

ISSUES

1. Whether Permittee refused to admit a police officer to the licensed premises which was or appeared closed, when the officer identified himself and asked to enter to conduct a reasonable search to ensure compliance with alcoholic beverage laws. OAR 845-006-0345(4)(b).¹

2. Whether Permittee made false representations or statements to the Commission in order to induce or prevent action by the Commission. ORS 471.425(1).²

3. Whether Permittee sold, dispensed, served, and/or consumed alcoholic liquor on the licensed premises between the hours of 2:30 a.m. and 7:00 a.m. OAR 845-006-0425(1).³

4. If the one or all of the above violations have been proved, what is the appropriate penalty? OAR 845-006-0500.

EVIDENTIARY RULING

OLCC's Exhibits A1 through A9 were admitted into the record, over the objection of Permittee's hearsay and relevance objections. Permittee's Exhibits P1 through P8 were admitted into the record without objection.

¹ OAR 845-006-0345(4)(b) provides:

4) Access to Premises:

* * *

(b) Examination of premises that are or appear closed occurs only when there is reason to believe an alcoholic beverage law violation is occurring. No licensee or permittee will refuse or fail to promptly admit a Commission regulatory employee or police officer to the licensed premises when the regulatory employee or officer identifies him/herself and asks to enter to conduct a reasonable search to ensure compliance with the alcoholic beverage laws.

² ORS 471.425(1) provides:

(1) No person shall make false representations or statements to the Oregon Liquor Control Commission in order to induce or prevent action by the commission.

³ OAR 845-006-0425(1) provides:

(1) Except as provided by sections (2) and (3) of this rule, and OAR 845-015-0140, alcoholic liquor may be sold, dispensed, served, consumed on, or removed from licensed premises only between the hours of 7 a.m. and 2:30 a.m.

The exceptions described in sections (2) and (3) and OAR 845-015-0140 do not apply here.

CREDIBILITY DETERMINATION

A credibility determination is required here, because the testimony of Permittee's witnesses, Corporate Principals Cecilia and Joyce Chan, as well as the testimony of Permittee himself differed on many points from the testimony of OLCC's witnesses. Permittee also alleged that the testimony of the OLCC inspectors and the police was not credible.

The concurring opinion in *Lewis and Clark College v. Bureau of Labor*, 43 Or App 245 (1979), provides a good analysis of factors to be considered in determining credibility:

“credibility (more properly weight) is determinable from a number of factors other than witness demeanor. The credibility, i.e., weight, that attaches to testimony can be determined in terms of the inherent probability, or improbability of the testimony, the possible internal inconsistencies, the fact it is or is not corroborated, that it is contradicted by other testimony or evidence and finally that human experience demonstrates it is logically incredible.”

In this matter, the OLCC inspectors and police officers testified in a clear and straightforward manner. They are trained observers who had the benefit of written reports to refresh their memories of the events regarding the violations at issue. Despite attempts by the Corporate Principals and Permittee to paint a different picture, the Commission finds no evidence in this record to suggest that any of the testimony of the OLCC inspectors or the police officers was fabricated or unfairly slanted against either the Corporate Principals or Permittee. The Commission does find that much of the testimony of the Corporate Principals and Permittee was self serving and improbable. The Commission also notes that the Corporate Principals and Permittee are facing serious administrative sanctions which may provide a motivation to be less than totally truthful. The Commission is also persuaded that at least one of the Corporate Principals, Cecilia Chan, as well as Permittee, gave false statements to OLCC inspectors during their investigation.

The testimony and other evidence presented by the witnesses for OLCC is more reliable than the evidence presented by the Corporate Principals and Permittee. The findings below reflect this Credibility Determination.

FINDINGS OF FACT

1. Permittee Jialin Chan is an employee of Lucky Jade Inc., Cecilia Qina Chan, President/Director/Stockholder and Joyce Qiwen Chan, Director/Stockholder (Licensees). The licensed premises is the Lucky Jade Chinese Restaurant, located at 12268 SW Scholls Ferry Road, Tigard, Oregon. (Ex. A1.)

