

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

IN THE MATTER OF:)	FINAL FINDINGS OF FACT
)	CONCLUSIONS OF LAW
YOGEE'S)	AND ORDER
YOGEE'S, LLC)	OLCC-09-V-073
ROBERT FAAS, MEMBER)	
TOBY FAAS, MEMBER)	
611 SE CASS STREET)	
ROSEBURG, OREGON)	

HISTORY OF THE CASE

On May 8, 2009, the Oregon Liquor Control Commission (OLCC) issued a Notice of Proposed License Suspension/Civil Penalty to Licensee Yogee's LLC and its members Robert Faas, Sr. and Toby Faas, doing business as Yogee's at 611 SE Cass Street, Roseburg, Oregon. The notice proposed to impose the following penalties: (1) a 10 day suspension of Licensee's license or a civil penalty of \$1,650 for permitting a minor to buy, be served, or drink alcoholic beverages, in violation of OAR 845-006-0335(3)(a); and (2) a seven day license suspension or a civil penalty of \$1,155 for permitting a minor on the licensed premises or to be in an area prohibited to minors, in violation of OAR 845-006-0335(3)(b). OLCC proposed to increase the penalties for Violations 1 and 2 based on the alleged aggravating circumstances that Toby Faas was personally involved in the violations.

Licensee filed a timely hearing request. OLCC referred the case to the Office of Administrative Hearings on June 26, 2009.

On May 18, 2010, OLCC issued an Amended Notice of Proposed License Suspension/Civil Penalty. The Amended Notice proposed an additional 10 day license suspension or a civil penalty of \$1,650 for permitting another minor on the licensed premises or to be in an area prohibited to minors, in violation of OAR 845-006-0335(3)(b).

A contested case hearing was held in Roseburg, Oregon, on November 9, 2010, before Administrative Law Judge James W. Han. Attorney Gregory T. Lusby represented Licensee. Kelly Routt presented the case for OLCC.

The following witnesses testified for OLCC: Roseburg Police Officers Mary Young (nee Taylor) and Gary Klopfenstein, and OLCC Inspectors David Spani and Chad Gray. The following witnesses testified for Licensee: Robert Faas, Jr., Robert Faas, Sr., and Toby Faas. The record closed on November 9, 2010.

The Administrative Law Judge considered the record of the hearing and the applicable law and issued a Proposed Order mailed December 15, 2010. Staff filed Comments on the Proposed Order on December 30, 2010.

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:

ISSUES

1. Whether Toby Faas permitted a minor to buy, be served, or drink alcoholic beverages on the licensed premises on February 14, 2009.
2. Whether Toby Faas permitted a minor to be on the licensed premises or in an area of the licensed premises prohibited to minors on February 14, 2009.
3. Whether Licensee permitted a minor to be on the licensed premises or in an area of the licensed premises prohibited to minors on November 1, 2009.
4. If the violations are proved, what are the appropriate penalties?

EVIDENTIARY RULING

Exhibits A1 through A9 were admitted in evidence at the hearing. The Commission overruled Licensee's objections to hearsay evidence of Travis January's and Richie Alm's statements. Licensee's Exhibits L1 through L3 were admitted in evidence without objection. The Commission overruled OLCC's relevance objection to Exhibit L4, a certified copy of Travis January's judgment of felony conviction, and admitted Exhibit L4 in evidence.

FINDINGS OF FACT

1. Yogee's LLC, doing business as Yogee's at 611 Cass Street, Roseburg, Oregon, has been licensed by OLCC to serve alcoholic liquor since July 1999. Toby Faas and Robert Faas, Sr., are Licensee's members. (Test. of Spani; Ex. A1.)
2. The bar at Yogee's is located to the side and rear of the premises and faces away from the entrance. From the bar, the view to the entrance is blocked by the kitchen. The premises has posted signs that prohibit minors from all parts of the premises at all times. (Test. of Gray.)

