, 2007.

Licensee's unforeseen setbacks in remodeling the kitchen that prevented her from serving the full menu did not prevent her from notifying OLCC of the reduced menu, therefore she was not entitled to mitigation for the remodeling setbacks. *Dad's Restaurant & Lounge*, OLCC-06-V-029, December, 2007.

The fact that both OLCC and police did some compliance checks during which they found no violation of restrictions is not mitigating for the times in which they did find violations. *Dad's Restaurant & Lounge*, OLCC-06-V-029, December, 2007.

The nature of the premises as a fine dining establishment as opposed to a bar does not count towards mitigation. *Meriwether's*, OLCC-06-V-077, April, 2007

Licensee had argued for mitigation because he had age verification equipment, but the Commission declined to grant mitigation because licensee had not used the equipment while making the sale to a minor. The mere presence or ownership of the equipment is not a mitigating factor. *Monmouth Market*, OLCC-05-V-045, October, 2006.

C.4.a.9.

C. VIOLATIONS

C.4.a.9. Miscellaneous (continued)

The death of a patron at the hands of Licensee's security during one of the problem incidents warrants aggravation. *New Copper Penny*, OLCC-04-V-040, October 2005.

Licensee is entitled to mitigation of the standard penalty for a history of serious and persistent problems because it has demonstrated an ability and willingness to control the premises. Licensee's willingness and ability to control the problems is reflected in: (1) the relative number of problem incidents constituting the history of serious and persistent problems herein that arose from Licensee's appropriate steps to deal with problem persons; four of the eight incidents comprising the history of serious and persistent problems arose from Licensee's security staff taking appropriate steps to deal with problem persons by denying them entry or reentry into the licensed premises or to prevent escalation of a brewing problem; (2) the steps licensee has taken since the last incident to control future problems of the types identified herein; licensee changed its radio advertising practice, discontinued live music events, modified its hours on weekends, and developed a new late-night food menu to offer more food during the late night hours; and (3) Licensee's 24-year compliance history shows evidence of Licensee's willingness and ability to control problems at the premises. *New Copper Penny*, OLCC-04-V-040, October 2005.

The Commission has previously concluded that having a reputation for selling alcohol to minors is an aggravating factor. *Neighbor's Market* (OLCC, Final Order, 87-V-009, September 1987). The Commission finds that it is also an aggravating factor for a licensee to have a reputation in the community for selling drugs either within the premises or in areas adjacent to the premises for which licensee is responsible. Aggravation of the penalty on this basis is appropriate. *Jiffy Mart*, OLCC-04-V-027, February 2005.

Licensee argued that his efforts since the violation were due substantial mitigation. The record showed that Licensee remodeled and cleaned up the premises and locked the door to the outside bathroom that was being used for unlawful purposes. Licensee began working at the premises daily and stopped using a manager. He began "taking the violations seriously." While Licensee's efforts are laudable, the Commission does not find that they are due mitigation. Licensee did not develop a compliance plan, as requested by OLCC, and changes did not start occurring until five months after the last of five violations. Licensee should have recognized the need for close supervision of these premises earlier. The amount of time it took for changes to occur negates any mitigation Licensee may be due for making efforts to prevent further violations. *Jiffy Mart*, OLCC-04-V-027, February 2005.

Licensee permitted his employee to work as a bartender for over six months without a service permit. The lengthy period that Licensee's employee was permitted to work without a permit makes this case more serious than the typical case, and warrants aggravation of two days, or an additional \$330 of civil penalty to the sanction. *Rick's White Horse Restaurant & Lounge*, OLCC-04-V-036, April 2005.

The fact that Licensee received a letter of recommendation from a local police department official and that Licensee's employee attended and completed server education while failing to obtain the server permit are not relevant to the issue of mitigation. *Rick's White Horse Restaurant & Lounge*, OLCC-04-V-036, April 2005.

C.4.a.9.

C. VIOLATIONS

C.4.a.9. Miscellaneous (continued)

The fact that Licensee admitted his error immediately and did not claim he did not violate the rule did not rise to extraordinary cooperation warranting mitigation. (Citing *Synthia Smith & Teresa Oakes*, OLCC-03-V-012, October 2003.) *The New Market*, OLCC-04-V-016, January 2005.

