

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

IN THE MATTER OF) FINAL FINDINGS OF FACT
) CONCLUSIONS OF LAW
) AND ORDER
GARCIA’S GAS & MINI MART) OLCC-11-V-005
ANTONIO CESAR GARCIA)
DENISE GARCIA)

HISTORY OF THE CASE

On December 30, 2011, the Oregon Liquor Control Commission (OLCC or Commission) issued a Notice of Proposed License Cancellation to Antonio Cesar Garcia and Denise Garcia, dba Garcia’s Gas & Mini Mart (Licensees). The OLCC proposed to cancel Licensees’ license for violations of two license restrictions.

Licensees made a timely request for hearing. The Commission referred the request to the Office of Administrative Hearings (the OAH) on February 9, 2011. The OAH assigned the case to Senior Administrative Law Judge (ALJ) John Mann. At OLCC’s request, ALJ Mann held a prehearing conference, by telephone, on May 25, 2011. Licensee Antonio Cesar Garcia participated in the conference without counsel. Licensee Denise Garcia did not participate. Anna Davis, OLCC Case Presenter, represented OLCC.

ALJ Mann held a contested case hearing on May 26, 2011 in The Dalles, Oregon. Licensee Antonio Cesar Garcia personally appeared at the hearing without counsel and testified. Licensee Denise Garcia participated by telephone without counsel and testified. Anna Davis represented OLCC.

Licensees presented testimony from Daisy Garcia and Evangelina Garcia. OLCC presented testimony from Maria Alcantar and Rich Miller (OLCC Inspector). Mitchell Wilson, an Oregon certified interpreter, provided Spanish interpretation for Maria Alcantar and Evangelina Garcia.

The record closed on May 26, 2011 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 July 6, 2011.

No Exceptions to the Proposed Order were filed within the 25-day period specified in OAR 845-003-0590.

The Commission adopts the Proposed Order of the Administrative Law Judge as the Final Order of the Commission and enters the following based on the preponderance of the evidence:

ISSUES

1. Whether Licensees violated a restriction on the license that prohibited Evangelina Garcia from being at the licensed premises. OAR 845-005-0355(5).
2. Whether Licensees violated a restriction on the license that prohibited Evangelina Garcia from participating in the operation or management of the licensed premises. OAR 845-005-0355(5).
3. What is the appropriate sanction if either or both of the above violations are proven.

EVIDENTIARY RULING

Exhibits A1 through A11 were admitted into the record without objection.

FINDINGS OF FACT

1. Garcia's Gas & Mini Mart, located at 1200 Kelly Avenue in The Dalles, Oregon, has been owned and operated by various members of the Garcia family since 2001. (Ex. A4 at 2.) In 2003, Antonio Contreras Garcia (Licensees' father) applied for a liquor license for the business. The Commission denied the application because Mr. Garcia had a felony drug conviction. Later in 2003, Evangelina Garcia (Mr. Garcia's wife and the mother of Licensees) applied for a license in her own name. (Test. of Miller.) OLCC granted a license to Evangelina Garcia with restrictions which prohibited Antonio Contreras Garcia from being present at, or participating in ownership decisions or the management of, the licensed premises. (Ex. A4 at 2.)
2. On October 18, 2004, OLCC cancelled Evangelina Garcia's license for allowing Antonio Contreras Garcia to be at the licensed premises on January 7, January 9, and April 28, 2004, in violation of the license restrictions. (Test. of Miller.)
3. In April 2006, Antonio Contreras Garcia again applied for a liquor license for Garcia's Gas & Mini Mart. The OLCC denied the application based in part on his prior drug conviction and because his wife, who was not eligible for a license, had an interest in the business. (Ex. A4 at 2; test. of Miller.)
4. Evangelina Garcia continued to operate Garcia's Gas & Mini Mart, without a liquor license, through October 2008 when she transferred operation of the business to her daughter, Denise Garcia. (Ex. A4 at 2-3.)
5. On October 5, 2008, Antonio Contreras Garcia was arrested and charged with multiple felony offenses, including charges that he distributed methamphetamine at the licensed premises on multiple dates. (Ex. A4 at 3.)