2. On December 23, 2008, Tigard police officer Jeffery Lain responded to the licensed premises in response to a 911 hang up call. Dispatch advised the officer that the call taker could hear multiple people yelling in the background and an argument over money. The call came from within the licensed premises. Dispatch requested a welfare check. (Test. of Lain; Exs. A4 at Page 3 and A5.)

3. Officer Lain arrived at the licensed premises at approximately 5:00 a.m. The officer was in uniform and displaying a badge. The officer could hear multiple people yelling, screaming and laughing in the back of the licensed premises. The officer saw through a crack in the window coverings a male, later identified as Ming Chin, standing behind the bar, drinking. The officer also watched as Chin handed a beer to a female who appeared to be under the age of 21. The officer also saw four young males and two young females sitting and standing around a table. One of the females and two of the males were drinking. (Test. of Lain; Ex. A4 at Page 3.)

4. As Officer Lain waited for backup units to arrive, he saw three males and two females walk to the front door of the licensed premises. One of the males pushed on the door as if to open it, but it was locked. As the male yelled to be let out, he saw Officer Lain. The male then yelled that the police were outside and ran back into the bar. (Test. of Lain; Ex. A4 at Page 3.)

5. Officer Lain banged on the door while shining his flashlight at Chin. Chin looked at the officer as the officer pointed at him. Chin stayed behind the bar, ignoring the officer, even after the officer knocked several times on the door. The officer also heard persons running out the back door of the licensed premises. He was not able to pursue them, because his cover had not yet arrived. (Test. of Lain; Ex. A4 at Page 3.)

6. After approximately three minutes, Permittee came to the door and opened it. Permittee is the brother of Corporate Principals Cecilia Chan and Joyce Chan, and he worked as a server at the licensed premises. Officer Lain detected a strong odor of an alcoholic beverage coming from Permittee's breath. When Officer Lain asked who was in charge here, Permittee said he was. Permittee told the officer that the business belonged to his family and that he worked there from time to time. Permittee also told the officer that the persons inside the licensed premises were his friends and that no one had been drinking since 2:00 a.m. When Officer Lain told Permittee that he had observed people drinking inside the premises, Permittee responded that it was "Okay" because the business was closed. (Test. of Lain; Ex. A4 at Page 3.)

7. Officer Lain's cover arrived and he asked Tigard Officers Odam and Whitham to check the premises for possible under age drinkers. Both Officers Odam and Whitham were in full uniform. Permittee walked in front of the door and stated that the police could not enter without a warrant. Officer Lain informed Permittee about the nature of the original 911 call and told him that the police wanted to enter to check the welfare and safety of the occupants he had observed. Permittee did not move away from the door and the officers had to physically take hold of Permittee and remove him from the doorway before they could enter the licensed premises. (Test. of Lain and Witham; Ex. A4 at Page 3.)

8. While inside the premises, Officer Lain smelled a strong odor of marijuana. While checking the bathrooms, he found trace amounts of marijuana around the rim of the toilet bowls, which were still running as if they had recently been flushed. (Test. of Lain; Ex. A4 at Page 3.)

9. Officer Lain found only one of the individuals he had noted inside the licensed premises when he first arrived, Ryan Skinner. He believed the others left out the back door while he was in front waiting for his cover officers to arrive. (Test. of Lain; Ex. A4 at Page 3.)

10. On January 28, 2009, Inspectors Enright and Wellman met with Permittee at the OLCC office in Milwaukie to discuss the events of December 23, 2008. The inspectors had reviewed the Tigard police report regarding the December 23, 2008 incident, but did not disclose many of the details in the report, because they wanted to hear Permittee's recollection of those events without any prompting. Permittee was able to communicate with the inspectors in English. He told the inspectors that he was the only employee on duty that day and he worked from 11:30 a.m. to 2:30 a.m. He said that he was alone when he closed up at 2:30 a.m., that it was snowing at that time, and that he called his friend Leo Chin to pick him up. According to Permittee, Chin arrived at the premises around 3:30 a.m. When Chin arrived, Permittee saw another person standing outside, Ryan Skinner. Permittee said that he knew Ryan as a patron, but that he had not been inside the premises that evening. Permittee added that Ryan left the premises about five minutes later, after he told Ryan that he needed to leave the premises. Permittee also said he watched as Ryan walked away through the Lamb's Thriftway parking lot. (Test. of Enright and Wellman; Ex. A3 at Pages 6 - 10.)

