BEFORE THE LIQUOR CONTROL COMMISSION
OF THE STATE OF OREGON

In the Matter of the Proposed Issuance of a Letter of Reprimand Concerning the Wholesale Malt Beverage and Wine (WMBW) License held by: Miller Brands, Inc. MILLER BRANDS, INC. 5825 NE Skyport Way Portland, Oregon 97218 - - - - - - - - - - - - - Multnomah County	)	FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

A hearing in the above matter was held on the 12th day of August, 1983, in Portland, Oregon, before Hearings Examiner Douglas Crumme'. The Licensee appeared in person and was represented by Kimberlee Collins, Attorney at Law. The Commission was not represented by legal counsel.

RECORD OF PREVIOUS VIOLATIONS

NONE.

The Commission having considered the record of the hearing, the applicable law and regulations, the Proposed Order of the Hearings Examiner, Exceptions to the Proposed Order of the Hearings Examiner, and now being fully advised, makes the following:

FINDINGS OF FACT

1. Miller Brands, Inc., doing business as MILLER BRANDS, INC., 5825 NE Skyport Way, Portland, Oregon, has held a Wholesale Malt Beverage and Wine (WMBW) license at all dates relevant to the Findings of Fact below.

2. The Commission's Enforcement Division has charged the Licensee with the violation of ORS 471.305 (delivered malt beverages to an unlicensed premises).

3. Charles Walker held a Restaurant (R) license from the Commission at the Hot Potata Too in Portland from 1977 through June 30, 1982.

4. Mr. Walker continued selling beer and wine at the Hot Potata Too after June 30, 1982 although he realized his Restaurant license from the Commission had expired.

5. Denis Sjothun is employed as a pre-salesman by Miller Brands, Inc. Mr. Sjothun's duties are to visit licensed retail premises and take orders for beer.

6. Miller Brands, Inc. has a policy that its salesmen are to check to make sure that a retail account has a valid license at the time of the annual renewal date of the account's license. Miller Brands' procedure is that the salesman is to write the number of the license certificate in the salesman's records.

7. Mr. Sjothun paid a sales call on the Hot Potata Too in July, 1982. Since the license renewal date for the Hot Potata Too was July 1, 1982, Mr. Sjothun asked the Hot Potata Too's manager, Alan Perkins, if the Hot Potata Too's Restaurant license with the Commission had been renewed. Mr. Perkins did not know and was not able to locate a renewed license certificate. Consequently, Mr. Sjothun did not sell or arrange for the delivery of any alcoholic beverages to the Hot Potata Too that week.

8. Mr. Sjothun visited the Hot Potata Too approximately one week after the visit described in the Finding of Fact above. Mr. Sjothun again inquired of manager Alan Perkins whether the premises' Restaurant license had been renewed. Mr. Perkins stated to Mr. Sjothun that Mr. Perkins had talked over the phone about the matter with Licensee Charles Walker. Mr. Perkins related that Mr. Walker had said the Restaurant license had been renewed and that he (Mr. Walker) was in possession of the current license certificate. Based upon that representation, Mr. Sjothun took an order for alcoholic beverages from the Hot Potata Too.

9. Miller Brands, Inc.'s driver-salesman Robert Kinney subsequently visited the Hot Potata Too to deliver the premises' order for alcoholic beverages. Mr. Kinney also inquired whether the license for the Hot Potata Too had been renewed. Manager Alan Perkins also stated to Mr. Kinney that Licensee Charles Walker had stated over the phone that the license was renewed and that Mr. Walker was in possession of the license certificate. Mr. Kinney delivered the order of alcoholic beverages.

10. Miller Brands, Inc.'s employees proceeded to make regular deliveries of alcoholic beverages to the Hot Potata Too until February, 1983 when Miller Brands was notified by the Commission that the Hot Potata Too's Restaurant license had not been renewed in July, 1982.

11. Alan Perkins had been the manager of the Hot Potata Too for five years until the end of his employment there in February, 1983. Miller Brands, Inc.'s pre-salesman Mr. Sjothun

had been acquainted with Mr. Perkins at the Hot Potata Too for a matter of years and driver-salesman Mr. Kinney had been acquainted with Mr. Perkins at the Hot Potata Too for at least six months. Both Miller Brands, Inc.'s employees had a trusting relationship with Mr. Perkins.

12. Neither Mr. Sjothun, Mr. Kinney nor any other Miller Brands, Inc. employees checked further about the renewal of the Hot Potata Too's license certificate in July, 1982 following the inquiries described in the Findings of Fact above.

