

violation of OAR 845-009-0015(1)(2)(3)(4). In addition, the Notice alleged that on December 13, 2012 Licensee permitted unlawful activity at the licensed premises when a confidential reliable informant (CRI) purchased marijuana from a patron inside the premises in violation of OAR 845-006-0347(3). Licensee timely requested a hearing on both Notices.

The Commission referred Licensee's hearing request in the matter of JB's Deli to the Office of Administrative Hearings (OAH) on April 3, 2013. The Commission referred Licensee's hearing request in the matter of The Galley Sports Pub to the OAH on April 18, 2013. The two matters were consolidated, and the OAH assigned the consolidated cases to Senior Administrative Law Judge (ALJ) Alison Greene Webster.

Senior ALJ Webster presided over a contested case in this matter in Tualatin, Oregon, on July 31, 2013. Michael Mills, Attorney at Law, represented the Licensee. Adriana Ortega presented the case for the OLCC.

OLCC Inspector David Luster testified on the Commission's behalf. Licensee called the following witnesses: Corporate Principal Tsering Sharchitsang and Licensee's lead bartender, Debie Bueslinck. The record closed at the conclusion of the hearing on July 31, 2013.

The Administrative Law Judge considered the record of the hearing and the applicable law and issued a Proposed Order mailed August 13, 2013.

No Exceptions or Comments to the Proposed Order were filed within the 15-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:

EVIDENTIARY RULINGS

OLCC Exhibits A1, A2, A3, A5, A11, A12, A13 and A14 and Licensee's Exhibit P1 were admitted at hearing without objection. OLCC withdrew Exhibits A4, and A6 through A10.

ISSUES

1. Whether Licensee permitted Virendra Nath to supervise employees who mixed, sold or served alcoholic beverages without a valid service permit in violation of ORS 471.360(1)(a) or, alternatively, whether Licensee failed to verify that Mr. Nath had a valid service permit in violation of OAR 845-009-0015(1)(2)(3)(4).

2. Whether, on December 13, 2012, Licensee permitted unlawful activity on the premises when a confidential reliable informant purchased marijuana from a patron inside the licensed premises in violation of OAR 845-006-0347(3).

3. If one or more of the above violations occurred, what is the proper sanction?

FINDINGS OF FACT

1. The Commission first granted Sharchitsang, Inc., Tsering Sharchitsang, President, Secretary, Director and Stockholder, a liquor license in May 2000. At all times pertinent to this case, Licensee held a Limited On Premises Sales License for JB's Deli, located at 11975 N. Center Avenue, Portland, and a Full On Premises Sales license at an adjoining premises for The Galley Sports Pub, located at 11979 N. Center Avenue, Portland. (Ex. A1.)

2. Until Licensee's leases were terminated as of June 30, 2013, Licensee operated both The Galley Sports Pub and JB's Deli. The Galley was open for business from 8:15 or 8:30 a.m. until 2:00 a.m. JB's Deli was open from 8:30 or 9:00 a.m. until 2:00 a.m. Licensee's primary business at both locations (about 75 percent of the business) was the video lottery terminals. Cigarette sales were another significant part of Licensee's business. Liquor sales were secondary to the lottery and cigarette business. Licensee generally had only one employee (a bartender/cashier) working at each premises at a time. One employee covered the day shift at each location and one employee covered the night shift at each location. (Test. of Sharchitsang; test. of Bueslinck.)

3. At all times pertinent to this case, Corporate Principal Tsering Sharchitsang was responsible the following operational duties, among others: the hiring and firing of employees at the two licensed premises, employee scheduling, payroll, ordering and stocking liquor, shopping and stocking the food, and running the premises' liquor dispensing system. Ms. Sharchitsang holds both an OLCC service permit and a food handler permit, although she rarely, if ever, worked as a server. As a general rule, Ms. Sharchitsang was at the premises and working in the office most days between 10:00 a.m. and 2:00 p.m. (Test. of Sharchitsang; Ex. P1.)

