

## E. RETAIL AGENTS

### E.1. Responsibility for Shortages

In addressing Agent's objection to the burden issue, the ALJ partially relied upon *OLCC Agency No. 182* (Amended Final Order 92-RO-002, October 1993) in discussing burden of proof allocation. *OLCC Agency No. 182* announced that the burden of proof would no longer be on the Merchandising Division to prove that a shortage occurred and the amount of the shortage, but that the burden of proof would be on the agent to prove that a shortage did not exist. *OLCC Agency No. 182* has not been followed since it was issued in 1993. In all audit shortage cases subsequent to *OLCC Agency No. 182*, the Commission has reverted to its prior precedent, requiring OLCC to prove that a shortage existed and the amount thereof; the agent at all times has borne the burden of either refuting the proof that there is a shortage or proving that the shortage could not have been prevented in the exercise of reasonable care. See, e.g., *OLCC Agency No. 187*, OLCC-93-RO-002, Dec. 1993); *OLCC Agency No. 103*, OLCC-00-RO-001, Aug. 2000; and *OLCC Agency No. 197*, OLCC-05-RO-002, July 2005. It is apparent that *OLCC Agency No. 182* has been implicitly overruled in so far as the allocation of the initial burden regarding proof of shortage. The Commission wishes now to clarify explicitly its overruling of the burden of proof allocation announced in *OLCC Agency No. 182*. *Agency No. 198*, OLCC-05-RO-007, December 2005.

Agent was notified of a shortage of approximately \$150,000. Within 30 days, Agent deposited nearly five weeks worth of liquor sales proceeds and the Commission gave him written notice of the remaining shortage amount (approximately \$40,000). Agent failed to pay the remaining shortage amount within 30 days. Agent claimed he did not pay the remaining shortage as he doubted the audit's accuracy and disputes the shortage. These defenses are without merit as, under the plain language of the Retail Sales Agent Agreement, the agent is obligated to pay the shortage amount even though he or she has requested a hearing to dispute the shortage. At hearing, the burden of proof is on agent to show that the shortage could not have been prevented or avoided in the exercise of reasonable care. The agent must also prove the cause of the shortage. Failure to follow this process was a deliberate and substantial violation of Section 14(a) of the Agreement, warranting termination under Section 22(d). Additionally or alternatively, Agent violated a policy or procedure of the Commission with regard to liquor sales proceeds or inventory which caused, or is likely to cause, a financial loss to the Commission (his failure to pay the shortage amount denies the Commission the benefit of these funds), constituting good cause to terminate the Agreement under Section (2)(g). *Agency No. 198*, OLCC-04-RO-0006, December 2004.

Agent complained in a general way that her training was inadequate and that OLCC staff were unhelpful. She failed to submit any evidence to show that the training was inadequate or that inadequacies in training were related to the violations leading to the termination. Absent some specific connection between acts or omissions of staff and the violations leading to the termination of the Retail Sales Agreement, there is no good cause for suspension in lieu of termination. *Agency No. 143*, OLCC-02-RO-005, December 2002.

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### E.1. Responsibility for Shortages (continued)

Agent contended that the Commission should consider his good record of compliance to mitigate against the penalty of issuance of a notice of violation to Agent, as it does in determining the appropriate penalty for licensees and permittees. The Commission concluded that while the contract contemplates the possibility of mitigation when the agent is faced with termination (Paragraph 24), there is no provision for consideration of mitigation short of a termination action. Pursuant to Paragraphs 22e and 23, a notice of violation is the only appropriate penalty for an individual contractual violation. *Agency No. 16*, OLCC-02-RO-004, December 2002.

The successor agent sufficiently demonstrated the cause of that portion of shortage arising within 2 days of close-out audit of predecessor where: (1) Successor agent was not informed to be present for close-out audit by District Representative; (2) Predecessor agent was left alone in the store for one hour after conclusion of audit and the time the successor agent was told to arrive to open the store; and (3) Successor agent could identify as missing specific products which had been present at the closing audit.

The successor agent sufficiently demonstrated the cause of that portion of shortage attributable to successor's operation of the store where: (1) Pricing labels on shelves had not been changed by prior agent for 10 years; (2) Prior agent had unexplained shortages for 10 years; (3) The amount attributable to incorrect shelf pricing was likely to be substantial; (4) Successor agent received no training on changing price labels from OLCC or predecessor agent; and (4) immediately after successor agent corrected problem and changed all labels, shortages ceased.

