

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

In the Matter of the Off-Premises Liquor License Application filed by:) FINAL FINDINGS OF FACT
) CONCLUSIONS OF LAW
) AND ORDER
Silvia Tamayo and Baudelio Perez; dba El Paisano Superstore)
)
) Agency Case No.: OLCC-10-L-010

HISTORY OF THE CASE

On April 19, 2008, the Oregon Liquor Control Commission (OLCC or Commission) received an application for an Off-Premises Sales license from Applicants Silvia Tamayo (Tamayo) and Baudelio Perez (Perez), (together, Applicants), doing business as El Paisano Superstore, located at 2926 N. Lombard, Portland, Oregon, 97217.

On September 15, 2010, the OLCC issued a Notice of Proposed License Refusal to Applicants Tamayo and Perez. The OLCC proposed to refuse to issue an Off-Premises Sales license because of allegations that Tamayo provided false or misleading information to the OLCC and that Tamayo is not of good repute and moral character.

Tamayo made a timely request for hearing. The Commission referred the request to the Office of Administrative Hearings on September 23, 2010. The Office of Administrative Hearings assigned the case to Administrative Law Judge (ALJ) John R. Lohuis. ALJ Lohuis held a contested case hearing in Tualatin, Oregon on December 15, 2010. Kelly Routt, case presenter, represented the OLCC. OLCC Investigator Eric Hildebrand testified on behalf of the OLCC. Tamayo appeared in person and represented Applicants. Tamayo testified on her own behalf. Ignacio Escudero, Oregon certified interpreter, appeared as interpreter for Tamayo.

The record closed at the end of the hearing on December 15, 2010.

The Administrative Law Judge considered the record of the hearing and the applicable law and issued a Proposed Order mailed February 8, 2011. Staff filed Comments on the Proposed Order on March 29, 2011.

On April 21, 2011, 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:¹

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¹ The Commissioners have arrived at the same outcome as the Administrative Law Judge, and on the same bases (false statements and poor moral character). The Commissioners have, however, reached these refusal bases through different analyses, in part.

ISSUES

1. Whether the OLCC should refuse to issue a license to Applicants because Tamayo provided false or misleading information to the OLCC; and if so, whether Applicants have shown good cause to overcome the denial. ORS 471.313(4)(b); OAR 845-005-0325(6).
2. Whether the OLCC should refuse to issue a license to Applicants because Tamayo is not of good repute and moral character. ORS 471.313(4)(f).

EVIDENTIARY RULING

Exhibits A1 through A7 were admitted into the record without objection. Exhibit A8 was admitted into the record over Tamayo's objections.

FINDINGS OF FACT

1. On August 13, 2007, Silvia Tamayo and Baudelio Perez purchased a convenience store business from Lu Enterprises, Inc. (Ex. A1.) Tamayo and Perez signed a commercial lease for the premises on September 21, 2007 and soon began operating their convenience store, El Paisano Superstore. (*Id.*; testimony of Tamayo.)
2. In September 2007, Tamayo received two checks from a money wire service. One of the checks was payable to Lu Enterprises, Inc. and the other was payable to Carmen Lu, the sole principal of Lu Enterprises, Inc. Lu called Tamayo seven times to ask if Tamayo had received the checks, but Tamayo told Lu she did not know where the checks were. (Test. of Hildebrand; Ex. A5; Ex. A2.) On or about September 21, 2007, Tamayo forged Carmen Lu's signature on the checks and cashed them. Tamayo used the money from the checks for El Paisano Superstore. (Ex. A3; Test. of Hildebrand.)
3. On October 27, 2007, the police arrived at Tamayo's convenience store and arrested her for Criminal Possession of a Forged Instrument in the Second Degree, Theft in the Second Degree, and Identity Theft. The police handcuffed Tamayo and took her to the police station. (Test. of Tamayo.)
4. On April 9, 2008, Tamayo and Perez applied for an Off-Premises Sales license from the OLCC. Part of the liquor license application is a one-page "Individual History Form" that contains questions about each applicant's demographic information and background. When Tamayo filled out her Individual History Form, she answered every question except for question 11. Question 11 asked,

Do you have any arrests or citations that have not been resolved?

Yes No [.] **If yes**, arrested/cited for: _____ Date _____
County/City/State/ _____ [.] (Emphasis in original).

Tamayo left question 11 unanswered and did not disclose her October 2007 arrest. (Ex. A1.)

5. The same day that Tamayo completed and signed the OLCC application for a liquor license and her Individual History Form, she filled out a City of Portland Office of Neighborhood Involvement Personal History Form. The City of Portland form asked:

Arrest Record (This is not the same information asked on the OLCC application). Police Bureau background investigation requires that you include all arrests, including all traffic tickets, citations and arrests of any kind. Please indicate the penalties imposed for violations of any laws, including liquor regulations. State the nature of the charge, jurisdiction, date, and final disposition. If none, write “none”. (Emphasis in original).

