

**BEFORE THE LIQUOR CONTROL COMMISSION
OF THE STATE OF OREGON**

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|--|---|-------------------------------|
| In the Matter of the Full On-Premises |) | FINAL FINDINGS OF FACT |
| Sales License Held by: |) | CONCLUSIONS OF LAW |
| |) | AND ORDER |
| VegasStars, LLC |) | OLCC-09-V-101 |
| Christopher Lenahan, Managing Member |) | |
| Jacob Wang, Member |) | |
| Gary Yang, Member |) | |
| Jessica Yang, Member |) | |
| dba DIRTY BAR & GRILL |) | |
| 35 NW Third Avenue |) | |
| Portland, OR 97209 |) | |

HISTORY OF THE CASE

On August 18, 2009, the Oregon Liquor Control Commission (OLCC or Commission) issued an Amended Notice of Proposed License Suspension/Civil Penalty to VegasStars, LLC, Christopher Lenahan, Managing Member, Jacob Wang, Member, Gary Yang, Member and Jessica Yang, Member, dba Dirty Bar & Grill (collectively Licensee), located at 35 NW Third Avenue, Portland, Oregon. The Notice alleged that Licensee’s employee Dirk Allen knowingly sold, served or otherwise made alcoholic liquor available to a visibly intoxicated person in violation of ORS 471.410(1). The Notice proposed a penalty of a 12 day suspension or a civil penalty of \$1,980 for the alleged violation. Licensee timely requested a hearing.

The Commission referred Licensee’s hearing request to the Office of Administrative Hearings on September 3, 2009. A contested case hearing was held in this matter in Tualatin, Oregon, on January 6, 2010, before Administrative Law Judge Alison Greene Webster. Attorney Greg Oldham represented Licensee. Kelly Routt presented the case for the OLCC.

OLCC called the following witnesses to testify: Portland Police Officer Brian Hughes; Portland Police Sergeant Timothy Robinson; Portland Police Officer Ryan Derry; OLCC Inspector Richard Miller; and OLCC Inspector Shannon Hoffeditz. The following witnesses testified on Licensee’s behalf: Permittee and employee Dirk Allen and Managing Member Christopher Lenahan.

The record was held open for written closing arguments, and closed on February 4, 2010, upon receipt of OLCC Staff’s Response to Licensee’s Closing Argument.

The Administrative Law Judge considered the record of the hearing and the applicable law and issued a Proposed Order mailed February 19, 2010. Staff filed Comments on the Proposed Order on March 8, 2010.

On April 15, 2010, the Commission considered the record of the hearing, the applicable law, the Proposed Order of the Administrative Law Judge, Staff’s Comments on the Proposed

Order and the Administrative Law Judge's Response to Staff's Comments. Based on this review and the preponderance of the evidence, the Commission enters the following:

EVIDENTIARY RULINGS

OLCC Exhibits A1 through A10 were admitted at hearing without objection. Licensee's Exhibits P1 and P2 were also admitted.

ISSUES

1. Whether Permittee Dirk Allen knowingly sold or made alcoholic liquor available to a visibly intoxicated person, Zachary Sanders. ORS 471.410(1).¹
2. If the violation is proved, what is the appropriate penalty?

FINDINGS OF FACT

1. VegasStars, LLC, Christopher Lenahan, Managing Member, Jacob Wang, Member, Gary Yang, Member and Jessica Yang, Member, dba Dirty Bar & Grill have held a Full On-Premises Sales license at the premises located at 35 NW Third Avenue, Portland, since February 2008. (Ex. A1.)

2. On September 26, 2008, OLCC Inspector Jason Evers entered the premises in an undercover capacity on a compliance check. He saw a patron showing signs of visible intoxication in a very crowded bar. He also saw little or no alcohol monitoring by Licensee's staff. Although the inspector did not observe a sale or service to the visibly intoxicated patron, he saw the visibly intoxicated patron consuming what he believed to be a whiskey and Coke. The inspector determined that the violation was "unproven," but he recommended that the Licensee be issued a warning. (Ex. A10 at 2-4.) On November 13, 2008, Inspector Hoffeditz issued Licensee a Notice of Warning for an employee's knowing sale or service of alcoholic beverages to a visibly intoxicated person. (Ex. A10 at 1.)

