

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

In the Matter of the Off-Premises Sales) FINAL FINDINGS OF FACT
License held by) CONCLUSIONS OF LAW
) AND ORDER
Jong Cheol Yang) OLCC-10-V-001
dba Rainbow Market)
220 Railroad)
Sherwood OR 97140)

HISTORY OF THE CASE

On December 21, 2009, the Oregon Liquor Control Commission (OLCC or Commission) issued a Notice of Proposed License Suspension/Civil Penalty to Jong Cheol Yang (Licensee), dba Rainbow Market, located at 220 Railroad, Sherwood, OR 97140. The Commission alleged that Licensee violated OAR 845-006-0335(1)(a)(b)(c) by failing to verify a minor's age before allowing the minor to buy an alcoholic beverage when the minor reasonably appeared to be under 26 years of age. Licensee made a timely request for hearing.

The Commission referred the request to the Office of Administrative Hearings on January 21, 2010 and the case was first assigned to Alison Greene Webster, then to Robert L. Goss, Administrative Law Judge (ALJ). A prehearing conference was held before ALJ Goss on March 15, 2010. Licensee was not represented by counsel. The OLCC was represented by Abby R. Michels, Case Presenter. A contested case hearing was held on March 23, 2010 in Tualatin, Oregon, before ALJ Goss. Licensee appeared, was not represented by counsel and testified at the hearing. The OLCC was represented by Ms. Michels. Witnesses for the OLCC were: Sherwood Police Officer Greg Hirsch, Sherwood Police Officer Richard Rayniak, Sherwood Police Captain Mark Daniel, minor decoy Nick Marlow, and OLCC Inspector Jesse Enright. Licensee did not call any witnesses. The OAH provided Licensee a qualified Korean interpreter at hearing, Sahng Ju Peters. The record closed at the conclusion of the hearing.

The Administrative Law Judge considered the record of the hearing and the applicable law and issued a Proposed Order mailed March 26, 2010. Staff filed Comments on the Proposed Order on April 9, 2010.

On June 17, 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:

ISSUES

1. Whether Licensee failed to verify the age of a minor before selling the minor an alcoholic beverage, when the minor reasonably appeared to be less than 26 years of age. OAR 845-006-0335(1)(a)(b)(c).

2. If a violation is proved, what is the appropriate penalty?

EVIDENTIARY RULING

OLCC's Exhibits A1 through A10 were admitted to the record without objection. Licensee did not offer any exhibits.

FINDINGS OF FACT

1. Licensee Jong Cheol Yang, dba Rainbow Market, located at 220 Railroad, Sherwood, Oregon, has been licensed by the OLCC since April 11, 1996. Licensee currently holds an Off-Premises Sales License. Licensee is a member of the Responsible Vendor Program. (Exs. A1, A2.)

2. On October 29, 2009, OLCC Inspector Jesse Enright, in a cooperative effort with the Sherwood Police Department, conducted a minor decoy operation, focusing on OLCC licensed premises in the City of Sherwood. The operation utilized a 20 year old decoy, Nick Marlow, born on September 25, 1989. OLCC and the Sherwood officers checked 12 licensed premises on that day. Five of the premises refused to sell alcoholic beverages to minor Marlow after checking his identification. Of the seven licensed premises that sold alcoholic beverages to minor Marlow, the employees or managers at four of them admitted to Inspector Enright that minor Marlow appeared to be under 26 years of age. Employees or managers at seven of the twelve premises visited checked Marlow's identification. (Test. of Enright, Marlow.)

3. Minor Marlow entered the premises. Minor Marlow entered the licensed premises at approximately 8:11 p.m. Minor Marlow obtained a 40 oz. bottle of Budweiser beer from the back of the store and brought it to the counter, where Licensee was working. Licensee sold the beer to minor Marlow without asking minor Marlow for any identification. Licensee also did not ask about minor Marlow's age. After the sale, Inspector Enright and Sherwood officers entered the store and contacted Licensee. Licensee admitted that he had sold the beer to minor Marlow and that he had not asked minor Marlow for identification. When advised that he had sold alcohol to a minor, Licensee told the officers that minor Marlow appeared to him to be "about 27." Licensee told Inspector Enright that he believed minor Marlow was 27 years old because he had hairy arms and was "balding." (Exs. A3, A4, A8; test. of Enright.)

4. Minor Marlow appears to be his true age of 20 years old. On October 29, 2009, Marlow was clean shaven with short cropped hair. He is not "balding". He had unlined facial features and was wearing clothing appropriate for a young male in his late teens or early 20s. (Exs. A5, A6, test. of Hirsch, Rayniak, Daniel and Enright.)

5. On October 29, 2009, Licensee had posted a homemade sign near the area of the cash register at the licensed premises. The sign stated:

MUST check up
the I.D.
under looking
30 yr old
(Alcohol: 1988;
(Smoke: 1991

(Ex. A10.)

6. As a result of the October 29, 2009 minor decoy operation, Licensee was issued a citation by the Sherwood Police for a charge of Sale of Liquor to a Minor, a City of Sherwood offense. Licensee pled guilty to the charge on December 16, 2009 in the Sherwood Municipal Court and was assessed a fine of \$292. (Exs. A3, A9.)