In a second sale to a minor within a two-year period, Licensee argued for mitigation of penalty because he believed he had not been given an opportunity to purchase age verification equipment or to join the Responsible Vendor Program at the time of the first violation. OLCC staff maintained that Licensee was provided the same information as all other Off-Premises licensees concerning the options available when a violation has occurred, and that the Licensee made an informed choice to pay the fine after the first violation. The Commission concluded that Licensee's understanding, or lack thereof, of the options provided him relative to the earlier case, and whether or not he would have exercised those options had he understood them at that time, has no bearing on the penalty to be imposed in a subsequent case. Licensee is not entitled to affirmative mitigation for options he failed to exercise, for whatever reasons, at an earlier time and for a separate violation. *Griffs Mini Market*, OLCC-04-V-015, October 2004.

The Commission declined to allow mitigation based on the bartender cutting the perpetrator off from further alcohol service prior to the disorder. That step was nothing more than that which the law already required the bartender to do, given the perpetrator's visibly intoxicated state. That step, in itself, was ineffectual in preventing the disorder that followed. The bartender was obligated to follow up on the warning of potential disorder, which he did not do. *Cactus Bar & Grill*, OLCC-03-V-014, June 2004.

Where "choice of evils" does not constitute a defense to the charge, it can be the basis for mitigation in some instances. Where, however, a licensee puts himself on duty while intoxicated, even to eject an unruly patron, that licensee will not be rewarded with mitigation. Intoxication impairs the judgment of the actor and further elevates the risk of disorder. *Cactus Bar & Grill*, OLCC-03-V-014, June 2004.

Where Licensee permitted seven unlawful drug activities on the licensed premises (including three on the same date), in violation of OAR 845-006-0347(3), license cancellation was the appropriate penalty. The penalty was also aggravated by Licensee's personal involvement in one of the violations. *The Table*, OLCC-03-V-026, May 2004.

Where licensee relied on language on the application which appears to direct the applicant to mail in the application; had endeavored to ensure that the server had, in fact, mailed in the application and had received a false assurance from the server that the application had been mailed; and where Licensee established a palm pilot tracking system after the violation to prevent similar violations, the Commission awarded for three mitigating circumstances (equaling a reduction of 6 days or \$990). *The Blue Parrot*, OLCC-03-V-043, June 2004.

C.4.a.9.

C. VIOLATIONS

C.4.a.9. Miscellaneous (continued)

Licensees were members of the Responsible Vendor Program at the time their employee sold alcohol to a minor. The Commission concluded that members of the Responsible Vendor Program were eligible for mitigation. The Commission awarded mitigation for the following efforts which exceeded the requirements for the Program: (1) Licensees internal minor decoy program and participation in a community-based program; and (2) Licensees extensive orientation program, monthly training program and daily review of taped transactions. The Commission declined to award requested mitigation for the termination of the clerk who sold to the minor and for the upgrade to the age verification equipment. *Circle K Store #468*, OLCC-03-V-017, October 2003.

Admitting the violation to OLCC inspector does not rise to extraordinary cooperation warranting mitigation. *Synthia Smith & Teresa Oakes*, OLCC-03-V-012, October 2003.

Cancellation of the license is the appropriate penalty for Licensees' permitting unlawful activities associated with the sale or possession of drugs within a two-month period, particularly where Licensees know drug sales were occurring just outside the premises and drug paraphernalia was being sold at the premises. Licensees were not vigilant in making efforts to prevent or control illegal activity in or around their store. *Dekum Market*, OLCC-03-V-002, August 2003.

Where the corporate principal was managing the bar the night two minors were present and drinking for two hours. During this time, the minors were openly visible to the principal and the principal had direct contact with the minors; consequently, the principal was directly involved in Licensee's failure to check the identifications of the minors. Aggravation to the penalty was given on the basis of the principal's direct involvement. *Sugar Pine Inn*, OLCC-02-V-038, July 2003.

Where Licensees were charged with and found to have committed one violation of ORS 471.360(1)(6) (as to three named employees), the appropriate level of aggravations for the multiple employees is two days or \$330 for each employee beyond the first one. *Parilla Grill*, OLCC-01-V-082, August 2002.

Past practice and precedent dictate that the standard conversion factor for each mitigating factor is two days suspension or \$330 civil penalty. This conversion factor applies whether the deduction is being made from a maximum penalty of ten days suspension or \$1,650 civil penalty, or from a maximum penalty of thirty days suspension or \$4,950 civil penalty. The conversion factor is not proportionately increased as the maximum penalty increases. *Parilla Grill*, OLCC-01-V-082, August 2002.

C.4.a.9.

