

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

In the Matter of the Limited On-Premises) FINAL FINDINGS OF FACT
Sales License Held by:) CONCLUSIONS OF LAW
) AND ORDER
US Deli & Pub, LLC) OLCC-09-V-044
Rajinder Johal, Managing Member) OLCC-09-V-044A
Parveen Parveen, Member) OLCC-09-V-044B
dba US Deli & Pub)
100 Lancaster Drive NE)
Salem OR 97301)

HISTORY OF THE CASE

On March 30, 2009, the Oregon Liquor Control Commission (OLCC or Commission) issued a Violation Notice to US Deli & Pub LLC, Rajinder Johal, Managing Member, Parveen Parveen, Member (Licensee), doing business as US Deli & Pub, located at 100 Lancaster Drive NE, Salem, Oregon. That notice was followed up with an Amended Notice of Proposed License Suspension/Civil Penalty issued to Licensee on June 17, 2009. The Amended Notice alleged:

(1) Licensee permitted an employee to sell, mix, or serve alcoholic beverages, or supervise those who do, without a valid service permit issued by the Commission, in violation of ORS 471.360(1)(b), or alternatively, Licensee failed to verify that the employee had a valid service permit or pending application, and/or Licensee failed to personally deliver a completed service permit application and continue to verify that the person had taken and passed a Server Education course and been issued a service permit, in violation of OAR 845-009-0015(1)(2)(3)(4).

(2) Managing Member Rajinder Johal asked or encouraged another person to alter or conceal potential evidence or to attempt to do so, in violation of OAR 845-006-0345(3)(c).

Licensee made a timely request for hearing. The Commission referred the request to the Office of Administrative Hearings on May 7, 2009. The case was assigned to Robert L. Goss, Administrative Law Judge (ALJ). A contested case hearing was held on November 6, 2009 in Salem, Oregon, before ALJ Goss. Licensee was represented by Terence McLaughlin, an Attorney. OLCC was represented by Anna Davis, Case Presenter. Witnesses for OLCC were: OLCC Inspectors Jacki Miranda and Steve Berrios. Witnesses for Licensee were: Rajinder Johal, Managing Member of US Deli & Pub LLC. The record closed on November 6, 2009.

The Administrative Law Judge considered the record of the hearing and the applicable law and issued a Proposed Order mailed February 8, 2010. Staff filed Comments on the Proposed Order on February 23, 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 permitted an employee to sell, mix, or serve alcoholic beverages, or supervise those who do, without a valid service permit issued by the Commission, in violation of ORS 471.360(1)(b), or in the alternative, whether Licensee failed to verify that an employee had a valid service permit or pending application, and/or Licensee failed to personally deliver a completed service permit application and continue to verify that the employee had taken and passed a Server Education Course and been issued a service permit, in violation of OAR 845-009-0015(1)(2)(3)(4).

2. Whether Managing Member Rajinder Johal asked or encouraged another person to alter or conceal potential evidence or to attempt to do so, in violation of OAR 845-006-0345(3)(a)(C).

3. If any or both of the above violations are proved, what is the appropriate penalty?

EVIDENTIARY RULING

OLCC's Exhibits A1 through A9 and A12 were admitted into the record without objection. Licensee's objections to OLCC's Exhibits A10 and A11 on hearsay and relevance grounds were overruled and those Exhibits were also admitted into the record. Licensee's Exhibit R1 was admitted into the record without objection.

FINDINGS OF FACT¹

1. US Deli & Pub LLC, Rajinder Johal, Managing Member, Parveen Parveen, Member, doing business as US Deli & Pub, located at 100 Lancaster Drive NE, Salem, Oregon, has been licensed by the OLCC since February 8, 2008. Licensee currently holds a Limited On-Premises Sales (L) License. (Ex. A1 at Page1.)