In response to this question, Tamayo answered “1 year and ½ ago arrest check fraud[.]” (Ex. A8.)

6. On June 20, 2008, Tamayo was convicted for Identity Theft, a class C Felony, and Theft in the Second Degree, a class A Misdemeanor, in Multnomah County Circuit Court. Tamayo was sentenced to supervised probation for a period of 18 months. (Ex. A3.)

7. On July 10, 2009, OLCC investigator Eric Hildebrand interviewed Tamayo. Hildebrand showed Tamayo her application for a liquor license and the Individual History Form she had filled out. (Ex. A6; test. of Hildebrand.) Hildebrand pointed to question 11, which was highlighted, and asked her if the information listed there was correct. Tamayo said “Yes.” Hildebrand asked Tamayo if she had forgotten to add any information. Tamayo replied “No.” (*Id.*; test. of Tamayo.)

8. Hildebrand showed Tamayo records of her June 2008 convictions for Identity Theft and Theft in the Second Degree. Tamayo then admitted to Hildebrand that she had been convicted of these crimes. Hildebrand asked Tamayo why she had omitted the arrests from her Individual History Form. Tamayo told Hildebrand that she had forgotten about the arrests. (*Id.*)

CONCLUSIONS OF LAW

1. The OLCC should refuse to issue Applicants’ application for a license because Tamayo provided material false or misleading information to the OLCC. Applicants have not shown good cause to overcome the refusal of the license. OAR 845-005-0325(6).

2. The OLCC should refuse to issue Applicants’ application for a license because Tamayo is not of good repute and moral character. ORS 471.313(4)(f).

OPINION

The OLCC alleges that Applicants provided material false or misleading information to the OLCC and that Tamayo is not of good repute and moral character. As a result of these allegations, the OLCC proposes to refuse to issue Applicants an Off-Premises Sales license. As

the proponent of these allegations, the OLCC has the burden of establishing by a preponderance of the evidence that the allegations are true and that the proposed refusal to issue the license is appropriate. ORS 183.450(2) (“The burden of presenting evidence to support a fact or position in a contested case rests on the proponent of the fact or position”); *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); *Metcalf v. AFSD*, 65 Or App 761, 765 (1983) (in the absence of legislation specifying a different standard, the standard of proof in an administrative hearing 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 than not true. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390, 402 (1987). As set forth below, the OLCC has met its burden with respect to these allegations.

1. False or Misleading Information

ORS 471.313 provides, in part:

The Oregon Liquor Control Commission may refuse to license any applicant under the provisions of this chapter if the commission has reasonable ground to believe any of the following to be true:

* * * * *

(4) That the applicant:

* * * * *

(b) Has made false statements to the commission.

* * * * *

OAR 845-005-0325 provides, in part:

If any of the following criteria apply, the Commission will deny a license unless the applicant shows good cause that overcomes the criterion involved:

* * * * *

(6) The applicant provides material false or misleading information to the Commission.

* * * * *

ORS 471.313(4)(b) provides that the Commission may refuse to license any applicant if the Commission has reasonable grounds to believe that the applicant has made false statements to the Commission. A false statement must be material to be a basis for refusal.² OAR 845-005-

² In his Proposed Order, the Administrative Law Judge (ALJ) elected to analyze this refusal basis under the statute, rather than the rule. The rule interprets the statute, and the subsequent judicial gloss on the statute, and makes clear that the false statement must be “material” in order to merit license denial. The ALJ’s analysis did not explicitly analyze the materiality of the false statements, though the ALJ found that the false statements were intentional, one of the tests for materiality. In his Response to Staff Comments, the ALJ stated that he did not utilize the tests for materiality found in OLCC case precedent, because they had varied over the years, and were inconsistent. The Commission notes that OLCC Final Orders are *Trebesch* orders, carrying precedential value and having the same legal effect as a rule,

0325(6). A long line of Commission final orders establish that a false statement is material if it meets any of the following three tests: (1) the subject of the false statement is a basis for the Commission to refuse or cancel the license (*Trocadero Inn*, OLCC-90-V-055, February 1991); (2) the false statement inhibits the Commission's ability to investigate a person's eligibility for a license (*Punjab Tavern*, OLCC-91-L-015, April 1992); or (3) the false statement is intentional (*AM/PM Market No. 756*, OLCC-95-L-031, July 1996). Thus, a false statement that is intentional is a material false statement, but a material false statement under the first two tests does not also need to be intentional. The test for determining the intentionality of a false statement is whether the person making the statement intended to mislead the Commission when the statement was made. *Thomas Creek Steak and Seafood*, OLCC-00-L-008, April 2001. See also *Yesenia Bakery & Meat Market* (OLCC, Final Order, 97-L-011, March 1998) (the failure to provide information for several years on renewal applications showed a clear intent to mislead the Commission about applicant's conviction history).

