

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

In the Matter of the Full On-Premises) FINAL FINDING OF FACT
Sales License Held by:) CONCLUSIONS OF LAW
) AND ORDER
)
YOGEE'S LLC) OLCC-10-V-066
ROBERT FAAS, MANAGING MEMBER) OLCC-10-V-066A
TOBY FAAS, MEMBER) OLCC-10-V-066B
)
DBA YOGEE'S)
611 SE CASS STREET)
ROSEBURG, OR 97470)

HISTORY OF THE CASE

On December 7, 2010, the Oregon Liquor Control Commission (OLCC) issued a Notice of Proposed License Suspension/Civil Penalty to Yogee's LLC and its members Robert Faas and Toby Faas (collectively the Licensees), doing business as Yogee's at 611 SE Cass Street, Roseburg, Oregon. The notice alleged that on October 9, 2010, Licensees committed two violations by (1) permitting a minor to buy, be served, or drink alcoholic beverages on the licensed premises in violation of OAR 845-006-0335(3)(a), and (2) permitting a minor to be on the licensed premises in violation of OAR 845-006-0335(3)(b). The notice proposed to suspend Licensees' license for 64 days and stated that in lieu of 56 days of suspension Licensees may pay a \$9,240 civil penalty and serve the remaining eight days of suspension.

Licensees filed a timely hearing request. OLCC referred the case to the Office of Administrative Hearings (OAH) on January 14, 2011. On March 8, 2011, the OAH served a notice of a contested case hearing for May 3, 2011.

On April 27, 2011, OLCC issued an Amended Notice of Proposed License Suspension/Civil Penalty, that deleted the allegation that Licensees permitted a minor to buy, be served, or drink alcoholic beverages on the licensed premises in violation of OAR 845-006-0335(3)(a); it also deleted Robert Faas as a person involved in the alleged violation of permitting a minor to be on the licensed premises in violation of OAR 845-006-0335(3)(b). The Amended Notice proposed to suspend Licensees' license for 11 days or to impose a \$1,815 civil penalty.

The hearing was held on May 3, 2011, in Roseburg, Oregon. Anna Davis presented the case for OLCC. OLCC inspector David Spani also was present. Chas Deleon testified by telephone for OLCC. Greg Lusby, attorney at law, represented Licensees. Toby Faas and Robert Faas also appeared for Licensees.

After Deleon testified, Davis submitted, under OAR 137-003-0530(4), a Second Amended Notice of Proposed License Suspension/Civil Penalty that proposed to suspend Licensees' license for 31 days or to impose a \$5,115 civil penalty in lieu of the suspension. The Second Amended Notice reasserted the two violations alleged in the December 7, 2011, notice, with some modifications. The ALJ allowed the Second Amended Notice and, at the Licensees'

request, adjourned and continued the hearing to enable Licensees' to respond to the amended allegations, as required by OAR 137-003-0530(4).

A continued hearing was held on June 10, 2011, in Roseburg, Oregon. Davis presented the case for OLCC. Inspector Spani and Roseburg Police Officer Scott Campbell testified for OLCC. Lusby represented Licensees. Toby Faas also appeared for Licensees. Abigail Watson, Joan Brown, Jeffrey Anderson, and Toby Faas testified for Licensees. Lusby stated that Robert Faas was unable to attend the hearing because he lacked transportation that would accommodate his wheelchair. The record was closed on June 10, 2011, except that Licensees were allowed to submit Robert Faas's affidavit relating to his lack of involvement in the alleged violations.

On June 17, 2011, Licensees filed Robert Faas's notarized affidavit. Regulatory Staff filed an objection to the affidavit on the ground that the affidavit asserted matters beyond Robert Faas's involvement in the alleged violations, and Regulatory Staff would not be able to cross-examine Faas regarding his assertions in his affidavit. In response, Licensees offered to make Robert Faas available for live testimony and cross-examination.

The record was reopened and a third day of hearing was held on September 8, 2011, in Roseburg, Oregon, for Robert Faas's testimony and cross-examination. Davis represented OLCC. Inspector Spani also was present for OLCC. Lusby represented Licensees. Toby Faas also appeared for Licensees. Robert Faas testified for Licensees. The record was closed 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 October 25, 2011. Staff filed Comments on the Proposed Order on November 9, 2011.

