BEFORE THE LIQUOR CONTROL COMMISSION
OF THE STATE OF OREGON

IN THE MATTER OF:	)
	)
	)
SPOT 79, Inc.	) **FINAL FINDINGS OF FACT**
TERRY WEAVER,	) **CONCLUSIONS OF LAW**
PRES/TREAS/DIR/STKHLD,	) **AND ORDER**
RALONA WEAVER,	)
VICE-PRES/SEC/DIR/STKHLD	) OLCC-08-V-045
dba Spot 79	)
7944 SE Foster Road	
Portland, Oregon 97206	

HISTORY OF THE CASE

On May 7, 2008, the Oregon Liquor Control Commission (OLCC or Commission) issued a Notice of Proposed License Suspension/Civil Penalty to The Spot 79, Inc., Terry Weaver, President/Treasurer/Director/Stockholder, and Ralona Weaver, Vice President /Secretary /Director/Stockholder (Licensee). The OLCC alleged that Terry Weaver, a corporate principal of Licensee, drank alcoholic beverages while on duty on March 28, 2008 in violation of OAR 845-006-0345(1). The Commission proposed that Licensee's license be suspended for 32 days or that Licensee pay a civil penalty of $4,950 and serve a suspension of two days. Licensee made a timely request for hearing.

The Commission referred the request to the Office of Administrative Hearings on June 23, 2008. The case was assigned to John Mann, Senior Administrative Law Judge (ALJ). A contested case hearing was held on March 9, 2009 in Tualatin, Oregon, before ALJ Mann. Licensee was represented by Duke Tufty, attorney at law. The OLCC was represented by Becky Voelkel, Case Presenter. Witnesses for OLCC were: Stanley Grubbs, Karen Keith, and Leslie Kleinkopf. Terry Weaver testified on behalf of the Licensee. The record closed at the end of the hearing.

The Administrative Law Judge considered the record of the hearing and the applicable law and issued a Proposed Order mailed June 3, 2009**.**

Licensee filed Exceptions to the Proposed Order on June 17, 2009.

On August 20, 2009, October 16, 2009 and December 17, 2009, the Commission considered the record of the hearing, the applicable law, the Proposed Order of the Administrative Law Judge, Licensee's Exceptions to the Proposed Order and the Administrative Law Judge's Response to Licensee's Exceptions. Based on this review and the preponderance of the evidence, the Commission enters the following:

ISSUE

Whether Licensee's corporate principal, Terry Weaver, consumed alcoholic beverages while on duty in violation of OAR 845-006-0345(1).

EVIDENTIARY RULING

Exhibits A1 through A5 and Exhibit P1 were admitted to the record without objection.

FINDINGS OF FACT

1. Spot 79, Inc. has held a Full On-Premises Sales license for its Spot 79 tavern at 7944 SE Foster Road in Portland, Oregon since January 23, 2002. Terry Weaver is the President and Treasurer of the corporation. Mr. Weaver's wife, Ralona Weaver, is the Vice President and Secretary of the corporation. Both Mr. and Ms. Weaver are stockholders and directors of Spot 79, Inc. (Ex. A1.)

2. On July 12, 2006, Licensee was charged with failing to verify the age of a person appearing under the age of 26 in violation of OAR 845-006-0335(1), a Category III violation. Licensee paid a fine of $990 for the violation. (Ex. A1 at 1; test. of Grubbs.)

3. In October 2007, Teresa Sanak, a patron of Spot 79, informed the OLCC that she had been injured during an altercation with Mr. Weaver while he was off-duty at the tavern. OLCC inspector Peggy Mullen issued a Notice of Warning to Licensee and asked other OLCC inspectors to conduct undercover observations to determine if Mr. Weaver was drinking while on duty. (Ex. A2 at 3; test. of Grubbs.)

4. On March 28, 2008, Mr. Weaver worked his normal shift, beginning work at approximately 6:00 a.m. and clocking out at 5:45 p.m. At that time, Diane Olson, a bartender, assumed control of the premises. Mr. Weaver then sat at a table with his wife and another woman. During the course of the evening, Mr. Weaver consumed glasses of Jagermeister (an alcoholic beverage) and beer. (Test. of Weaver.)

5. At approximately 6:47 p.m. on March 28, 2008, three OLCC inspectors, Stanley Grubbs, Leslie Kleinkopf, and Karen Keith, went to the Spot 79 to observe Mr. Weaver. The inspectors sat at a booth and ordered a meal. The inspectors observed Mr. Weaver sitting at a table with two women. Mr. Weaver had an empty "rocks" glass and a partially consumed bottle of beer in front of him. Mr. Weaver had his back to the bar, and was facing the direction of the inspectors' booth. The inspectors were able to overhear comments made by Mr. Weaver. (Test. of Grubbs.)