In the present matter, Tamayo completed and signed as part of a liquor license application an Individual History Form. Question 11 of the Individual History Form asked, in part, "Do you have any arrests or citations that have not been resolved?" Tamayo omitted her October 2007 arrest for Criminal Possession of a Forged Instrument in the Second Degree, Theft in the Second Degree, and Identity Theft.

Tamayo's omission on her Individual History Form to the OLCC contrasted sharply with the information she provided on the City of Portland form she completed the same day. Because Tamayo disclosed her arrest on the City of Portland form, but omitted her arrest on the OLCC's form completed the same day, it is unlikely that Tamayo "forgot" that she had been arrested. Yet, when asked by OLCC investigator Hildebrand whether she had forgotten to include any information on her Individual History Form, Tamayo responded that she had not forgotten any information. When Hildebrand showed Tamayo her arrest record, Tamayo told Hildebrand that she had forgotten that she had been arrested. Tamayo's statement to Hildebrand that she had forgotten she had been arrested was both willful and untruthful, as was her statement that she had not forgotten to include any information on the form.

Tamayo's intentional false statements to the OLCC in her Individual History Form and to its investigator constitute material false statements and provide a basis to refuse the license application pursuant to OAR 845-005-0325(6).

Separately, Tamayo's false statements were also material because the subject of the false statement, the recent arrests for identity theft, provided a basis to refuse the license because of the nature of the crimes committed, See, e.g., ORS 471.313 (d).

without requiring prior rulemaking. See *Trebesch v. Employment Department*, 300 OR 264 (1985); *Coffey v. Board of Geologist Examiners*, 348 OR 494 (2010). Consequently, a subsequent final order may overrule a past final order, so long as it is done correctly. As the test for materiality has evolved, the more recent cases overrule any inconsistencies in prior orders, and an announcement, applying the revised interpretation to future cases only, has always been made in the order at the time precedent has been changed. To know what tests remain, one must read the cases backwards in time from the most recent to the earliest. The same three tests for materiality referenced above and applied in this case have been consistently in place, and applied, since 1996.

OAR 845-005-0325 allows an applicant to show good cause to overcome a denial of a license.³ In OLCC licensing cases, good cause refers to factors that tend to show that the licensee is not a poor risk for compliance with liquor laws, despite the refusal basis. In prior OLCC contested cases, the good cause analysis has been based on evidence provided by applicants, as license applicants have the burden of showing, by a preponderance of the evidence, any good cause factors that overcome the denial criteria. Applicant Tamayo did not provide any evidence of good cause; therefore, Applicants cannot show good cause to overcome the refusal basis.

The OLCC has established that Tamayo made false and misleading statements in her license application and to a Commission inspector and has not demonstrated good cause to overcome the denial basis. Consequently, the OLCC may refuse to grant Applicants' liquor license application under ORS 471.313(4)(b) and OAR 845-005-0325(6).

2. Lack of Good Repute and Moral Character

The OLCC also proposes to refuse to grant the Applicants' license application under ORS 471.313(4)(f), which provides:

The Oregon Liquor Control Commission may refuse to license any applicant under the provisions of this chapter if the commission has reasonable ground to believe any of the following to be true:

* * * * *

(4) That the applicant:

* * * * *

(f) Is not of good repute and moral character.

* * * * *

The Commission may refuse to license any applicant if the Commission has reasonable ground to believe that the applicant "is not of good repute and moral character." ORS 471.313(4)(f). The lack of good repute and lack of moral character are separate grounds, either of which provides a basis for license refusal. Relevant to matters in this case, the Commission has held that "not of good moral character" may be proved by prior violations of the law which, based on their nature or number, indicate either "turpitude" or "disregard for law." *Thomas Creek Steak and Seafood* (OLCC, Final Order, 00-L-008, April 2001). In making the

³ The ALJ, in his Proposed Order, utilized OAR 845-003-0220(5) to interpret the standard for "good cause" as used in OAR 845-005-0325. OAR 845-003-0220 sets out definitions for that division (003) only. Division 3 rules are hearings procedural rules, not substantive rules, and section (5) of OAR 845-003-0220, defining "good cause", would guide such decisions, for example, as whether a person had good cause to miss a procedural deadline contained in division 3. The procedural "good cause" standard for division 3 is not the same as the good cause standards developed through case precedent interpreting OAR 845-005-0325(6), the substantive rule here at issue. The analysis used by the Commissioners reflects, as it must, case precedent interpreting "good cause" under OAR 845-005-0325(6) and other similar licensing denial provisions.

determination, the Commission must look only to those aspects of moral character which relate significantly to the proper exercise of the license involved. *See Schmitz v. OLCC*, 30 Or App 563 (1997).