On December 1, 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, Robert Faas, and an unnamed male bartender permitted minor Chas Deleon to buy, be served, or drink alcoholic beverages on the licensed premises on October 9, 2010. OAR 845-006-0335(3)(a).

(2) Whether Robert Faas, Toby Faas, an unnamed male bartender, and a female bartender permitted minor Chas Deleon to be on the licensed premises or in an area of the licensed premises prohibited to minors on October 9, 2010. OAR 845-006-0335(3)(b).

(3) If the violations are proved, what are the appropriate penalties?

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EVIDENTIARY RULING

Exhibits A1 through A5 and R1 were admitted in evidence at the hearing without objection. Exhibit R2—an April 21, 2011, letter from OLCC to Gregory Lusby regarding a Final Order in a previous case involving Yogee’s—was not admitted because it was not relevant. Robert Faas’s affidavit was not admitted because it was cumulative of his live testimony. The following documents also were made part of the record: The April 27, 2011, Amended Notice of Proposed License Suspension/Civil Penalty; the Second Amended Notice of Proposed License Suspension/Civil Penalty; and the affidavit of Susan Rudberg regarding her attempts to contact witness Chas Deleon.

CREDIBILITY DETERMINATION

The Commission based its charges against the Licensees primarily on Deleon’s statements to Inspector Spani and Deleon’s testimony at the hearing. According to Deleon, no one at Yogee’s asked to see his identification to verify his age, the Licensees permitted Deleon to buy and consume alcoholic liquor while he was on Yogee’s premises, and he bought drinks from both a male and a female bartender. Licensees presented testimony that contradicted these assertions. Because of the conflicting testimonies on these central issues, The Commission has made the following credibility determination by considering the probabilities or improbabilities of the witnesses’ testimonies, the internal consistency of the testimonies, and the witnesses’ motivations for lying. *See Kowloons* (OLCC Final Order, 99-V-088, November 2000).

At the hearing, Deleon twice admitted that he did not have a clear recollection of the events at Yogee’s on the night at issue. Before Deleon entered Yogee’s, he drank two cans of beer—one 40-ounce can and another of “average” size, probably 12 ounces. Thus, he drank at least 52 ounces of beer. Deleon was not a large man—he weighed 165 pounds in October 2010. He acknowledged that he was “drunk” before he entered Yogee’s. It is likely that Deleon’s intoxication contributed to his admitted inability to clearly recall the events of that night. *See Tew v. DMV*, 170 Or App 443 (2002) (recognizing that alcohol consumption can affect a person’s ability to perceive and remember events). Further, Inspector Spani interviewed Deleon 11 days after the incident. The length of time between the night in question and the inspector’s interview of Deleon also casts doubt on the trustworthiness of Deleon’s recollection.

Deleon gave contradictory testimony about whether he had an identification card on his person when he entered Yogee’s. Deleon asserted that he had no identification card with him, but he also testified that, after being admitted to Yogee’s, he met his friends outside, where his friend tried to return a card to Deleon, saying it was Deleon’s identification and Deleon would need it to get back inside Yogee’s. At the hearing, Deleon asserted unpersuasively that the friend’s statement, that the card was Deleon’s identification, was “random.”

Moreover, Deleon’s assertion that no one at Yogee’s asked for his identification was improbable, given that he acknowledged he entered Yogee’s together with his friends and that one of his friends was under 21 years old and was “kicked out.” No evidence contradicted Toby Faas’s testimony that he ejected Deleon’s friend because the friend had no identification. If Toby Faas had prevented one of his companions from remaining in Yogee’s for lack of identification, it is unlikely that Faas would have allowed Deleon to remain without asking for Deleon’s identification.

Although Officer Campbell did not charge Deleon with falsely representing his age or using a false identification card, there was no evidence that the officer searched Deleon for a false identification. If Deleon had a false identification card, he would have had a motive to lie to the officer about it, because misrepresentation of age by a minor, unlawful possession of fictitious identification, and possession of a forged instrument are all crimes, under ORS 165.017, 165.022, 165.805, and 165.813; *see also* ORS 471.135.

