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BEFORE THE LIQUOR CONTROL COMMISSION
OF THE STATE OF OREGON

In the Matter of the Proposed Suspension of the Dispenser Class A (DA) and Package Store (PS) Licenses held by: Floyd W. Zimmerman SHAMROCK TAVERN S/S Main P.O. Box 302 Fossil, Oregon 97830 - - - - - - - - - - - Wheeler County	)	FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

A hearing in the above matter was held on the 2nd day of September, 1982, in Fossil, Oregon, before Hearings Examiner Allen R. Scott. The Licensee appeared in person and was represented by Roy Kilpatrick, Attorney at Law. The Commission was represented by legal counsel.

RECORD OF PREVIOUS VIOLATIONS

DATE	OFFENSE	DISPOSITION
8-16-81	Minor (sold, consume, enter or remain, no S-146)	$325 Fine

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. Licensee has held a Dispenser Class A (DA) license and a Package Store (PS) license in the trade name SHAMROCK TAVERN at all times relevant to these Findings of Fact.

2. Licensee has been charged with violation of OAR 845-06-045(2) (permitted disorderly conduct), OAR 845-06-035(2)(a) (employee permitted a minor to consume alcoholic liquor upon the premises), and OAR 845-06-035(2)(b) (employee permitted a minor to enter and remain on a portion of the premises posted as being prohibited to minors).

3. On October 30, 1981, at approximately 9:30 p.m., three patrons in the lounge portion of the Shamrock Tavern became involved in an argument. The three were Gary L. Shaffer, Bob McCullough, and Charles T. Lowe, Jr.

4. The argument continued for approximately one-half hour. The three men spoke in somewhat loud, angry voices during the argument. Benjamine Lappen also became involved in the argument.

5. Ed Asher was the only employee on duty at this time. Mr. Asher did not intercede in the argument during the half hour that it continued. At one point, Mr. Asher went to the restaurant portion of the premises and informed some patrons seated there that a fight might occur.

6. A patron of the premises, Robert Sears, believing that a fight might be imminent, approached the people arguing and interceded. While Mr. Sears was present, the argument stopped. However, one of the participants stated that as soon as Mr. Sears left, he would try to get two of the other participants to fight. Mr. Asher, the bartender, was approximately five or six feet away from this conversation.

7. Mr. Sears moved away from the people involved in the dispute, and the argument began again.

8. After the argument resumed, a scuffle occurred. The participants immediately went out into the street. Whether their departure was based entirely on their own will or whether the bartender required that they leave is uncertain.

9. After a further scuffle in the street, three of the participants, Mr. Shaffer, Mr. Lappen, and Mr. McCullough, returned to the tavern. Mr. Lowe left the area.

10. After the three participants returned to the tavern, there was no further dispute of any sort for a few minutes.

11. After a few minutes, Mr. Lowe suddenly appeared in the tavern with a knife. Mr. Asher, the bartender, immediately asked everyone to leave. He left with the patrons, leaving Mr. Lowe behind. Also present somewhere on the premises was Beverly Lappen, Benjamine Lappen's wife, who had not left. It is not certain whether Mr. Asher knew that Mrs. Lappen was still in the premises.

12. Mr. Asher, after leaving the premises, went across the street to the telephone company where he worked. He opened the door with his key and made a phone call to the police.

13. After leaving the tavern, Benjamine Lappen discovered that his wife was still in the premises. Meanwhile, Mr. Lowe's father had entered the tavern carrying a crowbar.

14. Mr. Lappen went back into the tavern to look for his wife. As soon as he entered, he was hit on the head twice by Mr. Lowe, Sr. with the crowbar. Mr. Lowe, Jr. then slashed Mr.

Lappen with a knife. The police arrived shortly thereafter and attended to Mr. Lappen.

15. Licensee and employees had not had any problems with the participants in this incident prior to this matter.

16. The Shamrock Tavern has not had problems with serious altercations.

17. On October 30, 1981, at approximately 8:30 p.m., Douglas K. Long entered the lounge portion of the Shamrock Tavern. This portion has a No. II Posting which bars minors from that portion of the premises.

18. Mr. Long was born on November 29, 1962, and was therefore 19 years of age at this time. While in the lounge portion of the premises, Mr. Lowe consumed several beers. He remained in the lounge portion of the premises for approximately one and one-half hours.

19. Mr. Long was not asked for identificatioo while on the premises.

20. Licensee Floyd W. Zimmerman was not on the premises during these incidents. He was in Portland in a hospital.

21. Licensee has been licensed at the Shamrock Tavern since 1955. He is also been licensed at Zim's Hofbrau in The Dalles for 11 years.

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. No licensee shall permit or tolerate any loud, noisy, disorderly, or boisterous conduct, or any profane or abusive language, in or upon the licensed premises. OAR 845-06-045(2).

It is noted first that although the above regulation is very broad, the actual charge against Licensee is that his employee "permitted disorderly conduct." No allegation was made that the employee permitted loud, noisy, or boisterous conduct.

The word "permit" has, both in legal contexts and general usage, a range of meanings. It can mean merely to allow, or it can mean to expressly assent to or agree to or to "authorize." With respect to the rule quoted above, it is presumed that the use of the two words "permit" and "tolerate" was not unintentional or superfluous; that is, they were intended to refer to different concepts. Since the word "tolerate" is close in meaning to the word "allow," it is concluded that "permit" in the context of this rule refers to the act of expressly assenting to or agreeing to something.