11. Inspector Enright told Permittee that they were investigating possible administrative violations concerning the events of December 23, 2008 and that any statements Permittee made in an attempt to prevent OLCC action would likely result in a violation. Permittee told the inspectors that he understood what they were telling him. When asked if he wished to change any statements, Permittee replied "No." (Test. of Enright and Wellman; Ex. A3 at Pages 6 - 10.)

12. Permittee also told the inspectors that he was almost done closing the premises at approximately 4:00 a.m., that he cooked food for himself at around 4:30 a.m. but that his friend Chin did not have anything to eat. Permittee denied that anyone consumed alcohol at the premises after 2:30 a.m. Permittee said that he could not drink alcohol because of what the inspectors understood from Permittee was cirrhosis of the liver. Permittee admitted that the officers had smelled alcohol on his breath but continued to deny any consumption of alcohol. (Test. of Enright and Wellman; Ex. A3 at Pages 6 - 10.)

13. Inspector Enright again reminded Permittee that any false statements could result in a violation. Permittee again stated he and Chin were the only persons in the premises after 3:30 that morning. Inspector Wellman again reiterated the warning about making false statements. (Test. of Enright and Wellman; Ex. A3 at Pages 6 - 10.)

14. During his interview with the inspectors, Permittee eventually changed his story and admitted that Ryan Skinner returned to the premises between 3:30 a.m. and 4:00 a.m. and was at the premises when the police arrived at 5:00 a.m. Permittee continued to deny that anyone else was at the premises and asserted that officers were lying in the police report about seeing females in the premises that morning. (Test. of Enright and Wellman; Ex. A3 at Pages 6 - 10.)

15. Towards the end of the interview, Inspector Enright asked Permittee if he would like an interpreter for the interview and he declined. (Test. of Enright; Ex. A3 at Pages 6 - 10.)

16. Permittee told the inspectors that the police officers yelled at him as he stood in front of the door and told him to step away from the door. Permittee then changed the story and said

that he stepped away and let the police inside the premises after they answered his questions about the search warrant. (Test. of Enright; Ex. A3 at Pages 6 - 10.)

CONCLUSIONS OF LAW

1. Permittee refused to admit a police officer to the licensed premises which was or appeared closed, when the officer identified himself and asked to enter to conduct a reasonable search to ensure compliance with alcoholic beverage laws.

2. Permittee made false representations or statements to the Commission in order to induce or prevent action by the Commission.

3. Permittee sold, dispensed, served, and/or consumed alcoholic liquor on the licensed premises between the hours of 2:30 a.m. and 7:00 a.m.

4. The appropriate sanction is a 69 day suspension of Permittee's service permit. Permittee Chan may pay a civil penalty of \$225.00 in lieu of nine days of the suspension, with the remaining 60 days suspension mandatory.

OPINION

The Commission has the burden of proving its charges by a preponderance of the evidence. ORS 183.450(2); *Cook v. Employment Div.*, 47 Or App 437 (1980) (in the absence of legislation specifying a different standard, the standard of proof in administrative hearings is preponderance of the evidence).

Violations

1. Refusing to admit a police officer to the premises.

The Commission alleges that, on December 23, 2008, Permittee refused to admit a police officer to the licensed premises, which was or appeared to be closed, when the officer identified himself and asked to enter to conduct a reasonable search to ensure compliance with alcoholic beverage laws. OAR 845-006-0345(4)(b).

Permittee Chan denies that he refused or failed to promptly admit the police officers.