C. VIOLATIONS

C.4.a.9. Miscellaneous (continued)

Substantial breach(es) of a restriction or condition on the license constitute(s) a violation of ORS 471.405(1), a Category I violation. Such breaches are not easily mitigated, as certain licenses would not have been granted or renewed but for restrictions or conditions being placed on the licenses. These restrictions or conditions are necessary to address specific problems or concerns relating to the license. The objective of elevating a standard requirement of law to a strict requirement of the license privilege, through either license restrictions or a settlement agreement, is to provide for strict accountability by introducing the possibility of license cancellation. The Commission believes strict accountability is appropriate where failure to abide by standard requirements of law bears a relationship to ongoing problems. *La Macarena*, OLCC-00-V-116, August 2002.

Slight mitigation of penalty was awarded to Licensee whose clerk was found to have sold alcohol to a minor without verifying age, because Licensee required their employees to read and sign a statement every week agreeing to follow Licensee's training and policies governing the sale of alcohol and tobacco. *Nick's AM/PM*, OLCC-02-V-003, August 2002.

Where Licensees simultaneously permitted four minor dancers to be in an area prohibited to minors, the penalty was aggravated only to that of a second level violation due to partially offsetting mitigation. *Boogie Woogies/Stars Cabaret*, OLCC-01-V-051, September 2002.

Where permittee violated ORS 471.385(1)(a) by making a false statement in the application for a permit, which false statement made her eligible for the permit when she was in fact ineligible at the time of application, it is appropriate to aggravate the penalty to cancellation. *Shelly May Wilder*, OLCC-01-V-073, June 2002.

Licensee was found to have violated OAR 845-009-0015 by allowing his employee to sell alcoholic beverages without licensee having mailed or delivered the completed service permit application and fee to the Commission by the end of the first work day following the employee's first shift. Licensee was not entitled to the benefit of the employee's effort to comply (employee timely completed the service permit application and gave it to the employer) in mitigation of licensee's penalty. *Sugar Pine Inn*, OLCC-00-V-108, April 2002.

Flight 99 Tavern, OLCC-87-V-033, February 1988, does not stand for the proposition that if either licensee or permittee has made good faith efforts to achieve compliance, both benefit, independent of who performed the acts. Each is entitled to mitigation for their own individual acts, not for the acts of the other. *Sugar Pine Inn*, OLCC-00-V-108, April 2002.

C. VIOLATIONS

C.4.a.9. Miscellaneous (continued)

“Penalty entrapment” occurs when a defendant, although predisposed to commit a minor or lesser offense, is entrapped into committing a greater offense subject to greater punishment. The Commission determined that the elements of penalty entrapment had not been established: (1) Licensee was not entrapped; (2) Licensee did not commit a greater offense, because the offenses were the same; and (3) Licensee was not subjected to a greater punishment because OLCC charged both violations at the same, lower penalty level applicable to first violations due to the lack of intervention between the violations, rather than imposing the greater penalty allowed by the penalty rule for the second violation. *United Gas & Food Mart*, OLCC-01-V-047 & 048, February 2002.

That licensee was uncooperative and verbally abusive to police and OLCC inspectors during the investigation is not an independent basis for aggravating the penalty; such evidence does rebut any claim for mitigation based on cooperation (i.e., steps taken to avoid future problems by following OLCC suggestions). *Cascade West Grub & Ale House*, OLCC-01-V-071/-076, February 2002.

Mitigation of penalty was not allowed for the immediate termination of the clerk who sold to a minor where the clerk had violated the law before and was not fired. *Cascade West Grub & Ale House*, OLCC-01-V-071/-076, February 2002.

Where the licensed premises has the reputation of selling alcohol to minors, such reputation constitutes an aggravation factor. By itself, it does not warrant imposition of a mandatory suspension. A mandatory suspension was imposed in *Neighbor's Market*, OLCC-87-V-009, September 1987, because the reputation was combined with licensee's willful intent to sell to minors (higher prices charged to minors and secretive sales in the back of the store) and with a prior violation. *Jiffy Mart*, OLCC-01-V-053, December 2001.

Where Licensee did not know of the store's reputation for selling beer to minors and took remedial steps suggested by OLCC after the violation to prevent future violations by minors, mitigation is appropriate. *Jiffy Mart*, OLCC-01-V-053, December 2001.

Aggravation of penalty is warranted where none of Licensee's five employees had service permits, even after repeated warnings to Licensee, and where OLCC had provided application forms two months earlier. *Shanghai Restaurant*, OLCC-01-V-040, November 2001.

Where a clerk admitted he knew the juvenile buyer was a minor at the time of sale, and made furtive efforts to conceal the transaction (took the juvenile outside, got the items from the cooler, and surreptitiously concluded the sale away from the cash register), the violation was committed intentionally and forms a basis to aggravate the penalty. *Main Street Texaco & Mini Market*, OLCC-00-V-069, October 2001.