Deleon also gave conflicting information to the police officer and to Inspector Spani about drinking at Yogee's. Deleon told the officer that he had not been served any alcoholic liquor at Yogee's. He told the inspector that he lied to the officer to avoid a citation. But Deleon eventually admitted to the officer that he drank two beers before entering Yogee's. Because he admitted to consuming alcoholic liquor, there was no reason for him to continue denying that he had been served alcoholic liquor at Yogee's. Yet, he never told the officer that anyone at Yogee's had served him alcoholic liquor.

On November 16, 2010, Inspector Spani interviewed Toby Faas. According to Inspector Spani's note of the interview, Faas told him that Faas "was aware [Deleon] had purchased alcoholic drinks in [Yogee's]." That evidence contradicted Toby Faas's hearing testimony that he served Deleon only a soda pop and that no other employee or dancer served Deleon an alcoholic drink at Yogee's. The inconsistency casts doubt on Toby Faas's testimony on this point, but no one questioned Toby Faas or Inspector Spani at the hearing regarding the meaning of Faas's being "aware," how he became aware, or who had sold alcoholic drinks to Deleon. Without further evidence on these matters, the Commission concludes that Toby Faas's hearing testimony, under oath and cross-examination, is entitled to more weight than the inspector's one-sentence note regarding the interview.

Further, Toby Faas's and Robert Faas's testimonies at the hearing were consistent with what Toby Faas told Officer Campbell and what the officer wrote on the citation he issued to Deleon: that Toby Faas had asked Deleon for his identification and Deleon had produced what appeared to be an Oregon driver license or identification card which showed Deleon to be 22 years old; and that Deleon had not been served any alcoholic drinks at Yogee's.

As noted above, Deleon himself corroborated Toby Faas's and Robert Faas's testimonies that Toby Faas had ejected one of Deleon's companions for lack of identification. Deleon also corroborated Toby Faas's and Anderson's testimonies that shortly after Deleon and his companions entered Yogee's, they met outside where they talked about Deleon's identification card. Deleon thus corroborated Toby Faas's testimony that he ordered Deleon and his friends to talk outside after Faas determined one of Deleon's friends was underage.

Deleon's assertion that both a male and a female bartender served him drinks at Yogee's was unreliable. Yogee's sole female bartender employee, Yogee's bookkeeper, Toby Faas, and Robert Faas all testified persuasively that no female bartender worked at Yogee's on the night in question, and that Toby Faas was the only bartender on duty that night.

Because of these considerations, the Commission has determined that Licensees' evidence was more reliable than Deleon's testimony on the points in contention. The findings of fact are based on this determination.

FINDINGS OF FACT

(1) In June 1999, OLCC issued a Full On-Premises Sales license to Yogee's LLC, doing business as Yogee's at 611 Cass Street, Roseburg, Oregon. (Ex. A1; test. of Spani.) Yogee's has posted signs that prohibit minors from all parts of the premises at all times. Yogee's has nude dancing entertainment and the dancers sometimes serve drinks to customers. (Test. of Spani.) Yogee's did not allow dancers behind the bar and did not allow dancers to sell drinks. (Test. of Watson and Toby Faas.)

(2) Toby Faas and Robert Faas are Licensee's managing members. (Ex. A1; test. of Spani.) As a result of an injury to his brain stem, Robert Faas requires an electric wheelchair to move about. He also has difficulty speaking clearly. (Test. of Robert Faas.) Unless the weather prevents him, he goes to Yogee's regularly and watches the premises from near the front door. Robert Faas does not pour or serve drinks; he does not check identifications because he would not be able to tell people they were not old enough to enter the premises. Sometimes, Robert Faas would indicate to Toby Faas when a customer appeared underage. (Test. of Toby Faas.)

(3) Chas Deleon was 18 years old on October 8, 2010, when he and three friends from the Wolf Creek Job Corps camp took a bus to Roseburg on a weekend pass. (Test. of Deleon.) One of Deleon's three companions also was under 21 years old. (Test. of Deleon; Ex. A2 at 3.) Deleon and his friends rented a room at a Roseburg motel that was close to a Greyhound bus station. They made multiple purchases of beer from a convenience store and drank the beer near the bus station and in their motel room. Deleon drank one 40 ounce can of beer and another "average" size can of beer, like the cans sold in a 30-can pack of beer. (Test. of Deleon.) Deleon weighed 165 pounds in October 2010. (Ex. A5 at 1.)