2. On March 13, 2009, OLCC Inspector Jacki Miranda entered the licensed premises to conduct a compliance related investigation. Inspector Miranda observed Todd Copenhaver (Copenhaver), an employee of the licensed premises, take an order for and serve a bottle of Budweiser Light beer to a male patron. Inspector Miranda identified herself to Copenhaver and asked to see his photo identification and service permit. Copenhaver provided an ID card and

¹ The Commission corrected the following scrivener's errors throughout the Findings of Fact section. In Finding of Fact five, the Commission changed the word "has" in the proposed order to the word "had". In Finding of Fact six, the Commission added the second "he" to the sentence "Copenhaver said that he told the attorney that he had not done either of those things and that management had never asked to see any documentation." In Finding of Fact nine, the Commission added the word "had" to the sentence "Johal stated that he trusted Copenhaver and had no reason to believe he would lie to him."

said his temporary service permit must be in his other pants at home. Inspector Miranda took down Copenhaver's information and gave him verbal instructions about having his service permit on his person. (Exs. A2, A3; test. of Miranda.)

3. Inspector Miranda returned to her office and checked OLCC service permit records and discovered that there was no record of Copenhaver being issued a service permit. Inspector Miranda also learned that Copenhaver had an unrelated warrant out for his arrest. After notifying local police about the warrant, Inspector Miranda returned to the licensed premises and contacted Copenhaver. Copenhaver immediately apologized for lying about his service permit, saying that he had worked at the licensed premises for about five months, knew he needed a service permit and did not want to get into trouble. Copenhaver retrieved and gave to Inspector Miranda a temporary service permit application which he had signed on October 6, 2008. The application did not have a manager's or licensee's authorized signature. Service permit applications are only valid for 45 days from signing. It had been more than 45 days since Copenhaver signed his application. Copenhaver's application was never a valid temporary service permit. Copenhaver also told Inspector Miranda that he had never taken a server education course. Inspector Miranda issued a criminal citation to Copenhaver serving without a permit. Copenhaver was then taken into custody by local police on the warrant. Copenhaver was subsequently convicted on the lack of service permit charge on April 16, 2009 in Marion County Circuit Court. Following his conviction, Mr. Copenhaver was not subject to further criminal, civil, or administrative sanctions for serving without a service permit. (Exs. A2 through A6; test. of Miranda.)²

4. On April 22, 2009, Inspector Miranda received a phone call from Copenhaver. Copenhaver related the following to Inspector Miranda:

- Copenhaver asked if he could get into any more trouble with OLCC since he had already received a criminal citation regarding the lack of a service permit. When Inspector Miranda asked Copenhaver what he meant, he stated that his former boss, Rajinder Johal, had contacted him and asked that he come and give a statement to Johal's attorney regarding his lack of a service permit.
- Johal called Copenhaver multiple times at his parents' house and on two separate occasions, Johal asked Copenhaver to lie to the OLCC about not having a service permit. Copenhaver added that Johal told him that there was nothing more that OLCC could do to him since he had already received a ticket.
- Johal asked Copenhaver to tell OLCC that when he began working at the licensed premises, he had shown false documents which showed he had a service permit. After asking Copenhaver to lie, Johal asked Copenhaver to at

² In his Response to Agency Comments, ALJ Robert Goss stated that he had no objection to changing the sentence "Copenhaver's application was expired and no longer valid" to indicate that the application was never a valid temporary service permit. In addition, he had no objection to amending this finding to reflect that Mr. Copenhaver was not subject to further criminal, civil, or administrative sanctions.

least sign a written statement to the effect that he had shown a false document to Johal which led him to believe he had a service permit.

- Copenhaver spoke with his parents, Diana and Cliff Copenhaver, about what he should do. Copenhaver expressed concern about lying to the OLCC, but thought if he helped Johal, he might get his job back. Copenhaver's parents advised him not to lie.

(Ex. A7; test. of Miranda.)

5. Copenhaver met with Johal and his attorney, Mr. McLaughlin, to provide a video interview. Copenhaver stated in the interview that he had not shown anything to Johal when he first started working, as he did not have a service permit and has never had one. Copenhaver also stated that he had no false documents pertaining to an OLCC service permit, nor did anyone at the licensed premises ask to see any proof of having a service permit. (Ex. A7; test. of Miranda.)

