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BEFORE THE LIQUOR CONTROL COMMISSION  
OF THE STATE OF OREGON

In the Matter of the )  
Proposed Termination of )  
the Agency Agreement with: )  
 ) FINAL  
 ) FINDINGS OF FACT,  
Donald Bihn ) CONCLUSIONS OF LAW,  
OLCC AGENCY #142 ) AND ORDER  
310 NW Broadway )  
Portland, Oregon 97219 )  
- - - - - )  
Multnomah County )

A hearing in the above matter was held on the 11th day of May, 1983, in Portland, Oregon, before Hearings Examiner Allen R. Scott. The Agent appeared in person and was represented by David Cargo, Attorney at Law. The Commission was represented by legal counsel.

The Hearings Examiner, having considered the record of the hearing, the applicable law and regulations and being fully advised, issued a Proposed Order dated August 5, 1983.

No Exceptions were filed to the Proposed Order within the fifteen (15) day period specified in OAR 845-03-050.

Now, therefore, the Commission hereby adopts the Proposed Order of the Hearings Examiner as the Final Order of the Commission, and enters the following:

FINDINGS OF FACT

1. Donald E. Bihn has been a retail sales Agent for the Oregon Liquor Control Commission at all times relevant to these Findings of Fact.

2. Agent Bihn and the OLCC entered into an Agency Agreement on October 15, 1979. This Agreement is still in effect.

3. The Commission's Staff has proposed that the Agency Agreement between Mr. Bihn and the Oregon Liquor Control Commission be terminated based upon the following grounds:

- "a. Intentional participation by Agent in misappropriation of money or other property of the Commission as evidenced by repeated/substantial diversions of state funds into your personal bank account(s). This has resulted in an audited shortage of approximately \$45,000 as per audit conducted on 3/22/83.
- b. Substantial and deliberate violations of written policies or operating procedures of the Commission as stated in the retail operations manual and other notifications, and the terms of your agency agreement by failing to deposit agency sales receipts daily into the state Treasurer's bank account.
- c. Substantial and deliberate violations of written policies or operating procedures of the Commission as stated in the retail operations manual and other notifications, and the terms of your agency agreement by failing to properly report daily sales receipts to the Commission and falsifying records submitted to the Commission."

4. As an Agent of the Commission, Mr. Bihn was authorized to sell distilled spirits to the public. The ownership of the liquor remained with the OLCC until it was sold to a consumer. The proceeds from the sales were owned by the OLCC as soon as received.

5. During the period from January 4, 1983, through March 3, 1983, Agent Bihn deposited into his personal bank account 49 checks given in payment for alcoholic beverages at his Agency. The checks totaled approximately \$36,000.

6. During January and February, 1983, on 29 occasions Agent Bihn failed to report sales to the OLCC as having been made on the day actually made. The sales were reported to the Commission on forms entitled "Sale To Dispenser Licensee" bearing dates other than the date of actual sale. The variance between the date on the form sent to the OLCC by Agent Bihn and the date of actual sale is as follows: six instances - 50 days; two instances - 49 days; one instance - 13 days; two instances - 12 days; two instances - 11 days; one instance - 10 days; three instances - 8 days; eight instances - 6 days; two instances - 5 days; and two instances - 4 days.

#### DISCUSSION

For the sake of clarity, it should be noted what this case is about, and, more importantly perhaps, what it is not about. In his closing argument and memorandum, counsel for the OLCC cites many alleged violations of Commission directives or regulations by Agent Bihn. However, many of these are not within the scope of the charges. The charges are fairly specific, and they frame the issues in the case. Many of the alleged violations argued by the OLCC's counsel are therefore immaterial to the case and are not considered by the Commission.

It should also be noted that the subject matter of the hearing does not include the question of how much money may be owed by Agent Bihn to the OLCC. There was some discussion in the hearing about the precise amount of any "shortage" and also argument by Agent Bihn that the OLCC owes him money. These

matters are not within the scope of the charges and are therefore not considered by the Commission.

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Commission may terminate this agreement for good cause, which includes, but is not limited to, any of the following:

. . .

Intentional participation of Agent in misappropriation of money or other property of the Commission. (Agency Agreement (15)(e)).

The evidence establishes that Agent Bihn accepted funds from the sale of alcoholic liquor at his Agency and placed them in his own bank account or accounts. Such taking of possession of the funds is in violation of written Commission policy: for example, page 13, paragraph 5, Retail Operations Manual, directs that "all checks must be deposited to the OLCC Agency bank account." More important is the fact that these funds belonged to the OLCC, not to Agent Bihn. By placing them in his own bank account, Agent Bihn was making use of the funds without authority or right to do so. That act constitutes misappropriation. The large number of such occurrences indicates that the misappropriation was not inadvertant, as does the fact that they occurred over a period of several months. Furthermore, the lack of any convincing explanation by Agent Bihn for the actions indicates that the misappropriation was intentional. The evidence also indicates that when Agent Bihn learned of a pending Commission audit, he attempted to hide the misappropriation by placing funds in the proper account. This action also

indicates that misappropriation was intentional. The Commission concludes that the evidence establishes that the misappropriation was intentional.

It is noted that the specific charge relating to misappropriation states that the misappropriation "has resulted in an audited shortage of approximately \$45,000 as per audit conducted on 3/22/83." However, the "audited shortage" does not necessarily bear any relationship to the misappropriation. For example, one could misappropriate funds without any shortage appearing in an audit, if the funds were replaced prior to the audit. On the other hand, an "audited shortage" can exist without misappropriation, as there are many other reasons for shortages. The Commission concludes that the phrase in the charge relating to the "audited shortage" is surplusage and that the amount of the shortage at the time of audit is not directly relevant to the charge. The evidence does establish, however, that the misappropriation was of a substantial amount of funds.