C.4.a.9.

C. VIOLATIONS

C.4.a.9. Miscellaneous (continued)

Where a co-worker reported the illegal sale to a minor to the police, mitigation is available to the Licensee. The Commission wishes to encourage and reward such efforts by licensees and their employees, assisting, as it does, the Commission's goal of keeping alcohol out of the hands of minors, and assisting in its retrieval once such a transaction has occurred. *Main Street Texaco & Mini Market*, OLCC-00-V-069, October 2001.

Mitigation was not allowed for past good record where Permittee had held permit for only one year. *Benjamin Soto Lopez*, OLCC-01-V-008, August 2001.

Where, in a violation case based on a history of serious and persistent problems (Category I), Licensee's willingness and ability to adequately control the premises (mitigation) and the extensive nature and degree of efforts to prevent violations were noted, the Commission mitigated the penalty from cancellation to a \$975 fine or a license suspension of 15 days. *300 Club*, OLCC-99-V-060, April 2001.

When Licensees adopt voluntary compliance steps, a failure to follow through on some of their suggested steps will not defeat mitigation where Licensees made serious and substantial efforts to follow through on the voluntary compliance steps and where any failings to achieve a compliance step were minor in light of the substantial steps taken. *Balzer's Pub & Grill*, OLCC-99-V-019, March 2001.

Where Licensee put herself back on duty by getting up from her table where she was consuming beer to stop a patron from leaving the premises with a drink in his hand, Licensee was acting in good faith to prevent a violation. If this were the only act performed when Licensee put herself back on duty, Licensee would be entitled to mitigation of the penalty for the violation of drinking on duty. However, where Licensee also served beer to individuals, the act of stopping the patron cannot be viewed in isolation from the other on-duty acts to provide mitigation. *Teri's Town Tavern*, OLCC-00-V-018, November 2000.

Where the record shows that the licensee participates in the Responsible Vendor program, absent additional aggravating or mitigating circumstances, the recommended penalty in the penalty schedule for a Responsible Vendor Program participant is appropriate. *Jefferson Grocery*, OLCC-00-V-037, October 2000.

Where violation of dancing restriction was not substantial, no violation of ORS 471.405(1) occurred. *Cisco & Pancho's*, OLCC-99-V-080ES, September 2000.

Licensee was charged, in the alternate, with a violation of ORS 471.405(1), sale in manner other than the license permits and OAR 845-006-0100(2)(b), changing the principal use of any room or area without prior OLCC permission. Because there was no proof that alcoholic beverages were sold or offered for sale at the dances, a necessary element, the Commission concluded that Licensee did not violate ORS 471.405(1). The Commission concluded that Licensee violated OAR 845-006-0100(2)(b) by changing the principal use of her dining room to hold two all-age dances on two dates, after approval from the OLCC had been denied. *Yen Ha Coast*, OLCC-99-L-005, May 2000.

C.4.a.9.

C. VIOLATIONS

C.4.a.9. Miscellaneous (continued)

Where service to two minors occurred simultaneously, and the bartender failed to check the identification of either, the incident was penalized as a single violation that was aggravated, rather than two violations. *Stockman's Exchange*, OLCC-99-V-003, May 2000.

Licensee violated a restriction prohibiting her from allowing her former husband to work in the licensed business, when husband was observed performing tasks on the licensed premises on 8 occasions in 2 months. The Commission concluded that mitigation of penalty short of cancellation was appropriate as Licensee did not want her former husband working on the premises and asked him not to do so, but did not press the matter because of fear of assault by him; former husband did not commit any violations of liquor laws during the time he worked; Licensee has had no previous violations during the six years she has been licensed at the premises; following the events constituting the violation, Licensee obtained a restraining order against her former husband; and Licensee has since enforced the restraining order and her former husband was jailed. *A Taste of Thai*, OLCC-99-V-015, February 2000.

The Licensee's actions following the sale and the minor's departure from the store do not "undo" the lack of age verification before the sale or the resulting violation. Licensee's subsequent action to retrieve the alcoholic beverage and to refund the money should be considered in assessing a penalty, not in determining whether a violation occurred. The Commissioners determined that an appropriate penalty was a Letter of Reprimand. *Brother's Market & Deli*, OLCC-99-V-044, February 2000.

