BEFORE THE LIQUOR CONTROL COMMISSION
OF THE STATE OF OREGON

In the Matter of the Full On-Premises	**)**	**FINAL FINDINGS OF FACT**
Sales License Held by:	**)**	**CONCLUSIONS OF LAW**
	)	**AND ORDER**
	)	
Bing's Restaurant, Inc.	**)**	**OLCC-11-V-054**
Sue Joe, Pres./Dir./Stockholder	**)**	**OLCC-11-V-054A**
Paul Joe, Stockholder	**)**	**OLCC-11-V-054B**
Rosemary Joe, Stockholder	**)**	**OLCC-11-V-054C**
Lisa Joe, Stockholder	**)**	**OLCC-11-V-054D**
dba BING'S RESTAURANT	**)**	
58209 S. Columbia River Highway	**)**	
St. Helens, Oregon 97051	**)**	

HISTORY OF THE CASE

On July 13, 2011, the Oregon Liquor Control Commission (OLCC or Commission) issued a Violation Notice (the Notice) to Bing's Restaurant, Inc.; Sue Joe, President/ Director/Stockholder; Paul Joe, Stockholder; Rosemary Joe, Stockholder; and Lisa Joe, Stockholder, doing business as Bing's Restaurant (collectively Licensee), located at 58209 S. Columbia River Highway, St. Helens, Oregon.

The OLCC alleged that Licensee violated ORS 471.360(1) by permitting an employee to mix, sell, or serve alcoholic beverages without a valid service permit. In the alternative, the OLCC alleged that Licensee violated OAR 845-009-0015(1)-(4) by failing to verify that its employee had a valid service permit or pending application, and/or failing to personally deliver a completed service permit application and/or failing to continue to verify that its employee had taken and passed a Server Education course and been issued a service permit. The OLCC proposed a $1,650 civil penalty or a 10 day suspension as a penalty.

Licensee made a timely request for hearing. The OLCC referred the request to the Office of Administrative Hearings on August 18, 2011. The Office of Administrative Hearings assigned the case to John R. Lohuis, Administrative Law Judge (ALJ). ALJ Lohuis held a contested case hearing on January 10, 2012 in St. Helens, Oregon. Anna Davis represented the OLCC. OLCC investigator Carla Clayton testified on behalf of the OLCC. Agnes Peterson represented Licensee. Dani Cave, Ruth Naish, and Wendell Olson testified on behalf of Licensee. Paul Joe, Licensee's president, appeared but did not testify. The record closed on 5:00 p.m. on January 18, 2012 after receipt of written closing arguments.

The Administrative Law Judge considered the record of the hearing and the applicable law and issued a Proposed Order mailed March 5, 2012. Staff filed Comments on the Proposed Order on March 20, 2012. The Administrative Law Judge filed his Response to [Exceptions and] Staff's Comments on June 6, 2012.

On April 5, 2012 and June 7, 2012, 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 [Exceptions and] Staff's Comments. Based on this review and the preponderance of the evidence, the Commission enters the following[1]:

ISSUES

1. Whether Licensee violated ORS 471.360(1)(b) by permitting employee Dani Cave to mix, sell, or serve alcoholic beverages on the licensed premises without a valid service permit.

In the alternative, whether Licensee violated OAR 845-009-0015(1), (2), (3), and (4) by failing to verify that employee Dani Cave had a valid service permit or pending application, and/or failing to personally deliver a completed service permit application and/or failing to continue to verify that Dani Cave had taken and passed a Server Education course and been issued a service permit.

2. If a violation or violations are established, what is the appropriate penalty?

EVIDENTIARY RULING

Exhibits A2 and A3, offered by the OLCC, were admitted to the record without objection. Exhibit A1 was admitted in its entirety over Licensee's relevance objection and motion to strike portions of the exhibit.

Exhibit P1, offered by Licensee, was admitted without objection.

FINDINGS OF FACT

1. On January 28, 1997, the OLCC issued a license to sell alcoholic beverages to Licensee Bing's Restaurant, Inc., dba Bing's Restaurant, located at 58209 S. Columbia River Highway, St. Helens, Oregon. (Ex. A1; test. of Clayton.)