6. Sometime during the evening, Mr. Weaver went to the restroom and passed an Automatic Teller Machine (ATM.) The ATM's screen had a message stating that it was out of cash. Mr. Weaver told Ms. Olson that the machine was empty and told her that he would refill it. He then went into the business office where he got cash, filled the machine, and then returned paperwork to Ms. Olson. He entered the office through a door which was located away from the

bar. (Test. of Weaver.) The OLCC inspectors observed Mr. Weaver speak to Ms. Olson at the bar and thought that she passed something to him shortly before he filled the ATM. (Test. of Grubbs, Kleinkopf, and Keith.) Mr. Weaver cannot remember Ms. Olson passing anything to him. Mr. Weaver had his own keys to the ATM and did not need to get anything from Ms. Olson to fill the machine. (Test. of Weaver.)

7. At approximately 7:09 p.m., Mr. Weaver returned to his seat and was served another Jagermeister and another beer. At approximately 7:30 p.m., a visibly intoxicated male, Steve Ryan, approached Mr. Weaver to discuss an issue involving Cindy Olson[1] who had worked a four hour shift at the Spot 79 the previous Thursday. Mr. Ryan, who was upset, told Mr. Weaver that Cindy had not been paid for her work. Mr. Weaver repeatedly told Mr. Ryan that he did not want to discuss the matter and that he should come back on a different day. Mr. Ryan would not leave and would not stop talking about the issue. Mr. Ryan ignored requests from Cindy, who was seated at the bar, and Ms. Olson, both of whom told Mr. Ryan to stop. Mr. Ryan told Mr. Weaver that it was "only $32." (Ex. A2. at 3.) Mr. Weaver then told Ms. Olson to "Give [Cindy] the four hours." (Test. of Grubbs.) Ms. Olson made a note and later paid Cindy $32. (Test. of Grubbs; Ex. A5.) Ms. Olson prepared a Customer Draw form to document the payment to Cindy. Cindy signed the form on a line marked "MGR. SIG." (Ex. A5.) Cindy's signature obscures part of the information on that line which appears to read either "as per Terry" or "for Terry." (Ex. A5.)

8. At approximately 7:41 p.m., Mr. Weaver was served another Jagermeister and another beer. He then went to the bar and spoke briefly with Cindy. He returned to his table a few moments later. (Test. of Grubbs; Ex. A2 at 4.)

9. The following day, March 29, 2008, Inspector Keith and Inspector Grubbs, returned to the Spot 79 and spoke with Mr. Weaver. Mr. Weaver told the inspectors that he filled the ATM the previous night to help the servers who appeared to be busy. The inspectors also told Mr. Weaver about their observations of the incident with Mr. Ryan and told him that he put himself on duty by assisting in the operation or management of the business. Mr. Weaver explained that he did not know that his actions put him on duty. He stated that he knew he could not go behind the bar, but did not know that he could not help. (Ex. A2 at 2-3; test. of Grubbs.)

CONCLUSION OF LAW

Licensee's corporate principal, Terry Weaver, consumed alcoholic beverages while on duty in violation of OAR 845-006-0345(1).

[1] Cindy Olson is not related to Diane Olson. To avoid confusion, the Commission has identified Cindy Olson by her first name in the remainder of this order.

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). *See also 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).

In this case, the Commission asserts that Mr. Weaver violated OAR 845-006-0345(1) which provides:

> (1) Drinking on Duty: No licensee, permittee, employee or agent will drink or be under the influence of intoxicants while on duty. "On duty" means from the beginning of a work shift that involves the sale or service of alcoholic beverages, checking identification or controlling conduct on the premises, to the end of the shift including coffee and meal breaks. "A work shift that involves the sale or service of alcoholic beverages" includes supervising those who sell or serve, check identification or control the premises. OAR 845-006-0345(1).[2]

The issues to be decided are whether Mr. Weaver had the authority to put himself on duty and whether the acts that he performed were done on behalf of the licensee. *The Sportsman Club* (OLCC, Final Order, 87-V-002, June 1987). If so, then the next issue is whether the acts involved the mixing, sale or service of alcoholic beverages, checking identification or controlling conduct on the premises. *Id.*, *see also Edi's Fireside Cantina* (OLCC, Final Order, 93-V-063, May 1994).