Successor agent held not responsible for either portion of the shortage under Paragraph (14) of the Retail Sales Agent Agreement as both portions of the shortage were held to be from causes that could not have been prevented or avoided in the exercise of reasonable care. *OLCC Agency 198*, OLCC-97-RO-003, October 1998.

Agent held responsible for shortage where agent could not explain how the shortage occurred. *OLCC Agency 187*, OLCC-93-RO-002, December 1993.

The Commission was not persuaded by agent's argument that the amount he needed to repay for shortages should be calculated at cost rather than retail. The Commission concluded that agents are to repay shortages at retail value. *OLCC Agency No. 221*, OLCC-92-RO-007-ES, March 1993.

The Commission changed its interpretation of Paragraph 14 of the Retail Sales Agent Agreement. The Commission's past precedent determined that the burden of proof is on the Merchandising Division to prove that a shortage occurred and the amount of the shortage. The Commission no longer intends to follow this precedent. In future contested cases involving shortages in merchandise or inventory, the burden of proof will be on the agent to prove that a shortage does not exist. *OLCC Agency No. 182*, OLCC-92-RO-002, March 1993. Amended Final Order October 1993.

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### E.1. Responsibility for Shortages (continued)

Pursuant to Paragraph 14 of the Retail Sales Agent Agreement, the agent must prove the cause of the loss and that the loss could not have been prevented or avoided in the exercise of reasonable care. The Commission concluded agent was responsible for the loss where agent did not present any information to show the cause of the loss. *Agency No. 113*, OLCC-91-RO-005, January 1992.

The agent was not responsible for all or part of a loss due to an armed robbery where the agent did not violate the manual provisions because, 1) the excess cash accumulated in a period of less than one hour; and 2) he did not have a reasonable opportunity to remove the cash in excess of \$400 in the 45 minutes preceding the robbery. *OLCC Agency No. 122*, OLCC-88-RO-001, July 1988.

An agent is responsible for shortages that the agent's employees cause, as well as shortages that the agent personally causes. *OLCC Agency No. 230*, OLCC-87-RO-002, December 1987; *OLCC Agency No. 182*, October 1983, Amended Final Order October 1993; *OLCC Agency No. 103*, OLCC-92-RO-004, March 1993.

Agent was responsible for a loss of money at the agency because cause of loss was unknown, and therefore agent could not show that the cause of the loss was something he could not prevent by the exercise of reasonable care. *OLCC Agency No. 230*, OLCC-87-RO-002, December 1987; *OLCC Agency No. 182*, October 1983, Amended Final Order October 1993; *OLCC Agency No. 103*, OLCC-92-RO-004, March 1993.

Where evidence proves that some theft of inventory has occurred, agent must prove shortage is due to theft. The Commission will determine how much of the inventory was stolen and whether the loss due to theft could have been prevented in the exercise of reasonable care. *OLCC Agency No. 199*, OLCC-88-RO-002, March 1989; *OLCC Agency No. 197*, OLCC-86-RO-002, October 1986.

Mitigation not applicable to case involving loss of money from unknown cause at agency. *OLCC Agency No. 25*, OLCC-RO-001, May 1985.

Agent was not responsible for initial losses because she could not have reasonably anticipated that someone would travel through her neighbor's ceiling crawl space and pry open one of her wall panels to remove liquor. Agent was responsible for subsequent losses after inventory shortages reasonably put her on notice to investigate and discover the loosened wall panel. *OLCC Agency No. 152*, February 1983.

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### E.2. Termination Grounds

#### E.2.a. Reporting/Depositing Correct Sales

Agent was late in depositing a series of liquor sales proceeds for two months, then stopped depositing the proceeds into the state treasury account for slightly over one month, at the end of which he made 30 separate deposits. During this interval, Agent made a total of 55 late payments and had a recent history of 71 late deposits during the latter half of the preceding year. Agent's repeated failures to timely bank all liquor proceeds, as required by Section 13 of the Retail Sales agent Agreement and the Retail Operations manual, were both deliberate and substantial. Additionally or alternatively, Agent violated Commission policy or procedures relating to liquor sales proceeds and caused a financial loss to the Commission. Under either approach (Section 22(d) or Section 22(g)), the Commission determined it had good cause to terminate Agent's contract. *Agency No. 198, OLCC-04-RO-0006, December 2004.*

