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BEFORE THE LIQUOR CONTROL COMMISSION
OF THE STATE OF OREGON

In the Matter of the)	
Repayment of a Loss)	
Incurred by:)	
)	FINAL
Mark Karson, Agent)	FINDINGS OF FACT,
OLCC AGENCY NO. 182)	CONCLUSIONS OF LAW,
3738 NE Sandy)	AND ORDER
Portland, OR 97232)	
- - - - -)	
Multnomah County)	

A hearing in the above matter was held on the 23rd day of March, 1983, in Portland, Oregon, before Hearings Examiner Allen R. Scott. The hearing was reopened at the Commission's direction on the 6th day of September, 1983. The Agent appeared in person and was represented by David Nepom, Attorney at Law. The Commission was 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, Exceptions to the Proposed Order of the Hearings Examiner, and now being fully advised, makes the following:

FINDINGS OF FACT

1. Mark Karson has been an OLCC Agent at AGENCY NO. 182 at all times relevant to these Findings of Fact.
2. On October 21, 1982, between 4:00 p.m. and 5:00 p.m., Agent Karson incurred a loss at the Agency of \$624. The Commission's staff has required Agent Karson to reimburse it for

the \$624 shortage subject to refund if the matter is ultimately concluded in Mr. Karson's favor.

3. On the date in question, October 21, 1982, Mr. Karson placed money in the safe during the afternoon. He then left the safe on "dial lock," also known as "day lock." A "dial lock" is achieved by closing the safe door and turning the combination, thus causing the pins to lock the door. To unlock the door, one turns the dial the correct direction to the last number of the combination and then pulls the door open. If the dial is turned in the wrong direction, the safe will not unlock unless the whole combination is dialed.

4. The "dial lock" or "day lock," as a form of securing safes was commonly used in OLCC agencies at this time during working hours.

5. After placing the money in the safe and leaving it on "dial lock," Agent Karson left the Agency. His manager and first clerk were the only employees present in the Agency.

6. Shortly after Agent Karson left the store, \$624 was taken from the safe.

7. The safe is located in the back portion of the Agency. Access to this back portion is gained from the front portion of the Agency, where retail sales are made, through a swinging door. This door is in plain view of the counter, behind which employees would be working.

8. The only other access to the rear area where the safe is located is through an exterior rear door. This door was

barred and the thief did not gain access to the premises through it.

9. The safe was not forcibly opened.

10. Agent Karson and his employees frequently take money from the front of the premises to a cash drawer in the rear. It is then eventually transferred to the safe. The safe is opened by employees as many as 10 times during a particularly busy hour, and up to 50 times per working day. Agent Karson feels that it would be a burden on the operation of the Agency to have the safe fully locked so that use of the full combination is required.

11. In 1979, Agent Karson incurred a loss through theft from cash drawers in the Agency. Access to the Agency on that occasion was gained through a forcible entry of the rear door. No money was taken from the safe, which was at that time located in the front portion of the premises.

12. Following this 1979 incident, the OLCC's staff instructed Mr. Karson to take certain steps to prevent future occurrences of this kind. Among the steps was the following:

"Move the safe from the lobby into the back room. Keep all non-operational funds securely locked in the safe."

13. The Commission's Retail Operations Manual has the following "rules" relating to safes and the handling of cash:

"Safes should be kept closed and locked."

"Agents are held personally responsible for safeguarding cash. Funds deposited daily must be equal to the amount of sales taken

in during the day. Surplus cash must be kept in the safe, hidden in the agency, or deposited periodically throughout the day.
. . ."

DISCUSSION

The Commission ordered the hearing reopened to take the testimony of Bill Ferrante, Area Supervisor for the Retail Operations Division. Mr. Ferrante had investigated the theft and had written reports to his superiors. In one of the reports Mr. Ferrante concluded that "no one could foresee that this would happen." He therefore recommended that the Commission give consideration to absorbing the loss.

