

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

In the Matter of the Service Permit)	FINAL FINDINGS OF FACT
Held by:)	CONCLUSIONS OF LAW
)	AND ORDER
PAMELA SHAW)	OLCC-09-V-086
Service Permit No. 274558)	

HISTORY OF THE CASE

On June 6, 2009, the Oregon Liquor Control Commission (OLCC or Commission) issued a Violation Notice to Service Permittee Pamela Shaw (Shaw) alleging that on March 7, 2009, she knowingly sold or made an alcoholic beverage available to a visibly intoxicated person in violation of ORS 471.410(1) or, alternatively, allowed a visibly intoxicated person to consume alcoholic beverages on the licensed premises after observing that the person was visibly intoxicated. The Notice proposed a 10 day service permit suspension or a civil penalty of \$250. Permittee Shaw timely requested a hearing. The Commission referred Shaw’s hearing request to the Office of Administrative Hearings on August 6, 2009.

A contested case hearing was held in Tualatin, Oregon, on November 12, 2009, before Administrative Law Judge Alison Greene Webster of the Office of Administrative Hearings. Permittee Shaw appeared in person without counsel. Kelly Routt presented the case for the Commission.

OLCC Inspectors Siobhan Triska and Dana Tawney testified on behalf of the Commission. Permittee Shaw testified on her own behalf. The record closed on November 12, 2009, 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 December 3, 2009.

Permittee filed Exceptions to the Proposed Order on December 16, 2009.

On February 18, 2010, the Commission considered the record of the hearing, the applicable law, the Proposed Order of the Administrative Law Judge, Permittee’s Exceptions to the Proposed Order and the Administrative Law Judge’s Response to Permittee’s Exceptions. Based on this review and the preponderance of the evidence, the Commission enters the following:

EVIDENTIARY RULINGS

OLCC Exhibits A1 through A5 and Permittee Shaw's Exhibits P1 and P3 were admitted into the record at hearing. Permittee Shaw’s Exhibit P2 was withdrawn.

ISSUES

1. Whether Permittee Pamela Shaw violated ORS 471.410(1)¹ by selling, giving, or otherwise making available, alcoholic liquor to a person who was visibly intoxicated.

Alternatively, whether Shaw violated ORS 471.412(1)² by knowingly allowing a person to consume alcoholic beverages on the licensed premises after observing that the person was visibly intoxicated.

2. If a violation of ORS 471.410(1) or 471.412(1) is proven, what is the appropriate sanction?

CREDIBILITY DETERMINATION

The testimony of Permittee Shaw cannot be reconciled with the testimony of Inspectors Tawney and Triska. Permittee Shaw admitted knowing that patron Jeremy Head was intoxicated, but denied serving him an alcoholic beverage. She claimed that she made him a juice drink instead. The inspectors, on the other hand, testified that after Mr. Head showed signs of visible intoxication, permittee Shaw provided him with a drink containing distilled spirits. This same drink later tested positive for alcohol. Because it is material whether Permittee Shaw provided patron Jeremy Head with an alcoholic beverage after she recognized that he was visibly intoxicated, a credibility determination is necessary.

Permittee Shaw testified as follows: A patron named Brett ordered two alcoholic drinks, one of which (a Madras) he asked her to make “weak.” About 15 minutes later, patron Brett returned to the bar with Mr. Head and ordered two more drinks, including another Madras. She noted at that time that Mr. Head appeared to be under the influence of something -- he was acting “wired” and “hyper” and was overly touchy with others -- so she decided to serve him just juice and no alcohol. Mr. Head came back to the bar and complained about the lack of alcohol in his drink. He also asked her for a hug. She declined to put any alcohol in his juice, but she eventually gave him a hug. He left the juice on the bar and did not drink it. A short time later, Mr. Head came back to the bar and she served him some water. He then left the premises with a friend.

Inspectors Tawney and Triska testified to the following: They entered the premises at about 12:44 a.m. They immediately took notice of Mr. Head, who was showing signs of visible intoxication. He did not have a drink in front of him at the table where he was seated with friends. A few minutes after 1:00 a.m., Mr. Head went to the drink order station at the bar. He

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

² ORS 471.412(1) provides:

No licensee or permittee shall knowingly allow a person to consume or to continue to consume alcoholic beverages on the licensed premises after observing that the person is visibly intoxicated.

was alone. Permittee Shaw mixed him a drink containing ice, distilled spirits from a bottle behind the bar, a reddish liquid mixer from a plastic container and a squirt of something from the dispenser gun. Inspector Triska heard Permittee Shaw assure Mr. Head that there was some vodka in the drink. The inspectors also saw Permittee Shaw demonstrate with her fingers against the glass how much she had poured. Mr. Head picked up the drink and walked away with it. He consumed most of the drink, but eventually left the glass at a table with a small amount remaining. The drink later tested positive for alcohol. Mr. Head returned to the bar once more and was served a glass of water. He then left the premises through the back door.