2. On the afternoon of June 8, 2011, OLCC Inspector Carla Clayton visited Bing's Restaurant. She identified herself to the individual working behind the bar (later identified as employee Dani Cave) and asked to see her service permit and the service permits of any other servers on duty. (Ex. A2; test. of Clayton.)

[1] In this Final Order, the Commissioners reverse the analysis, conclusions and outcome of the Proposed Order issued by the Administrative Law Judge. Specifically, the Commissioners find that Licensee committed the alternative charged violation of OAR 845-009-0015(1), (2), (3) and (4). Consequently, the Commission imposes the standard sanction for that violation.

3. While Ms. Cave was locating her service permit, Inspector Clayton looked around the premises. She noticed one patron seated at the bar drinking a non-alcoholic drink. Inspector Clayton did not see any customers with alcoholic beverages. (Ex. A2; test. of Clayton.)[2]

4. Ms. Cave handed Inspector Clayton her service permit. Inspector Clayton noticed that Ms. Cave's service permit had expired on May 1, 2011, and she asked Ms. Cave if she knew that her service permit had expired. Ms. Cave believed that her service permit was valid until 2012, and was surprised to hear Inspector Clayton say that her permit had expired. Ms. Cave told Inspector Clayton that she did not know that her permit had expired and explained that she was filling in for a bartender who had called in sick that day. (Ex. A2; test. of Clayton, Cave.)

5. Inspector Clayton asked Ms. Cave how long she had worked at the premises. Ms. Cave responded that she had been hired in 1995 as a waitress. Ms. Cave added that she normally works as a waitress and had only recently begun filling in as a bartender when needed. When asked, Ms. Cave confirmed that her duties as a waitress included serving alcoholic beverages. At the time of the charged violation, Ms. Cave regularly worked at the premises as a waitress on Fridays, Saturdays and Sundays from 10:30 am to 4:00 pm.[3] (Test. of Clayton, test. of Cave.)

6. Inspector Clayton checked the service permit of another employee, Ruth Naish, and confirmed that Ms. Naish had a valid permit. Ms. Naish is Licensee's regularly scheduled bartender. (Ex. A2; test. of Clayton.)

7. On June 8, 2011, Ms. Cave did not mix, sell or serve alcoholic beverages (Test. of Cave, test. of Clayton.)

8. Inspector Clayton advised Ms. Cave that she must complete a service permit application and have it signed by the manager before selling any alcohol. Ms. Cave completed a service permit application and mailed it to the Commission that same day. Ms. Cave also completed the required education class within a few weeks. (Test. of Cave; test. of Clayton.)

9. Licensee has written policies and procedures for its employees. One of Licensee's policies provides that employees will be discharged for "any violation of OLCC rules and regulations." (Ex. P1, p. 2.) Another policy provides that "all employees show *[sic]* know OLCC (Oregon Liquor Control Commission) Rules. All servers shall have a valid OLCC permit/license and Oregon food Handler's card. All employees have been given a copy of State of Oregon Food Handler's Book and Oregon Liquor Control Commission Rules and

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[2] In their Comments to the Proposed Order, staff asked for a correction to this finding to either delete the words "diet soda" as testified to by a witness not cited as a source in this finding, or to attribute the witness source in the finding. The Administrative Law Judge, in his Response to [Exceptions and] Comments agreed to modification of the finding by deleting "diet soda" and substituting "a non-alcoholic drink", as testified to by the named witness.

[3] A review of the record by the Commissioners shows that Ms. Cave testified that she worked a regular schedule consisting of shifts on Fridays, Saturdays and Sundays each week, and this testimony was uncontradicted. The Commission modifies this finding of fact based on clear and convincing evidence regarding Ms. Cave's regular work schedule. In his response to staff's comments, the Administrative Law Judge agreed to this addition.

Regulations." Another policy states: "ALL EMPLOYEES SHALL READ THE POLICY BOOK AND SHALL BE RESPONSIBLE FOR THEIR ACTIONS." (Ex. P1, p. 2.) Ms. Cave was aware of these policies. (Test. of Cave; Ex. P1, p. 2.)