3. On the night of April 18 and the early morning hours of April 19, 2009, Zachary Sanders was a patron at the licensed premises. Sanders is approximately 6'4" tall. He has a slender build and strawberry blond hair. On the dates in issue, he had a beard as well. (Ex. A7; test. of Hughes; test. of Derry; test. of Miller.)

4. Bartender Dirk Allen came on duty on the night of April 18, 2009 sometime between 10:30 p.m. and 11:00 p.m. He was aware that Sanders was in the bar. Sanders ordered two beers and a mixed drink from him. At one point, Sanders approached the bar with two female patrons and ordered them a rum and Coke. Allen thought that Sanders was trying to "hit on" the women. The women took the drink and walked off. Sanders refused to pay for it, requiring Allen to void the tab. (Test. of Allen.)

¹ "No person shall sell, give or otherwise make available any alcoholic liquor to any person who is visibly intoxicated." ORS 471.410(1).

5. At about 12:05 a.m. on April 19, 2009, Officers Hughes and Derry and Inspector Miller entered the premises in an undercover capacity to monitor Licensee for overservice and visibly intoxicated patrons. Within minutes of their arrival in the main bar area, all three took notice of Sanders, who was at the time standing by himself, approximately 10 feet from the bar.² The officers and Inspector Miller were standing within five or six feet of Sanders.

6. Officer Hughes noted that Sanders' eyes were wide open and his cheeks appeared sunken. Sanders' head was moving and his body and arm movements were rapid and jerky. To Officer Hughes, Sanders looked like a "tweaker," a person under the influence of methamphetamine. Officer Hughes watched Sanders touch or grab at women as they walked by him. Officer Hughes saw Sanders run his hands along several women's buttocks and thighs as they passed by. The officer also saw a few of the women turn around and look at Sanders with anger and/or disgust. It was apparent to Officer Hughes that the women did not welcome or want Sanders touching them. (Test. of Hughes; Ex. A2.)

7. Officer Derry also saw that Sanders was behaving oddly and appeared to be under the influence of a stimulant, either cocaine or methamphetamine. Officer Derry noted Sanders' jerky movements and inappropriate groping at women who walked by. (Test. of Derry.)

8. Inspector Miller saw Sanders repeatedly scratch his head and rub the back of his neck. Inspector Miller also saw Sanders drinking clear liquid from a glass. He watched an interaction between Sanders and a female patron. The female, who had been dancing on a counter near where Sanders was standing, accidentally spilled Sanders' drink and said something to Sanders. He was slow to respond. He stared back at her, glassy eyed. When he did respond, he seemed jittery and disjointed. Inspector Miller commented to Officer Hughes about Sanders' demeanor and appearance. Officer Hughes mentioned to Inspector Miller that Sanders appeared to be under the influence of methamphetamine. (Test. of Miller; Ex. A5.)

9. At one point, after the officers and inspector had been observing Sanders for about 15 or 20 minutes, Sanders walked up to the bar, spoke briefly to the bartender, took a bottle of water from the counter and then walked away. (Test. of Derry; Ex. A2.)

10. About 10 minutes later, at approximately 12:40 a.m., Sanders walked up to the bar again. Inspector Miller followed Sanders to the bar, and was standing to his right as Sanders spoke to the bartender, Allen. Inspector Miller noted that Sanders' eyes appeared unfocused and his face was flushed. Inspector Miller could not hear the conversation between Sanders and Allen,³ but he saw that Sanders was very animated and moving his hands. Allen served Sanders

² The bar and bartenders are on a raised platform, about a foot off the ground, providing the bartenders with a raised view of the crowd and floor area. (Test. of Miller; Ex. A5 and Ex. P1.)

³ When Sanders ordered this drink at 12:40 a.m., bartender Allen recognized him from his previous drink orders that night. Allen told him that he still needed to pay for the rum and Coke. Allen also told Sanders he would not serve him unless Sanders paid for both the rum and Coke and the vodka and tonic. Sanders protested briefly, but paid for both drinks. (Test. of Allen.)

an alcoholic beverage (a vodka and tonic). Sanders paid for the drink and walked back to the dance floor area. (Test. of Miller; Exs. A4 and A5.)