6. On April 23, 2009, Inspector Berrios met personally with Copenhaver and interviewed him. The interview was recorded. Copenhaver told Inspector Berrios that Johal had asked him at least two times to lie about not having a service permit and asked him to sign a statement that said Copenhaver showed them false documents. Copenhaver related to Inspector Berrios that when he met with Johal and his attorney, he was asked if he had ever led Johal to believe that he had an OLCC card or had shown false documents. Copenhaver said that he told the attorney that he had not done either of those things and that management had never asked to see any documentation. Following the interview, Mr. Copenhaver signed a Statement that Inspector Berrios prepared, which reflected what Mr. Copenhaver said in the interview. By signing the Statement Mr. Copenhaver indicated that it was the truth to the best of his knowledge, freely given without threat or promise of reward or immunity of any kind. Mr. Copenhaver was given the opportunity to make corrections, additions, or deletions to the Statement and did not make any such changes. (Exs. A9, A12; test. of Berrios.)³

7. On May 6, 2009, Inspector Miranda took a written statement from Diana Copenhaver, Todd Copenhaver's mother. Mrs. Copenhaver related in that statement the following:

- Todd Copenhaver asked his mother to call Johal to tell him that he had been arrested and would not be in to work until he was released. Mrs. Copenhaver and Johal eventually spoke on the phone and Johal asked her how he could get the store key back. Mrs. Copenhaver told Johal to call the Sheriff's Department.
- Mrs. Copenhaver did not hear back from Johal until after Todd Copenhaver had been released. Johal called several times and left messages that it was important for Todd Copenhaver to call him back, because he was going to court soon.

³ In his Response to Agency Comments, ALJ Robert Goss stated that he had no objection to amending this finding to reflect that the Inspector recorded the interview, Mr. Copenhaver freely signed a prepared written Statement and attested to its truth, and Mr. Copenhaver made no changes to the Statement.

- Todd Copenhaver went to his parents after receiving a phone call from Johal and asked them what he should do, because he could get in trouble for lying to the court and saying that he had given a fake server card. His parents told him to not lie and that he could get into a lot of trouble if he did.

(Ex. 10; test. of Miranda.)

8. On May 18, 2009, Inspector Miranda obtained a written statement from Cliff Copenhaver, Todd Copenhaver's father. In that statement, Cliff Copenhaver supported Diana Copenhaver's statement concerning their discussion with Todd about lying about a server card. He confirmed that he and Diana Copenhaver told Todd not to lie. (Ex. A11; test. of Miranda.)

9. On May 12, 2009, OLCC Inspectors Berrios and Miranda met with Johal to discuss Copenhaver's claims. Johal told the inspectors that when Copenhaver began working at the licensed premises, he asked if Copenhaver had a service permit, and Copenhaver showed him something from his wallet that led him to believe Copenhaver had a permit. Johal stated that he trusted Copenhaver and had no reason to believe he would lie to him. Johal added that once he realized Copenhaver did not have a service permit, he knew he should have verified it more closely. Johal had applied for and has possessed a service permit since he began operating the premises, has seen his own service permit, and has seen applications for service permits.⁴ Johal denied asking Copenhaver to change his story. The Inspectors cited Johal for tampering with a witness. The charge was later dismissed, because the Marion County District Attorney's Office believed the matter was administrative and not criminal. (Ex. A7; test. of Miranda.)

10. Thereafter, OLCC issued the Amended Notice of Proposed License Suspension/Civil Penalty, which put Member Johal on notice of the allegation concerning asking or encouraging another person to alter or conceal potential evidence. (Ex A2; Ex A7).⁵

CONCLUSIONS OF LAW

1. Licensee permitted an employee to sell, mix, or serve alcoholic beverages, or supervise those who do, without a valid service permit issued by the Commission, in violation of ORS 471.360(1)(b).

2. The evidence fails to establish that Managing Member Rajinder Johal asked or encouraged another person to alter or conceal potential evidence or attempted to do so.

3. A 10-day license suspension or a civil penalty of \$1,650 is an appropriate penalty for a violation of ORS 471.360(1)(b).

⁴ In his Response to Agency Comments, ALJ Robert Goss stated that he had no objection to amending this finding to reflect Johal's experience with service permits and applications for permits.

⁵ The Commission adopts this finding of fact based on the evidence in the hearing record.

