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BEFORE THE LIQUOR CONTROL COMMISSION  
OF THE STATE OF OREGON

In the Matter of the	)	
May 21, 1981 Audit	)	
Shortage of:	)	
	)	FINAL
Pauline Pierce	)	FINDINGS OF FACT,
OLCC AGENCY NO. 152	)	CONCLUSIONS OF LAW,
826 Main Street	)	AND ORDER
Klamath Falls, Oregon 97601	)	
- - - - -	)	
Klamath County	)	

A hearing in the above matter was held on the 11th day of August, 1982, in Portland, Oregon, before Hearings Examiner Douglas Crumme'. The Agent appeared in person and was represented by Randall Vogt, Attorney at Law. The Commission was not represented by legal counsel.

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

FINDINGS OF FACT

1. Pauline Pierce is the Commission's Retail Sales Agent at AGENCY NO. 152, 826 Main Street, Klamath Falls, Oregon. Mrs. Pierce has been at Agency 152 for approximately six years.

2. The Commission's May 21, 1981 audit of Agency 152 indicated a shortage of \$2,805.60. Agent Pauline Pierce has deposited the \$2,805.60 shortage amount with the Commission and requested a hearing, seeking a refund. Agent Pierce disputes her responsibility for the shortage under paragraph (9) of the

Agency Agreement on the grounds that the shortage resulted from a cause that she could not have prevented or avoided in the exercise of reasonable care. Agent Pierce contends that the bulk of the shortage is due to a burglary. (Licensee's Exhibit No. 4.) The Commission's Staff has taken the position that there is not sufficient evidence of a burglary to relieve Agent Pierce of responsibility for the \$2,805.60 shortage. (Commission's Exhibit A.)

3. The Commission's most recent audits of Agency 152 have shown the following results:

<u>AUDIT REPORT NO.</u>	<u>PERIOD COVERED</u>	<u>NUMBER OF MONTHS</u>	<u>AUDIT SHORTAGE</u>	<u>APPROXIMATE AVERAGE SHORTAGE PER MONTH</u>
342	10-17-79 to 5-20-80	7	\$ 750.55	\$107.22
136	5-21-80 to 10-15-80	5	583.20	116.64
358	10-15-80 to 5-20-81	7	2,805.60	400.80
1	5-21-81 to 6-30-81	1	939.40	939.40
250	7-1-81 to 3-23-82	9	1,448.12	127.57

4. In addition to the audits that the Commission conducts at Agency 152 approximately every six months, Agent Pauline Pierce also takes her own monthly inventory. The results of these inventories during the audit period that led up to the \$2,805.60 audit shortage on May 21, 1981 were as follows:

<u>MONTH/YEAR</u>	<u>INVENTORY OVER/SHORT</u>
October, 1980	\$ + 13.95
November, 1980	+ 481.10
December, 1980	- 1,686.05
January, 1981	- 595.90
February, 1981	- 241.40
March, 1981	- 2,257.60
April, 1981	- 2,667.15

5. Agency 152 has been at its present location at 826 Main Street, Klamath Falls, Oregon since approximately 1979. The selection of this site was investigated and approved by the Commission.

6. When Agency 152 first moved to its present location at 826 Main Street in 1979, the Agency took up the entire building. However, Agent Pierce had the understanding with her landlord that the building would be subdivided later into spaces for two stores and that after the subdivision, Agency 152 would be located on only one side.

7. The subdivision of Agency 152's building at 826 Main was begun in November or December of 1980 and was completed in January or February of 1981.

8. After the subdivision of her building was completed, Agent Pierce moved the Agency into one side of the building. The other side of the building was leased to a store known as the Basin Trader.

9. The business of the Basin Trader was buying, selling and trading new and used goods such as guns, electronic gear and other items.

10. The procedure for Mrs. Pierce's monthly inventory counts (see Findings of Fact No. 4) were that she would take a physical count of the bottles and cases at the close of the last business day of the month. She would forward the count to the Commission. The Commission would report back on approximately the 20th of the next month with the dollar amount that the inventory was over or short.