Evidence of prior law violations of a sufficient magnitude or frequency to show a disregard for the law may show that an applicant or licensee is not of good moral character. *Campbell v. Bd. of Medical Examiners*, 16 Or App 381 (1974), cited in *McCann v. OLCC*, 27 Or App 487, 491 (1976).

In assessing "turpitude," the Commission uses the test for moral turpitude adopted by the court in *In re Chase*, 299 Or 391 (1985). In applying the *In re Chase* factors, the Commission determined that, to involve moral turpitude, the illegal activity must first be knowing and intentional and involve one or more of the following elements: fraud, deceit or dishonesty; harm to a specific individual; or illegal activity undertaken for personal gain. *Tony's Tavern* (OLCC, Final Order, 86-L-012, February 1987).

Finally, a lack of good moral character can be shown by a lack of honesty in dealing with government in order to gain a benefit, such as a liquor license. This is a basis for poor moral character under the test described in *Schmitz v. OLCC*, 30 Or App 563 (1971).

In *Schmitz v. OLCC*, the applicant stated that he would purchase a liquor license and that he had a lawyer who could "get him a license." *Id.* The OLCC denied the applicant's liquor license because his statements showed a lack of honest dealing with the agency and thus a lack of good moral character. The Court of Appeals upheld the denial of the applicant's liquor license, holding that "[h]onest dealing is an essential part of the relationship between the Commission and the licensee..." and noting that the applicant's statements showed poor moral character as it related to the administration of the liquor laws. *Id.* at 567.

As noted above, the record in this case shows that Tamayo was dishonest with the OLCC when she omitted her arrest record from her Individual History Form, again when she stated that she had correctly answered the OLCC's questions, and again when she stated that she had forgotten to include her arrest record on the form. Tamayo's lack of honesty when communicating with the OLCC is comparable to the applicant's lack of honest dealing with the OLCC in *Schmitz*, and the result in this matter should be no different.

In addition, as noted above, the Commission has previously concluded that a crime or crimes involving moral turpitude, by its/their nature, show/shows that an applicant does not have good moral character. In assessing "turpitude," the Commission uses the test for moral turpitude adopted by the court in *In re Chase*, 299 Or 391 (1985), cited in *Under the Bridge Cigarettes*, OLCC-05-L-002, February 2006. The Commission determined that, to involve moral turpitude, the crime must be knowing and intentional and involve one or more of the following elements: fraud, deceit or dishonesty; harm to a specific individual; or illegal activity undertaken for personal gain. *Tony's Tavern*, OLCC-86-L-012, February 1987. The Commission later refined the test when it found that moral turpitude was not shown where only two *Chase* elements were present (one of which was the required knowing and intentional element). *Sparkles Tavern*, OLCC 88-L-021, 1989; *Punjab Tavern*, OLCC 91-L-015, April 1992. The Commission

requires, to find moral turpitude, that the acts at issue be knowing and intentional and involve two or more of the following elements: fraud, deceit or dishonesty; harm to a specific individual; or illegal activity undertaken for personal gain.⁴ *Under the Bridge Cigarettes, supra.*

In this case, all of the elements required to show moral turpitude have been met. Applicant Tamayo's criminal actions were knowing and intentional and reflected fraud and deceit. Applicant Tamayo's actions also caused harm to a specific victim. Finally, these illegal actions were taken for personal gain.

The OLCC has established two alternate and independent bases for demonstrating Applicant Tamayo's lack of good moral character, providing two independent bases for refusing to issue the liquor license under ORS 471.413(4)(f).

FINAL ORDER

The Commission orders that the application for an Off-Premises Sales license filed by Applicants Silvia Tamayo and Baudelio Perez, dba El Paisano Superstore, be DENIED.

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

Dated this 26th day of April, 2011.

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

Mailed this 26th day of April, 2011.

THIS ORDER IS EFFECTIVE ON THE DATE MAILED.

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.

⁴ In his response to staff's Comments to the Proposed Order, the ALJ declined to assess Applicant's moral turpitude because "moral turpitude" is not a term found in ORS 471.313(4)(f). The ALJ declined to use an analytical framework not contemplated by statute, rule, or appellate precedent. It has long been established by Commission precedent that there are at least three alternate tests to apply before arriving at a conclusion regarding poor moral character for purposes of ORS 471.313(4)(f) and its identical predecessor, ORS 471.295(4)(f). We have discussed that OLCC Final Orders have precedential value and have the same legal effect as a rule, without requiring prior rulemaking. *See Trebesch, supra.*