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

OLCC contends that Licensee has committed two violations: (1) permitting an employee to sell, mix, or serve alcoholic beverages, or supervise those who do, without a valid service permit issued by the Commission, in violation of ORS 471.360(1)(b), or in the alternative, Licensee failed to verify that an employee had a valid service permit or pending application, and/or Licensee failed to personally deliver a completed service permit application and to continue to verify that the employee had taken and passed a Server Education Course and been issued a service permit, in violation of OAR 845-009-0015(1)(2)(3)(4); and (2) asking or encouraging another person to alter or conceal potential evidence or to attempt to do so, in violation of OAR 845-006-0345(3)(a)(C).

Licensee does not contest Violation (1) and admitted at hearing that he permitted employee Copenhaver to sell, mix, or serve alcoholic beverages without a valid service permit on the licensed premises on March 13, 2009. Although Managing Member Johal had asked Mr. Copenhaver about a service permit when he was hired and Copenhaver showed him a document, Licensee concedes that Managing Member Johal did not look at it carefully. The evidence demonstrates that Licensee permitted Mr. Copenhaver to serve and sell alcohol without a service permit by failing to properly verify whether Mr. Copenhaver had such a permit. *Cal Sports* (OLCC, Final Order, 02-V-021, April 2003). A violation of ORS 471.360(1)(b) having been shown, the alternate violation of OAR 845-009-0015(1)(2)(3)(4) should be dismissed.

Licensee contests Violation (2). Licensee argues that OLCC's investigation leading up to the proposed violation was flawed, in that OLCC Inspectors and staff should not have believed Todd Copenhaver's word over the word of Managing Member Johal regarding the events surrounding the alleged violation.

Notwithstanding Licensee's characterization of OLCC's investigation, the issue here is not whether OLCC properly began and pursued this investigation, but rather whether OLCC can now prove its allegations against Managing Member Johal.

In *Rainbow Market* (OLCC, Final Order, 08-V-124, October 2009), the Commission dismissed a violation because the hearsay evidence produced at hearing did not support a conclusion that an employee possessed controlled substances while on duty at the licensed premises, nor did the other circumstantial evidence produced at hearing support that conclusion. The *Rainbow Market* decision cited to *Cole/Dinsmore v. DMV*, 336 Or 565 (2004) and adopted the "nonexclusive list of five factors" described in that case to determine whether hearsay is substantial evidence. *Cole/Dinsmore* reiterated that the analytical model originally set out in *Reguero v. Teacher Standards and Practices*, 312 Or 402 (1991), was the appropriate method to

determine whether hearsay evidence is sufficiently reliable to be substantial evidence. In *Reguero*, the court established the following nonexclusive criteria for assessing the substantiality of hearsay evidence: (1) whether there are alternatives to relying on the hearsay evidence; (2) the importance of the facts sought to be proved by the hearsay statements to the outcome of the proceeding and considerations of economy; (3) the state of the supporting or opposing evidence, if any; (4) the degree of lack of efficacy of cross-examination with respect to the particular hearsay statements; and (5) the consequences of the decision either way. *Reguero*, 312 Or at 418.

To determine whether the hearsay is sufficiently reliable to constitute substantial evidence, the Commission applies the *Reguero* analysis.⁶

The first factor is whether there are alternatives to relying on the hearsay evidence. Having Todd Copenhagen testify may have been an alternative to relying on the hearsay evidence if he was available to testify. He was not called as a witness at hearing and his availability or lack thereof was not explained.

The second factor is the importance of the facts sought to be proved by the hearsay statements to the outcome of the proceeding and considerations of economy. This factor is given great weight. The facts sought to be proven by the hearsay statements were crucial to the outcome of the issue, same as in *Rainbow Market*. Also, here, credibility is fundamental to the tampering with a witness allegation. The second factor favors not relying on the hearsay statements.