CONCLUSIONS OF LAW

1. Licensee failed to verify that Ms. Cave had a valid service permit or pending application, and/or failed to personally deliver a completed service permit application and continue to verify that Ms. Cave had taken and passed a Server Education course and been issued a service permit, before allowing her to mix, sell or serve alcoholic beverages, in violation of OAR 845-009-0015(1), (2), (3), and (4).

The alternatively charged violation of ORS 471.360(1) should be dismissed.

2. The appropriate penalty is a 10-day license suspension or a civil penalty of $1,650.00.

OPINION

OLCC alleges that Licensee permitted employee Dani Cave to mix, sell, or serve alcoholic beverages without a valid service permit in violation of ORS 471.360(1)(b). OLCC also alleges, in the alternative, that Licensee failed to verify that Ms. Cave had a valid service permit or pending application, and/or failed to personally deliver a completed service permit application and continue to verify that Ms. Cave had taken and passed a Server Education course and been issued a service permit, in violation of OAR 845-009-0015(1), (2), (3), and (4). As the proponent of these allegations, the OLCC has the burden to establish by a preponderance of the evidence that the allegations are true and that the proposed penalty is appropriate. ORS 183.450(2); *Harris v. SAIF*, 292 Or 683 (1982); *Metcalf v. AFSD*, 65 Or App 761 (1983).

Violation of OAR 845-009-0015(1), (2), (3), and (4)

The OLCC alleged, in the alternative, that Licensee violated OAR 845-009-0015(1), (2), (3), and (4) by failing to verify that Ms. Cave had a valid service permit or pending application, and/or Licensee failed to personally deliver a completed service permit application and continue to verify that Ms. Cave had taken and passed a Server Education course and been issued a service permit, before allowing her to mix, sell or serve alcoholic beverages.[4]

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[4] OAR 845-009-0015 provides, in relevant part:

(1) Before allowing anyone who is required to have a service permit to mix, sell, serve or to supervise those who mix, sell or serve alcoholic beverages for on-premises consumption, a licensee must:
(a) Make sure the person has a valid service permit; and
(b) Verify the person's identity (for example, make sure the person's physical description matches the person's driver's license photo and description).
(2) If the person does not have a service permit but has filed an application with the Commission, the licensee must, before allowing the person to mix, sell or serve alcoholic beverages for on-premises consumption:
(a) Verify that the person has a pending application (for example, see a copy of the service permit application the person filed or call the person's former employer);

As a threshold issue, the record supports a conclusion that Ms. Cave mixed, sold, or served alcoholic beverages at the licensed premises between May 1, 2011 and June 8, 2011 and she did not have a valid service permit during that time. The record shows that Ms. Cave regularly worked at the premises as a waitress on Fridays, Saturdays and Sundays from 10:30 am to 4:00 pm. She had worked in this capacity since 1995. She readily acknowledged that her duties as a waitress included the sale and service of alcohol. On June 8, 2011 she was working behind the bar filling in for another bartender who was out sick, and she had recently filled in as bartender on other occasions when needed. Ms. Cave's service permit expired on May 1, 2011 and as of June 8, 2011 she had been without a valid permit for 38 days. Licensee argues that there is no proof that Ms. Cave served alcohol on the date of the inspector's visit. However, such direct evidence is not required where, as in this case, there is no question that the employee was expected to serve alcohol as part of her duties. *Sunseri Dutch Mill*, OLCC-07-V-024 (December 2007). Here, as in *Sunseri*, the Commission infers, based on the nature of her job duties, that Ms. Cave mixed, sold and served alcoholic beverages between May 1, 2011 and June 8, 2011 when she did not have a valid service permit. This is especially so when she worked as a bartender, where those are the primary duties to perform.