In January 1999, the Commission adopted a new violation policy, PAP 845-112-004 (commonly called "fast track" cases.) The provision in the policy that limits an Administrative Law Judge who finds mitigating circumstances to no more than a 40 percent reduction of the standard penalty, is a rule for the following reasons: (a) It is a directive implementing the mitigation factors, which are listed in OAR 845-006-0200; (b) the policy is applicable to the general public, not just a single individual; and (c) it directly affects the amount payable by licensees, which substantially affects the interests of the public. Since the policy constitutes a rule, the rule is invalid because it was improperly adopted. Therefore, Administrative Law Judges may choose to follow, but are not bound by, the 40 percent limitation policy. *Peterson's on 4th*, OLCC-97-V-062, December 1999.

The Commission has concluded that where the penalty schedule specifies a standard penalty of suspension (only), any mitigation will be applied only to reduce the length of suspension, and will not result in giving the Licensee the option of paying a monetary penalty in lieu of suspension. *Express Mart*, OLCC-97-V-067, July 1998.

The fact that Licensees have had three violations within a six month period is not a reason to aggravate the penalty because the Commission's penalty schedule rule, OAR 845-06-200, already reflects increased sanctions for each successive violation within a two-year period. *7-Eleven Food Store No. 14495D*, OLCC-98-V-003, May 1998.

C.4.a.9.

C. VIOLATIONS

C.4.a.9. Miscellaneous (continued)

The Commission concluded that the circumstances in this case were mitigating circumstances under OAR 845-06-200(7)(c) and reduced the penalty to a Letter of Reprimand where: the minor decoy was six feet tall, on multiple occasions over a period of years the minor decoy had worn the uniform of a Washington County Search and Rescue unit into the licensee's store, on other occasions the minor decoy had worn a 45-caliber handgun when he went to licensee's store. Licensee argued that because he had seen the minor on multiple occasions wearing a uniform that licensee believed was a law enforcement agency uniform, and on other occasions had seen the minor carrying a hand gun, that he reasonably believed that the minor was 21 years of age or older. *Mini Mart*, OLCC-97-V-006, June 1997.

The Commission imposed an indefinite suspension on the license. Where licensee allowed others to obtain an interest in the business without prior Commission approval, the Commission suspended the licensee "until such time as Mr. Rahim and Mr. Naseri are divested of their interest in the business or become approved as licensees." *H-Market No. 2*, OLCC-96-V-008, December 1997.

The Commission concluded that the fact that permittee accepted marijuana as a tip for service at the licensed premises is directly related to the service permit privilege and is a circumstance warranting aggravation of any penalty. Moreover, the Commission concluded that aggravation is also warranted because the violation involved two controlled substances. *Deborah L. Anderson*, OLCC-96-V-042, December 1996.

Where licensee held a winery license and licensee committed a violation of being convicted of a felony, Commission mitigated the penalty because there were mitigating circumstances and, in addition, the Commission imposed a fine only rather than a fine and suspension combined because the licensee showed that imposition of a suspension on the winery would have significant adverse affect on the licensee's ability to continue operation of the winery due to the ongoing nature of the wine-making process. *Flynn Vineyards*, OLCC-94-V-080, February 1996.

Where the licensee has had one prior violation for maintaining a noisy establishment, the appropriate level of sanction for the licensee's second Category III Violation is Level 2. *New Max's Tavern*, OLCC-95-V-010, February 1996.

Where the standard sanction in the penalty rule was a Letter of Reprimand and there were reasons to mitigate the penalty, the penalty was mitigated to a Letter of Warning. *Whiskey Gulch Gang*, OLCC-93-V-008, October 1993; *Headless Horseman*, OLCC-93-V-049, December 1993.

A Letter of Warning does not count in any cumulative way to increase future sanctions against the licensee. *Whiskey Gulch Gang*, OLCC-93-V-008, October 1993; *Headless Horseman*, OLCC-93-V-049, December 1993.

For a violation of ORS 471.360(1), mitigation of penalty is warranted where a service permit is obtained after a violation, but before hearing. *Seafood Mama*, OLCC-92-V-087, March 1993.

C.4.a.9.

C. VIOLATIONS

C.4.a.9. Miscellaneous (continued)

Significant mitigation was appropriate for licensees in this case where employee disregarded licensees' instruction not to serve the customer hard liquor, where licensees had genuine interest in complying with liquor laws and a long, prior history of good compliance, and where food service was emphasized over liquor sales. *Lighthouse Inn/Rosie's Restaurant*, OLCC-92-V-086, March 1993.

The use of a deadly weapon by the licensee in a disorderly activity he committed was an aggravating circumstance. *Powderhorn*, OLCC-92-V-004, February 1993.