As previously described in the Credibility Determination above, the evidence presented by the police as to what occurred on December 23, 2008 is more reliable than the contradictory evidence presented by Permittee. The preponderance of the reliable evidence in the record supports a conclusion that, on December 23, 2008, Permittee refused, or failed to promptly admit Tigard Police Officer Lain to the premises. Officer Lain had to physically remove Permittee from the doorway before he could enter the premises. Permittee also informed Officer Lain that he needed a warrant. Officer Lain was investigating possible violations of alcoholic liquor laws, including intoxication by Permittee while on duty, as well as possible minors on the premises, some of whom Officer Lain saw consuming alcohol. A search of the premises to investigate was

a reasonable response to those observations, to ensure compliance with alcoholic liquor laws. The premises was closed at the time that the police wished to enter, and the police officers were clearly identified as such. A violation of OAR 845-006-0345(4)(b) has been proven.

2. False statements to OLCC inspectors.

The Commission alleges that, on January 28, 2008, Permittee made false representations or statements to Commission staff (Inspector Enright) in order to induce or prevent action by the Commission. ORS 471.425(1).

The first element of the violation is whether there were false statements or representations. Permittee made several statements to OLCC Inspector Enright that were demonstrably false. The statements involved the events surrounding Officer Lain's contact with Permittee on the early morning of December 23, 2008. Both Officer Lain and Inspector Enright testified as to what Permittee told Officer Lain on that date, and Enright testified to the statements that Permittee told him during an interview held on January 28, 2009. Those statements directly contradicted Permittee's earlier statements. Permittee also made false statements to Officer Lain on December 23, 2008, and repeated them at the January 28 interview with the inspectors.

Permittee's false statements include:

1. Denying that there were any females inside the premises after 2:30 a.m., when Officer Lain personally observed females inside the premises around 5:00 a.m.
2. Denying that any alcohol was consumed after the premises closed at 2:30 a.m., when Officer Lain saw multiple persons drinking beer from 16 oz. glasses and bottles inside the premises at around 5:00 a.m.
3. Denying that anyone exited the premises from the back door, when Officer Lain heard several people do so.
4. Telling Inspectors Wellman and Enright that Mr. Skinner left the premises before 3:30 a.m. and did not return, and later admitting that Skinner returned and was still on the premises when the police arrived around 5:00 a.m.
5. Telling the inspectors that he allowed police entry after they answered his questions about a search warrant, when he instead stood in front of the entrance doors and refused to allow the entry, forcing the officers to physically move him away from the door.
6. Telling Officer Lain that there was no marijuana on the premises, when Officer Lain noted a strong odor of marijuana inside the premises and saw traces of marijuana in the toilet bowls.

7. Denying drinking alcohol on the premises, when Officer Lain noted that he smelled a strong odor of an alcoholic beverage on Permittee's breath.

Similar to the argument regarding his refusal to admit police officers to the premises, Permittee claims that Officer Lain lied about his statements and actions. Permittee also denies making at least some of the statements attributed to him by Inspector Enright. As noted before, the testimony of Permittee is less reliable than the evidence presented by the Inspectors and Officer Lain on this issue. In addition, Permittee admitted at hearing to making some false statements during his interview with the inspectors. The record supports a finding that Permittee made several false statements.

The second element of the violation is whether the false statements were material. In *Trocadero Inn* (OLCC, Final Order, 90-V-055, February, 1991), the Commission held that a false statement is material if the subject of the false statement is a basis for refusal, cancellation or suspension of a license by the OLCC. Here, Permittee's false statements were made as the OLCC investigators were investigating the multiple violations that are the basis for this suspension. Permittee's statements relate specifically to whether the violations of after hours service, refusing to admit police officers and drug use occurred on the premises. In both *Jiggles* (OLCC, Final Order, 85-V-016, February 1987) and *Frenchy's Tavern* (OLCC, Final Order, 88-BS-001, June 1988), the Commission held that a false statement is material if it has a logical correlation to whether the Licensee committed a violation. Here, Permittee's false statements were material, because they impeded the investigation into whether violations occurred. OLCC has proven that the false statements were material.

The third element of a false statement violation is whether they were made to induce or prevent action by the OLCC. Inspector Enright had informed Permittee during the interview that consequences of lying included possible cancellation of the liquor license. The main purpose of Permittee's false statements were to cause OLCC to not pursue action against him or the Licensee. Permittee's admission of lying at hearing is not a defense. See *Mac Club* (OLCC, Final Order, 04-V-065, July 2005) (later retraction of a false statement cannot be a defense).