4. At all times pertinent to this case, Licensee employed Debie Bueslinck as a bartender/cashier. For the last five years, Ms. Bueslinck served as Licensee's lead bartender/cashier. She worked the day shift at The Galley, from 8:15 a.m. to 5:15 p.m. or later, four days a week. Ms. Bueslinck had more responsibilities than the other bartenders/cashiers. She trained new employees, ordered the beer and wine, had access to the locked stock room to replenish the bar as needed and access to the safe. Ms. Bueslinck counted cash and prepared tills for the shifts as needed. She worked with Ms. Sharchitsang to develop the bartender/cashier schedules. (Test. of Sharchitsang; test. of Bueslinck; Ex. P1.)

5. At all times pertinent to this case, Licensee employed Virendra Nath, aka "Judge," to manage the lottery and cigarette aspects of the business. Mr. Nath is Ms. Sharchitsang's father-in-law. He is 80 years old and semi-retired. Until late January of this year, Mr. Nath was listed with the Lottery Commission as Licensee's manager/key person. Mr. Nath generally worked at the premises for one to two hours in the early morning and one to two hours in the evening. His duties included emptying out the lottery machines, counting and verifying cash from the lottery machines, completing the daily lottery reports and other back office paperwork, tracking the cigarette inventory and distributing the cashiers' starting cash and cigarettes in the morning. Mr. Sharchitsang did not work the floor (other than to empty out the lottery machines) and had no

interactions with Licensee's patrons. He spent the majority of his time at work in a private office situated between the two premises. (Test. of Sharchitsang; test. of Bueslinck; Ex. P1.)

6. On November 2, 2012, the Portland Police Bureau used a confidential reliable informant (CRI) to make a controlled drug purchase inside JB's Deli. The transaction involved a drug dealer handing the CRI a cigarette pack containing crystal methamphetamine in exchange for money. Portland Police subsequently notified OLCC of the drug buy inside JB's Deli. (Ex. A3.)

7. On November 23, 2012, OLCC Inspector David Luster called the premises to notify Licensee of the drug activity on the licensed premises. Luster first spoke with bartender Mary Darrow. He asked Ms. Darrow if there was a manager on duty. Ms. Darrow advised that the premises did not have a manager. Luster advised Ms. Darrow about the drug buy inside JB's Deli, and asked that Ms. Sharchitsang contact him. Ms. Sharchitsang was working in the office at that time and came to the phone to speak with Luster. Luster advised Ms. Sharchitsang of the November 2, 2012 drug buy at JB's Deli. He also advised her of an earlier controlled drug buy at The Galley on the night of October 26, 2012. Luster explained that these illegal drug sales at the licensed premises would result in Licensee receiving Notice of Warning Tickets (NWTs) for unlawful activity. (Ex. A3.)

8. Later that same date, Luster contacted Ms. Sharchitsang again to inquire about the status of her service permit. He asked if she supervised any of her alcohol service staff. She advised that she did not work any shifts on the floor supervising her bartenders, but she employed a "lead bartender." Luster asked if staff would report to her regarding any alcohol related issues. Ms. Sharchitsang stated that her employees could report directly to her or to the lead bartender. (Ex. A3; test. of Luster.)

9. On the night of December 13, 2012, Portland Police used a CRI to make another controlled drug purchase inside The Galley. The transaction occurred in the premises' bathroom. The CRI purchased 12.2 grams of marijuana from a dealer in exchange for \$40 cash. (Ex. A5.)

10. At some point in late 2012, Luster learned from the Portland Police that Ms. Sharchitsang and Mr. Nath attended a crime prevention meeting with the police and other Hayden Island business owners at Portland Police Bureau's North Precinct on November 29, 2012. During that meeting, Mr. Nath represented that he, along with Ms. Sharchitsang, were the contact people for JB's Deli and The Galley. (Ex. A5; test. of Luster.)

11. On January 18, 2013, Luster contacted Ms. Sharchitsang by telephone to advise her of the December 13, 2012 controlled drug purchase at The Galley. During this conversation, Luster inquired about Mr. Nath and his responsibilities at The Galley and JB's Deli. Ms. Sharchitsang described Mr. Nath as a "manager."³ Luster asked about Mr. Nath's duties at the premises. Ms. Sharchitsang said that Mr. Nath comes into the premises in the morning and at night to empty out the video lottery machines. Luster then asked if Mr. Nath "directly supervises those who mix, sell and serve alcohol within the premises." Ms. Sharchitsang said "yes."