(4) Deleon and his companions were already "drunk" when they went to Yogee's shortly before midnight on October 8, 2010. Because of his intoxication, Deleon did not retain a clear recollection of the details of the events at Yogee's that night. (Test. of Deleon.) The four of them walked through Yogee's front door, passed by Robert Faas, and immediately contacted Toby Faas about 30 to 35 feet from the entrance. (Test. of Robert Faas and Toby Faas.) Robert Faas started to waive to get Toby Faas's attention because the men looked to be underage. (Test. of Robert Faas.) Toby Faas asked to see their identification cards. The first man did not have an identification card, and Toby Faas told him he would have to wait outside because he needed an identification card to be inside Yogee's. The second man, Deleon, showed Toby Faas an identification card that stated Deleon was 22 years old. (Test. of Toby Faas and Robert Faas.) Robert Faas was too far away to see the card. (Test. of Robert Faas.) Toby Faas looked at the card, rubbed it to see if the cover could be removed, and checked the card's corners to see whether the corners would peel back. To Toby Faas, the card appeared to be an Oregon driver license or identification card. (Test. of Toby Faas.) The third man showed Toby Faas an identification card stating that he was over age 21, and Toby Faas permitted him to remain. (Test. of Robert Faas.) The fourth man told Toby that he was "the ride" for the others and that if they went he would have to go too. (Test. of Toby Faas.)

(5) At that point, one of Deleon's friends said he needed to get something, and Deleon took a card from his wallet and gave it to his friend. As the men were talking, Toby Faas told them to talk outside. Deleon and one of his companions went out the side door, while the other two went out the front door. (Test. of Toby Faas.)

(6) Jeffrey Anderson was driving a taxi cab on the night of October 8 to 9, 2010. At close to midnight, Anderson was standing outside Yogee's waiting for a fare. He saw Deleon and another man exit Yogee's side door and meet two men who came from up the street. (Test. of Anderson.) The two men from up the street were Deleon's companions that Toby Faas had not allowed inside Yogee's. (Test. of Deleon.) Toby Faas also came out through the side door to have a smoke and joined Anderson. Faas and Anderson were three or four feet from Deleon and his companions. (Test. of Anderson.)

(7) It appeared to Anderson and Faas that Deleon wanted money and had given a card to one of his companions. (Test. of Anderson and Toby Faas.) The companion attempted several times to give the card back to Deleon, saying, "this isn't your ATM card; it's your ID." Faas told Anderson that the man attempting to return the card to Deleon did not have an identification card and was not allowed inside Yogee's. Anderson saw that the card looked like an Oregon driver license or identification card; it was of the same size and had a photograph on it. (Test. of Anderson.) The companion then slapped the card on Deleon's chest, saying, "this is your ID, you need it to get back inside." (Test. of Deleon, Anderson, and Toby Faas.) Deleon took the card and returned inside Yogee's. The other men walked off. Faas laughed and told Anderson that Faas would not serve Deleon if he could not tell his bank card from his identification card. (Test. of Anderson.)

(8) Yogee's was not busy that night; there were about 15 to 20 people on the premises. (Test. of Robert Faas.) Toby Faas noticed Deleon socializing with the dancers. He served Deleon a soda pop. (Test. of Toby Faas.)

(9) Besides Robert and Toby Faas, no other Yogee's employee was on duty that night. (Test. of Brown.) The dancers at Yogee's are not Yogee's employees. Yogee's contracts with a person who employs and provides the dancers. (Test. of Brown.)

(10) Watson was Yogee's only female bartender in October 2010, but she did not work on the evening of October 8 to 9, 2010. (Test. of Watson, Brown, Toby Faas, and Robert Faas.) Toby Faas was the only bartender on duty that night. (Test. of Brown, Toby Faas, and Robert Faas.)

(11) On October 7, 2010, Anderson applied to OLCC for a service permit to sell liquor as a bartender at Yogee's. He first worked as a Yogee's bartender after October 9, 2010. (Test. of Anderson.)