11. The results of the March, 1981 monthly inventory at Agency 152 showing a \$2,257.60 shortage were provided to Agent Pierce on about April 20, 1981. Agent Pierce assumed that the sudden large shortage was the result of a miscount and that her April inventory would show the correct figure.

12. The results of the April, 1981 monthly inventory at Agency 152 showing a \$2,667.15 shortage were provided to Agent Pierce on about May 18 to 20, 1981. Upon seeing this confirmation of the March shortage, Agent Pierce suspected that the cause of the large shortage was something other than a miscount. Agent Pierce expected the Commission to conduct its regular audit at her premises within a few days. Therefore she decided to wait until the Commission audit was conducted to try to get to the bottom of the large shortage that had arisen.

13. The Commission's May 21, 1981 audit of Agency 152 revealed that the shortage had grown to \$2,805.60. Agent Pierce made a phone call to Gene Sandquist, Director of the Commission's Retail Operations Division, to discuss the problem. Mr. Sandquist questioned Mrs. Pierce about whether she had a common ceiling with any other businesses located next to her. After the phone conversation, Mrs. Pierce checked the upstairs storage area of the Agency and found a piece of wood paneling that was loosened and stuck out from the remainder of the wall. Upon further examination, Mrs. Pierce was able to hear voices coming from next door up through a crawl space in the ceiling of the Basin Trader.

14. After discovering the loose wall paneling, Agent Pierce phoned the police. The Klamath Falls Police Department came to Agency 152 to investigate. The Police determined that one of the wood wall panels in the upstairs storage area had been loosened and left pushed out somewhat from the rest of the wall. Upon checking behind the loosened panel, the Police discovered an opening that led down into a crawl space and through the ceiling of the Basin Trader. The Police determined that dust between the loose wall paneling and the ceiling of the Basin Trader was freshly disturbed as if someone had made numerous trips between the ceiling of the Basin Trader and the second floor storage area of Agency 152.

15. After discovering the loose wall paneling, the Klamath Falls Police set up a silent burglar alarm to try to apprehend anyone coming from the Basin Trader through the loose paneling to burglarize Agency 152. No such activity was detected by the burglar alarm as of June 11, 1981.

16. The Klamath Falls Police Department contacted the operators of the Basin Trader on June 11, 1981. After discussion, Police attention turned to Mr. John Staub of Klamath Falls. Mr. Staub had worked at the Basin Trader and had quit on May 8, 1981. Mr. Staub was believed to be a heavy drinker and had come to work numerous times with liquor on his breath. Mr. Staub had keys to the Basin Trader and to the Basin Trader's burglar alarm.

17. The Klamath Falls Police looked at the ceiling crawl space from the Basin Trader side on June 11, 1981. The Police

concluded that the crawl space showed evidence of persons entering the crawl space.

18. The Klamath Falls Police questioned John Staub concerning Agency 152's missing inventory. Mr. Staub stated to the Police that he had heard there had been a theft of liquor at Agency 152 but that he [Mr. Staub] had no idea who had taken the liquor. Mr. Staub indicated to the Police that he had heard the crawl space between the two stores had been used. Mr. Staub said he would take a polygraph examination on the subject. Subsequently, Mr. Staub said that on the advice of an attorney he no longer wished to take a polygraph examination.

19. The Klamath Falls Police Department has discontinued its investigation into the suspected burglary at Agency 152 because of lack of evidence to prosecute anyone.

20. The Klamath Falls Police Department Detective who investigated this case concluded that an unidentified person entered Agency 152 from the Basin Trader through the loosened panel and removed liquor. (Exhibit No. 3.)

21. The upstairs storage area of Agency 152 was not involved in the subdivision of the building that occurred between November, 1980 and February, 1981. The upstairs and the wall in question were already in place and were not changed by the subdivision.