A violation of ORS 471.425(1) has been proved.

3. Selling, dispensing, serving and/or consuming alcoholic liquor on the licensed premises after hours.

The Commission alleges that, on December 23, 2008, Permittee Chan, sold, dispensed, served, and/or consumed alcoholic liquor on the licensed premises between the hours of 2:30 a.m. and 7:00 a.m., in violation of OAR 845-006-0425(1). That rule restricts the above activities on a licensed premises to the hours between 7:00 a.m. and 2:30 a.m.

Officer Lain personally observed a person (Ming Chin) inside the premises handing a beer to a young looking female at approximately 5:00 a.m. When Lain later spoke to Permittee, who was also found inside the premises, Permittee initially denied that anyone had been drinking inside the premises, but later stated that it was "Okay," because the business was closed.

In *Amber Inn* (OLCC, Final Order, 85-V-014, July 1985), the Commission held that selling to employees or friends rather than to the general public is not a defense to a charge of operating during prohibited hours. OLCC has proven that a violation of OAR 845-006-0425(1) has occurred.

Penalty

OAR 845-006-0500 defines the violation of refusing to admit a police officer, as well as the violation of making false representations or statements, as Category II violations.

The Commission's standard penalty schedule recommends a 30 day mandatory suspension for the first Category II violation and a revocation of the permit for the second violation within two years. The Commission proposes to charge both of these violations at the first level because the false representation violation was discovered during the investigation of the refusal to admit police officers violation. That is an appropriate treatment of the two violations. Therefore, a 30 day suspension for each violation, for a total of 60 days, would be the standard sanction.

The Commission defines the violation of selling, dispensing, serving and/or consuming alcoholic liquor outside the hours of operation as a Category IV violation. The standard penalty for a first Category IV violation, which is the case here, is a seven day suspension or a \$175.00 penalty.

The standard penalties would be appropriate, absent mitigating or aggravating circumstances. The Public Safety Program found aggravating circumstances in regards to the serving, dispensing, etc. violation, in that multiple individuals were served alcoholic beverages. The Public Safety Program proposes the Commission aggravate the sanction two additional days for this circumstance.

OAR 845-006-0500(7)(c) describes some of the aggravating and mitigating circumstances that can apply when determining a sanction and specifically describes as an aggravating factor a violation involving more than one patron. Two days of additional suspension for the stated aggravation is warranted in this case.

The Public Safety Program also requests that the standard civil penalty of \$175.00 be increased by \$50.00 to reflect the additional two days of aggravation suspension. Exhibit 1 of OAR 845-006-0500 describes \$25.00 as the standard civil penalty increase per each day of aggravation, in cases involving service permits.

In total, the Public Safety Program recommends that the Commission suspend Permittee's service permit for 69 days (30 + 30 + 7 = 67 days for the standard penalties + 2 days for one aggravating factor). The Public Safety Program also recommends that Permittee be allowed to pay a civil penalty of \$225.00 (\$175.00 standard penalty + \$50.00 for 2 days of aggravation) in lieu of nine days of the 69 day suspension with remaining 60 days of the suspension mandatory. That is an appropriate penalty in this case.

FINAL ORDER

The Commission issues the following order:

The Service Permit of Jialin Chan shall be suspended for 69 days. Permittee Chan may pay a civil penalty of \$225.00 in lieu of nine days of the suspension with the remaining 60 days of the suspension mandatory.

If you choose to pay the fine, it must be paid within 20 days of the date of this Order; otherwise the suspension must be served.

It is further ordered that notice of this action, including the reasons for it, be given.

Dated this 12th day of February, 2010.

/s/ Stephen A. Pharo
Stephen A. Pharo
Executive Director
OREGON LIQUOR CONTROL COMMISSION

Mailed this 12th day of February, 2010.

THIS ORDER IS EFFECTIVE ON THE DATE MAILED. Any monetary fine or civil penalty set out in the order shall be due and payable 20 days after the date of mailing.

NOTICE: You are entitled to judicial review of this Order. Judicial review may be obtained by filing a petition for judicial review within 60 days from the service of this Order. Judicial review is pursuant to the provisions of ORS Chapter 183.