The Commission overrules the portions of the *Drumstick Tavern*, OLCC-89-V-018, April 1989, and *Eola Inn*, OLCC-90-V-105, June 1991, which established precedents holding that mitigation is appropriate when minors did not attempt to consume alcohol or did not, in fact, consume alcohol when they were on the licensed premises unlawfully. The Commission concludes that the fact that a violation did not occur is not in itself a mitigating circumstance. *Beer Nutz*, OLCC-92-V-003, May 1992.

Where the license was suspended on an emergency basis, and by the time the Final Order was issued, licensees had already served the number of days of suspension that was ordered, the Commission gave licensees credit for the number of days of suspension that they had already served. *Sao-Mai Restaurant*, OLCC-91-V-136, August 1992.

There was no basis for crediting and reducing licensee's penalty for the time and profits she lost during the days she waited for the Commission to complete their investigation of the pending violations and approve her license application. *Montero's Authentic Mexican Restaurant*, OLCC-92-V-018, July 1992.

Where licensee argued that penalty should be mitigated because the customer who was VIP was taking a cab home and was not driving, the Commission concluded this is not a reason to mitigate because statute prohibiting sale to visibly intoxicated persons does not distinguish between VIPs who are driving and those who are not. *Candy and Jeans*, OLCC-91-V-192, June 1992.

There was a reason to aggravate the penalty where the licensee failed to immediately transmit the service permit applications of five employees, but only one violation was charged. *New Max's Tavern*, OLCC-91-V-087, December 1991.

Instructions given to a licensee at her request for educational purposes are not a reason to aggravate the penalty for prior warnings. *New Max's Tavern*, OLCC-91-V-087, December 1991.

Licensee's good-faith effort to prevent a violation was a reason to mitigate the penalty. Just before selling beer to the minor in the instant case, licensee refused to sell to a minor who could not show identification. *17th & Lincoln Market*, OLCC-91-V-060, December 1991.

There was a reason to mitigate the penalty for licensee's good-faith effort to comply where licensee's employee discovered one of two minors on the premises and required the minor to leave when he could not show identification. *Old Town Club*, OLCC-90-V-168, November 1991.

C.4.a.9.

C. VIOLATIONS

C.4.a.9. Miscellaneous (continued)

Where the minor involved is a juvenile, there is a basis to aggravate the penalty. *Plaid Pantry No. 96*, OLCC-90-V-048, January 1991; *The Marketeria*, OLCC-91-V-088, November 1991.

There is a basis to mitigate the penalty where the licensee did as much as she reasonably could to ensure that the employee would not sell to a minor, but the violation occurred in spite of licensee's efforts. *The Marketeria*, OLCC-91-V-088, November 1991.

Violations of permitting a minor to consume (OAR 845- 06-035(2)(a)), enter and remain in a posted area (OAR 845-06-035(2)(b)), and permitting on the premises without verifying age, should be considered one violation for purposes of sanction and violation record because the offenses involve one minor and were sufficiently related in time and subject matter. *Robin Munson*, OLCC-87-V-011, September 1987; *Blue Moon*, OLCC- 87-V-012, September 1987.

Where a licensee is charged with several violations, the penalties for the separate violations should not be merged if the violations are not based on the same factual circumstances. *Van's Olympic Room, Inc., J.B.'s Paradise Room*, OLCC-86-L-002, April 1987.

Agency is not permitted to permute a single discrete act of misconduct into two or more by affixing different labels to the act. *Pratt v. Real Estate Division*, 76 Or App 483, 709 P2d 1134 (1985); *Britton v. Bd. of Podiatry Examiners*, 55 Or App 544, 632 P2d 1273 (1981).

C. VIOLATIONS

C.4.b. Consolidation of Penalties

Where licensee argued that he should have been found to be in violation of one instead of two separate violations for an employee serving alcohol without a service permit, the Commission concluded that it was appropriate to charge licensee with two separate violations because there had been numerous contacts by OLCC staff between the incidents during which time staff instructed licensee on employees serving without service permits. Only one employee was involved and the incidents were approximately two weeks apart. *The Gold Mine*, OLCC-94-V-039, July 1995.

Where licensee was charged with two separate violations, but under similar circumstances the Commission had charged other licensees with one violation and recommended aggravation of the penalty, the Commission determined to apply the sanction consistent with one violation with an aggravated penalty so that licensee was not treated differently from other licensees to his detriment. *Punjab Tavern*, OLCC-92-V-088, June 1993.

The Commission has charged a single violation and imposed a single penalty in circumstances where a licensee had multiple employees who did not have valid service permits. *Sao-Mai Restaurant*, OLCC 91-V-136, August 1992; *Cow Palace*, OLCC-91-V-180, June 1992; *Seafood Mama*, OLCC-92-V-087, March 1993.