February 14, 2009

3. Shortly before 1:20 a.m. on February 14, 2009, Robert Faas, Jr., was playing pool at Yogee's when he saw minor Travis January and another man enter the premises and walk to a table near the entrance. (Test. of Robert Faas, Jr.) January appeared to be a minor: he had no facial lines, little facial hair, and a young face. (Test. of Gray.) On the table were drink glasses that had been there when January arrived. (Test. of Robert Faas, Sr.) January's companion went to the bar to order drinks. Robert Jr. was suspicious of their behavior and went to the bar to warn Toby. Robert Sr. also saw January and his companion and went toward the bar to warn Toby that January looked like a minor. He returned to his place when he saw Robert Jr. reporting to Toby. After Toby had finished serving a rum drink and a soft drink to January's companion, Toby came around the bar and followed the man toward the table where January was seated. By then, Roseburg Police Officer Mary Young and another officer had entered the premises. (Test. of Robert Faas, Jr. and Robert Faas, Sr.)

4. The officers were looking for a person with a knife. Immediately on entering the premises, Officer Young saw January at a table near the entrance. Young knew January from previous interactions, knew he was a minor on probation, and knew that his probation terms prohibited him from possessing alcoholic liquor. Young saw several drink glasses on the table where January was sitting. Young called January's probation officer and then arrested January for entering a licensed premises and for violating the terms of his probation. Young also spoke to Toby Faas, who said that January had entered Yogee's with friends and Faas had not had the chance to ask for January's identification before the police arrived. (Test. of Young; Ex. A3.)

5. Young took January to the police station and gave him an alcohol breath test within 20 minutes of the arrest. The test showed that January had a 0.09 blood alcohol content. (Ex. A3 at 3.) On March 13, 2009, January failed to appear for a court hearing and the Roseburg Municipal Court entered a judgment of conviction against January for being a minor in possession of alcoholic liquor and for entering a licensed premises. (Ex. A5 at 1.)

6. On April 7, 2009, OLCC Inspectors Spani and Gray interviewed January in Douglas County jail regarding his presence at Yogee's on February 14, 2009. Spani told January that he was investigating whether Yogee's had violated the liquor law and gave January a copy of Young's police report of the incident. (Test. of Gray.) Spani took notes during the interview and Gray compiled the notes into a written report that Spani reviewed. (Test. of Spani.)

7. January told the inspectors that he had been drinking with friends at Yogee's for two or three hours and that he bought drinks at the bar and no one asked for his identification. January also said that had been his first visit to Yogee's. (Test. of Gray; Ex. A2.) The OLCC inspectors did not attempt to find and interview January's companion at Yogee's.

8. On April 7, 2009, the OLCC inspectors also interviewed Toby Faas. Faas told the inspectors that January entered Yogee's with friends and had been there a short time before police officers entered the premises and contacted January. Faas said that January and his friends had consumed sodas and no alcoholic liquor while at Yogee's. (Test. of Spani; Ex. A2.)

November 1, 2009

9. On November 1, 2009, Roseburg Police Officer Gary Klopfenstein saw minor Richie Scott Alm, Jr., standing outside Yogee's. To Klopfenstein, Alm appeared to be about 20 years old and intoxicated. Alm had glassy, blood-shot eyes and gave off an odor of alcoholic liquor. Alm told Klopfenstein that he had drunk three beers before entering Yogee's but had no alcohol at Yogee's. Alm had no identification and told Klopfenstein that no one at Yogee's had asked for his identification. Klopfenstein issued a citation to Alm for being a minor in possession of alcoholic liquor. (Test. of Klopfenstein.)

10. Toby Faas, who had not seen Alm inside Yogee's, learned that police had arrested a minor outside the premises. (Test. of Toby Faas.)

11. On February 10, 2010, Alm pleaded guilty in Roseburg Municipal Court to being a minor in possession of alcohol. (Test. of Klopfenstein; Ex. A7 at 1 to 3.)

12. OLCC's inspectors reviewed the citation Officer Klopfenstein issued to Alm (Ex. A7) but did not interview the officer. The inspectors attempted unsuccessfully to reach Alm at a Jobs Corps telephone number. They made no other attempt to find and interview Alm. (Test. of Spani.) The inspectors interviewed Toby Faas about the incident with Alm in February 2010.