6. In October 2008, Denise Garcia applied for an Off-Premises Sales license for Garcia's Gas & Mini Mart. In February 2009, Ms. Garcia added her brother, Antonio Cesar Garcia, to the pending license application. Antonio Cesar Garcia is the son of Antonio Contreras Garcia and Evangelina Garcia. (Ex. A4 at 2.)

7. On September 22, 2009, OLCC informed Licensees, by certified mail, that it granted Licensees an Off-Premises Sales License for Garcia's Gas & Mini Mart with the following two restrictions:

- 1. Licensees will not allow Antonio Garcia Contreras (aka Antonio Contreras Garcia) date of birth 6/18/61 or Evangelina Garcia to be on the licensed premises at any time.**
- 2. Antonio Garcia Contreras (aka Antonio Contreras Garcia) and Evangelina Garcia may not participate in the operation or management of Garcia's Gas & Mini Mart.**

(Ex. A3 at 1; emphasis in original.) The September 22, 2009 letter advised Licensees that they had the right to request a hearing to dispute the restrictions. (Ex. A3 at 3.) Licensees did not request a hearing and OLCC issued a Final Order by Default, on December 28, 2009, affirming the license restrictions. (Ex. A4.)

8. Licensee Denise Garcia lives in Portland, Oregon and was not involved in the daily operation of the licensed premises. She would occasionally come to the licensed premises on weekends "to make sure everything was up to par," but did not perform regular work duties. (Test. of Denise Garcia.) Licensee Antonio Cesar Garcia was in the United States Marine Corps from 2002 through January 2010. He did not live in The Dalles during that time and did not directly participate in the operation of the licensed premises. Licensee Antonio Cesar Garcia moved back to The Dalles in April 2010. Following his return, Mr. Garcia did not regularly work at the licensed premises, but would do so if his assistance was needed. (Test. of A. Garcia.)

9. From September 2009 through September 2010, Gloria Contreras (Licensees' aunt) usually worked alone at the licensed premises each morning. During that same period, Daisy Garcia (Licensees' sister) worked each day beginning at 1:00 or 2:00 p.m. until the store closed at the end of the day. (Test. of Daisy Garcia.)

10. On September 30, 2010, at approximately 4:25 p.m., OLCC inspector Rich Miller visited the licensed premises for the first time. Mr. Miller was aware of the license restrictions and secured a photograph, from DMV records, of Evangelina Garcia so that he could identify her if she was present. Mr. Miller was aware that Antonio Contreras Garcia was incarcerated at the time and unlikely to be at the premises. (Test. of Miller; Ex. A5 at 3.)

11. When Mr. Miller entered the licensed premises, he saw two women behind the counter. One woman, later identified as Daisy Garcia, was seated. The other, later identified as

Evangelina Garcia, was standing. Mr. Miller introduced himself to Daisy Garcia and informed her that he was there for a premises visit. Mr. Miller asked Daisy Garcia if the other woman was her mother, Evangelina Garcia. Daisy Garcia answered “No.” (Ex. A5 at 3.) When Mr. Miller told Daisy Garcia that she had a photograph and knew that the other woman was Evangelina Garcia, Daisy Garcia admitted that it was her mother. (*Id.*; test. of Miller; test. of Daisy Garcia.)

12. Daisy Garcia told Mr. Miller that Evangelina Garcia had agreed to deposit \$50 into Daisy Garcia’s bank account. Daisy Garcia stated that she asked her mother to come to the store to give her a bank deposit slip. Daisy Garcia told Mr. Miller that her mother got off work at Cascade Fruit Company at 3:30 p.m., and then went to Fred Meyer before coming to the licensed premises. Daisy Garcia told Mr. Miller that her mother had only been at the licensed premises for a few minutes when Mr. Miller arrived. (Test. of Daisy Garcia; test. of Miller; Ex. A5 at 3.)