Agent filed late sales reports for five consecutive weeks and submitted no sales reports for the seven following weeks. Agent claimed his conduct was not a substantial and deliberate violation of the Retail Sales Agent Agreement because he had difficulty compiling a complete database for his new POS system and felt he had a lack of support and cooperation from OLCC. The Commission concluded that Agent made a conscious decision to stop sending in weekly sales reports, thus his actions were deliberate. The violation was also substantial considering Agent's history of submitting late sales reports, and the quantity of late and/or missing sales reports during the three month period at issue. Agent violated Section 13(d) of the Retail Sales Agent Agreement and the Retail Operations Manual, and, under Section 22(d) of the Agreement, good cause for termination is established. *Agency No. 198, OLCC-04-RO-0006, December 2004.*

The Commissioners terminated an Agency Agreement for good cause, under Paragraph 22, where the agent intentionally violated Commission policy regarding liquor sales proceeds by not making daily deposits of sales proceeds on 11 dates. The record showed that a shortage of approximately \$35,500 occurred during this time period. *OLCC Agency No. 218, OLCC-95-RO-002, February 1996.*

Agent substantially and deliberately failed to properly report and deposit correct daily sales where agent did not make a good faith effort to determine actual sales. Instead, agent simply reported and deposited his cash in the till on some days, even though he knew that a large discrepancy was developing between his reported sales and his inventory depletion. On other days, agent added personal funds to the cash in the till because he realized there was a need to make up for deposit shortages that had occurred on earlier dates. Carl Shoemaker, *OLCC Agency No. 169, OLCC-86-RO-003, March 1987.*

Agent's failure to submit his daily sales reports on time to the Commission on ten occasions two years prior to the hearing was not a deliberate and substantial violation of Section IV (D)(3) of the Retail Operations Manual, where the reports were late because of extenuating circumstances. Carl Shoemaker, *OLCC Agency No. 169, OLCC-86-RO-003, March 1987.*

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### E.2.a. Reporting/Depositing Correct Sales (continued)

Agent's failure to deposit daily sales on time, as required under Section IV (E)(2)(a) of the Retail Operations Manual, was a substantial and deliberate violation where deposits were late on 59 occasions over a three-year period and where there was no explanation why the majority of the deposits were late. Carl Shoemaker, *OLCC Agency No. 169*, OLCC-86-RO-003, March 1987.

The Commission terminated an Agency Agreement based upon findings that agent had permitted a substantial and deliberate violation of regulations and written policy and because agent had intentionally misappropriated money. Donald Bihn, *OLCC Agency No. 142*, September 1983.

E.2.a.

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### E.2.b. Proper Accounting

Agent failed to be responsible and account to the Commission for all liquor and monies, as required under Section III (L) of the Retail Operations Manual, where agent knew that his method of computing daily sales to report and deposit was inaccurate and unreliable. Carl Shoemaker, *OLCC Agency No. 169*, OLCC-86-RO-003, March 1987.

E.2.b.

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### E.2.c. Recording Sales

Evidence did not show that agent failed to record sales on days where he reported and deposited more sales than he recorded, when the explanation for the discrepancy was that agent was adding personal funds to his deposits in order to make up for accrued shortages from previous days. Carl Shoemaker, *OLCC Agency No. 169*, OLCC-86-RO-003, March 1987.

E.2.c.

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### E.2.d. Retaining Records

Agent did not fail to retain "daily agency cash and summary reports," as required under Section II (F) of the Retail Operations Manual, where agent may have failed to keep his daily computer cash and summary reports on 11 days, but agent kept his cash register tapes that also showed cash and summary information for the 11 days. Carl Shoemaker, *OLCC Agency No. 169*, OLCC-86-RO-003, March 1987.

E.2.d.