(12) Officer Campbell entered Yogee's for a security check at about 1:40 a.m. on October 9, 2010. He saw Deleon near the dance stage. To the officer, Deleon looked like a high school student. The officer did not see any beverages in Deleon's possession, but the officer smelled a moderate odor of alcoholic liquor on Deleon's breath. (Test. of Campbell; Ex. A3 at 2.) When the officer asked to see Deleon's identification, Deleon told the officer he did not have any and that no one at Yogee's had asked him for one. Deleon showed the officer his Job Corps badge, which was not the same size as an Oregon driver license or identification card. Deleon told the officer that he had not been served any drinks while at Yogee's and denied that he had been drinking. Later, while in the officer's patrol car, Deleon admitted to the officer that he drank two beers before he entered Yogee's. The officer issued a citation to Deleon for entering a licensed premises and for being a minor in possession of alcoholic liquor, based on his having consumed beer before entering Yogee's. (Ex. A5; test. of Campbell.)

(13) Toby Faas told Officer Campbell that he had asked to see Deleon's identification and that Deleon had showed him an Oregon driver license or identification card. Toby Faas told the officer that he believed Deleon's companion had allowed Deleon to use the companion's identification to get inside Yogee's. Faas confronted Deleon about his possession of an identification card and demanded that Deleon show it to the officer. Deleon continued to assert he had no identification card. (Ex. A3; test. of Campbell.) Toby Faas asked the dancers whether any of them had bought a drink for or took a drink to Deleon. All the dancers said no. (Test. of Toby Faas.)

(14) By then, Anderson had returned to Yogee's to pick up another fare. He saw Officer Campbell had arrested Deleon. Anderson told the officer that he had seen Deleon had an identification card. (Test. of Anderson.)

(15) On October 20, 2010, Inspector Spani met with Deleon at a Job Corps facility. (Test. of Spani.) Deleon could not "remember all the details" of the events on the night of October 8 to 9, 2010. (Test. of Deleon.) He told the inspector that on that night, he entered Yogee's front door, walked past an older man in a wheel chair, and bought drinks at the bar from both a male and a female bartender. Deleon said that no one at Yogee's asked him for identification. Deleon told the inspector that he lied to the police officer about not drinking at Yogee's, because he hoped by doing so the officer would not issue a citation to him. Deleon denied using someone else's identification or a fake identification card. Deleon refused to give the inspector the names of the companions who went to Yogee's with him, but he said one of the companions was under 21 years old. (Test. of Spani.)

(16) Deleon told Inspector Spani that Robert Faas was not personally involved in permitting him to enter the premises or allowing him to drink alcoholic beverages at Yogee's. (Test. of Spani.) Deleon told the inspector that the male bartender who served Deleon was the same person who talked to Officer Campbell about Deleon. (Test. of Deleon.)

(17) The Oregon Driver and Motor Vehicle Services Division has not issued an Oregon driver license or identification card to Deleon. (Test. of Spani.)

(18) On November 16, 2010, Inspector Spani interviewed Toby Faas. The inspector's note of the interview stated that Faas "was aware [Deleon] had purchased alcoholic drinks in [Yogee's]." (Ex. A3 at 4.)

CONCLUSIONS OF LAW

(1) Neither Robert Faas, nor Toby Faas, nor an unnamed male bartender permitted minor Chas Deleon to buy, be served, or drink alcoholic beverages on the licensed premises on October 9, 2010.

(2) Neither Robert Faas nor Toby Faas permitted minor Chas Deleon to be on the licensed premises or in an area of the licensed premises prohibited to minors on October 9, 2010.

(3) Because no violation has been proved, no sanctions are warranted.

OPINION

The Oregon Liquor Control Act provides that “[n]o one other than the person’s parent or guardian may sell, give or otherwise make available any alcoholic liquor to a person under the age of 21 years. * * * A person violates this subsection who sells, gives or otherwise makes available alcoholic liquor to a person with the knowledge that the person to whom the liquor is made available will violate this subsection.” ORS 471.410(2). The Act also generally prohibits a person under 21 years of age from “enter[ing] or attempt[ing] to enter any portion of a licensed premises that is posted or otherwise identified as being prohibited to the use of minors.” ORS 471.430(3).

OLCC has the power and the duty to enforce the Act, including regulating the licensing of persons to sell alcoholic liquors. ORS 471.730. Under that authority, OLCC may cancel or suspend any liquor license and may impose a civil penalty if it finds or has reasonable ground to believe the licensee: “[h]as violated any provision of [Chapter 471] * * * or any rule of the commission adopted pursuant thereto” or “[k]nowingly has sold alcoholic liquor to persons under 21 years of age * * *.” ORS 471.315 (1)(a)(A) and (G). OLCC’s rule OAR 845-006-0335(3) provides, in part, that “[n]o licensee, permittee, or licensee’s employee will permit a minor: (a) To buy, be served or drink any alcoholic beverage on licensed premises; [or] (b) To be on licensed premises or an area of the licensed premises prohibited to minors * * *.”