13. Daisy Garcia and Evangelina Garcia both told Mr. Miller that they were aware of the license restrictions and knew that Evangelina Garcia was not supposed to be on the premises. Mr. Miller told Evangelina Garcia that she would need to leave the store. Evangelina Garcia complied. Mr. Miller followed Evangelina Garcia out of the store and observed her walking toward a white Ford Taurus. Mr. Miller asked Evangelina Garcia if that was her car. Evangelina Garcia nodded to indicate yes. (Test. of Miller.)

14. At approximately 5:20 p.m., Mr. Miller went to La Michoacana, a licensed premises located next door to Garcia’s Gas & Mini Mart. Mr. Miller spoke to La Michoacana’s owner, Maria Alcantar. Mr. Miller asked Ms. Alcantar if she knew Evangelina Garcia and if she had seen her at the Garcia’s Gas & Mini Mart during the last year. Ms. Alcantar stated that she knew Evangelina Garcia and that Ms. Garcia had been at Garcia’s Gas & Mini Mart on a daily basis. Ms. Alcantar stated that Daisy Garcia typically worked the morning shift and that Evangelina Garcia would relieve her each day at 3:30 p.m. when she got off work from her other job. Ms. Alcantar stated that Evangelina Garcia drove a white Taurus, and that Daisy Garcia drove a black Ford truck. Mr. Miller observed both vehicles in the parking lot that same day. Ms. Alcantar also stated that she did not know how long Daisy Garcia could continue to work because she was pregnant. (Test. of Miller; Ex. A5 at 4.)

15. Daisy Garcia was not pregnant in September 2010. She sometimes borrowed her mother’s car to drive to work. From April through September 2010, Licensee Antonio Cesar Garcia regularly drove his mother’s car because his own vehicle was not working. On occasion, Licensee Antonio Cesar Garcia drove his mother to work in the white Taurus. (Test. of Daisy Garcia.)

16. Mr. Miller again visited the licensed premises on November 18, 2010 at 1:40 p.m. He observed the white Taurus in the parking lot. After inspecting the premises with Daisy Garcia, Mr. Miller confirmed that Evangelina Garcia was not present. (Test. of Miller.)

17. Ms. Alcantar knows the Garcia family and worked at Cascade Fruit Company with Evangelina Garcia for approximately 10 years. In July 2003, Ms. Alcantar signed a petition opposing a liquor license for Garcia’s Gas & Mini Mart, primarily because she did not like Antonio Contreras Garcia and was aware of his prior criminal conviction. In 2004, Ms. Alcantar

obtained a restraining order against Antonio Contreras Garcia to prevent him from coming into La Michoacana. Antonio Contreras Garcia often called Ms. Alcantar and her daughter “bitches.” (Test. of Alcantar.)

18. Mr. Miller also spoke to Beverly Jeffries, who lived near the licensed premises. Ms. Jeffries spoke primarily about the events surrounding the execution of a search warrant, and arrest of Antonio Contreras Garcia, at the licensed premises. Ms. Jeffries did not report seeing Evangelina Garcia at the licensed premises. Mr. Miller did not speak to anyone else to try to confirm whether Evangelina Garcia had been at the licensed premises prior to September 30, 2010. (Test. of Miller.)

19. In early 2011, Licensees ceased operating Garcia’s Gas & Mini Mart and leased the business to a tenant. The tenant contacted OLCC to ask about the possibility of getting a liquor license. Mr. Miller spoke with the tenant and explained that it would be difficult for the tenant to get a separate license because Licensees currently held a liquor license for the same location. The tenant reported that information to Licensee Denise Garcia. In March 2011, Licensees surrendered their liquor license so as not to impede their tenant’s ability to secure a license. (Test. of Miller; test of Denise Garcia.)

20. Sometime in 2011, Ms. Alcantar went to Licensees’ former business to try to collect a \$500 debt from the tenant. Shortly thereafter, Ms. Alcantar was charged with criminal trespass. (Test. of Alcantar.)