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### E.2.e Miscellaneous

The agent has provided excuses for his failure to comply with Retail Sales Agent Agreement and Retail Operations Manual in areas of interior store appearance, exterior store Appearance, and merchandizing. However, none of the excuses provide an adequate defense to the charges that have been brought, particularly when some of the issues have been going on for years. The agent failed to use his "best efforts" to maintain the "condition and appearance of store" in accordance with the Retail Sales Agent Agreement. *OLCC Agency No. 63, OLCC-06-RO-001, September, 2006.*

The things that the OLCC alleges the agent failed to maintain are nearly the same things OLCC alleges he failed to correct. As such, a separate analysis of the two violations is unnecessary in the final order. *OLCC Agency No. 63, OLCC-06-RO-001, September, 2006.*

Agent was notified of a shortage of approximately \$150,000. Within 30 days, Agent deposited nearly five weeks worth of liquor sales proceeds and the Commission gave him written notice of the remaining shortage amount (approximately \$40,000). Agent failed to pay the remaining shortage amount within 30 days. Agent claimed he did not pay the remaining shortage as he doubted the audit's accuracy and disputes the shortage. These defenses are without merit as, under the plain language of the Retail Sales Agent Agreement, the agent is obligated to pay the shortage amount even though he or she has requested a hearing to dispute the shortage. At hearing, the burden of proof is on agent to show that the shortage could not have been prevented or avoided in the exercise of reasonable care. The agent must also prove the cause of the shortage. Failure to follow this process was a deliberate and substantial violation of Section 14(a) of the Agreement, warranting termination under Section 22(d). Additionally or alternatively, Agent violated a policy or procedure of the Commission with regard to liquor sales proceeds or inventory which caused, or is likely to cause, a financial loss to the Commission (his failure to pay the shortage amount denies the

Commission the benefit of these funds), constituting good cause to terminate the Agreement under Section (2)(g). *Agency No. 198, OLCC-04-RO-0006, December 2004.*

Agent complained in a general way that her training was inadequate and that OLCC staff were unhelpful. She failed to submit any evidence to show that the training was inadequate or that inadequacies in training were related to the violations leading to the termination. Absent some specific connection between acts or omissions of staff and the violations leading to the termination of the Retail Sales Agreement, there is no good cause for suspension in lieu of termination. *Agency No. 143, OLCC-02-RO-005, December 2002.*

E.2.e.

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### E.2.e Miscellaneous

Agent contended that the Commission should consider his good record of compliance to mitigate against the penalty of issuance of a notice of violation to Agent, as it does in determining the appropriate penalty for licensees and permittees. The Commission concluded that while the contract contemplates the possibility of mitigation when the agent is faced with termination (Paragraph 24), there is no provision for consideration of mitigation short of a termination action. Pursuant to Paragraphs 22e and 23, a notice of violation is the only appropriate penalty for an individual contractual violation. *Agency No. 16*, OLCC-02-RO-004, December 2002.

Pursuant to Paragraph 22(c) of the agreement, agent was insolvent and unable to pay his retail liquor store debts where he did not have money to pay store rent and employee wages. *OLCC Agency No. 221*, OLCC-92-RO-007-ES, March 1993.

Agent was charged with committing a "substantial and deliberate" violation because he failed to pay the amount of a shortage within 30 days, as required by the contract. The Commission concluded that "deliberate" means willful, intentional or purposeful, and that agent did not act deliberately. The Commission concluded that agent failed to pay the shortage because he simply did not have the money to pay it. *OLCC Agency No. 221*, OLCC-92-RO-007-ES, March 1993.

E.2.e.

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### E.3. Fine/Suspension in Lieu of Termination

Agent contended that the Commission should consider his good record of compliance to mitigate against the penalty of issuance of a notice of violation to Agent, as it does in determining the appropriate penalty for licensees and permittees. The Commission concluded that while the contract contemplates the possibility of mitigation when the agent is faced with termination (Paragraph 24), there is no provision for consideration of mitigation short of a termination action. Pursuant to Paragraphs 22e and 23, a notice of violation is the only appropriate penalty for an individual contractual violation. *Agency No. 16*, OLCC-02-RO-004, December 2002.

Agent complained in a general way the her training was inadequate and that OLCC staff were unhelpful. She failed to submit any evidence to show that the training was inadequate or that inadequacies in training were related to the violations leading to the termination. Absent some specific connection between acts or omissions of staff and the violations leading to the termination of the Retail Sales Agreement, there is no good cause for suspension in lieu of termination. *Agency No. 143*, OLCC-02-RO-005, December 2002.

There were no good-cause reasons to suspend the agent, under Paragraph 24, instead of terminating the Agency Agreement where the record failed to show that the agent made a good-faith effort to comply with the Commission's requirements regarding sales proceeds. The agent deliberately failed to make deposits of sales proceeds on 11 dates. *OLCC Agency No. 218*, OLCC-95-RO-002, February 1996.