11. As soon as Sanders walked away, Inspector Miller asked Allen what kind of drink he had just served to that patron. Allen asked Inspector Miller to whom he was referring. Inspector Miller said the tall, red-headed male who had just been at the bar. Allen said he served Sanders a vodka and tonic. Inspector Miller ordered the same drink. (Test. of Miller.)

12. Officers Hughes and Derry and Inspector Miller called for back-up so they could break cover and arrest Allen for serving alcoholic beverages to a visibly intoxicated person. Officer Hughes also had probable cause to arrest Sanders for disorderly conduct. Sgt. Robinson arrived in uniform and took Sanders into custody without incident. Inspector Hoffeditz also arrived to assist with the investigation, and she contacted Allen with Inspector Miller. (Test. of Miller; test. of Hughes; test. of Robinson; test. of Hoffeditz.)

13. After breaking cover, Inspector Miller interviewed Allen. Inspector Hoffeditz was present and took notes of the interview. Allen admitted serving Sanders the vodka and tonic. Allen said he also served Sanders a couple of beers earlier in the night. He explained that Sanders had approached the bar and ordered a rum and Coke for a female patron and told Allen to put it on his tab, even though Sanders did not have one. Allen admitted seeing Sanders in the bar area during his shift. Inspector Miller then asked Allen about his encounter with Sanders when Sanders ordered the vodka and tonic. Allen said that after he served the drink to Sanders, he was not going to serve him again because he “didn’t think he should have any more.” When Inspector Miller asked Allen what he meant by that comment, Allen said he thought Sanders might be on “coke” by the way he was acting. Inspector Miller asked what signs Allen had noticed to indicate that Sanders was on cocaine, and Allen said Sanders was really skinny and red-faced. Allen also acknowledged that Sanders appeared animated and was talking “super fast” during their contact at the bar. Inspector Miller also asked Allen why he served Sanders an alcoholic beverage if he believed Sanders was under the influence of cocaine or something similar, but Allen did not respond to that question. (Test. of Miller; Ex. A4.)

14. Sgt. Robinson cited Allen for selling or serving alcoholic liquor to a person who is visibly intoxicated in violation of ORS 471.410(1). (Ex. A3.)

15. Officer Hughes cited Sanders for disorderly conduct, based upon his grabbing and groping of female patrons at the licensed premises. Sanders admitted that he had been drinking at the bar, even though he was on probation for possession of methamphetamine and was prohibited from consuming alcohol as a condition of his probation. Hughes also cited Sanders for probation violation. (Ex. A2; test. of Hughes.)

16. Sanders submitted to a breath test and a urine test. His breath test disclosed a blood alcohol content of .173 percent. A toxicological analysis of his urine sample showed the presence of methamphetamine and its metabolite amphetamine, along with benzylpiperazine (BZP) and trifluoro-m-tolyl piperazine (TFMPP) (recreational drugs that produce effects similar to MDMA/Ecstasy). (Test. of Hughes; Ex. A9.)

17. Allen subsequently pled guilty, and was convicted of violating ORS 471.410(1). He was sentenced to 16 hours of community service. (Test. of Allen.)

18. Licensee has alcohol awareness policies and procedures to avoid problems with overservice at the premises. Licensee has trained security staff and alcohol monitors on duty. Licensee has a detailed safety and security plan, and after any incident, Licensee's security staff meets to discuss the matter, how it was handled and how to prevent such incidents from reoccurring. At the end of every Thursday, Friday and Saturday night shift, Licensee's security staff has a debriefing meeting to discuss any issues that arose during the shift. Licensee offers free bottled water. Patrons can ask a server or grab their own bottled water from the bar. Licensee also has "safe zones," areas of the premises separate from the bars and dance floors, to segregate intoxicated patrons to discourage them from wandering out on the street and/or causing trouble with the other patrons in the premises. Licensee offers water, coffee and or food to patrons showing signs of visible intoxication. Licensee also has weekly staff meetings that include continuing training and education on methods to identify and control intoxicated patrons. Subsequent to the incident at issue, Licensee instituted a "30 second engagement" rule to avoid permitting visibly intoxicated persons to enter the bar. The rule requires that Licensee's door staff engage the patron in a brief conversation, so that staff can better assess the patron's sobriety. (Test. of Lenahan; Ex. P2.)