CONCLUSIONS OF LAW

1. Toby Faas did not permit a minor to buy, be served, or drink alcoholic beverages on the licensed premises on February 14, 2009.
2. Toby Faas did not permit a minor to be on the licensed premises or in an area of the licensed premises prohibited to minors on February 14, 2009.
3. Licensee did not permit a minor to be on the licensed premises or in an area of the licensed premises prohibited to minors on November 1, 2009.
4. Because no violations were proved, no penalties are appropriate.

OPINION

Licensee was charged with violations of OAR 845-006-0335(3)(a)(Permitting a minor to buy, be served, or drink alcoholic beverages)¹ and OAR 845-006-0335(3)(b)(Permitting a minor to be in the licensed premises or to be in an area prohibited to minors).² Licensees may be sanctioned by cancellation, suspension or imposition of a civil penalty for violations of Commission rules. ORS 471.315(1)(a)(A).

In *Lava Lanes of Medford*, OLCC-04-V-007, February 2005, the Commission stated the following with respect to the standard of "permitting" a minor to be in an area prohibited to minors:

OLCC has the authority "[t]o adopt such regulations as are necessary and feasible for carrying out the provisions of this chapter * * *." ORS 471.730(5). In exercising that authority, OLCC issued OAR 845-006-0335(3)(b), which states that no permittee or employee of a licensee will permit a minor to be in an area of the licensed premises prohibited to minors. "Permitting" is proved by establishing that the licensee or permittee had knowledge of or had sufficient time and opportunity to detect and determine the minor's presence at the premises." *Sparkles Tavern*, (OLCC, Final Order, 88-L-021, September 1989). It is not necessary to show that the licensee had knowledge of the presence of the minor on the premises; the licensee also permits a minor to remain if the licensee had sufficient time and opportunity to detect the minor.

¹ OAR 845-006-0335(3)(a) provides that "No licensee, permittee, or licensee's employee will permit a minor: To buy, be served or drink any alcoholic beverage on licensed premises."

² OAR 845-006-0335(3)(b) provides that "No licensee, permittee, or licensee's employee will permit a minor: To be on licensed premises prohibited to minors, except as provided in ORS 471.430, 471.480, 471.482, and this rule."

The Commission similarly concluded in *Stuart Anderson's Cattle Company*, OLCC-98-V-040, June 1999, that its authority to sanction a licensee for a violation of OAR 845-006-0035³ is found in ORS 471.315(1)(a)(A), which does not require proof of knowledge that the purchaser was a minor. The Commission held in *Stuart Anderson's Cattle Company* that “[t]he rule and statute do require proof that a sale or service of alcohol to someone who appeared to be less than 26 years of age occurred without age verification.”⁴

Violations 1 and 2

For Violation 1, OLCC alleged that Licensee’s member Toby Faas permitted minor Travis January to buy, be served, or drink alcoholic beverages on the licensed premises, in violation of OAR 845-006-0335(3)(a). For Violation 2, OLCC alleged that Toby Faas permitted January to be on the licensed premises or in an area of the licensed premises prohibited to minors, in violation of OAR 845-006-0335(3)(b).

To prove these violations, OLCC relied solely on the hearsay evidence of January’s statements to the OLCC inspectors in April 2010. The only evidence that January bought, was served, or drank an alcoholic beverage at Yogee’s was January’s assertions to the inspectors that he was at Yogee’s drinking with friends and had bought drinks there without presenting identification. Although Toby Faas sold a rum drink to January’s companion, there was no evidence that January drank from that beverage. And although there were drinking glasses on the table next to January, there was no evidence that the glasses contained alcoholic beverages or that January drank from them while he was on the premises.

Similarly, to prove that January had been inside Yogee’s long enough for Faas to detect his presence, OLCC relied entirely on hearsay evidence of January’s assertion to the inspectors that he had been inside Yogee’s for two hours before he was arrested. OLCC’s only other witness to the event was Officer Young, who did not know how long January had been in the premises before she contacted and arrested him.