Retail sales agent violated Paragraph 22(e) of the Retail Sales Agent Agreement with the Commission by failing to complete and return the 1990 Cost Survey for exclusive agents within the time frame required by the Commission. Although Paragraph 23 of the Retail Sales Agent Agreement only provides for a Notice of Violation for any infraction of the agreement, the Commission suspended the Notice of Violation and instead issued a Letter of Warning to agent because agent had eventually returned the survey, albeit late. *OLCC Agency No. 193*, OLCC-92-RO-001, April 1993.

The Commission concluded that agent showed good-cause reasons pursuant to Paragraph (24) why he should not be terminated where the following circumstances existed. Agent attempted to pay the shortage by applying for a bank loan, and when that was denied he attempted to give the Commission a security interest in his equipment and fixtures; agent had repaid approximately \$10,900 of the \$14,000 shortage through the Commission's withholding of his compensation checks; the shortage did not occur due to any dishonesty on agent's part; and the Commission's performance evaluation of agent stated that agent had done a very good job in the operation of his agency. *OLCC Agency No. 221*, OLCC-92-RO-007-ES, March 1993.

Agent received one Notice of Violation pursuant to Paragraphs (22)(e) and (23) of Retail Sales Agent Agreement for violation of sale to minor. *OLCC Agency No. 74*, OLCC-90-RO-001, April 1991.

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### E.3. Fine/Suspension in Lieu of Termination (continued)

Where an agent had not yet committed enough violations to raise the possibility of being sanctioned with termination under Section 22(e) of the Retail Sales Agent Agreement, the Commission would not determine whether mitigating circumstances surrounding the current violation would weigh in favor of suspension rather than termination in a future termination proceeding. *OLCC Agency No. 193*, OLCC-89-RO-002, January 1990.

A fine or suspension was not justified instead of contract termination where an agent violated sales reporting and depositing procedures over a five-month period without advising the Commission and where agent was less than forthcoming when Commission eventually became aware of the problem. Carl Shoemaker, *OLCC Agency No. 169*, OLCC-86-RO-003, March 1987.

Agent's late deposits of sale proceeds, the most recent of which was nearly two years old, was not a sufficient basis, in itself, to support termination of the Agency Agreement where there had been no problem with late deposits since. Carl Shoemaker, *OLCC Agency No. 169*, OLCC-86-RO-003, March 1987.

E.3.

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### E.4. Violations

#### E.4.a. Sales to Minors/Failure to Verify Age

No mitigation is available for an agency violation even whether there was a long history of compliance and the violation was caused, at least in part, by the age verification equipment's shortcomings, which were remedied only after the agent complained to the software company as a result of this violation. *OLCC Agency No. 178*, OLCC-06-RO-004, March, 2007.

The time necessary to conduct a package sales transaction is, generally, of short duration. This fact does not relieve licensees and liquor agents of the affirmative duty to observe anyone who purchases alcoholic liquor to ensure that the purchaser is not visibly intoxicated or a minor. Licensees and agents have that affirmative duty, independent of the type of license or length of transaction. *Agency No. 60*, OLCC-04-RO-005, December 2004.

The "knowing" standard in ORS 471.315(1)(a)(G) applies to sanctioning licensees, but does not apply to sanctioning liquor agents for violations of ORS 471.410. Penalties for agents are prescribed in the Retail Sales Agent Agreement and include sanctioning an agent for the conduct of an employee, whether that conduct is willful or negligent (pursuant to Paragraph 11). *Agency No. 17*, OLCC-04-RO-0002, July 2004.

Agent is located in a city with a population of 20,000 or more. Agent challenged the minor decoy operation leading to the sale to a minor on the basis of the method used to generate the random sample required by ORS 471.346 and OAR 845-009-0200(3). Agent claimed that failure to remove from the random sample pool those licensees and agents randomly selected and visited in past operations was inequitable and discriminatory. The Commission upheld the random number generator method for selection of premises to be visited in a decoy operation and further held that removal of premises previously visited from the random sample pool would have violated ORS 471.346 and OAR 845-009-0200. *OLCC Agency No. 183*, OLCC-03-RO-002, October 2003.

Agent challenged the penalty of a notice of violation for sale to a minor as excessive on two basis: (1) that one notice of violation would disqualify him from applying for a second store; and (2) there is no opportunity for mitigation of penalty for a notice of violation. The Commission determined that the Agent's "excessive punishment" argument likely stemmed from the Eighth Amendment to the United States Constitution and/or Article I, Section 16 of the Oregon Constitution. Because both constitutional provisions apply only to criminal cases, they are inapplicable to OLCC's proceeding. *OLCC Agency No. 183*, OLCC-03-RO-002, October 2003.