CONCLUSIONS

1. Permittee Dirk Allen knowingly sold or made alcoholic liquor available to a visibly intoxicated person, Zachary Sanders.

2. The appropriate penalty for the violation of ORS 471.410(1) is a 10 day license suspension or a civil penalty of \$1,650.

OPINION

The burden of presenting evidence to support a fact or position in a contested case rests on the proponent of the fact or position. ORS 183.450(2). OLCC has the burden of proving its allegations by a preponderance of the evidence. *Metcalf v. AFSD*, 65 Or App 761 (1983); *Jody's Restaurant & Lounge* (OLCC, Final Order, 97-V-015, August 1997). Proof by a preponderance of the evidence means that the fact finder is persuaded that the facts asserted are more likely true than not true. *Riley Hill General Contractors v. Tandy Corp.*, 303 Or 390 (1989).

1. Service of Alcoholic Beverages to Visibly Intoxicated Person

The Commission alleges that permittee Allen knowingly sold, served or otherwise made alcoholic liquor available to a visibly intoxicated person, Zachary Sanders, in violation of ORS 471.410(1). The *prima facie* elements of a violation of ORS 471.410(1) are: (1) the sale, service or making available alcoholic liquor; (2) by an on-duty licensee, permittee or agent of licensee; (3) to a person who was showing visible signs of intoxication before the service;⁴ (4) the

⁴ The Commission has found that signs of visible intoxication include, but are not limited to: slurring, heavy odor of alcohol, difficulty in handling money or lighting cigarettes, staggering, swaying, stumbling

licensee, permittee or agent knew the person was visibly intoxicated; and (5) the person was actually intoxicated. “A ‘knowing’ sale to a visibly intoxicated person is met where, prior to the sale or service of alcohol, the patron demonstrated signs of visible intoxication, the server had the opportunity to observe the signs, and the server either actually observed the signs (*i.e.*, interaction with patron while displaying signs) or knew of the presence of a circumstance from which knowledge could be inferred.” *Cheers to You* (OLCC, Final Order, 00-V-070, October 2001). OLCC calls these latter circumstances knowing “flag factors.” The server’s state of mind is a question for the trier of fact to be determined in view of the circumstances as shown by the evidence. ORS 471.315; *Aloha Station* (OLCC, Final Order, 99-V-034, August 1999); *Plaid Pantry No. 55* (OLCC, Final Order, 98-V-063, October 1998).

The knowing “flag factors” include, but are not limited to, the following: (1) interaction with the patron from prior occasions, including drinking patterns and alcohol tolerance; (2) the number of drinks served during an identifiable time frame; (3) notification at the time of service that the patron is cut off or has reached his or her maximum; (4) contemporaneous statements by the server about the patron’s condition; (5) admissions or stipulations by the server or patron that the patron was visibly intoxicated or should not have been served; or (6) one or more signs of intoxication so open and notorious that it or they could not have been reasonably missed. *Cheers to You*, Final Order at 15-16.

In *Omar’s* (OLCC, Final Order, 04-V-033, August 2005), the Commission found a knowing sale to a visibly intoxicated person where the server had roughly 15 minutes to observe a patron who was talking loudly, slurring his words and using profane language. The patron was also pacing back and forth, swaying and staggering and gesturing in an exaggerated manner. The Commission held that 15 minutes gave the server ample opportunity to observe the patron and determine that he was visibly intoxicated. Similarly, in *Stagecoach Saloon* (OLCC, Final Order, 99-V-084, April 2000), the Commission found a knowing sale to a visibly intoxicated person where the person exhibited signs of visible intoxication for about 10 minutes in proximity to the permittee. In *Agency 1158* (OLCC Final Order, 09-RO-002, December 2009), the Commission found that a liquor store clerk made a knowing sale to a visibly intoxicated person where the clerk engaged the customer in a brief conversation, and the customer, a chronic alcoholic who was able to walk and talk and pay for her purchase, nevertheless showed signs of diminished mental or physical control, including shaking and jitteriness.

