

On October 22, 1984 the Commission considered the record of the hearing, the applicable law and regulations, the Proposed Order of the Hearings Examiner, and Exceptions to the Proposed Order of the Hearings Examiner. Being fully advised, the Commission makes the following:

FINDINGS OF FACT

1. Sunya Porter holds a Dispenser Class A (DA) license at THE PORTERHOUSE, 331 Fifth Street, Madras, Oregon. At all times relevant to the facts herein she was a co-licensee with Richard Porter at the premises. The allegations discussed below were charged prior to Richard Porter's formal withdrawal from the license.

2. Licensees have been charged by the Commission with violating the following regulations and statutes:

- a. ORS 472.180(8) (sale to a minor).
- b. OAR 845-06-035(2)(a) (permitting minor to consume).
- c. OAR 845-06-035(2)(b) (permitting minor to enter and remain).
- d. OAR 845-06-045(2) (permitting disorderly conduct or language).
- e. ORS 471.130(1) (failing to check ID).

All the above violations are alleged to have occurred the afternoon of July 10, 1983.

3. Richard Porter had not participated in managing the premises since about March, 1982.

4. On July 10, 1983, altercations occurred at the premises involving Arlene Wewa, Stephanie Burke, Donna Sutterlee and Bernardine, last name unknown, a friend of Wewa. Burke and

Sutterlee arrived at The Porterhouse around 1:30 p.m., and Wewa arrived around 3:00 p.m. with two friends. Burke and Sutterlee were seated at a table approximately 20 feet from the bar, and Wewa was seated at the bar.

5. Service Permittee Wesley Fine was on duty behind the bar. Fine has a 50 percent hearing loss in one ear. Licensees were not on the premises.

6. Due to some mutual antagonism between Wewa and Burke, each began making openly hostile remarks about the other, which could be heard from a distance of at least 20 feet. Fine heard their remarks. Wewa and Burke both live and work on the Warm Springs Reservation, and were previously acquainted with each other.

7. At some point, Burke and Wewa were in the women's bathroom together. They began shoving each other, and then fell to the floor. Burke was pulling on Wewa's hair with both hands while Wewa hit and kicked Burke; both were yelling. Each claims the other was the initial aggressor. The fight continued for at least ten minutes. The outer door to the bathroom is approximately 21 feet from the bar. At some time during the fight a small group of people gathered immediately outside the bathroom door.

8. About ten minutes after the fight began, Sutterlee emerged from the bathroom and notified Fine that there was an altercation in the women's bathroom. Fine went inside and persuaded Wewa and Burke to let go of each other. He then returned to the bar.

9. Wewa and Burke left the bathroom separately. Wewa returned to a table where Bernardine was sitting. They ordered some beer from Fine, and when he served it Bernardine asked him why Sutterlee was in the premises, and stated that Sutterlee was under 21.

10. Fine testified that Burke had told him when she came into The Porterhouse that Sutterlee was 21. She volunteered this information without an inquiry from Fine about Sutterlee's age. Fine also testified that he would have checked Sutterlee's identification if Burke had not told him Sutterlee was 21.

11. After Burke left the bathroom following her fight with Wewa, she and Sutterlee went to the bar. At this time Burke was visibly injured and bleeding. Fine returned to the bar from Wewa's table and told them to leave because Sutterlee was under age.

12. Sutterlee then called Fine a "son of a bitch." Upon hearing that, Bernardine left her table and hit Sutterlee in the face, causing Sutterlee's nose to bleed. Bernardine returned to her table, and Burke was assisted out of the bar by Sutterlee. Neither Wewa nor Bernardine was asked to leave the premises.

13. As a result of the fight with Wewa, Burke suffered a concussion, jaw injuries, chipped facial bones and various contusions.

14. Fine did not request identification from Sutterlee, either when Burke told him she was 21 or when Bernardine told him she was not.

15. On July 10, 1983, Donna Sutterlee was 18 years old. Her date of birth is July 3, 1965. At the time of her deposition on December 19, 1983 she appeared to 18 or 19 years old. She did not wear facial makeup for the deposition, although she ordinarily does. She was wearing makeup on July 10, 1983.

16. While in The Porterhouse Sutterlee consumed at least three beers, and remained at least two hours. Fine was aware of her presence in the premises prior to the fight, although Sutterlee did not directly order the alcoholic beverages she consumed. Her drinks were usually ordered by Burke. Fine was aware that Burke was ordering drinks for Sutterlee.