The Commission has concluded that where the record did not indicate, in terms of facts or argument presented, why the licensee should be treated differently from other licensees alleged to have committed similar multiple violations, the Commission imposed a lesser penalty so that the licensee was not treated differently from other licensees, to his detriment. *Doc's Golden West*, OLCC-89-V-085, October 1989.

Where licensee who held both package store and restaurant licenses committed violation by selling kegs, the Commission charged a violation against only the restaurant license, not the package store license. The Commission did not consider whether separate violations and penalties could have been charged against each license. *Howard's Northwest Deli*, OLCC-88-V-101, February 1989.

A charge for the violation of ORS 471.315(1)(d) (maintained disorderly establishment) is not separate or discrete from the violation of OAR 845-06-045(2) (permitted disorderly activities) and OAR 845-06-045(3) (permitted criminal activities), because the two rules interpret the statute. *214 Tavern*, OLCC-87-V-045, December 1987.

Violations of ORS 471.315(1)(g), for selling to a minor, and of ORS 471.130(1), for failing to check identification, should be considered one violation for purposes of a sanction and the licensee's violation record. *Sandy Texaco Gas & Goodies*, OLCC-87-V-019, November 1987.

C.4.b.

C. VIOLATIONS

C.4.b. Consolidation of Penalties (continued)

OAR 845-06-045(6) [now (8)] does not interpret ORS 471.405. It is a delegative rule promulgated under the authority of ORS 471.730. The separate statutory origins of the statute and the rule presumably indicate that they have differing regulatory purposes. This would be a basis for identifying separate discrete acts and, thus, separate violations and sanctions. However, the Hearings Examiner followed the recommendation of Regulatory staff and treated the two violations as one incident for purposes of the licensee's violation record and proposed sanction. *Valley View Vineyards*, OLCC-87-V-014, November 1987.

C.4.b.

C. VIOLATIONS

C.4.c. Penalty Schedule

The schedule matrix for standard penalties includes repeated violations of the same statute within two years, so aggravating the standard penalty on these grounds, as the ALJ had proposed, would be unfairly duplicative. *Hunter's R.V. Park*, OLCC-06-V-068, February, 2007.

A violation of OAR 845-006-0360 (covering over a minor posting sign) is not specifically categorized in the Commission's penalty schedule, Exhibit 1 to OAR 845-006-0500. The Commission sought to classify the violation as a Category IV violation, i.e., one that creates a climate conducive to abuses associated with the sale or service of alcoholic beverages. All licensees that allow on-premises consumption are required to post signs stating when or if minor patrons are allowed on the premises. As set forth in OAR 845-006-0340(1), the Commission has "a responsibility to send a clear message to the community and its youth that drinking alcohol is an adult activity, and that drinking environments are for adults." A licensed premises that does not have its minor posting in full public view runs the risk that a minor seeking entry would not know that he or she was not allowed inside. It was appropriate for the Commission to classify the violation of covering a minor posting sign as a Category IV violation. *H2O Martini Bar & Restaurant*, OLCC-05-V-012, December 2005, *affirmed without opinion, Capital Asset Holdings, Inc., et al v. OLCC*, 213 Or. App. 240 (2007).

The Commission was authorized to cancel a license where Licensee had seven violations within the first six months the licensed premises was open for business. At least three of the seven violations (Licensee's false statements to the Commission and his employees' failure to verify the age of persons seeking to buy alcohol) were serious offenses. They were violations that created an immediate threat, or at least a potential threat, to the public safety. These seven violations also established a pattern of disregard for the law, which was further evidenced by the Licensee's attempts to conceal from the Commission that his minor sister had been on the premises on multiple occasions, and his allowing her unfettered access to the premises even after he had been warned by an inspector not to allow minors inside. *H2O Martini Bar & Restaurant*, OLCC-05-V-012, December 2005, *affirmed without opinion, Capital Asset Holdings, Inc., et al v. OLCC*, 213 Or. App. 240 (2007).

Where licensee entered the Responsible Vendor Program after, rather than before, the violation occurred, the standard penalty matrix for category III violations is applicable, rather than the category III(a) matrix for those already enrolled in the Program. *The Shack Restaurant & Sports Bar*, OLCC-01-V-067, January 2002.

The Commission will not impose a greater civil penalty than that which was in effect at the time of violation, regardless of the penalty rule in effect at later stages of the proceeding. Generally, the most lenient version of the penalty schedule rule in effect at the time of violation, time of charging document, or at the time of the Final Order, will apply. *Quick Stop Market*, OLCC-99-V-028/-063, June 2000.