In this case, Licensee does not dispute permittee Allen sold an alcoholic beverage to patron Sanders. Licensee also does not dispute that Sanders was intoxicated. Licensee does, however, question whether Sanders was showing visible signs of intoxication before the service and whether Allen knew that he was visibly intoxicated. Licensee asserts that because Sanders’ intoxication was due to a mix of alcohol and stimulant drugs, his behavior varied and he was not showing the typical signs and symptoms of alcohol that Allen was trained to recognize. Licensee contends that although Allen saw Sanders in the bar area and had some contact with him at the

or falling, bloodshot, watery or glassy eyes, disruptive or loud behaviors, clumsiness, such as spilling drinks or bumping into things, argumentative behavior and extreme mood swings. *Jody’s Restaurant & Lounge* (OLCC, Final Order, 97-V-015, August 1977). A visibly intoxicated person is one whose physical and mental control is diminished by alcohol or drugs to a point where such diminished control can be seen or observed. *Portland Civic Stadium* (OLCC, Final Order, 85-V-032, January 1986).

bar before and at the time he sold Sanders the vodka and tonic at 12:40 a.m., Allen did not have an opportunity to observe Sanders' intoxication and did not knowingly serve him.

The following facts are undisputed. Allen saw Sanders in the bar area when Allen came on duty between 10:30 p.m. and 11:00 p.m. Before the officers and inspectors arrived, Allen had two or three contacts with Sanders at the bar, including an exchange in which Sanders refused to pay for a drink that he ordered for a female patron. Between 12:05 a.m. and 12:40 a.m., when Sanders approached Allen at the bar to order another drink, Sanders remained in the bar area, within 10 feet from the raised bar. Sanders, at 6'4" tall, stands taller than most people, and he would have been visible to the bartenders if they were looking his way. Finally, Allen had a brief conversation with Sanders at the bar before he served Sanders the vodka and tonic at 12:40 a.m.

What is disputed is whether Sanders was showing visible signs of intoxication and whether Allen observed those signs. Because Licensee contends that Allen did not have an opportunity to observe Sanders' intoxication and did not knowingly serve him, it is necessary to address the conflicting testimony and to consider the knowing "flag factors" to determine whether Allen had knowledge of circumstances from which his knowledge of Sanders' intoxication can be inferred.

Was Sanders showing visible signs of intoxication? As set out in the findings above, Sanders was behaving oddly and appeared to be under the influence of a stimulant drug. His movements were jerky and disjointed, his eyes were wide open and his cheeks were sunken. He was annoying female patrons by inappropriately touching and groping at them as they walked past. He repeatedly scratched his head and rubbed the back of his neck. When Sanders walked to the bar at about 12:40 a.m., his eyes appeared unfocused and his face was flushed. He was very animated and moved his hands while talking with Allen at the bar. Sanders' diminished physical control was observable and apparent to others, including Officers Hughes and Derry and Inspector Miller. And, although some of the signs of intoxication that Sanders exhibited were not typical for a person intoxicated by alcohol alone (*i.e.*, repeatedly scratching at his head and rubbing the back of his neck, jittery and disjointed movements), Sanders was nevertheless visibly intoxicated.

Did Allen have an opportunity to observe Sanders' intoxication and knowingly serve him? As noted above, in the approximate hour and a half before Sanders approached the bar at 12:40 a.m., Allen served him two or three drinks. Allen had an exchange with Sanders when Sanders ordered the rum and Coke for a female patron, and then refused to pay for it. Between 12:05 a.m. and 12:40 a.m., while the officers and inspector were observing Sanders, Sanders was standing on the dance floor about 10 feet from the bar, within Allen's line of sight. Allen may not have been continuously monitoring Sanders' actions, but Allen had ample opportunity to observe him on the dance floor during this 35 minute period. And, Allen had actual interaction with Sanders before he served and sold him the vodka and tonic. Furthermore, as discussed below, the evidence establishes that shortly after the incident, Allen acknowledged that Sanders appeared intoxicated or should not have been served.