E.4.  
E.4.a

## E. RETAIL AGENTS

### E.4.a. Sales to Minors/Failure to Verify Age (Continued)

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.

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.

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.

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.

E.4.a

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### E.4.a. Sales to Minors/Failure to Verify Age (Continued)

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.*

Agent argued that only acts committed by a liquor agent could result in violation of the Retail Sales Agent Agreement and a sanction against the liquor agent. The Commission concluded that Paragraph (11), imposing on agent responsibility for the acts and omissions of store personnel within the course and scope of their duties when in violation of the Agreement (whether willful or negligent), read in combination with Paragraph (7)(b), mandating compliance with all statutes, rules, policies, and procedures of the Commission, impose liability on the agent for the acts and omissions of store personnel in violation of statutes, rules, etc., when those acts or omissions are within the scope of the employee's duties, whether omitted or committed willfully or negligently. *OLCC Agency No. 155, OLCC-97-RO-001, January 1998.*

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.*

E.4.a

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### E.4.b. Sales to Visibly Intoxicated Persons

To establish a negligent sale of alcohol to a VIP, the preponderance of the evidence must show that there were visible signs of intoxication which the seller had some opportunity to observe. Actual observation is not required. There must be visible signs of intoxication before a duty to prevent such a sale attaches. If a sale is made after the duty attaches, it is a negligent sale. *Agency No. 49*, OLCC-04-RO-003, December 2004; *Agency No. 60*, OLCC-04-RO-005, December 2004.

It is possible for a retrograde extrapolation of BAC levels to be coordinated with the signs of visible intoxication most likely displayed at the time of sale when all relevant variables affecting absorption and dissipation are addressed and when the extrapolation covers the time of sale. Results of a BAC test were not given weight in terms of correlation with visible signs of intoxication at the time of sale in this case because the relevant variables affecting absorption and dissipation of alcohol were not sufficiently addressed and the extrapolation did not clearly cover the time of sale. *Agency No. 60*, OLCC-04-RO-005, December 2004.

It is not always required that there be testimony from a third-party eyewitness to the signs displayed at the time of the sale in order to find that signs were displayed and that those signs were sufficient to alert the clerk to the patron's intoxication. Prior cases involving both package stores and a liquor store have arrived at that outcome from other sources. In *7-Eleven No. 23980*, March 1984, the fact that the clerk acknowledged the patron was wearing socks without shoes (in November) and he could tell she had consumed some alcohol, coupled with police observations of intoxication 45 minutes before the purchase, was sufficient to infer signs of visible intoxication were present at the time of the sale. In *7-Eleven No. 20806*, November, 1984, patron's state of intoxication at jail 30 minutes before the sale, coupled with the clerk's acknowledgment of an odor of alcohol and slight swaying, should have put the clerk on notice to investigate further before making the sale. In *Kelsey's Korner*, October 1997, the Commission announced it would infer that signs of visible intoxication were displayed within the store if signs of visible intoxication were observed both before and after the patron was in the store. In *Agency No. 17*, July 2004, the patron was observed driving erratically, evidencing intoxication, before and after the sale of alcohol; signs of visible intoxication while in the store were inferred where, in particular, patron would have been required to engage in conversation with the clerk to ask for the product (all product was behind the counter). In *Costless Market*, April 2003, a review of the store's videotape of the transaction supplied the proof of visible intoxication at the time of the sale. It is also possible for a retrograde extrapolation of BAC levels to be coordinated with the signs of visible intoxication most likely displayed at the time of sale when all relevant variables affecting absorption and dissipation are addressed and when the extrapolation covers the time of sale. *Agency No. 60*, OLCC-04-RO-005, December 2004.

The time necessary to conduct a package sales transaction is, generally, of short duration. This fact does not relieve licensees and liquor agents of the affirmative duty to observe anyone who purchases alcoholic liquor to ensure that the purchaser is not visibly intoxicated or a minor. Licensees and agents have that affirmative duty, independent of the type of license or length of transaction. *Agency No. 60*, OLCC-04-RO-005, December 2004.

E.4.b.