17. On November 2, 1982, Inspector Bartholomew issued Licensees a Record of Verbal Instructions regarding disorderly premises, based on Madras police reports of two disturbances at The Porterhouse in October, 1982. During this visit to Mrs. Porter the inspector informed her that The Porterhouse was requesting police assistance too often and too quickly for disturbances at the premises and advised her that altercations should be stopped before they escalate into physical confrontations. He also stated that the police were dissatisfied with being called to The Porterhouse for a disturbance, discovering that the incident leading to the call had ended, and that no one would sign a complaint. Licensees later instructed their night shift lounge employees that the police were only to be called in "emergency" situations. Although Fine does not work nights and did not receive these instructions, he was aware of

licensees' "emergency" policy. Licensees did not relay the direction to day shift employees because they felt that no problems arose in the daytime that would be likely to trigger a call to the police. Licensees did not define emergency for Fine, nor did they provide instructions about handling non-emergency disturbances. When patrons hit each other while Fine is on duty he attempts to calm them down by talking to them.

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The commission may cancel or suspend any license granted, or impose a monetary penalty in lieu of or in addition to suspension as provided by ORS 472.187, if it finds:

. . .

(8) that the licensee knowingly has sold alcoholic liquor to persons under 21 years of age . . . ORS 472.180(8).

Donna Sutterlee was under 21 years of age on July 10, 1983. Five months after this incident she appeared to be 18 or 19 years of age; the fact that she was not wearing her normal makeup at that time, but was on July 10, 1983, does not establish that she appeared to be three years older on July 10, 1983. She looked young enough for the bartender to believe she was a minor when so informed by another person. She looked young enough for the bartender to doubt her age when she first entered; the bartender stated he would have checked her identification if Burke had not told him Sutterlee was 21.

Licensees' bartender Fine sold alcoholic liquor to Burke who then gave it to Sutterlee. The fact that the sale was not direct is not exculpatory in this situation. The only Oregon

authority on this point is State v. Laughlin, 148 Or 485 (1934). In that case an adult purchased beer which he then made available to a minor. The licensee was found not to have sold to the minor. However, the court also stated, "If there were any evidence that [the adult] was acting as agent of [the minor] in purchasing the beer, a different question would be presented." Fine testified he knew at the time of the sale that Burke was ordering on behalf of Sutterlee. That fact distinguishes this case from Laughlin, and the Commission concludes that by selling alcoholic liquor which he knew was intended for a person whose youthful appearance provided reasonable grounds to doubt she was 21, Licensee's employee knowingly sold alcoholic liquor to a minor.

2. No licensee or permittee employed by such licensee shall permit a minor, whether or not accompanied by a parent or guardian, to consume any alcoholic beverage upon the licensed premises, whether or not the alcoholic beverage is given to the minor by a parent, guardian or spouse of legal age. OAR 845-06-035(2)(a).

Licensees' bartender permitted Donna Sutterlee, a minor, to consume alcoholic beverages on licensed premises. Due to Sutterlee's youthful appearance the bartender had reasonable grounds to doubt she was 21.

3. No licensee or permittee employed by such licensee shall permit a minor, whether or not accompanied by a parent or guardian, to enter or remain upon the licensed premises, or a portion of the licensed premises that has been posted by the Commission as provided by Rule 845-06-040 as being prohibited to the use of minors, except as provided by Sections (3) and (4) of this rule. OAR 845-06-035(2)(b).

Licenses' employee allowed Donna Sutterlee, a minor, to enter and remain on licensed premises for at least two hours. Due to Sutterlee's youthful appearance the bartender had reasonable grounds to suspect she was a minor.

4. No licensee shall permit, tolerate, participate in or encourage any loud, noisy, or boisterous conduct, any lewd conduct, any conduct or language which is intended to threaten another with physical harm, or any fighting or offensive physical contact, such as one patron pushing another, in or upon the licensed premises or areas just outside the licensed premises which are controlled by the licensee. OAR 845-06-045(2).