According to Inspector Miller, Allen recognized after the sale that Sanders should probably not have had any more to drink because he looked like he was on “coke.” Inspector Miller also testified that Allen described Sanders as red-faced and as talking “super fast.” Inspector Miller testified that Allen admitted that Sanders was very animated during their contact at the bar. At hearing, however, Allen denied making these statements during his interview with the inspectors. Allen denied saying that Sanders talked fast or appeared red-faced. Allen asserted that Sanders did not appear intoxicated when he ordered the vodka and tonic at the bar. Allen also claimed that the inspectors put words in his mouth, and that the inspectors, not he, suggested that Sanders looked like he was on cocaine.

After considering the conflicting testimony, the Commission finds Inspector Miller’s testimony regarding Allen’s statements and admissions during the interview more reliable than Allen’s testimony at hearing. *See, e.g., Wolf Den* (OLCC Final Order, 89-V-021, July 1989).⁵ Inspector Miller interviewed Allen shortly after Allen sold the vodka and tonic to Sanders. Inspector Hoffeditz was present, and took notes on Allen’s responses during the interview. Inspector Miller completed his written report about the incident and Allen’s interview responses the following day. The officers also completed their written reports shortly after Allen’s and Sanders’ arrest. There is no evidence that Allen took notes about the incident or his interview with the inspectors. The evidence establishes that Sanders behaved oddly and appeared to be under the influence of a stimulant while at the licensed premises. Given these circumstances, the Commission finds it more likely than not that, when interviewed after the incident, Allen admitted to the inspectors that Sanders looked like he was on “coke” and should not have been served.

The Commission also finds it more likely than not that, at the time Allen served the vodka and tonic to Sanders, he recognized that Sanders was showing signs of visible intoxication. Allen’s acknowledgement during the interview that Sanders looked like he was on “coke” indicates that, like the officers and Inspector Miller, Allen noted signs on Sanders to indicate that Sanders was under the influence of a stimulant. Therefore, the knowing element has been established. *See Synthia Smith and Teresa Oakes* (OLCC Final Order, 03-V-12, October 2003) (the Commission found a “knowing” flag factor where the server admitted to the inspector that the patron did not appear to be sober; violation of ORS 471.410(1) shown); *see also Kozy Korner Restaurant & Lounge* (OLCC Final Order, 01-V-002, November 2001).

In *Kozy Korner*, a violation of ORS 471.410(1) established where patron was displaying visible signs of intoxication, the server had the opportunity to observe the signs when the patron ordered a drink from the server, there was direct interaction between the patron and the server while the patron was exhibiting the signs of intoxication, and the patron was sold four drinks in one and a half hours. The Commission held that the server knew, by virtue of her interaction with the patron, that the patron was visibly intoxicated, despite her assertion that she did not suspect the patron was intoxicated until after the sale.

⁵ In *Wolf Den*, the Commission found that a licensee’s admission to inspectors made immediately after the incident was more credible than the licensee’s testimony at hearing several months later because the licensee had not had time to fabricate a story, the inspectors had no reason to lie about the licensee’s admission and the inspectors’ report documenting the licensee’s statements was completed just days after the incident.

2. Penalty

The Commission has established violation categories and standard sanctions for first and subsequent violations within each category. OAR 845-006-0500(7), Exhibit 1. The sanctions set out in Exhibit 1 are just guidelines, however. If the Commission finds aggravating or mitigating circumstances, it may assess a greater or lesser sanction. OAR 845-006-0500(7)(c). Grounds for mitigation include good faith efforts to prevent a violation and extraordinary cooperation in the violation investigation that shows the licensee or permittee accepts responsibility. Grounds for aggravation include, but are not limited to, prior warnings about compliance problems, repeated failure to comply with laws, and efforts to conceal the violation. *Id.*

A violation of ORS 471.410(1) is a Category III violation. OAR 845-006-0500(7). The standard penalty for a licensee's first Category III violation is a 10 day suspension or a civil penalty of \$1,650. OAR 845-006-0500(7). In this case, Commission staff seeks to aggravate the standard sanction by two days or \$330 because Licensee received a prior warning about sale or service to a patron showing signs of visible intoxication.