³ Ms. Sharchitsang identified Mr. Nash as a manager because he was listed with the Lottery Commission as Licensee's manager/key person for purposes of Licensee's lottery business. (Test. of Sharchitsang.)

Luster also asked Ms. Sharchitsang how many hours per day Mr. Nath performed these duties. Ms. Sharchitsang advised that Mr. Nath worked four or five hours per day, seven days a week, performing his duties, and has done so for the past 12 years. (Ex. A5; test. of Luster.)

12. Finding no records for Mr. Nath in the OLCC's service permit/servers education system, Luster advised Ms. Sharchitsang that it is a violation for Mr. Nash to be supervising alcohol service staff without a valid service permit issued by the OLCC. Ms. Sharchitsang said she understood and would be getting an application submitted for him right away. (Ex. A5; test. of Luster.)

13. About an hour later, Luster again contacted Ms. Sharchitsang to ask if Mr. Nath supervised staff at both The Galley and JB's Deli. Ms. Sharchitsang responded affirmatively, adding that she did not realize that Mr. Nath needed a service permit. Ms. Sharchitsang further explained that she has a service permit, and that she is the one who does all the payroll and hiring and firing. She noted that Mr. Nath is listed on the Lottery paperwork, and that if she knew that he needed a service permit she would have gotten him one. (Ex. A5; test. of Luster.)

14. At 4:46 p.m. on January 18, 2013, Ms. Sharchitsang sent an email to Luster regarding the December 13, 2012 drug sale at The Galley and Mr. Nath's duties at the licensed premises. She wrote, in pertinent part, as follows:

In response to your other enquiry regarding Virendra Nath (Judge) he is semi-retired and helps with emptying out our poker machines and checking paperwork, but is listed as a manager on our lottery paperwork. I do all the hiring/firing, scheduling, payroll, stocking of food and liquor, and as the licensee, hold both the OLCC server's permit and the food handler's permit. We honestly were not aware that he was required to have a server's permit, and none of our applications indicated so. This is the first time since we have been licensed that this has been brought to our attention. As I mentioned, he is leaving for India due to health reasons on Tuesday, January 22, and intends to be there for 3 or 4 months, depending on his health. At this point, I will file papers with the lottery to remove him as manager. I hope the above information is helpful. Please let me know if there is any other information I can provide.

(Ex. A12.)

15. On January 29, 2013, Luster contacted Ms. Sharchitsang to advise her that "I as an inspector of the Commission am bound by administrative rules and have no choice based on the facts to issue her the specified violations." Luster also advised Ms. Sharchitsang that he was "very concerned" why she did not inform him of Mr. Nath when he asked on November 23, 2012 if she employed a manager. Ms. Sharchitsang said that she did not realize what Luster meant by the term "on duty," and that all Mr. Nath did was come in during the morning to do paperwork in the office. She also said that Mr. Nath would sometimes assist her in locating employees to cover a shift when the scheduled employee was unavailable. (Ex. A12; test. of Sharchitsang; test. of Luster.)

16. Luster relied on Ms. Sharchitsang’s affirmative answer to his question whether Mr. Nash “directly supervised” employees and the number of hours Mr. Nash worked each day to conclude that Mr. Nash was required to have a service permit. Luster did not, however, inquire further into Mr. Nash’s duties as they related to alcohol sales at the licensed premises. Luster spoke only to Ms. Sharchitsang, and did not interview Mr. Nath, Ms. Bueslinck or any other employee of Licensee when investigating Mr. Nath’s duties at the licensed premises. (Test. of Luster.)

17. In late January 2013, when Mr. Nath left for India, Ms. Sharchitsang contacted the Lottery Commission and removed Mr. Nath as Licensee’s key person for purposes of the lottery business. (Test. of Sharchitsang.)