13. Mr. Kinney's delivery route for Miller Brands involves approximately 30 stops each day. Mr. Kinney is customarily quite busy on his delivery route.

14. During the period July 1, 1982 through February, 1983, other wholesalers besides Miller Brands continued to make deliveries of alcoholic beverages to the Hot Potata Too. To Hot Potata Too's manager Alan Perkins' knowledge, Miller Brands' employees Denis Sjothun and Robert Kinney were the only wholesaler representatives that specifically inquired whether the Hot Potata Too's Restaurant license had been renewed in July, 1982.

DISCUSSION

The Licensee's position at the hearing was that the Commission should issue a "Notice of Warning" rather than a Letter of Reprimand in this matter.

The Licensee's understanding is that a Letter of Reprimand would be counted as a "major" violation under the Commission's Penalty Schedule Rule, OAR 845-06-200, for purposes of computing a penalty on any subsequent major violation the Licensee

might commit. The Licensee believed that a "Notice of Warning," on the other hand, would be counted as a "minor" violation under OAR 845-06-200.

The Commission takes official notice that a Notice of Warning is an item that the Enforcement Division issues either in the form of a ticket issued by an Inspector or in the form of a letter issued by the Milwaukie headquarters office. Neither form gives a licensee the notice of opportunity for hearing required under ORS 183.415(1) and ORS 183.415(2). There is a question, consequently, about what effect a Notice of Warning would have with respect to the Commission's Penalty Schedule, OAR 845-06-200. The Commission is not aware of any administrative rule providing that a Notice of Warning is considered to be a "minor" violation for purposes of applying the Penalty Schedule to a licensee's violation history. Because of the lack of the required notice of opportunity for a hearing, it is quite arguable that a Notice of Warning should not be counted at all against a licensee as a prior violation.

In any event, the Licensee's position is that the Staff's proposed Letter of Reprimand should be mitigated so that the violation charge is recorded as a "minor" rather than a "major" violation under OAR 845-06-200.

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. A Brewery or a Wholesale Malt Beverage and Wine licensee shall deliver malt beverages only to or on a licensed premises. Sale of alcoholic liquors under any license issued by the Commission authorizing retail sales by licensee shall be restricted to the premises described in the license, but deliveries may be made by the licensee to

> customers pursuant to bona fide orders received on the licensed premises prior to delivery. ORS 471.305.

Licensee violated ORS 471.305 through delivering malt beverages to the Hot Potata Too between July 1, 1982 and February, 1983 when the Hot Potata Too was without a valid license from the Commission authorizing the retail sale of alcoholic beverages.

ULTIMATE CONCLUSIONS OF LAW

> When there has been a violation of ORS Chapter 471 or 472, or any rule adopted thereunder, upon any premises licensed by the Commission, the Commission may revoke or suspend either the service permit of the employee who violated the law or rule or the license of the licensee upon whose premises the violation occurred, or both the permit and the license. ORS 471.385(3).

The Commission may cancel or suspend the Licensee's license for the violation of ORS 471.305 (sale to unlicensed premises).

The Commission notes that the Enforcement Division's proposed Letter of Reprimand in this matter is reduced from the penalty provided in the penalty schedule for a first violation of ORS 471.305 of a five-day suspension or a $325 fine. The Commission does not believe that a further reduction in the penalty beyond a Letter of Reprimand or a reduction in status of the violation from "major" to "minor" under OAR 845-06-200 is indicated. The issuance of license certificates by the Commission allows a wholesale licensee a method of determining with confidence whether a retail licensee has a current valid license. It seems appropriate that the wholesaler should bear

responsibility for error in those cases where rather than inspecting the retail license certificate, the wholesaler chooses to rely on the word of the retailer that the license has been renewed.

FINAL ORDER

1. It is hereby ordered that Miller Brands, Inc., doing business as Miller Brands, Inc., 5825 NE Skyport Way, Portland, Oregon, be issued a LETTER OF REPRIMAND for the violation of ORS 471.305 from July 1, 1983 through February, 1983.

2. It is further ordered that any next violation that is classified as "major" under the Commission's Penalty Schedule Rule that the Licensee commits within two years of the violation of ORS 471.305 in the instant matter be treated as a first violation for purposes of affixing a penalty according to the Penalty Schedule.

It is further ordered that due notice of such action, stating the reasons therefor, be given as provided by law.

Dated this 21st day of November, 1983.

C. Dean Smith

C. Dean Smith
Administrator
OREGON LIQUOR CONTROL COMMISSION

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