CONCLUSIONS OF LAW

1. Licensee failed to verify the age of a minor before selling the minor an alcoholic beverage, when the minor reasonably appeared to be less than 26 years of age.
2. The appropriate penalty is a nine-day suspension or civil penalty of \$1,485.

OPINION

A. Violation: Failing to verify the age of a minor

The Commission asserts that Licensee violated OAR 845-006-0335(1)(a)(b) and (c)¹ when he failed to verify minor Marlow's age before allowing him to purchase an alcoholic

¹ OAR 845-006-0335 provides, in pertinent part:

(1) Age Verification:

(a) ORS 471.130 requires a licensee or permittee to verify the age of a person who wants to buy or be served alcoholic beverages when there is "any reasonable doubt" that the person is at least 21 years old. The Commission requires a licensee or permittee to verify the age of anyone who wants to drink alcoholic beverages, or is in an area prohibited to minors, if there is reasonable doubt that the person is at least 21 years old. "Reasonable doubt" exists if the person appears to be under the age of 26;

(b) Whenever a licensee or permittee verifies age, he/she must verify it as ORS 471.130 requires (statement of age card or the specified items of identification) and must reject any obviously altered document or one which obviously does not identify the person offering it;

(c) Licensees must require all their employees who sell, serve, oversee or control the sale or service of alcoholic beverages to verify age as subsection (a) of this section requires.

beverage when he reasonably appeared to be under 26 years of age. As the proponent of this contention, the Commission bears the burden of proof. ORS 183.450(2); *Harris v. SAIF*, 292 Or 683, 690 (1982) (general rule regarding allocation of burden of proof is that the burden is on the proponent of the fact or position). In *Texaco Star Mart* (OLCC, Final Order, 97-V-051, April 1998), the Commission interpreted the language “verify the age of the person” to require that the seller verify that the person is at least 21 years of age.

Despite Licensee’s subjective belief that minor Marlow appeared to be 27 years of age, the record establishes that minor Marlow reasonably appeared to be less than 26 years of age on the date of the incident. In *Trails Inn Restaurant & Lounge* (OLCC, Final Order, 02-V-004, June 2002), the Commission held that the subjective belief of a licensee regarding a person’s age is not determinative. The issue is whether, on an objective basis, a minor appeared to be over the age of 26 when the minor purchased the alcoholic beverage from a licensee. Final Order at 9. As found above, Minor Marlow has a youthful appearance.² Of the twelve premises checked in the Sherwood minor decoy operation on October 29, 2009, nine either refused to sell alcohol to minor Marlow or admitted to Inspector Enright that minor Marlow appeared to be under 26 years of age. Furthermore, although not determinative, Licensee did not follow his own procedures when he sold the alcohol to minor Marlow, in that he had posted instructions on his premises to check the ID of any patrons appearing younger than the age of 30.

As minor Marlow reasonably appeared to be under the age of 26 when he purchased an alcoholic beverage from Licensee on October 29, 2009, there existed reasonable doubt that he was at least 21 years old. A violation of OAR 845-006-0335(1)(a)(b)(c) has been established.

B. Penalty

OAR 845-006-0500(7)(a)(E) defines a violation for the sale of alcohol to a minor when the retail licensee qualifies under the Responsible Vendor Program as a Category IIIa violation. Licensee qualifies under the Responsible Vendor Program and this is Licensee’s first Category IIIa violation within two years. Under the Commission’s penalty schedule, the standard penalty for a first Category IIIa violation is a seven day suspension or a civil penalty of \$1,155.

The Commission may increase or decrease the standard penalty if aggravating or mitigating circumstances are found. OAR 845-006-0500(7)(c). Also, as per the rule, the Commission may always increase or decrease a sanction to prevent inequity or to take account of particular circumstances in the case.

In this case, the OLCC charged the aggravating circumstance that Licensee was personally involved in the violation. Aggravation of the penalty on this basis is warranted. Licensee has not demonstrated any basis to mitigate the penalty. Past practice and precedent dictate that the standard conversion factor for each aggravating factor is two days suspension or a

² Minor Marlow testified in person at the hearing and his appearance at that time, as well as the photographs of him taken on October 29, 2009 both before and after the incident at the licensed premises, support the conclusion that he reasonably appeared to be under 26 years of age at the time Licensee sold alcohol to him on October 29, 2009.

\$330 civil penalty. *Parilla Grill*, (OLCC, Final Order, 01-V-082, August 2002). Accordingly, the recommended penalty of a nine day suspension or a \$1,485 civil penalty is appropriate.

FINAL ORDER

The Commission orders that the Off-Premises Sales License held by John Cheol Yang, doing business as Rainbow Market, located at 220 Railroad, Sherwood, Oregon, be suspended for nine (9) days for violation of OAR 845-006-0335(1)(a)(b)(c). Licensee may pay a civil penalty of \$1,485 in lieu of the suspension.

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 24th day of June, 2010.

/s/ Stephen A. Pharo

Stephen A. Pharo

Executive Director

OREGON LIQUOR CONTROL COMMISSION

Mailed this 24th day of June, 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.