The next question is whether the Licensee took the steps required by the rule to prevent Ms. Cave from mixing, selling or serving without a valid permit. The rule requires a licensee to take certain steps before allowing a person to mix, sell or serve alcohol. These include first verifying that the person has a valid service permit or a pending application, and if they do not, then mailing or personally delivering a completed service permit application, with the appropriate fee, to the Commission by the end of the first day after the person's first work shift. OAR 845-009-0015(1), (2), (3). Section (4) of the rule specifies that the licensee has a continuing duty to verify that the person passes a Server Education course and receives a permit. Licensee in this case took none of the steps that the rule requires. After her permit expired on May 1, 2011, Ms. Cave was an employee without a service permit. The rule requires the licensee to verify that she either obtained a new permit or completed an application, which the licensee was then required to submit to the Commission within one day. Licensee in this case took no steps to verify whether his employee's permit had expired or to ensure that a new application was submitted.[5] Licensee also took no steps to verify that she completed the server

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(b) Verify the person's identity (for example, make sure the person's physical description matches the person's driver's license photo and description); and
(c) Verify the person's age.
(3) If the person does not have a service permit or a pending application, the licensee must:
(a) Verify the person's identity (for example, make sure the person's physical description matches the person's driver's license photo and description);
(b) Verify the person's age; and
(c) Mail or personally deliver a completed service permit application, with the appropriate fee, to the Commission by the end of the first work day following the person's first work shift.
(4) If the person does not have a service permit or has a pending application, the licensee has a continuing duty to verify that the person has taken and passed a Server Education course, and that the person's service permit has been issued.

[5] Licensee argued that neither the server nor the licensee were aware that Ms. Cave's permit had expired. This does not excuse the violation. A service permit is valid for five years. ORS 471.370. The service

education requirements and that she obtained a new permit before mixing, selling or serving alcohol. Licensee argues that it had policies in place that required its employees to remain in compliance with the law. However, this is not what the rule requires. The rule requires that a licensee take very specific steps whenever an employee does not have a valid permit, by completing and submitting an application and continuing to verify that the employee receives their permit. By failing to do so, Licensee violated OAR 845-009-0015(1), (2), (3) and (4).

Because the record shows that Licensee allowed Ms. Cave to mix, sell, or serve alcoholic beverages without first having taking the steps required by the rule, the violation of OAR 845-009-0015(1), (2), (3), and (4) is established.

Violation of ORS 471.360(1)(b)

Because the violation of OAR 845-009-0015(1), (2), (3) and (4) has been established, the alternative violation is dismissed.

Penalty

Pursuant to ORS 471.315(1)(a)(A), the Commission may cancel, suspend, or fine a licensee for the violation proved in this case. Violation of OAR 845-009-0015(1), (2), (3), and (4) is a Category III violation. *See Sugar Pine Inn*, OLCC-00-V-108 (April 2002). The standard sanction for the first Category III violation within two years is a 10-day suspension or a civil penalty of $1,650.00.

If OLCC finds aggravating or mitigating circumstances, it may assess a greater or lesser sanction. OAR 845-006-0500(7)(c). OLCC has not charged aggravating circumstances and Licensee has not established cognizable mitigating circumstances. Accordingly, the standard sanction applies to this violation.

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permit that Ms. Cave carried with her clearly showed the expiration date. Because she had worked at the premises for over 15 years, Licensee must have known that her permit would expire at some point. Had Licensee simply checked the permit, it could have readily determined when the permit was due to expire. Licensee is responsible to monitor the status of the permits of its employees in order to verify that each has a valid permit allowing them to mix, sell and serve alcohol as required under OAR 845-009-0015(1), (2), (3) and (4).

FINAL ORDER

The Commission orders that Bing's Restaurant, Inc.; Sue Joe, President/ Director/Stockholder; Paul Joe, Stockholder; Rosemary Joe, Stockholder; and Lisa Joe, Stockholder, dba BING'S RESTAURANT serve a 10-day suspension or pay a civil penalty of $1,650.00 for the violation of OAR 845-009-0015(1), (2), (3), and (4).

The alternatively charged violation of ORS 471.360(1) is dismissed.

If you choose to pay the fine, it must be paid within ten (10) days of the date of this Order; otherwise, the suspension must be served.

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

Dated this 13th day of June, 2012.

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

Mailed this 13th day of June, 2012.

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.