As the proponent of the assertion that Licensees violated the liquor law, Regulatory Staff has the burden of proving the violations by a preponderance of the evidence. ORS 183.450(2); *Harris v. SAIF*, 292 Or 683 (1982); *Jody’s Restaurant & Lounge* (OLCC Final Order, 97-V-015, August 1997). 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).

For Violation 1, OLCC alleged that Toby Faas, Robert Faas, and an unnamed male bartender permitted minor Chas Deleon 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, Robert Faas, and an unnamed male bartender permitted Deleon 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).¹ To establish the violations, the Commission must show that Licensees knew of Deleon’s presence or had sufficient time and opportunity to detect his presence. *Lava Lanes of Medford* (OLCC Final Order, 04-V-007, February 2005). To impose sanctions on the Licensees, OLCC must present “reliable, probative and substantial evidence” of the violations. ORS 183.450(5).²

¹ The ALJ noted in the Proposed Order that earlier cases held that violations of serving or selling to a minor, permitting a minor to consume, and permitting a minor to be in a prohibited area should be considered one violation if they involve the same minor around the same time, citing *Robin Munson and Blue Moon* (OLCC Final Order, 87-V-011, 012, September 1987). The *Munson* and *Blue Moon* cases predate the Commission’s current rule for age verification which authorizes charging separate violations under separate sections of the rule. OAR 845-006-0335 (2)(b). Recent cases have recognized that permitting a minor in a prohibited area and allowing a minor to consume alcohol are separate acts that can qualify as separate violations. *See, e.g., Aminata’s* (OLCC Final Order, 11-V-003, August 2011).

Licensees do not dispute that Deleon was a minor on the night of the alleged violations. They also do not dispute that they knew Deleon was on the premises and knowingly allowed him to remain there. Therefore, unless Licensees prove a valid defense to the charge, the evidence established that Licensees violated OAR 845-006-0335(3)(b).

Licensees contend that they permitted Deleon on the premises because he showed Toby Faas a false identification that stated he was 22 years old. For the defense of false identification, the Licensees bear the burden of proving that Deleon showed Licensees convincing false identification. *Mini Mart* (OLCC Final Order, 97-V-066, June 1997); and see ORS 183.450(2). Licensees also assert that neither Licensees nor any of their employees permitted Deleon to buy, be served, or drink any alcoholic beverages at Yogee's; and no one but Toby Faas worked as a bartender on the night in question.

The Commission has held that a minor's presentation of a convincing false identification is a defense to charges of permitting a minor on a prohibited premises and of selling or serving alcoholic liquor to a minor. *Kowloons* (OLCC Final Order, 99-V-088, November 2000); *John Doughs Pizza* (OLCC Final Order, 90-V-161, August 1991). To be a convincing false identification, the identification must be one of the types described in ORS 471.130(1), such as a state-issued motor vehicle operator's license or an identification card.³ It must look real and must not appear to be altered. *John Doughs Pizza, id.* The licensee must reject any "obviously altered document" or one which "obviously does not identify the person offering it." OAR 845-006-0335(1)(b).⁴

² 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."

³ ORS 471.130(1) provides:

All licensees and permittees of the Oregon Liquor Control Commission, before selling or serving alcoholic liquor to any person about whom there is any reasonable doubt of the person's having reached 21 years of age, shall require such person to produce one of the following pieces of identification:

- (a) The person's passport.
- (b) The person's motor vehicle operator's license, whether issued in this state or by any other state, so long as the license has a picture of the person.
- (c) An identification card issued under ORS 807.400.
- (d) A United States military identification card.
- (e) Any other identification card issued by a state that bears a picture of the person, the name of the person, the person's date of birth and a physical description of the person.