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### E.4.b. Sales to Visibly Intoxicate Persons (Continued)

The sale of alcoholic liquor to a visibly intoxicated person, prohibited by ORS 471.410(1), constitutes a violation of Paragraph 7(b) of the Retail Sales Agent Agreement. *Agency No. 17, OLCC-04-RO-0002, July 2004.*

The “knowing” standard in ORS 471.315(1)(a)(G) applies to sanctioning licensees, but does not apply to sanctioning liquor agents for violations of ORS 471.410. Penalties for agents are prescribed in the Retail Sales Agent Agreement and include sanctioning an agent for the conduct of an employee, whether that conduct is willful or negligent (pursuant to Paragraph 11). *Agency No. 17, OLCC-04-RO-0002, July 2004.*

Agent's employee made a negligent sale of alcohol to a visibly intoxicated person where the alleged VIP had to walk at least five steps to the counter and was required to speak to the clerk to order his selection from behind the counter. The walking and conversation should have given some indication of the customer's intoxication, considering the signs of intoxication he displayed before entering, and after leaving, the store (erratic driving, staggering, slow and slurred speech, strong odor of alcohol, and bloodshot/red eyes). *Agency No. 17, OLCC-04-RO-0002, July 2004.*

E.4.b.

## E. RETAIL AGENTS

### E.4.c. Miscellaneous (Failure to Return Cost Survey)

Agent accepted bank card payments for purchases of alcoholic liquor from licensees in violation of the Retail Sales Agent Agreement, the Retail Operations Manual, and OAR 845-015-0170(2)(f). Agents can accept credit cards from over-the-counter customers, but not licensees. Agent stipulated that the violations occurred, but argued that the rule is not uniformly applied. Agent did not present evidence that the rule is not uniformly applied or evidence that OLCC is aware of other violations and intentionally not issuing Notice of Violation Tickets. OLCC established the violation and no mitigation was available as this is an agency case. *OLCC Agency No. 1113*, OLCC-07-RO-001, January, 2008.

The Retail Operations Manual (ROM) requires that OLCC give liquor agents 48 hours notice of an audit (absent exceptions not relevant to this case). While Agent was given fewer than 48 hours notice, the ROM requirement does not operate as a condition precedent to the obligations of Paragraph 15 of the Retail Sales Agent Agreement (regarding reasonable care and agent cooperation with audits). Therefore, receipt by the Agent of less than 48 hours notice does not warrant dismissal of an NVT for failure to cooperate with an audit. *Agency No. 193*, OLCC-04-RO-0004, December 2004.

Paragraph 15 of the Retail Sales Agent Agreement requires OLCC to use reasonable care to avoid interference with Agent's service to the public and business operations while carrying out an audit. The Commission concluded that the OLCC uses reasonable care to avoid interference with an agent's service to the public and business operations when, in scheduling the audit, it takes into account operational facets such as the size of the store inventory (impacts the amount of time the audit will take), the hours of operation of the store (impacts service to the public), and the liquor inventory delivery schedule (time counterproductive to an audit). OLCC considered those factors in scheduling the audit in this case. An agent's scheduling preferences or desire to be personally present for the audit need not be accommodated by the auditors in order to exercise reasonable care. *Agency No. 193*, OLCC-04-RO-0004, December 2004.

Paragraph 11 of the Retail Sales Agent Agreement requires that agents employ a sufficient number of personnel to operate the store efficiently and without unreasonable inconvenience to the public and in compliance with the agreement. One of the requirements of the Agreement is to submit to regular audits and to cooperate with the audits. Paragraph 15. In addition to providing sufficient staffing to serve the public, agents must also provide sufficient staffing for audits, either by being personally present or by delegating the responsibility to an employee. An agent may not refuse an audit because the agent insists on being personally present. An agent's failure to appear at the scheduled audit or to make arrangements to have a representative present demonstrates a lack of cooperation with the audit and constitutes a violation of the Retail Sales Agent Agreement. *Agency No. 193*, OLCC-04-RO-0004, December 2004.