The third factor is the state of the evidence opposing or supporting the hearsay evidence. This factor is given great weight. First, we look at the state of the opposing evidence. The hearsay statements were disputed at hearing by the sworn testimony of a witness (Managing Member Johal), same as in *Rainbow Market*. We keep in mind, however, that *Rainbow Market* was a stronger case for not relying on the hearsay because the conveyer of the hearsay did not believe the declarant. Second, we look at the state of the supporting evidence. Todd Copenhagen's parents' corroborating hearsay statements are based on what Todd Copenhagen told them. The record does not contain corroborating evidence that Member Johal asked Todd Copenhagen to lie that is independent from Todd Copenhagen's account of events. Therefore, the credibility of Todd Copenhagen—which, as discussed below, is in doubt—pertains to the statements he made to his parents as well as to the statements he made to the Inspectors. Looking at the opposing and supporting evidence in the record, we find that the third factor favors not relying on the hearsay evidence.

The fourth factor is to what degree cross-examination would not have been effective with respect to the particular hearsay statements. The efficacy of cross-examination of Todd Copenhagen, had he been called as a witness, is unknown, same as in *Rainbow Market*.⁷

⁶ The Commission added to the ALJ's proposed hearsay analysis to show the reasoning that led to the Commission's conclusion that the hearsay is not sufficiently reliable to constitute substantial evidence.

⁷ We can not gather any insight from the type of questions Licensee would have asked on cross-examination from the video interview because Member Johal did not know of the tampering with a witness allegation at the time the video was made. The video was made prior to the issuance of the

The fifth factor is the consequences of the decision either way. Given the state of the other evidence and the credibility concern discussed below, the consequence of the decision (30 day license suspension) favors non-reliance on the hearsay statements, same as in *Rainbow Market*.

The question of the timing of when the hearsay statements were made is considered in addition to the five factors above. Todd Copenhaver approached OLCC and volunteered the information after he was criminally convicted, which is different from the declarant in *Rainbow Market*. While Todd Copenhaver's motive in making the statements is not known, it seems less likely that he would have a motive to lie to avoid a sanction than the declarant in *Rainbow Market*. This additional factor is not assigned much weight given all of the evidence presented and the credibility issue discussed below. *Cole/Dinsmore v. DMV*, 336 Or at 585 n 18 (the weight to be given each factor may vary, depending on the circumstances of the case).

In summary, pursuant to *Rainbow Market*, weighing the above factors leads to the conclusion that the hearsay statements of Mr. Copenhaver are not sufficiently reliable evidence that could support a conclusion that Member Johal asked or encouraged Copenhaver to alter or conceal potential evidence or to attempt to do so.

Notwithstanding the *Reguero* analysis of Mr. Copenhaver's statements, there is also a credibility problem surrounding his statements. The record demonstrates that Mr. Copenhaver intentionally fabricated a lie at least once to the Inspectors during their investigation. When Copenhaver was originally asked by Inspector Miranda about his service permit, he told her that he had one, but it was in his other pants. Only when later confronted by Inspector Miranda with information that there was no record of him ever having a service permit did he change his story. At that point he apologized for not having a permit, acknowledged that he knew he needed such a permit and asserted that he did not want to get into trouble. No such blatant fabrication can be attributed to the testimony at hearing of Managing Member Johal. The intentional fabricated lie calls into question the weight that should be given to any other of Mr. Copenhaver's statements, or statements made by others regarding what Mr. Copenhaver told them.

The violation of OAR 845-006-0345(3)(a)(C) should be dismissed, based on a failure of proof.

Penalty

OAR 845-006-0500 defines Violation (1) as a Category III violation. The standard penalty for a first Category III violation is 10-day suspension or a \$1,650 civil penalty. Violation (1) was Licensee's first Category III violation. OLCC has not alleged any aggravating or mitigating circumstances in regards to Violation (1). The standard penalty is appropriate.

Amended Notice of Proposed License Suspension/Civil Penalty, which informed Member Johal of the tampering with a witness issue, and prior to the Inspectors' meeting with Member Johal to investigate, in part, that violation.

FINAL ORDER

The Commission orders that the Limited On-Premises Sales license held by US Deli & Pub, Rajinder Johal, Managing Member, Parveen Parveen, Member, doing business as US Deli & Pub, located at 100 Lancaster Drive NE, Salem, Oregon be suspended for 10 days for violation of ORS 471.360(1)(b). Licensee may pay a civil penalty of \$1,650 in lieu of the suspension.

The charged violation of OAR 845-006-0345(3)(a)(C) should 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 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 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.