Another question of definition involves the term "disorderly conduct." The regulation does not define this concept. The term "disorderly conduct" is used in a criminal statute (ORS 166.025). The wording of that statute, although not binding on the Commission, is perhaps instructive. Under this statute, disorderly conduct occurs if a person "with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof:

a. Engages in fighting or in violent, tumultuous or threatening behavior;

b. Makes unreasonable noise;

c. Uses abusive or obscene language, or makes an obscene gesture, in a public place;

d. Disturbs any lawful assembly of persons without lawful authority;"

There are several other subsections of this statute which do not appear to have any relevance to the situation involved here.

It is the Commission's view that the incident involved in this hearing must be divided into three parts: the initial argument, the brief "scuffle," and the final assault on Mr. Lappen. It is the Commission's conclusion that the latter two portions of this matter do not constitute a violation of the regulation because the bartender did not "permit" them. The brief scuffle began in the premises. It immediately moved outside, however, whether at the direction of the bartender or for some other reason. Given the fact that this scuffle immediately was removed from the premises, the Commission concludes that the bartender cannot be said to have "permitted" this conduct to occur in the premises.

Following the scuffle which occurred outside, three of the participants returned to the premises. The evidence indicates that the premises was then calm. There was no indication that any further incident would occur in the premises. However, one of the participants in this scuffle then suddenly burst into the premises with a knife. The bartender immediately directed everyone to leave. He left with the patrons, and went to use a phone across the street to call the police. One patron, however, Mrs. Lappen, had remained in the premises. There is no evidence that the bartender was aware of this fact. He could not, therefore, anticipate that Mr. Lappen would return to the premises in an attempt to find her and possibly protect her

from Mr. Lowe. There is also no evidence that the bartender was aware that Mr. Lowe's father had entered the premises with a crowbar. It is the Commission's conclusion, therefore, that the serious assault which occurred when Mr. Lappen reentered the premises was not something that Mr. Asher could have anticipated. The Commission believes that Mr. Asher's actions in attempting to clear the tavern and in leaving to call the police were not unreasonable and certainly cannot be described as "permitting" the disorderly conduct which followed, that is, the assault on Mr. Lappen.

The Commission also concludes that the initial argument is not a basis for finding that the employee permitted disorderly conduct because the argument was not disorderly conduct. The argument was vigorous enough to cause some of the patrons and the bartender to believe that a fight might occur. There is no evidence, however, that the argument involved profane, abusive, or even threatening language. It is the Commission's conclusion, based upon the wording of the regulation and upon the wording of the criminal statute, that disorderly conduct involves more than merely strong and even angry words.

The Commission concludes, therefore, that although the bartender's failure to do something about the argument is not commendable, and might constitute a violation under a differently worded charge, it does not constitute a violation of the precise charge made.

2. No licensee or permittee employed by such licensee shall permit a minor to consume any alcoholic beverage upon the licensed premises. OAR 845-06-035(1).

On October 30, 1981, between the approximate times of 8:30 p.m. and 11:30 p.m., Ed Asher, while on duty as a bartender on the licensed premises of the Shamrock Tavern, permitted Douglas K. Long, a person under the age of 21 years, to consume beer, an alcoholic beverage, on the licensed premises. Licensee did not dispute this charge.

> 3. No licensee or permittee employed by such licensee shall permit a minor to enter or remain upon a portion of the licensed premises that has been posted by the Commission as being prohibited to the use of minors. OAR 845-06-035(2)(b).

On October 30, 1981, between the approximate times of 8:30 p.m. and 11:30 p.m., Ed Asher, while on duty as a bartender in the Shamrock Tavern, permitted Douglas K. Long, a person under the age of 21 years, to enter and remain in the bar portion of the premises, which is posted as being prohibited to the use of minors, for approximately one and one-half hours. Licensee also did not dispute this charge.

ULTIMATE CONCLUSIONS OF LAW

The Commission concludes that Licensee violated OAR 845-06-035(2)(a) (employee permitted a minor to consume) and OAR 845-06-035(2)(b) (employee permitted a minor to enter or remain on a portion of the premises posted as being prohibited to the use of minors). The Commission concludes that Licensee did not violate OAR 845-06-045(2) (employee permitted disorderly conduct in or upon licensed premises).

FINAL ORDER

It is hereby ordered that the Dispenser Class A (DA) and Package Store (PS) license held by Floyd W. Zimmerman in the

trade name Shamrock Tavern, S/S Main, P.O. Box 302, Fossil, Oregon 97830, be SUSPENDED for ten (10) days for violation of OAR 845-06-035(2)(a) (permitted minor to consume) and OAR 845-06-035(2)(b) (permitted minor to enter or remain) or that Licensee pay a fine of $650 in lieu of the suspension.

It is further ordered that the charge of violation of OAR 845-06-045(2) (permitted disorderly conduct) be dismissed.

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

If you choose to pay the fine it must be paid within ten (10) days of the date of this Order, otherwise the suspension must be served.

Dated this 24th day of January, 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.