CONCLUSIONS OF LAW

1. Licensees violated a restriction on the license that prohibited Evangelina Garcia from being at the licensed premises. OAR 845-005-0355(5).

2. Licensees did not violate a restriction on the license that prohibited Evangelina Garcia from participating in the operation or management of Garcia’s Gas & Mini Mart. OAR 845-005-0355(5).

3. Because Licensees’ have surrendered the liquor license, the appropriate sanction for the restriction violation is a Letter of Reprimand.

OPINION

1. Violations

OLCC asserts that Licensees violated a restriction on their liquor license, in violation of OAR 845-005-0355(5), in two respects. First, OLCC asserts that Licensees violated a restriction by allowing Evangelina Garcia to be at the licensed premises on September 30, 2010. Second, OLCC asserts that Licensees violated a restriction by allowing Evangelina Garcia to participate in the operation and management of the licensed premises. OLCC had the burden to prove its allegations by a preponderance of the evidence. ORS 183.450(2); *Harris v SAIF*, 292 Or 683, 690 (1983) (general rule regarding allocation of burden of proof is that the burden is on the

proponent of the fact or position); *Sobel v. Board of Pharmacy*, 130 Or App 374, 379, (1994), *rev den*, 320 Or 588 (1995) (standard of proof under the Administrative Procedures Act is preponderance of evidence absent legislation adopting a different standard). 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).

OAR 845-005-0355(5) provides as follows:

A licensee or permittee who has a restricted license or permit must exercise license or permit privileges only in compliance with the restriction(s). Failure to comply with the restriction(s) is a Category I violation.

Licensees acknowledged the restrictions on their license. They also admitted that Evangelina Garcia was present at the licensed premises on September 30, 2010 in violation of one of the restrictions. However, they denied that Evangelina Garcia participated in the operation or management of Garcia's Gas & Mini Mart.

OLCC inspector Rich Miller visited the licensed premises on September 30, 2010. Evangelina Garcia was present, standing behind the counter, with her daughter Daisy Garcia. Both women testified at the hearing and confirmed that Evangelina Garcia was present. Thus, the evidence established that Licensees violated OAR 845-005-0355(5) as to the first restriction on the license.

However, the evidence did not establish, more likely than not, that Evangelina Garcia participated in the management or operation of Garcia's Gas & Mini Mart. On September 30, 2010, Mr. Miller spoke with Maria Alcantar, a neighboring business owner, who told Mr. Miller that Evangelina Garcia was present at the licensed premises every day. She claimed that Evangelina Garcia arrived at the store each day shortly after getting off work at Cascade Fruit Company. Ms. Alcantar claimed that Evangelina Garcia relieved her daughter, Daisy Garcia, who worked the morning shift. At the hearing, Ms. Alcantar confirmed her statements and asserted that Evangelina Garcia was "constantly" at the licensed premises. Ms. Alcantar stated that she normally left her own business each day between 3:30 and 3:45 p.m., when she would see Evangelina Garcia arrive. She also asserted that she regularly observed Evangelina Garcia's white Taurus in the parking lot. OLCC presented no evidence to corroborate Ms. Alcantar's testimony.

However, Ms. Alcantar's testimony was not sufficient to meet OLCC's burden of proof. First, Mr. Alcantar's testimony established, at best, that Evangelina Garcia went to the parking lot of the licensed premises each day after she got off work. However, her assertion that Evangelina Garcia actually worked at the store was not reliable. Ms. Alcantar asserted that Evangelina Garcia relieved her daughter, Daisy Garcia, each afternoon. But Ms. Alcantar did not assert that she ever went into the licensed premises or ever saw Evangelina Garcia perform any work duties. Ms. Alcantar told Mr. Miller that she was unsure how long Daisy Garcia would be able to continue working because she was pregnant. Daisy Garcia testified that she was not pregnant and there is no evidence in the record to establish why Ms. Alcantar believed that was

the case. Mr. Miller took a photograph on September 30, 2010 that included Daisy Garcia. She shows no visible signs of pregnancy in the photograph. (Ex. A8.) Ms. Alcantar also claimed to regularly observe Evangelina Garcia's car in the parking lot. However, Daisy Garcia testified that she sometimes drove the car, as did Licensee Antonio Cesar Garcia. That testimony was consistent with Mr. Miller's observation of the car at the licensed premises on November 18, 2010 when Evangelina Garcia was not present.