The parties agreed that Mr. Weaver consumed alcoholic beverages on March 28, 2009.[3] The parties also agree that Mr. Weaver re-filled an empty ATM and briefly dealt with an irate customer concerning an employment matter after he had consumed alcohol. The issue that must be decided is whether Mr. Weaver was "on duty" when he performed these actions.

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[2] This rule was amended, effective May 1, 2009. This order cites and discusses the version of the rule in effect during the pertinent period. However, the amendment does not affect the substance of the discussion in this order regarding what it means to be "on duty."

[3] The Commission concurs with the Administrative Law Judge's assessment in the Response to Licensee's Exceptions that Findings of Fact 4-7 support the uncontested conclusion that Licensee consumed alcohol before performing the acts at issue in this proceeding.

In this case, there is no dispute that Mr. Weaver, as the owner of the licensed premises, had the authority to put himself back on duty. Nor can there be any serious dispute that his actions, filling the ATM and dealing with an employment matter, were for the benefit of the business. Furthermore, there is no allegation that any of Mr. Weaver's actions involved the mixing, sale, or service of alcoholic beverages or the checking of identification. The question thus becomes whether Mr. Weaver's actions amounted to "controlling conduct on the premises."

The Commission and Licensee cited to several past cases decided under OAR 845-006-0345(1). Two of the cases involved licensees and permittees who were found to be on-duty when they prepared or served alcoholic beverages. In *Duffy's Irish Pub* (OLCC, Final Order, 05-V-032, February 2006) the Commission found that an employee was placed back on duty when the on-duty bartender allowed the employee to help replace an empty keg, take drink orders from customers and to assist in mixing an alcoholic beverage. Similarly, in *Foghorn Sports Pub & Grill,* (OLCC, Final Order, 05-V-027, February 2006) the Commission found that a licensee put himself back on duty when he poured and served alcoholic beverages for customers when the on-duty bartender was having an "emotional breakdown." *Id.* at 6. However, in this case Mr. Weaver did not engage in any activity related to the mixing, sale or service of alcoholic beverages.

Cactus Bar and Grill (OLCC, Final Order, 03-V-013, June 2004) is somewhat more on point. In that case, the Commission found that a member of a licensed LLC was on-duty when the member assisted in breaking up a fight that occurred on the premises. The member was present at the bar for the specific purpose of being available to assist a new bartender. During the course of the evening, a brawl broke out and the member assisted in breaking up the fight and escorting some of the participants out of the business. The Commission found that the member's activities amounted to controlling the conduct on the premises.

However, in *Marks Tavern* (OLCC, Final Order, 89-V-30), the Commission found that an employee did not place herself back on duty by instructing the on-duty bartender not to sell beer to a male patron. The Commission found that the off-duty employee gave that instruction as part of the off-duty employee's personal dispute with the patron. The Commission found that the off-duty employee had no authority to place herself back on duty and was not acting for the benefit of the business when she asked the bartender not to sell the beer.

In *MAC Club* (OLCC, Final Order, 99-V-110, December 2000), the Commission found that a bar owner placed himself back on duty by overruling the on-duty bartender's refusal to serve wine in a beer glass as requested by a customer. However, the Commission found that the owner did not place himself on-duty by adjusting a thermostat behind the bar or by signaling the bartender that a customer wanted a drink. Although the Commission acknowledged that adjusting the thermostat "could conceivably be considered controlling conduct on the premises," the Commission found that it was not "related in any direct way to the service of alcohol to patrons." *Id.* at 7. The Commission also found that signaling that a customer wanted a drink was consistent with something any customer might do and did not amount to controlling conduct on the premises. *Id.*

Neither the Licensee nor the Commission cited to any cases squarely addressing the issues in the present case. Unlike the licensees in *Duffy's Irish Pub* and *Foghorn Sports Pub & Grill,* Mr. Weaver took no actions that directly involved the mixing, sale, or service of alcohol. [4] He was not called upon to break up a fight between unruly patrons and to eject some of the patrons as in *Cactus Bar and Grill*. However, unlike the employee in *Marks Tavern*, Mr. Weaver had the authority to place himself on-duty and was not acting on a purely personal motive.

The Commission finds that the actions taken by Mr. Weaver present a close case as to whether they are closely enough related to controlling conduct or to the sale or service of alcoholic beverages under the rule. As to the decision to fill the ATM machine, the Commission concludes that this kind of action is not closely enough related to the sale or service of alcoholic beverages or to controlling conduct on the premises to find a violation. While it is possible that filling the ATM machine could indirectly assist the business by facilitating sales of alcoholic beverages, the connection is not close enough to warrant finding a violation based on that act alone.