Where the penalty schedule rule in effect at the time of the Final Order was more stringent than that in effect at the time of the violation, the Commission applied the less stringent penalty schedule. *Agate Beach Market & Deli*, OLCC-99-V-068, January 2000.

C.4.c.

C. VIOLATIONS

C.4.c. Penalty Schedule (continued)

The Commission concluded that a conviction for "violation of any municipal ordinance committed on the licensed premises" (ORS 471.385(1)(b)) is more similar to a conviction for permitting unlawful activity (OAR 845-06-047(3)) than a felony conviction, which is also included in ORS 471.385(1)(b). According to the penalty schedule rule, a violation for permitting unlawful activity (OAR 845-06-047(3)) is a Category III violation. The Commission concluded that an appropriate penalty for violation of ORS 471.385(1)(b), when the violation does not involve a felony, is the penalty recommended for Category III violations. *Sharon Ann Purcell*, OLCC-96-V-031, July 1997.

For determining whether there are "successive violations in the same category within a two-year period" in OAR 845-06-200(8), the relevant date of a violation would be the date that the act was committed which violated a statute, rule or order, rather than the date that a Final Order concluded that there had been a violation. *Dillinger's Pub Inc.*, OLCC-92-V-095 October, 1993.

The Commission determined to assess violations of ORS 471.315(3) (history of serious and persistent problems) as Category I violations under the penalty schedule. *Rastafarian Private Club*, OLCC-90-V-085, April 1991.

It is an aggravating circumstance if a violation involves a person who is less than 18 years old and the person objectively appears to be less than 21 years old. *Plaid Pantry No. 96*, OLCC-90-V-048, January 1991.

Where none of the suspensions for the individual violations exceeded 30 days, the Commission allowed the licensee the option of paying a fine instead of suspension, even though the aggregate suspension for all of the violations exceeded 30 days. [Reference is made to ORS 471.322 which allows the Commission to accept payment of a fine in lieu of suspension only when the suspension would be for 30 days or less]. *The Winema*, OLCC-90-V-117, May 1990.

Where the Commission inspector had not had a chance to intervene between violations, and where the record did not indicate, in terms of facts or argument presented, why the licensee should be treated differently than other licensees alleged to have committed similar multiple violations, the Commission imposed a lesser penalty so that the licensee was not treated differently than other licensees, to his detriment. *Doc's Golden West*, OLCC-89-V-085, October 1989.

The Commission has a policy of treating separate violations at the first level of the penalty schedule or even as the same violation where the Commission inspector has not had a chance to intervene between violations. *Eulah Faye Bergstrom*, OLCC-88-V-063, December 1988.

C.4.c.

C. VIOLATIONS

C.4.c. Penalty Schedule (continued)

Where a licensee is guilty of a violation solely as the result of the licensee's responsibility for the actions of an employee, the penalty schedule requires the same term of suspension for the licensee and employee, absent any aggravating or mitigating circumstances to distinguish the appropriate suspensions. The Commission cannot impose a longer suspension on the licensee by simply labeling the licensee's violation as something different than the permittee's violation. *Sandy Jug Tavern*, OLCC-87-V-022, OLCC-87-V-023, January 1988; affirmed without opinion. *Sahli v. Oregon Liquor Control Commission*, 94 Or App 575, 767 P2d 934 (1989).

Agency may revoke psychologist's license where psychologist was guilty of at least one of the 20 charges against her. The revocation of a license is a sanction within the agency's discretion. *Gilmore v. Board of Psychologist Examiners*, 81 Or App 321, 725 P2d 400, 1986.

A prior warning, where the licensee was not given the opportunity for a hearing, should not be treated as a prior violation for penalty schedule purposes. The penalty should not be elevated to the next level on the schedule because of the prior warning. Patricia J. Williams, *Patty Jean's*, OLCC-85-V-037, January 1986.

Violation charges involving previous dates that are consolidated into one hearing with charges involving subsequent dates may be treated as prior violations for purposes of the Commission's penalty schedule rule. Christos G. Kissas, *Tom's Grocery*, OLCC-84-V-019, 020, February 1985.

C.4.c.

C. VIOLATIONS

C.4.d. Mixed Penalty

It is appropriate to mitigate the standard penalty to a three day suspension or \$195 fine, and also provide a Letter of Reprimand to emphasize the Commission's concern about disorderly premises. *Reston Red's Tavern*, OLCC-89-V-155, April 1990.

C.4.d.