

BEFORE THE LIQUOR CONTROL COMMISSION
OF THE STATE OF OREGON

In the Matter of the)	
Proposed Suspension of the)	
Retail Malt Beverage (RMB))	
License held by:)	FINAL
)	FINDINGS OF FACT,
Jerry & Roberta Wiens)	CONCLUSIONS OF LAW,
THE ON-BROADWAY TAVERN)	AND ORDER
2314 NE Broadway)	
Portland, Oregon 97232)	OLCC-84-V-025
- - - - -)	
Multnomah County)	

A hearing in the above matter was held on the 10th day of October, 1984, in Portland, Oregon, before Hearings Examiner Jill Thompson. The Licensees appeared in person and were represented by William McGeorge, Attorney at Law, Portland, Oregon. The Commission was not 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 December 20, 1984.

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

RECORD OF PREVIOUS VIOLATIONS

NONE.

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

1. At all times relevant to the Findings of Fact below, Jerry & Roberta Wiens held a Retail Malt Beverage (RMB) license at The On-Broadway Tavern, 2314 NE Broadway, Portland, Oregon.

2. The Commission has charged licensees with violation of OAR 845-06-045(1) (licensee consuming on duty).

3. On August 22, 1984 Inspectors Bainbridge and Wilkerson entered the premises about 1:45 a.m. They saw licensee Roberta Wiens standing at one end of the bar holding a beer can. Wilkerson went to the game room and Bainbridge went to the bar and ordered two beers. Wiens served him the beer which Bainbridge took to the game room where he joined Wilkerson.

4. While in the game room Bainbridge saw Wiens take a swallow from the beer can. At about 2:05 a.m. he cited Wiens for drinking on duty, and confiscated the can she had drunk from. The can was a 12-ounce container of LA beer which had two or three ounces of beer left in it when confiscated.

5. The beer had been ordered by Kris Bergesen, a regular patron of the premises. She had been served the beer with a glass into which she poured some of the contents of the can. The glass was in front of Bergesen, and contained a liquid, when the inspectors entered.

6. After consuming some of the beer Bergesen told Wiens it tasted odd. Wiens then swallowed some beer from the can she served to Bergesen and agreed it tasted odd. It did not occur to Wiens that tasting the beer in response to a patron's complaint was objectively no different than consumption for any other purpose; in fact, she did not think at all about the implications of a test taste.

7. Prior to buying the premises in 1981 Wiens had been a bartender there since 1970. She has never been cited or charged with an OLCC violation as a permittee or as a licensee.

DISCUSSION

The staff argued at the hearing that because of some conflicting testimony Wiens' credibility was suspect. The staff also argued on this point that it is unreasonable to believe Bergesen would drink 9 or 10 ounces of beer that tasted peculiar, and that there was evidence that Wiens held the can of beer for longer than was necessary to take one swallow.

The conflicting testimony concerned whether Bergesen had been drinking wine or beer earlier in the evening, and whether she made admissions to Bainbridge when he cited her. The hearings took place several weeks after the incidents in question, and the fact that Wiens and Bergesen have differing recollections of what Bergesen was drinking prior to Wiens being cited does not suggest anything more than faulty recollection of an insignificant event. The statement allegedly made by Wiens to Bainbridge concerned whether she intended to request a hearing on the violation she is charged with. Bainbridge asserts she said that no hearing would be necessary; Wiens asserts she made no such statement. The fact that Wiens disputes the staff's testimony does not automatically cast doubt on her credibility. She has not denied she drank from the can of beer. Further, the issues of what Bergesen was drinking prior to Wiens' citation and whether

Wiens said she would not request a hearing are collateral to the charge of drinking on duty, and evidence regarding collateral issues is not subject to credibility determinations. State v. Thompson, 28 Or App 409, 559 P2d 1294 (1977).

There is no evidence to support an inference that Bergesen drank 9 or 10 ounces of the beer she complained about. The evidence indicates that she poured from the can she was served into a glass, leaving some in the can, and did not consume all the beer in the glass. Nor can the inference the staff wishes be drawn from the fact that Wiens had the beer can in her hand longer than was necessary to taste the contents. In fact, the fact that the inspectors saw her drink only once from the can during the 20 minutes they remained on the premises tends to confirm Licensee's explanation.

Licensee argues that no one disputes the fact that she took only a swallow, and that the incident should come within the de minimus rule, that is, too trivial to proceed against. However, licensee did not suggest any authority for extending the de minimus theory to administrative proceedings, and the Commission is not aware of such authority. The degree of licensee's infringement may have some bearing on whether mitigating circumstances are present, but does not abrogate the validity of the charge.

ULTIMATE CONCLUSIONS OF LAW

Licensee consumed alcoholic liquor while on duty in her premises. She did so as an unthinking response to a patron's

complaint rather than with an intent to consume for personal pleasure. She has been either a permittee or licensee of the Commission for 14 years with no record of previous violations during that time. The Commission concludes that these facts present mitigating circumstances.

ULTIMATE CONCLUSIONS OF LAW

No licensee, and no manager, operator, bartender, waiter, or other employe or other agent of a licensee, shall consume, either on the licensed premises or elsewhere, or be under the influence of, alcoholic liquor during the hours he or she is on duty. For the purposes of this section, a permittee or other employe or agent will be deemed to be on duty from the time he or she first comes on duty until the time he or she goes off duty at the end of the shift, including coffee and meal breaks. This section shall not apply to any person who holds an agent's or salesman's license and who does not operate a delivery vehicle, or to any person who works on the premises as an entertainer only. OAR 845-06-045(1).

Licensee Roberta Wiens violated OAR 845-06-045(1).

FINAL ORDER

It is hereby ordered that the Retail Malt Beverage (RMB) license held by Jerry and Roberta Wiens at the On-Broadway Tavern, 2314 NE Broadway, Portland, Oregon be SUSPENDED for two (2) days or that licensee pay a \$130 fine in lieu of suspension.

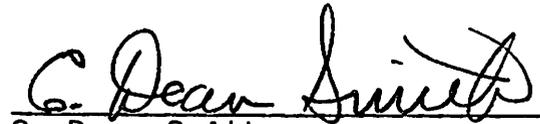
It is further ordered that due notice of such action, stating the reasons therefor, be given as provided by law.

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 15th day of January, 1985.



Jill Thompson
Hearings Examiner
Hearings Division



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.