However, the decision to resolve a dispute with an unruly, intoxicated patron by instructing the bartender to pay an employee is distinguishable from the routine business administration act of refilling an ATM machine. The decision to instruct a subordinate to pay Ms. Olson came in direct response to the demands of an unruly customer. It is Mr. Weaver's interaction directly with an intoxicated patron, and his resolution of the dispute by directing an employee to pay the employee as the patron demanded, that provides the connection to controlling conduct on the premises. The evidence established that Mr. Weaver was on-duty while consuming alcohol during the incident of resolving the dispute with the patron. The violation of OAR 845-006-0345(1) has been proven.

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. In this case, the Commission has proven a violation of OAR 845-006-0345(1) (drinking on duty), a Category III violation. This is Licensee's second Category III violation within two years. The standard sanction for this violation is a 30-day suspension or a $4,950 civil penalty.

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[4] The Commission concurs with the Administrative Law Judge's analysis in her Response to Licensee's Exceptions to Licensee's contention that prior cases limit the scope of being "on duty" under OAR 845-006-0345(1) to only those acts that include the mixing, sale or service of alcoholic beverages. The Administrative Law Judge properly noted that this interpretation does not comport with the actual language of the rule, which identifies acts that show that a person is "on duty" to involve "the sale or service of alcoholic beverages, checking identification **or** controlling conduct on the premises." (Emphasis added). A narrower interpretation, as advanced by Licensee, would not give meaning to the second and third of the three listed activities. Although Licensee cites to many OLCC cases interpreting the "on duty" rule with respect to various aspects of the sale or service of alcoholic beverages, those cases concern factual situations that differ from this case, and those cases do not foreclose the application of the rule to the facts found in this case.

However, if the Commission finds aggravating or mitigating circumstances, it may assess a greater or lesser sanction. OAR 845-006-0500(7)(c) sets for the standards for mitigating or aggravating a sanction:

> These sanctions are guidelines. If the Commission finds aggravating or mitigating circumstances, it may assess a greater or lesser sanction. Some of the reasons the Commission may mitigate a sanction are: good faith effort to prevent a violation; and extraordinary cooperation in the violation investigation that shows the licensee or permittee accepts responsibility. Some of the reasons the Commission may aggravate a sanction are: prior warning about compliance problems; repeated failure to comply with laws; efforts to conceal a violation; intentional violations; the violation involved more than one patron or employee; the violation involved a juvenile; and the violation resulted in injury or death. The Commission may always increase or decrease a sanction to prevent inequity or to take account of particular circumstances in the case

The Commission proposed that the sanction be increased by an additional two days because the violation was committed by a corporate principal. That circumstance is not an aggravating factor specifically listed in the rule. However, the Commission has held that aggravation is warranted when a licensee personally commits the violation. *P-Mart* (OLCC, Final Order, 92-V-098, April 1993). This is a reasonable interpretation. The list included in the rule, by its own terms, is not exhaustive but does provide guidance in determining what may be appropriately considered in imposing an additional sanction. Significantly, the rule includes as aggravating factors "intentional violations" and "efforts to conceal a violation." These factors suggest that the Commission will consider a licensee's moral culpability involved in a violation. The Commission may reasonably conclude that the direct action of a licensee's corporate principal should be taken more seriously than the actions of an employee. The Commission's proposed sanction is therefore appropriate.

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FINAL ORDER

The Commission orders that Licensee be assessed a 32-day license suspension or pay a civil penalty of $4,950 in lieu of 30 days of the suspension. If Licensee elects to pay the civil penalty, Licensee shall serve a 2 day mandatory license suspension for violation of OAR 845-006-0345(1).

If you choose to pay the fine, it must be paid within ten (10) days of the date of this Order; otherwise, the full 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 January, 2010.

/s/ Rudy Williams for:
Stephen A. Pharo
Executive Director
OREGON LIQUOR CONTROL COMMISSION

Mailed this 4th day of January, 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.

APPENDIX A
LIST OF EXHIBITS CITED

Ex. A1: OLCC History Card for The Spot 79, Inc.

Ex. A2: OLCC Intake/Compliance Action Report regarding Spot 79 by Inspector Karen Keith dated April 4, 2008.

Ex. A5: Customer Draw receipt for $32 to Cindy Olson dated March 28, 2008.