22. The loosened panel in the upstairs storage area of Agency 152 was in a dimly-lighted and little-used back area where nobody normally went for work purposes.

23. The Commission's Retail Operations Division encourages Commission retail sales agents to obtain burglar alarms. However, the Retail Operations Division does not require agents to have burglar alarms.

24. Pauline Pierce has never had a burglar alarm at Agency 152 since it has been at its present location, with the exception of the temporary alarm the Police set up after the May 21, 1981 audit.

25. The ceiling crawl space between Agency 152 and the business area next door has been blocked off and secured since May, 1981.

26. Mrs. Pierce has not had any reason to suspect her employees of dishonesty or theft during the time of the suspected burglary.

27. The Commission Staff has interpreted the Agency Agreement to require its Retail Sales Agents to pay for routine shortages resulting from causes such as shoplifting, employee theft, or unexplained loss, as evidenced by the testimony of Assistant Controller Frank Conrad. However, the Commission has interpreted the Agreement to relieve the Agent of responsibility for burglaries that could not reasonably have been prevented, as evidenced by the testimony of Mr. Conrad.

#### DISCUSSION

1. Agent Pierce believes the \$939.40 shortage that was discovered in the June, 1981 audit was the result of further burglarization of the premises through the ceiling crawl

space. The Police burglar alarm could have been disconnected by unplugging the alarm from the electric outlet. Mrs. Pierce suggests that someone coming from the Basin Trader was able to avoid detection by the temporary police burglar alarm and stole about \$900 more liquor sometime between May 21, 1981 and June 30, 1981.

Mrs. Pierce has paid the \$939.40 shortage. At her hearing she requested reimbursement from the Commission for this amount on the grounds that this shortage also could not have been prevented by the exercise of reasonable care as per paragraph (9) of the Agency Agreement.

The Commission concludes that responsibility for the \$939.40 shortage is not a proper issue in the present hearing since it does not appear that a formal claim to the Staff for reimbursement of this shortage has been made and the Staff has not had an opportunity to investigate and take a position on responsibility for this shortage.

2. Detective Sergeant Ron Rose, the Klamath Falls Police Officer who concluded that liquor had been taken from Agency 152 by someone entering through the loosened wall panel, did not appear at Mrs. Pierce's hearing before the Commission. Detective Rose's findings and conclusions were stated in his written report, which was received as Exhibit No. 3.

#### ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

Section 9 of the Agency Agreement between Pauline Pierce and the Oregon Liquor Control Commission states, in pertinent part, as follows:

(9) RESPONSIBILITY FOR SHORTAGES. If the Commission determines that a shortage in inventory or money occurred in operation of the agency, agent will pay the monetary value of the shortage to the Commission within 30 days after receipt of the request for payment from the Commission showing its calculation of the shortage, provided that agent will not be responsible for any shortage if it results from a cause which agent could not prevent or avoid in the exercise of reasonable care. The burden is upon agent to prove such a cause if it is in dispute. A request for payment shall be sent to agent by certified mail or personal delivery. If agent disputes the existence or amount of or responsibility for the shortage, agent may request a hearing before the Commission on the dispute. . . .

(Commission's Exhibit B.)

The evidence raises three main questions. First, was any of the May 21, 1981 audit shortage due to burglary? Second, if burglary was involved, could Mrs. Pierce have prevented any or all of the resulting losses by the exercise of reasonable care? Third, what is the dollar amount of any losses that could not have been prevented by reasonable care?

The evidence seems sufficient to establish that some of the May 21, 1981 audit shortage resulted from burglary. The \$2,805.60 shortage figure for the seven-month audit period in question was much higher than the average monthly shortages being experienced during other recent audit periods. Clearly, something out of the ordinary besides the normal loss due to shoplifting caused the large shortage documented on May 21, 1981.

The record suggests no reason to suspect Mrs. Pierce or her employees of theft.

The record convincingly shows that someone was secretly entering Agency 152 through the loosened storage room wall panel via the Basin Trader ceiling crawl space.