After considering the conflicting testimony, the Commission finds the inspectors' testimony more plausible and reliable than that of Permittee Shaw. The inspectors went to the licensed premises in an undercover capacity to conduct a compliance check. They immediately noticed that Mr. Head was intoxicated. They were paying close attention to his actions, including whether he was consuming alcoholic beverages. They were seated nearby at the bar when Mr. Head went to the drink order station. They made notes regarding what they saw and when it occurred, and later prepared a written report documenting their observations. Permittee Shaw, on the other hand, was not aware of the inspectors' presence. She did not know at the time that the inspectors were closely watching whether she provided Mr. Head with an alcoholic beverage. She does not dispute that she discussed with Mr. Head whether there was vodka in the drink (although she claims she was referring to a drink she made earlier), and does not dispute that she used her fingers to demonstrate the amount poured (although she claims she was referring to the earlier drink).

Permittee Shaw's version is not as persuasive as that offered by the inspectors. The inspectors saw Ms. Shaw placing more than one liquid into Mr. Head's drink and watched him pick up the drink and walk away. They continued watching him and later tested the drink for alcohol. Ms. Shaw's testimony simply does not account for the drink the inspectors observed in Mr. Head's possession. Nor would it make sense for the inspectors to test the drink if they had not previously seen it in Mr. Head's possession. Consequently, in making the findings set out below, the Commission gives more weight to the inspectors' testimony.

FINDINGS OF FACT

1. The Commission issued Pamela Shaw a service permit on December 9, 2008. The permit expires on December 28, 2012. (Ex. A1.)
2. At all times pertinent to this matter, Permittee Shaw was employed as a bartender and server at Triple Nickel Pub, located at 3646 SE Belmont Street, Portland, Oregon. (Test. of Shaw.)
3. At about 12:44 a.m. on March 7, 2009, OLCC Inspectors Siobhan Triska and Dana Tawney went to the Triple Nickel Pub in an undercover capacity. They entered the premises through the front door along SE Belmont Street. Once inside, the inspectors stopped briefly before deciding where to sit. As they stood there, patron Jeremy Head bumped into Inspector Tawney's shoulder. Mr. Head stopped and excused himself. Inspector Tawney motioned him to go forward. Mr. Head stood there for several seconds before moving on and taking a seat at a

nearby table. Both inspectors noted that Mr. Head appeared intoxicated. He seemed dazed and confused and was slow to process information. (Test. of Tawney; test. of Triska.)

4. Mr. Head sat down at a table with three other men. He did not have a drink in front of him. Mr. Head put his arms on the table and his head down on his arms and appeared to sleep for several minutes. (Test. of Tawney; test. of Triska.)

5. The inspectors ordered drinks at the drink order station at the bar, and then sat down at the bar, just a few feet from patron Head's table. The bar was well lit, and the inspectors could see the bartenders and most of the patrons from their seats at the bar. There were approximately 32 patrons in the premises at the time. (Test. of Tawney; Ex. A2.)

6. A few minutes after the inspectors sat down, Mr. Head and his tablemates got up from the table. Mr. Head was speaking loudly. He stopped and hugged several patrons and slapped others on the back. He was very gregarious and friendly. Mr. Head put his arms around the shoulders of two of his friends and the three started walking towards the front exit. Mr. Head continued to talk loudly and his speech was slurred. One of the friends suggested that it was time to leave. Mr. Head indicated that he wanted to stay at the premises, and turned away from his friends. One of Mr. Head's friends cautioned him not to start any fights. Both inspectors could hear this conversation between Mr. Head and his friends from their seats at the bar. Mr. Head's friends then left the premises. (Test. of Tawney; test. of Triska; Ex. A2.)

7. A few minutes later, at approximately 1:04 a.m., Mr. Head went to the bar service area and spoke to the bartender, permittee Shaw. The inspectors did not hear what he ordered, but they saw permittee Shaw mix him a drink over ice in a tall chimney glass. The inspectors saw permittee Shaw pour into the glass a clear liquid from a liquor bottle on the shelf behind the bar, a reddish mix from a plastic container on the bar, and a squirt of another liquid from the dispenser gun. Shaw then placed the drink on the bar in front of Mr. Head. (Test. of Tawney; test. of Triska; Ex. A2.)

8. Mr. Head said something to permittee Shaw and pushed the drink back towards her. Inspector Triska, who was seated about three seats from the drink order station, heard permittee Shaw say something to the effect of, "there's vodka in it, just not as much." The inspectors also saw Shaw put her index finger over her thumb next to the bottom of the glass, as if to show Mr. Head the amount of vodka she had poured into the drink. The two had another short discussion, and after 30 seconds or a minute, Mr. Head picked up the drink and walked away with it in hand. (Test. of Triska; test. of Tawney; Ex. A2.)

9. Mr. Head walked unsteadily back towards the table where he had been seated previously with his friends. The inspectors saw him consuming the drink. After a few minutes, Mr. Head got up from his chair and bear hugged a female patron. He was walking around inside the premises socializing with other patrons in a loud and physical way. He would hug them, hit them on the shoulder or slap them on the back. At one point, he appeared to shadow box with another patron. The inspectors watched Mr. Head closely over the next several minutes because they were concerned that his gregarious, overly animated behavior could lead to a fight with another patron. (Test. of Tawney; test. of Triska; Ex. A2.)