18. On June 30, 2013, Licensee ceased operation of JB’s Deli and The Galley. In July 2013, Licensee surrendered the liquor licenses to the OLCC. (Test. of Sharchitsang; Exs. A14 and A15.)

CONCLUSIONS

1. Mr. Nath did not supervise employees who mixed, sold or served alcoholic beverages at the licensed premises and was not required by law to have a service permit. Therefore, Licensee did not violate ORS 471.360(1) or OAR 845-009-0015(1)(2)(3)(4).

2. Licensee stipulates that on December 13, 2012, Licensee permitted unlawful activity on the premises when a confidential reliable informant purchased marijuana from a patron inside the licensed premises in violation of OAR 845-006-0347(3).

3. The appropriate sanction for the stipulated violation of OAR 845-006-0347(3) is a Letter of Reprimand.

OPINION

1. Violations

A. Mr. Nath’s Lack of Service Permit

As set out above, the Commission has charged Licensee with permitting Mr. Nath to supervise those who mix, sell or serve alcohol in violation of ORS 471.360(1)(a).⁴ Alternatively, the Commission has charged Licensee with failing to verify that Mr. Nath had a valid service permit in violation of OAR 845-009-0015(1)(2)(3)(4). As the proponent of these allegations, the Commission bears the burden of proof. ORS 83.450(2); *Harris v. SAIF*, 292 Or 683, 690 (1982)

⁴ ORS 471.360(1)(b), the provision under which the Commission originally charged Licensee, provides that “[n]o licensee shall permit any person to mix, sell, or serve any alcoholic liquor for consumption on licensed premises” unless the person has a valid service permit. Because the Commission withdrew the allegation that Mr. Nath personally mixed, sold or served alcoholic beverages on the premises, ORS 471.360(1)(b) is not applicable in this case.

(general rule regarding allocation of burden of proof is that the burden is on the proponent of the fact or position).

ORS 471.360(1)(a) provides as follows:

(1) Except as otherwise provided in ORS 471.375:

(a) Any person employed by a licensee of the Oregon Liquor Control Commission who participates in any manner in the mixing, selling or service of alcoholic liquor for consumption on the premises where served or sold shall have a valid service permit issued by the commission.

To prove a violation of this statutory provision, the Commission must show that Mr. Nath participated “in any manner” in the mixing, selling or service of alcoholic liquor for consumption on the premises. Although Ms. Sharchitsang answered affirmatively when Luster asked if Mr. Nath “directly supervised” persons who mix, sell and serve alcohol, Licensee contends that Mr. Nath’s duties did not participate in the mixing, selling or serving of alcohol at the premises and that he did not directly supervise employees at the premises. As set out below, the evidence supports Licensee’s contention.

A preponderance of the evidence establishes that Mr. Nash’s duties were limited to managing the lottery and cigarette sale aspects of Licensee’s business. On a daily basis, he emptied the lottery machines, counted the cash, completed the lottery reports and tracked the cigarette inventory. Mr. Nash was not responsible for hiring or firing employees, he was not responsible for training employees, and was not responsible for supervising the employees’ day-to-day activities. He was also not responsible for ordering the alcohol or for tracking the alcohol inventory. In fact, there is no evidence that Mr. Nash came into contact with alcoholic liquor in any manner at the licensed premises. Thus, the Commission has failed to establish that Mr. Nath participated in any manner in the mixing, selling or service of alcoholic liquor at The Galley or JB’s Deli.⁵ See *The Raven Inn* (OLCC Final Order, 07-V-021, -026, November 2007) (corporate principal who identified herself as the premises manager, but who only performed activities related to hiring and firing and business finances and not the ordering of alcohol or supervising the day-to-day activities of the premises did not directly supervise employees who mix, sell or serve alcoholic beverages and was not required by law to have a service permit).