The Klamath Falls Police Department closed their investigation of this matter for lack of evidence to prosecute any particular person. Failure to prosecute anyone, however, does not mean there was no burglary. Indeed, the Klamath Falls Detective Sergeant who investigated this matter concluded that an intruder removed liquor from Agency 152 through the loosened wall panel.

At least one employee of the neighboring Basin Trader store was identified who had been given keys to the door and the burglar alarm of the Basin Trader. So at least one person has been identified who would have had the opportunity to enter the Basin Trader undetected late at night.

Admittedly, an inference is required to reach the conclusion that the person or persons who secretly entered Agency 152 through the loosened panel stole liquor. This inference seems appropriate, however. No other reason is suggested why anyone would secretly break into Agency 152 in this manner except to steal.

The next and more difficult question is whether Mrs. Pierce could have prevented the burglary of Agency 152 through the exercise of reasonable care.

The Commission concludes that the shortages resulting from burglaries up through the receipt of the March, 1981 inventory report were not due to Mrs. Pierce's failure to exercise reasonable care. Mrs. Pierce could not have reasonably anticipated that someone with access to her business neighbor, the Basin Trader, would travel through the Basin Trader's ceiling crawl space and pry open one of her wall panels to remove liquor from the premises. The wall panel in question was in a dimly-lighted portion of a storage room where Agency 152 employees did not normally go for work purposes. So failure to discover the loosened panel before the large March inventory shortage was discovered does not indicate a failure to exercise reasonable care. It is questionable whether a burglar alarm would have been sufficient to detect someone entering the premises from an inside wall in the upstairs storage room as opposed to breaking open a door or window. The wall panel route is not the type of entry that would normally be anticipated in setting up a burglar alarm system.

However, after she received the March, 1981 inventory report showing a \$2,257.60 shortage, Mrs. Pierce was reasonably put on notice that something was amiss. She should have recognized the possibility of a burglary, physically inspected the premises and discovered the loose wall panel. It was unreasonable not to have detected and corrected the loose wall panel after receiving the March inventory report on April 20, 1981.

Therefore, Mrs. Pierce should be reimbursed only for those shortages occurring through April 20, 1981 that can be reasonably attributed to burglary through the wall panel.

The base figure to look at to compute reimbursement then is the \$2,257.60 inventory shortage for March reported on April 20, 1981.

Since the burden is on Mrs. Pierce under paragraph (9) of the Agency Agreement, any significant question whether some portion of the shortage before April 20, 1981 arose from a cause other than burglary should be resolved against Mrs. Pierce. There is no evidence to suggest that Agency 152 did not have the normal amount of unexplained loss of inventory during the audit period from October 15, 1980 to May 21, 1981. Mrs. Pierce would normally be responsible for this unexplained loss.

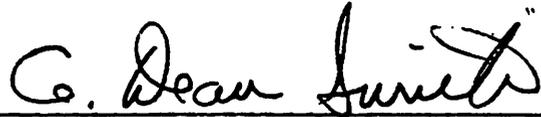
Therefore the Commission should deduct from the \$2,257.60 base an amount for the likely unexplained loss during the period audited on May 21, 1981. Findings of Fact No. 3 show that the most recent monthly average for such losses was \$127.57. This figure should be used as a guide to determine Mrs. Pierce's responsibility for the period in question. The period between the last audit on October 15, 1980 and the receipt of the March, 1981 inventory report on April 20, 1981 was approximately six months long. Six months multiplied by \$127.57 per month = \$765.42 for which Mrs. Pierce should be responsible. The net amount that Mrs. Pierce should be reimbursed then is  $\$2,257.60 - \$765.42 = \$1,492.18$ .

FINAL ORDER

It is hereby ordered that the Commission refund to Pauline Pierce, Retail Sales Agent, OLCC Agency No. 152, 826 Main, Klamath Falls, Oregon, the amount of \$1,492.18.

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

Dated this 28th day of February, 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.