Licensee asserts that aggravation is not warranted based upon the prior warning, because that warning was based upon an unproven allegation rather than an observed or adjudicated violation. Licensee also argues that there are grounds for mitigation, based upon Licensee's good faith efforts to prevent violations of this nature.

As noted above, by rule and case precedent, the Commission may aggravate a sanction where the licensee has received a prior warning about the same violation. *See, e.g., Eclectic Restaurant/Envy Lounge Bar* (OLCC Final Order, 09-V-028, October 2009) (sanction for permitting unlawful activity aggravated, in part, because licensee had received a prior notice of warning based on security employees not having security certification); *H2O Martini Bar* (OLCC Final Order, 06-V-104, December 2006) (sanction service permit violation aggravated, in part, because licensee had received a prior notice of warning for having two employees without service permits). In both of these cases, however, the prior warnings were correctly issued for the same substantive violation at issue in the later case. In that situation, a warning will become an aggravating factor automatically. In this case, however, the prior Notice of Warning issued to Licensee in November 2008 for knowingly selling or making alcohol available to a visibly intoxicated person was incorrectly based on an assumed sale. The inspector did not observe a sale or provision of alcohol to a visibly intoxicated person, but assumed such from his later observation of a visibly intoxicated person consuming alcohol. The correct warning, based upon those facts would be for allowing a visibly intoxicated person to consume alcohol, as prohibited by ORS 471.412. Therefore, under these unusual circumstances where the earlier warning was incorrectly issued for the same substantive violation, the prior warning does not provide a valid basis on which to aggravate the sanction.

Also by rule and case precedent, the Commission may mitigate a sanction based on the Licensee's good faith efforts to avoid such violations. But, the Commission has held that mitigation is not appropriate when the actions taken are nothing more than what the law already required the licensee to do. *See, e.g., Tony's Tavern* (OLCC Final Order, 06-V-012, August 2006). The Commission has also held that efforts and actions taken after the violation, while

laudable, do not provide grounds for mitigation. *See Dad's Restaurant & Lounge* (OLCC Final Order, 06-V-029, December 2007).

Here, prior to the violation, Licensee had in place established alcohol awareness policies and procedures. Among other things, Licensee offers free bottled water to patrons; it has designated "safe zones" for intoxicated patrons; and regular staff meetings and regular security staff debriefings. The violation (knowing sale to a visibly intoxicated patron Sanders) occurred notwithstanding these policies and procedures. Furthermore, although Inspector Evers did not observe a sale to a visibly intoxicated patron during his undercover observations on September 26, 2008, he did see a patron showing signs of visible intoxication in a very crowded bar with little or no alcohol monitoring by Licensee's staff. Inspector Evers observations, combined with the circumstances of the April 19, 2009 violation indicate that despite Licensee's documented alcohol awareness policies and procedures, Licensee's staff is not consistently vigilant about monitoring patrons and preventing violations. Consequently, mitigation of the penalty is not warranted.

In consideration of the above, the appropriate penalty for Licensee's violation of ORS 471.410(1) in this matter is the standard penalty of a 10 day suspension or a civil penalty of \$1,650.

FINAL ORDER

The Commission orders that for the charge that Licensee's employee Dirk Allen violated ORS 471.410(1) on April 19, 2009, the Commission impose a 10-day license suspension or a civil penalty of \$1,650 upon Licensee VegasStars, LLC, Christopher Lenahan, Managing Member, Jacob Wang, Member, Gary Yang, Member and Jessica Yang, Member, dba Dirty Bar & Grill.

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.

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

Dated this 22nd day of April, 2010.

/s/ Stephen A. Pharo

Stephen A. Pharo

Executive Director

OREGON LIQUOR CONTROL COMMISSION

Mailed this 22nd day of April, 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 10 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.