The Commission concludes, however, after hearing Mr. Ferrante's testimony, that Mr. Ferrante's conclusion is not persuasive. Mr. Ferrante acknowledged that he did not know how the loss had occurred. His conclusion that "no one could foresee" the theft is therefore only speculation. Mr. Ferrante acknowledged that attempts at theft are foreseeable and that if the employees were inattentive, as the evidence suggests, theft would be a foreseeable consequence.

It is further noted that although Mr. Ferrante visited the Agency after the theft, he did not discuss the matter with the employees involved. Mr. Ferrante also indicated that he did not consider himself to be a professional investigator.

The issue as to whether a "diversionary" technique might have been used by the thief or thieves to carry out the theft was also raised at the Commission meeting and at the reopened

hearing. However, there is no evidence that such a tactic was used by the thief or thieves. Given the fact that there were two employees on duty, the likelihood that such a tactic would work seems small, provided the employees were reasonably attentive. Mr. Ferrante noted that no one had mentioned the possibility of such a diversionary tactic to him during his investigation.

Mr. Ferrante's testimony indicated that there had been two incidents involving theft at liquor stores in the area some time before this loss. At least one of the them may have involved the thief entering the back room of an agency and stealing money. The evidence also indicated that no general warning of these prior incidents had been given to Mr. Karson or other agents. However, there is no evidence to indicate that the circumstances were similar or that the giving of a general warning would have prevented the loss in this case.

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

The "Agency Agreement" between the OLCC and Agent Mark Karson reads as follows, in pertinent part:

"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."

This provision in the agreement means that the agent is responsible for a loss unless the agent can show what the cause of the loss was and that the cause was not something that he/she could prevent by exercising reasonable care. In order for the loss to be absorbed by the Commission, it is therefore necessary that the cause of the loss be determined. In this case, the cause is unknown. Two theories were discussed at the hearing, and seem the most likely explanations: first, that the employees stole the money; second, that an unidentified thief entered the premises, went through the swinging door into the rear of the Agency, opened the safe, took out the money, and then went back out the swinging door into the retail portion of the Agency, and then left. Agent Karson steadfastly denied the first of these theories, claiming that the employees were extremely trustworthy. If the second choice were indeed the actual explanation it would appear that the employees were certainly negligent in permitting some person to sneak in under their eyes, go to the rear of the building, and then sneak back out with the money. The counter behind which one of the employees would have been stationed affords a clear view of the swinging door leading to the rear of the premises where the safe was located. If this second explanation is what actually happened, the employees involved must have been negligent in allowing such entry and theft. Their negligence would presumably be imputed to the Agent.

However, this is all speculation. The important point is that the identity of the thief or thieves is unknown, as is the

method by which the theft occurred. There is thus no basis for concluding that the cause was one which "Agent could not prevent or avoid in the exercise of reasonable care." Therefore, under the wording of the Agency Agreement, Agent Karson is responsible for the shortage.

It should be noted that, although much effort was spent on debating whether or not the "dial lock" method is reasonable or whether the 1979 occurrence somehow affects Agent Karson's responsibility in this matter, the absence of any showing as to the cause of the theft makes consideration of these issues unnecessary.

The Commission concludes that Agent has not met his burden of showing that the cause of the theft was something which he could not prevent or avoid in the exercise of reasonable care and therefore Agent is responsible for the shortage.

However, the Commission further concludes that some mitigation has been established in this matter.

ULTIMATE CONCLUSIONS OF LAW

The Commission concludes that the Agent Mark Karson is responsible for the shortage of \$624 at Agency No. 182 in accordance with the Agency Agreement. Because of mitigation, however, the Commission concludes that Mr. Karson should be required to repay only \$400 of the \$624 shortage.

FINAL ORDER

It is hereby ordered that Agent Mark Karson pay to the Commission \$400 of the \$624 shortage at Agency No. 182, 3738 NE Sandy, Portland, Oregon 97232.

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

Dated this 24th day of October, 1983.



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.