Furthermore, the evidence established that Ms. Alcantar may not have been a neutral witness. In 2003 she signed a petition to oppose the grant of a liquor license to Garcia's Gas & Mini Mart. Subsequently, she obtained a restraining order against Licensees' father. In 2011, she was charged with criminal trespass based on a dispute with Licensees' tenant. In short, her relationship with the Garcia family, and their business, has been contentious for several years.

OLCC argued that Licensees witnesses were all family members who had a motive to be untruthful because they supported Licensees. However, their testimony was largely consistent with Mr. Miller, even with regard to issues that were contrary to Licensees' interests. Both Daisy Garcia and her mother admitted that Evangelina Garcia was present at the store and that they were aware that this was a violation of the license restriction. Daisy also admitted that she initially lied to Mr. Miller about her mother's identity. Furthermore, because Licensees are not currently licensed, the most severe sanction they can face is a Letter of Reprimand. That sanction can be imposed even if only one of the two allegations is established. Licensees admit to one of the violations and would not face a more severe sanction if the second was established. In short, Licensees did not stand to benefit in any appreciable way if their family members gave false testimony with regard to the allegation in dispute.

The only real discrepancy in the testimony concerned whether Evangelina Garcia was at the licensed premises prior to September 30, 2010 and whether she participated in the operation and management of the location. The only evidence in the record to support that allegation is Ms. Alcantar's testimony. Her testimony on that issue would not be sufficiently reliable to meet OLCC's burden of proof, even if Licensees presented no contrary evidence. Further, even assuming that, prior to September 30, 2010, Evangelina Garcia was often at the licensed premises, there is no persuasive evidence that she participated in the management or operation of the business while there. Thus, whether Licensees' witnesses were biased, or had a reason to be untruthful, does not affect the outcome of this case.

OLCC had the burden to establish, more likely than not, that Licensees allowed Evangelina Garcia to participate in the operation and management of Garcia's Gas & Mini Mart. They did not meet that burden.

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2. Sanction

Failure to comply with a license restriction is a Category I violation. OAR 845-005-0355(5). While the standard penalty for a Category I violation is license cancellation, the Commission noted that cancellation is only appropriate where the violation is substantial, applying a four-part test from *Oceanside Restaurant and Lounge*, (OLCC, Final Order, 88-V-123, August 1989.) In addition, OLCC asserted, as an aggravating factor, that both alleged violations were repeated. OLCC is correct that, under most circumstances, it would be necessary to establish a substantial violation in order to support license cancellation. In addition, the existence of aggravating factors, if established, could have some bearing on the appropriate sanction.

However, in this case Licensees have surrendered their license. The Commission has no jurisdiction to cancel a license which no longer exists. Nevertheless, the Commission retains jurisdiction to issue a Letter of Reprimand to a former licensee in order to establish the licensee's record of compliance. *Sawyer Market*, (OLCC, Final Order, 98-V-004, June 1998); *300 Liberty Place*, (OLCC, Final Order, 97-V-023, March 1998); *Rod's Old Town*, (OLCC, Final Order, 92-V-073, February 1993.) Therefore, in this case, it is appropriate to issue a Letter of Reprimand for Licensees' violation of OAR 845-005-0355(5)

FINAL ORDER

The Commission orders that a Letter of Reprimand be issued to Denise Garcia and Antonio Cesar Garcia, formerly doing business as Garcia's Gas & Mini Mart, located at 1200 Kelly Avenue, The Dalles, Oregon, for violation of OAR 845-005-0355(5).

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

Dated this 9th day of August, 2011.

/s/Stephen A. Pharo

Stephen A. Pharo

Executive Director

OREGON LIQUOR CONTROL COMMISSION

Mailed this 9th day of August, 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.