⁵ Commission staff cited *Cabaret Lounge* (OLCC Final Order, 08-V-061, October 2009) for the proposition that a manager is required to have a service permit even if the manager’s specific managerial duties are not identified in the record. *Cabaret Lounge* is factually distinguishable from this case. In that case, the manager at issue was working the floor when contacted and interviewed by the inspectors. He identified himself as “the manager on duty.” He admitted to managing the licensee’s other location; he admitted to going behind the bar or into the kitchen in connection with his managerial duties; and he admitted to supervising employees, including those who mixed, sold or served alcoholic beverages. Here, on the other hand, there is no evidence Mr. Nath was an on-duty manager at the licensed premises. He did not manage employees, he did not work the floor and he had nothing to do with alcohol sales at the licensed premises.

Under OAR 845-009-0010(1)(c), any employee who “directly supervises” any employee who mixes, sells or serves alcoholic beverages for consumption on licensed premises is required to have a service permit. OAR 845-009-0015 sets out a licensee’s responsibility for verifying that any employee who is required to have a service permit has such a service permit.⁶ In this

⁶ OAR 845-009-0015 provides as follows:

(1) Before allowing anyone who is required to have a service permit under ORS 471.360 to perform the duties described in OAR 845-009-0010(1), 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 valid service permit, but he or she is eligible to Mix, Sell or Serve Based on an Application under OAR 845-009-0010(3), the following rules apply:

(a) If the person 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);

(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.

(b) If the person has not 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 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.

(c) After the application is filed, 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.

(3) All other persons authorized to indorse applications under ORS 471.375 must:

(a) Verify the person's identity (for example, make sure the person's physical description

case, however, Mr. Nash was not required by law to have a service permit because he did not participate in the mixing, selling or service of alcoholic liquor for consumption on the premises. And, because Mr. Nash was not required to have a service permit, Licensee did not violate OAR 845-009-0015(1)(2)(3) or (4).

Both the charged violation of ORS 471.360(1), and the alternate charged violation of OAR 845-009-0015(1)(2)(3)(4) should be dismissed.

B. Unlawful Activity at The Galley

The Commission has also charged Licensee with permitting unlawful activity on the licensed premises in violation of OAR 845-006-0347(3) when, on December 13, 2012, a confidential reliable informant purchased marijuana from a patron inside The Galley.

OAR 845-006-0347(3) provides, in pertinent part, as follows:

(3) Unlawful Activity:

(a) No licensee or permittee will permit any unlawful activity on the licensed premises or in areas the licensee controls that are adjacent to or outside the premises. Unlawful activity includes any activity that violates a criminal statute. Examples include, but are not limited to, crimes related to prostitution, public indecency, controlled substances and gambling. The Commission does not require a conviction to establish a violation of this section except as ORS 471.315 and 471.700 requires.

Licensee concedes this violation.

2. Penalty

Based on Licensee's concession, the Commission has established a violation of OAR 845-006-0347(3). The Commission has designated this violation as a Category III violation. OAR 845-006-0500(7), Exhibit 1.

Although the violation of OAR 845-006-0347(3) has been established, the Commission has no jurisdiction to suspend Licensee's license or impose a fine because the license is no

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 within 36 hours of indorsement. Holidays and weekends are not included in counting the 36 hours.

(4) If a company authorized to indorse applications under ORS 471.375(2)(b) fails to comply with subsection (3) of this rule, the Commission will rescind its approval to indorse service permit applications.

longer in existence. Licensee has closed the two licensed premises and surrendered the liquor licenses. Thus, the appropriate sanction is a Letter of Reprimand to establish Licensee's record of compliance. *Rod's Old Town* (OLCC Final Order, 92-V-073, February 1993); *300 Liberty Place* (OLCC Final Order 97-V-23, March 1998).

FINAL ORDER

The Commission orders that for the violation of OAR 845-006-0347(3), Licensee Sharchitsang, Inc., Tsering Sharchitsang, President/Secretary/Treasurer/Stockholder be issued a LETTER OF REPRIMAND.

The Commission orders that the charged violation of ORS 471.360(1) or, alternatively OAR 845-009-0015(1)(2)(3)(4), be DISMISSED.

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

Dated this 9 day of September, 2013.

/s/ Merle Lindsey

Merle Lindsey
Interim Executive Director
OREGON LIQUOR CONTROL COMMISSION

Mailed this 10 day of September, 2013.

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.