E.4.c

## E. RETAIL AGENTS

### E.4.c. Miscellaneous (Failure to Return Cost Survey) (continued)

Agent violated Section 7(a) of the Retail Sales Agent Agreement, the hours of operation requirements set out in the Retail Operations Manual, and OAR 845-015-0140, by voluntarily closing his store for business. Agent claimed it was futile for him to remain open in the absence of adequate inventory to serve his clients (OLCC did not fill his order and deliver product). The Commission concluded that there is no exception to the hours of operation requirements for lack of inventory, but even if there were, Agent would not qualify as he still had valuable inventory to sell on the date he closed his business. Agent violated the Agreement and the Commission's hours of operation policy. This violation was both deliberate and substantial, providing good cause for termination. *Agency No. 198, OLCC-04-RO-0006, December 2004.*

E.4.c

## E. RETAIL AGENTS

### E.5. Grounds for Termination

Failure to return the 1990 Cost Survey for exclusive agents within the time provided by the Commission violates Paragraph 16 of the Retail Sales Agent Agreement and warrants a Letter of Warning. *OLCC Agency No. 193*, OLCC-92-RO-001, April 1993.

Agent challenged the penalty of a notice of violation for sale to a minor as excessive on two basis: (1) that one notice of violation would disqualify him from applying for a second store; and (2) there is no opportunity for mitigation of penalty for a notice of violation. The Commission determined that the Agent's "excessive punishment" argument likely stemmed from the Eighth Amendment to the United States Constitution and/or Article I, Section 16 of the Oregon Constitution. Because both constitutional provisions apply only to criminal cases, they are inapplicable to OLCC's proceeding. *OLCC Agency No. 183*, OLCC-03-RO-002, October 2003.

Agent contended that the Commission should consider his good record of compliance to mitigate against the penalty of issuance of a notice of violation to Agent, as it does in determining the appropriate penalty for licensees and permittees. The Commission concluded that while the contract contemplates the possibility of mitigation when the agent is faced with termination (Paragraph 24), there is no provision for consideration of mitigation short of a termination action. Pursuant to Paragraphs 22e and 23, a notice of violation is the only appropriate penalty for an individual contractual violation. *Agency No. 16*, OLCC-02-RO-004, December 2002.

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.

Agent argued that only acts committed by a liquor agent could result in violation of the Retail Sales Agent Agreement and a sanction against the liquor agent. The Commission concluded that Paragraph (11), imposing on agent responsibility for the acts and omissions of store personnel within the course and scope of their duties when in violation of the Agreement (whether willful or negligent), read in combination with Paragraph (7)(b), mandating compliance with all statutes, rules, policies, and procedures of the Commission, impose liability on the agent for the acts and omissions of store personnel in violation of statutes, rules, etc., when those acts or omissions are within the scope of the employee's duties, whether omitted or committed willfully or negligently. *OLCC Agency No. 155*, OLCC-97-RO-001, January 1998.

The Commission's administrative enforcement proceedings are civil actions, rather than quasi-criminal proceedings, according to advice provided to the Commission by its legal counsel. See *Dillinger's Pub*, OLCC-97-V-038/039, October 1997. In the context of retail liquor agents, the Commission concluded that proceedings by the Commission to enforce paragraph (22) of the Retail Sales Agent Agreement are also not quasi-criminal, but civil in nature. *OLCC Agency No. 155*, OLCC-97-RO-001, January 1998.

E.5.

## E. RETAIL AGENTS

### E.5. Grounds for Termination (Continued)

When terms of a document at issue are ambiguous, the meaning of specific terms becomes a question of fact precluding summary judgment. A provision in a document is ambiguous if it has no definite significance and if it is capable of more than one sensible and reasonable interpretation. A provision is unambiguous if its meaning is so clear as to preclude doubt by a reasonable person. *Carlson v. 6 Reservation Ranch*, 118 Or App 512, 848 P2d 616 (1993).

A person is not paid "at a fixed rate," within the meaning of ORS 652.210(2), if the relevant contract makes the actual amount of his compensation depend on the financial condition of the corporation. *Thompson v. Bolliger, Hampton & Tarlow*, 118 Or App 700, 849 P2d 526 (1993).

An agreement to share profits and losses is a key element of partnership. *Thompson v. Bolliger, Hampton & Tarlow*, 118 Or App 700, 849 P2d 526 (1993).

Whether a person is an "employee," within the meaning of ORS 652.210(2), depends on the substance of the employment relationship, as evidenced by the relevant contract. *Thompson v. Bolliger, Hampton & Tarlow*, 118 Or App 700, 849 P2d 526 (1993).

The trial court is not free to ignore unambiguous contract provisions in order to remedy what it perceives to be an unanticipated inequity. *Thompson v. Bolliger, Hampton & Tarlow*, 118 Or App 700, 849 P2d 526 (1993).

E.5.