⁴ OAR 845-006-0335(1) provides:

- (a) ORS 471.130 requires a licensee or permittee to verify the age of a person who wants to buy or be served alcoholic beverages when there is "any reasonable doubt" that the person is at least 21 years old. The Commission requires a licensee or permittee to verify the age of anyone who wants to drink alcoholic beverages, or is in an area prohibited to minors, if there is reasonable doubt that the person is at least 21 years old. "Reasonable doubt" exists if the person appears to be under the age of 26;

In *John Doughs Pizza*, the Commission concluded that the licensee had not established a false identification defense, because the identification was not a motor vehicle operator's license or identification card; the licensee did not check the minor's identification on the day of the violation, but instead relied on the fact that the minor had presented the card to the licensee six to eight months previously; and the minor had testified that he had "used the fake ID only once or twice and then threw it away because he was nervous using it because it was a poor fake." Further, the minor had denied to OLCC investigators that he had used false identification, because he was "afraid that he would get in trouble if he told the truth. He testified only after he was compelled to testify by the Hearings Examiner and only after he was assured that no other charges would be brought against him as the result of his testimony." *John Dough's Pizza* (OLCC Final Order, 90-V-161, August 1991).

Here, Deleon presented to Toby Faas what appeared to be an Oregon-issued driver license or identification card that falsely stated Deleon was 22 years old. Faas determined that it appeared genuine and was not obviously altered because he examined the card, even rubbing it to see whether the cover could be removed and checking whether the card's corners would peel back. Anderson corroborated Faas's testimony by testifying that he saw Deleon's friend return to Deleon what looked like an Oregon driver license or identification card. Although Deleon denied using a false identification, there was no evidence that Deleon had been informed no charges would be brought against him if he admitted using a false identification. Thus, Deleon's testimony could have been motivated by his fear of being prosecuted for using false identification. Other than Deleon's testimony—which testimony the Commission has deemed unreliable, as discussed in the credibility determination above—there was no evidence to contradict Faas's testimony regarding Deleon's identification card, because Officer Campbell did not search Deleon for the identification. Thus, the Commission concludes that Licensees have established a defense to the alleged violations, based on Deleon's presentation of convincing false identification.⁵

Regulatory Staff and Licensees presented conflicting evidence on the issue of whether Licensees permitted Deleon to buy, be served, or drink alcoholic beverages while he was on the

(b) Whenever a licensee or permittee verifies age, he/she must verify it as ORS 471.130 requires (statement of age card or the specified items of identification) and must reject any obviously altered document or one which obviously does not identify the person offering it;

(c) Licensees must require all their employees who sell, serve, oversee or control the sale or service of alcoholic beverages to verify age as subsection (a) of this section requires.

⁵ Staff contend that Licensees failed to prove the false identification defense because the record contains no direct evidence that Toby Faas compared the photograph and physical description on the identification to Deleon. Staff is correct that the defense does not apply if the alleged false identification does not reasonably identify the person offering it. *See Trappers Lodge*, OLCC Final Order 93-V-018, July 1993 (The false identification defense was not proven where the IDs offered by the minors had photographs of other women and the heights and weights on the IDs did not match the minors.) In this case, the record shows that the identification presented by Deleon may have belonged to one of his companions and that Deleon has never been issued an Oregon driver license or identification card. However, the evidence also establishes that Toby Faas carefully examined the identification in Deleon's presence, looked at the birth date, and concluded that the card was authentic. *See Finding of Fact 4*. On these facts, the Commission infers that Faas's examination included a determination that the identification presented reasonably resembled Deleon.

premises, in violation of OAR 845-006-0335(3)(a). Regulatory Staff relied on Deleon's testimony and Inspector Spani's interview note that stated Toby Faas admitted being "aware" that Deleon bought alcoholic drinks at the premises. For the reasons discussed in the credibility determination above, Deleon's testimony and the interview note are not persuasive. The Commission finds that Licensees did not permit Deleon to buy, be served, or drink alcoholic beverages while he was at Yogee's. A preponderance of the evidence shows he was served a non-alcoholic soda pop. But even if the Commission had found that Licensees had permitted Deleon to buy, be served, or drink alcoholic liquor while on the premises, the Commission would nevertheless find that Deleon's presenting convincing false identification was a defense to the charge.

Penalties

Because the evidence did not support the charged violations, there is no basis on which to impose the proposed penalties. ORS 183.450(5).

FINAL ORDER

The Commission orders the Second 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 8th day of December, 2011.

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

Mailed this 8th day of December 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.