To impose sanctions on the Licensee, OLCC must present “reliable, probative and substantial evidence” of the violations. ORS 183.450(5).⁵ Reliable hearsay evidence alone can be substantial evidence to establish a fact, even though the hearsay proponent had direct, corroborating evidence available but chose not to offer it. *Reguero v. Teacher Standards and Practices*, 312 Or 402, 417-420 (1991). But “although hearsay evidence may constitute substantial evidence, nothing in *Reguero* compels the conclusion that the hearsay evidence in a particular case will satisfy that standard.” *Cole v. Driver and Motor Vehicle Services Branch*, 336 Or 565, 571 (2004).

³ This rule is now numbered as OAR 845-006-0335.

⁴ The Commission revised the recital of the applicable law in this portion of the order from that provided in the Proposed Order. The Proposed Order relied upon ORS 471.410(2), which requires that a violation for the sale or service of alcoholic liquor to a minor be done knowingly. Because this case involved a charge of permitting a minor to consume alcoholic liquor, ORS 471.410(2) is inapplicable and there is no requirement that the violation have been committed knowingly unless the evidence indicated sale or service.

⁵ ORS 183.450(5) provides: “No sanction shall be imposed or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party, and as supported by, and in accordance with, reliable, probative and substantial evidence.”

When unsworn hearsay constitutes the major (in this case, the *entire*) support for the administrative decision, the importance of providing the adversary (here, the petitioner) with the opportunity to test on cross-examination each of the available declarants' perception, memory, narration, and veracity is undeniable. [The agency] had no basis for evaluating the credibility of the declarants of the challenged hearsay on which it based its order. [Para.] Even where hearsay is sufficiently reliable to be admissible and might be relied on when the consequences of the decision would be minor, that same hearsay might not be relied on when the consequences of the decision would be a profound impact on, for example, the ability of an individual to pursue a chosen profession.

Reguero, 312 Or at 421 (original italics).

The *Reguero* decision identified the matters that must be considered in determining whether hearsay evidence may be sufficient to establish a violation in a contested case: (1) the alternative 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 efficacy of cross-examination with respect to the particular hearsay statements; and (5) the consequences of the decision either way. 312 Or at 418.

In this case, the first *Reguero* factor, "the alternative to relying on the hearsay evidence," argues against reliance on the hearsay. Regulatory Staff could have presented January as a witness at the hearing—staff offered no evidence that January was unavailable to testify or that it would have been unduly costly to present him as a witness. "When the alternative to relying on hearsay is to get the better evidence that is readily available, refusing to rely on the hearsay is appropriate." *Reguero*, 312 Or at 419, citing 3 Davis, *Administrative Law Treatise* 243 (2d ed 1980). Regulatory Staff had the initial burden of presenting substantial evidence to support its position. ORS 183.450(2). Staff chose to rely solely on the hearsay evidence to carry its burden; staff therefore bore the risk that the hearsay may be rejected. Licensee also could have subpoenaed January to appear, but its choice to rely on its own witnesses to contradict the hearsay evidence should not absolve Regulatory Staff from the consequences of the decision to risk relying on hearsay.

The second factor, "the importance of the facts sought to be proved by the hearsay statements to the outcome of the proceeding," also militates against relying on the hearsay. Regulatory Staff attempted to prove the alleged violations entirely by January's hearsay statements that he was in Yogee's for two to three hours and that he drank or was served alcoholic liquor there. These facts are essential to determining whether Licensee committed the alleged violations. Therefore, in the circumstances of this case, a full and fair hearing should be based on more reliable evidence than only hearsay statements of a person who was not subject to cross examination.

The third factor is "the state of the supporting or opposing evidence, if any." The evidence Regulatory Staff presented to corroborate the hearsay evidence was thin at best. Officer Young offered no testimony relating to whether Toby Faas had sufficient opportunity to

detect January's presence or whether Faas sold, served, or made alcoholic liquor available to January. January had been drinking that night, but the only evidence that he had been drinking at Yogee's was the uncorroborated hearsay.