10. At one point, Mr. Head set his drink glass down on a table in the center of the room and walked away. Inspector Tawney retrieved it. At the time, there was still some ice and a small amount of reddish liquid in the glass. Inspector Tawney took the drink to his location at the bar, and hid it between a computer monitor and the wall. (Test. of Tawney; test. of Triska; Ex. A2.)

11. At about 1:20 a.m., Mr. Head returned to the bar service station. The inspectors saw permittee Shaw give him a glass of water. A few minutes after that, Mr. Head left the premises through the rear door. (Test. of Tawney; test. of Triska; Ex. A2.)

12. After Mr. Head left the premises, Inspector Tawney went out the back door and retrieved a specimen cup from his vehicle. He then returned to the premises, retrieved the drink from its location behind the computer monitor, and poured the remaining liquid (without the ice) into the specimen cup. (Test. of Tawney.)

13. At about 1:35 a.m., Inspectors Tawney and Triska broke cover. Inspector Triska interviewed permittee Shaw and Inspector Tawney interviewed the other bartender on duty, permittee Boston. Permittee Shaw admitted to Inspector Triska that Mr. Head appeared intoxicated, but she denied serving him an alcoholic beverage after she realized he was intoxicated. She claimed that in the approximately one hour Mr. Head had been at the premises that night she had served him a very weak alcoholic beverage, a juice and a water. (Test. of Triska; Ex. A3.)

14. Inspector Tawney later tested the contents of the specimen cup. He used an alcohol test strip designed to estimate blood alcohol level in saliva. The liquid tested positive for alcohol.³ (Test. of Tawney.)

CONCLUSIONS

1. Permittee Pamela Shaw violated ORS 471.410(1) by selling, giving, or otherwise making available alcoholic liquor to a person who was visibly intoxicated.

The alternative charge under ORS 471.412(1) shall be dismissed.

2. The appropriate penalty for the violation of ORS 471.410(1) is a 10 day service permit suspension or a civil penalty of \$250.

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³ The specimen cup, its contents and the used alcohol test strip were offered at hearing for demonstration purposes only, and were not admitted into evidence.

OPINION

1. Violation

OLCC staff contends that permittee Shaw knowingly made an alcoholic beverage available to a visibly intoxicated patron, Jeremy Head, in violation of ORS 471.410(1). Alternatively, OLCC staff contends that permittee Shaw violated ORS 471.412(1) by knowingly allowing Mr. Head to consume alcohol after observing that he was visibly intoxicated. As the proponent of these contentions, the Commission bears the burden to prove this allegation by a preponderance of the evidence. ORS 83.450(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); *Cook v. Employment Div.*, 47 Or App 437 (1980) (in the absence of legislation adopting a different standard, the standard in administrative hearings is preponderance of the evidence). 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).

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 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)

In this case, the record establishes that prior to, and at the time that permittee Shaw made the drink in question available to Mr. Head, he showed signs of visible intoxication, including the following: bumping into the inspector; a slow response to the inspector’s comment; talking loudly; slurring his words; putting his head down on the table as if to sleep; being overly friendly to others in the premises; and hugging, touching and hitting other patrons. Permittee Shaw does not dispute that Mr. Head was visibly intoxicated. She does, however, assert that she did not serve him an alcoholic beverage and that she did not knowingly allow him to continue consuming an alcoholic beverage.

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 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).

As discussed in the Credibility Determination section above, Permittee Shaw asserts that once she saw Mr. Head at the bar and realized that he was intoxicated, she provided him with a juice drink that he refused to accept. For the reasons set out above, however, her testimony in this regard was not persuasive. A preponderance of the evidence establishes that, knowing that Mr. Head was under the influence of alcoholic liquor or some other intoxicant, permittee Shaw nevertheless served him an alcoholic beverage. It is more likely than not that the drink that the inspectors saw Permittee Shaw mix and serve to Mr. Head contained distilled spirits. Therefore, the violation of ORS 471.410(1) has been established.

Because the violation of ORS 471.410(1) has been established, the alternative charge alleging that permittee Shaw knowingly allowed a person to consume or to continue to consume alcoholic beverages in violation of ORS 471.412 shall be dismissed.

2. Penalty

A violation of ORS 471.410(1) is a Category III violation. OAR 845-006-0500(7). The standard penalty for a service permittee's first Category III violation is a 10 day suspension or a civil penalty of \$250. OAR 845-006-0500(7). Staff has cited to no aggravating or mitigating circumstances for this violation and recommends that the standard sanction be imposed. The Commission finds no basis to aggravate or mitigate this sanction, so the standard penalty is appropriate.

FINAL ORDER

The Commission orders that, for the charge that Permittee Pamela Shaw violated ORS 471.410(1), the Commission shall suspend Pamela Shaw's service permit for 10 days or impose a civil penalty of \$250. The alternate charge under OAR 471.412(1) shall be dismissed.

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 4th day of March, 2010.

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

Mailed this 4th day of March, 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.