The Commission concludes that this charge is sustained.

2. The Commission may terminate this agreement for good cause, which includes, but is not limited to, any of the following:

. . . .

A substantial and deliberate violation of any provision of ORS Chapter 471 or 472, or of the Oregon Administrative Rules, written policies or operating procedures of the Commission, or the terms of this Agreement. (Agency Agreement (15)(c)).

The specific allegation here is that Agent Bihn failed "to deposit Agency sales receipts daily into the state Treasurer's bank account."

The evidence establishes that Agent Bihn deposited Agency sales receipts in his own account on many occasions during January, February, and March, 1983. Such receipts were therefore not deposited into the "state Treasurer's bank account."

However, the Commission has not been referred to any statute, rule, or written directive of the Commission which requires daily deposit into the state Treasurer's account. The Retail Operations Manual (page 13, paragraph 5) states that "all checks must be deposited to the OLCC Agency bank account." That requirement is not the same as deposit in the Treasurer's account. The Retail Operations Manual contains the following additional language:

"The following is applicable to 1st National and U.S. National Banks: These deposit slips are 4-part. After filling out the deposit slip, detach the 'field office copy' and retain it in your office. The remaining three copies, intact will accompany your deposit to the bank. The teller will validate all three copies and retain the bank copy. Mail the 'controller's copies' along with your Daily Agency Sales Report to the OLCC office. Mail the 'State Treasurer's copies' daily to the State Treasurer in the pre-addressed envelopes provided. The State Treasurer's copy applies only to First National Bank and U.S. National Bank deposits."

It may be that the implication in this section is that the funds should be deposited in the Treasurer's bank account. However, the directive is not specific enough, in the Commission's opinion, to establish the charge. It may well be that

it is understood by agents and the Commission's staff that the deposits are to be made to the Treasurer's account. However, the Agency Agreement requires that for a violation to exist there must be a deviation from "written" policies, rules, or statutes. Since the evidence does not establish such a written policy, the Commission recommends that this charge be dismissed.

3. The Commission may terminate this agreement for good cause, which includes, but is not limited to, any of the following:

. . .

A substantial and deliberate violation of any provision of ORS Chapter 471 or 472, or of the Oregon Administrative Rules, written policies or written procedures of the Commission, or the terms of this Agreement. (Agency Agreement (15)(d)).

This provision is the basis for the third charge against Agent Bihn. The specific allegation is as follows: "Failing to properly report daily sales receipts to the Commission and falsifying records submitted to the Commission."

The evidence establishes that on many occasions in January and February, 1983, Agent Bihn did not report sales receipts to the Commission on forms for the day upon which the sale was made. Instead, he listed such sales on daily sales reports for other days, sometimes as many as 50 days after the actual date of sale.

The Retail Operations Manual has the following directives (page 45):

"How to Prepare a Daily Sales Report.

1. Enter regular sales (cash register tape or sales slip total) line 1.

2. Enter dispenser sales (total dispenser tickets) line 2.

. . .

Please have your sales report in by the following work day. Most of our sales and inventory accounting systems are computerized. All reports for a given day must be in the OLCC office before they can be processed and before you are given credit for your sales.

. . ."

Retail Operations Memo 82-22, September 1, 1982, contains the following statement (section 10):

"Daily Reports: after weighing the postage costs against fiscal benefits, Accounting reminds agents to mail daily reports and daily bank deposits on time to the Milwaukie Office. To comply with accepted accounting principals and State of Oregon fiscal policies and procedures, money is to be accounted for when received. In addition, state funds are moved from independent banks to the State Treasurer from these daily reports. Consistency in all outlets enhances our efficiency and is very cost effective. The only exception to this accounting requirement is the very small outlet in a remote area without adequate community banking services." (Emphasis in original.)

A memorandum to "all Retail Outlets," dated October 1, 1980, states as follows:

"Those agencies required to deposit and report sales daily must mail those reports daily--not save them and mail several together." (Emphasis in original.)

The Commission concludes that by failing to report to the OLCC daily sales receipts on forms containing the actual date of sale but reporting them instead on forms listing other dates, Agent Bihn violated the provisions noted above. It is

further concluded that by reporting these sales on forms listing a date different from that of the actual sale, Agent Bihn falsified records submitted to the OLCC.

The Commission concludes that this charge is sustained.

#### ULTIMATE CONCLUSIONS OF LAW

Under the "Agency Agreement" between Agent Donald Bihn and the OLCC, the Commission may terminate the Agreement if the Agent has committed a substantial and deliberate violation of any provision of ORS Chapter 471 or 472, or of the Oregon Administrative Rules, written policies or operating procedures of the Commission, or other terms of this Agreement. (Agency Agreement (15)(c)).

The Commission concludes that such a substantial and deliberate violation has been established with respect to charge No. 3 noted above.

The Agency Agreement also permits the Commission to terminate the Agreement if there has been intentional participation of agent in misappropriation of money or other property of the Commission. (Agency Agreement (15)(e)).

The Commission concludes that such intentional participation by the Agent in misappropriation of money or other property of the Commission has been established (charge No. 1).

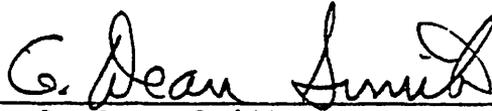
The Commission concludes further that the allegation made in charge No. 2 against Agent Bihn has not been established.

#### FINAL ORDER

It is hereby ordered that the Agency Agreement between the Oregon Liquor Control Commission and Donald Bihn be TERMINATED.

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

Dated this 26th day of September, 1983.



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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.