On the other hand, Toby Faas, Robert Faas, Sr., and Robert Faas, Jr. offered opposing evidence. Although their testimony was necessarily subject to self-interested bias, at least they offered first-hand testimony and were subject to cross-examination by Regulatory Staff. Their testimony was generally consistent and plausible. Robert Jr. testified that he saw January and another man enter the premises, was suspicious of January and his companion, and immediately went to warn Toby Faas. Robert Sr. also testified that he saw January enter the premises and he immediately moved to warn Toby. Toby testified that after serving a drink to January's companion, he started toward January but the police arrived and contacted January first. Toby denied serving any alcoholic liquor to January. Robert Sr. testified that the drink glasses at the table near January were there when January arrived. Toby told the OLCC inspectors that January entered Yogee's with friends and had been there a short time before police officers entered the premises and contacted January. The few inconsistencies in their testimony—including Robert Jr.'s assertion that the incident occurred in the afternoon and Toby's statement to OLCC investigators that January and his friend had consumed sodas and no alcoholic liquor—did not significantly undermine the credibility of their testimony.

The fourth factor, "the degree of lack of efficacy of cross-examination with respect to the particular hearsay statements," is another reason to reject the hearsay evidence. The accuracy of January's recollection was open to question. At the time of the incident, January was intoxicated. The inspectors interviewed January two months after the incident. The investigators also gave January a copy of Officer Young's report. Cross-examination could have been effective in determining how much January actually recalled and the extent to which Officer Young's report may have colored his recollection. Cross-examination may have disclosed that January had been drinking elsewhere before he came to Yogee's. Staff argued that January's statement was inherently reliable because it was a declaration against his interest. The argument was not persuasive because by the date of his interview in jail with OLCC investigators, January had already been convicted of being a minor in possession and of violating his parole. There was no basis to conclude that January believed his interests would have been further affected by his statements to the investigators.

Finally, the consequences of a finding that Licensee committed the violations would be serious to Licensee. Licensee would be subject to a license suspension or monetary penalty, enhanced by an alleged aggravating factor. The finding potentially would become part of a history of violations that may subject Licensee to increased penalties if they were charged in the future for another violation.

In conclusion, the hearsay evidence of January's statements is entitled to little or no weight because of January's availability to testify, the critical importance of January's statements, the lack of corroborating evidence, the potential efficacy of cross-examination, and the serious consequences to Licensee of an adverse decision. Therefore, there is no reliable evidence in the record to support a finding that Toby Faas and Licensee committed the alleged Violations 1 and 2. *See e.g., The Rainbow Market* (OLCC Final Order, 08-V-124, October 2009) (holding that a hearsay statement of a person not called as a witness offered to prove a fact crucial to the outcome of the hearing was not, in itself, substantial evidence to support the fact); *and see CS Convenience Services* (OLCC Final Order, 09-V-059, June 2010) (holding hearsay

statements were not sufficiently reliable to support a determination that a violation occurred, where the declarants were not called as witnesses at hearing, the facts sought to be proved were crucial to whether the violation occurred, and a key portion of the hearsay statements was disputed by another witness).

Violation 3

For Violation 3, OLCC alleged that Licensee permitted Alm to be on the licensed premises or in an area of the licensed premises prohibited to minors, in violation of OAR 845-006-0335(3)(b). OLCC's only basis for this allegation was the citation Officer Klopfenstein issued to Alm. OLCC's inspector interpreted the citation to mean that the officer had actually found Alm inside Yogee's. But at the hearing the officer stated that he saw and arrested Alm outside Yogee's.

The only evidence that Alm had been inside Yogee's was Alm's hearsay statements to Officer Klopfenstein. It is not necessary to evaluate the hearsay evidence under *Reguero* because, even taken at face value, the hearsay included no information as to where and how long Alm had been inside the premises. Thus, there was no basis to determine whether Toby Faas had sufficient time and opportunity to detect Alm's presence. OLCC failed to carry its burden under ORS 183.450(2) of presenting evidence to support its position regarding this alleged violation.

Penalties

Because OLCC failed to establish any of the alleged violations, there is no basis to impose penalties against Licensee.

FINAL ORDER

The May 18, 2010, Amended Notice of Proposed License Suspension/Civil Penalty is dismissed.

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.