On July 10, 1983, two separate assaults occurred at The Porterhouse. Each involved the same two groups: Wewa and Bernardine, who were friends; and Burke and Sutterlee, who were friends. Prior to their fight in the bathroom, Wewa and Burke had been exchanging angry words in loud tones of voice. Wewa was seated at the bar and Burke was at a table about 20 feet away. Wesley Fine was working behind the bar and heard the hostile interchange between Wewa and Burke. After the fight Wewa and Burke returned to the lounge. Wewa sat at a table with Bernardine and another friend, and Burke went to the bar with Sutterlee. Sutterlee became involved in a dispute with Fine, and then Bernardine, who hit her in the face.

Fine intervened in the fight between Wewa and Burke and persuaded them to stop. It cannot be found that he was aware of the fight prior to being notified of it and entering the bathroom; there is no evidence he noticed the people gathered outside the bathroom door. Consequently, the Commission cannot

conclude that he disregarded his obligation to maintain order in the premises insofar as permitting the physical assault in the bathroom to continue. However, in other respects, Fine was remiss in meeting his responsibilities.

The hostility between Wewa and Burke was evident to Fine before the fight. He heard their angry and provocative exchanges and should have mediated before their behavior escalated into physical attack. When the fight in the bathroom ended not only did he not ask the participants to leave, he served Wewa more beer. By serving alcoholic liquor to an individual who had immediately before engaged in physically aggressive and harmful contact, Fine at a minimum signified permission and tolerance of the previous fighting.

Of the options available to Fine which would demonstrate that physical assault in the premises was impermissible, he could not reasonably have concluded that continued service of alcoholic liquor to Wewa would effectuate the nonviolent atmosphere contemplated by the rule. To the contrary, he should have known that such service would indicate that he found nothing unusual or disturbing about Wewa's behavior. That he did so indicate is confirmed by the uninhibited nature of Wewa's friend Bernardine's attack on Sutterlee; nothing in the record suggests Bernardine felt constrained to delay or remove her attack until she was outside the premises.

5. All licensees and permittees of the commission, before selling or serving alcoholic liquor to any person about whom there is

any reasonable doubt of the person's having reached 21 years of age, shall require such person to produce the person's motor vehicle operator's license, or if the license does not bear a photograph of the operator, then a identification card issued to the person under ORS 482.900. However, if the person has no motor vehicle operator's license or an identification card, the permittee or licensee shall require such person to make a written statement of age and furnish evidence of the person's true age and identity. ORS 471.130(1).

Permittee Wesley Fine, an employee of Licensees, served alcoholic liquor to a minor whose youthful appearance establishes reasonable doubt about whether she was 21 years old, without requiring her to furnish identification.

ULTIMATE CONCLUSIONS OF LAW

Licensees violated OAR 845-06-035(2)(a) (permitted a minor to consume), 845-06-035(2)(b) (permitted a minor to enter and remain), 845-06-045(2) (permitted offensive physical contact and fighting), ORS 471.130(1) (failure to require identification) and ORS 472.180(8) (sale to a minor).

Neither Licensees' nor Fine's conduct provides mitigating circumstances. It cannot be argued that Fine's hearing impairment precluded him from hearing remarks made at Burke's table 20 feet from the bar, but even if it could there is no evidence it prevented him from hearing Wewa's statements from her seat at the bar. His failure to eject the combatants, and his continuing service of alcoholic liquor to one of them, indicated an indifference to the possibility of further offensive conduct. Nothing in the record indicates Bernardine felt she had

to restrain her assault on Sutterlee until Fine could not observe it. As to the charges involving the minor, Fine allowed her to remain and consume when one person told him she was 21, even though he otherwise would have questioned her age, and told her to leave when another person told him she was not. He never asked to see her identification.

Licensees provided no guidance to Fine that would enable him to better cope with physically threatening situations. Although the Commission's advice to Licensees to refrain from calling the police as often as they had may have been construed by Licensees more rigidly than it was intended, Licensees still had an obligation to have some policy for dealing with disruptions and to communicate it to all their employees.

If the incidents of July 10, 1983 were considered as a single act or transaction, it would still constitute Licensees' sixth major violation in a two-year period. The Commission's penalty schedule, OAR 845-06-200, indicates licensees are subject to license cancellation upon the fourth violation. The Commission concludes that the totality of the circumstances do not support a lesser sanction.

FINAL ORDER

It is hereby ordered that the Dispenser Class A (DA) license held by Sunya Porter at The Porterhouse, 331 Fifth Street, Madras, Oregon, be CANCELLED.

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 October, 1984.


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.