

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

IN THE MATTER OF THE LICENSE HELD)	FINAL FINDINGS OF FACT
BY:)	CONCLUSIONS OF LAW
)	AND ORDER
)	
Aroma Restaurant, LLC)	OLCC-12-V-072
Luis Zaragoza, Managing Member)	OLCC-12-V-072A
Jose Navarro Perez, Member)	OLCC-12-V-072B
dba AROMA RESTAURANT (F-COM))	
311 SW 17th Avenue)	
Hillsboro, OR 97123)	

HISTORY OF THE CASE

On November 7, 2012, the Oregon Liquor Control Commission (OLCC or Commission) issued a Notice of Proposed Suspension/Civil Penalty to Aroma Restaurant LLC, Luis Zaragoza, Managing Member, Jose Navarro Perez, Member, dba Aroma Restaurant, 311 SW 17th Avenue, Hillsboro, Oregon 97123 (Licensee). The OLCC alleged that Licensee permitted unlawful activity on the premises when it allowed a person to perform security services without being certified to do so.

Licensee made a timely request for hearing. The Commission referred the request to the Office of Administrative Hearings on January 10, 2013. The case was assigned to Administrative Law Judge (ALJ) Monica Whitaker. The file was reassigned to ALJ Rick Barber before the hearing.

A contested case hearing was held before ALJ Barber on April 24, 2013, in Tualatin, Oregon. Licensee was represented by Attorney John Andon. OLCC was represented by Case Presenter Anna Davis. Witnesses for OLCC were: Marvin Lang; OLCC Inspector Paul Rosenow; and Hillsboro Police Officer William Blood. Witnesses for Licensee were: LLC Member Luis Zaragoza; business manager Alonso Cadenas-Lemus; Steven Clark; and Sean Skeldon. The hearing was interpreted by Spanish interpreter Ignacio Escudero. The record closed on April 24, 2013.

The Administrative Law Judge considered the record of the hearing and the applicable law and issued a Proposed Order mailed May 23, 2013.

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

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

ISSUES

1. Whether Licensee violated OAR 845-006-0347(3) by permitting unlawful activity on its premises (allowing an unlicensed person to provide private security services without DPSST certification).
2. If a violation of OAR 845-006-0346(3) is found, what is the proper sanction?

EVIDENTIARY RULING

Exhibits A1 through A7 were admitted into evidence without objection. Exhibit P1 was admitted over OLCC's authentication objection.¹

CREDIBILITY DETERMINATION

A witness testifying under oath or affirmation is presumed to be truthful unless it can be demonstrated otherwise. ORS 44.370 provides, in relevant part:

A witness is presumed to speak the truth. This presumption, however, may be overcome by the manner in which the witness testified, by the character of the testimony of the witness, or by evidence affecting the character or motives of the witness, or by contradictory evidence.

A determination of a witness' credibility can be based on a number of factors other than the manner of testifying, including the inherent probability of the evidence, internal inconsistencies, whether or not the evidence is corroborated, and whether human experience demonstrates that the evidence is logically incredible. *Tew v. DMV*, 179 Or App 443 (2002).

For reasons that will be explained in greater detail in the Opinion below, Licensee's witnesses Zaragoza, Cadenas-Lemus and Skeldon are not considered credible in their testimony. This lack of credibility is reflected in the Findings of Fact below.

STIPULATIONS OF THE PARTIES

OLCC and Licensee stipulate to the following:

1. That Lang was on Licensee's premises on two occasions between August 24, 2012 and September 7, 2012.

¹ Exhibit P1 was provisionally admitted with the understanding that Licensee would authenticate it during the hearing. The ALJ gave OLCC staff the opportunity to again object to Exhibit P1 if the requisite authentication was not presented in the testimony. No further objection was made and, in fact, the exhibit was authenticated by the testimony of Zaragoza.

2. That the security work that Licensee hires security staff to perform requires DPSST certification.

3. That if a person was performing security services for Licensee without such certification, it would be “unlawful activity.”

FINDINGS OF FACT

1. Aroma Restaurant, LLC does business as the Aroma Restaurant at 311 SW 17th Avenue, Hillsboro, Oregon. Luis Zaragoza is the managing member of the LLC, with 50 percent ownership. Jose Navarro-Perez owns the other half of the LLC. On June 3, 2012, Licensee permitted unlawful activity on its premises when it allowed security personnel without DPSST certification to provide security services. (Ex. A1). OLCC issued a Notice of Proposed License Suspension to Licensee on July 31, 2012, proposing a ten day suspension or a civil penalty of \$1,650. (Ex. A2). Licensee contested the Notice, and eventually settled the case in October 2012 with a reduced penalty: a seven day suspension or payment of a \$1,155 civil penalty. (Ex. A3).

2. Licensee hires its security staff through a man named Robert, who personally provided security for Licensee part of the time. Robert advertised on Craigslist for security personnel, hiring individuals to work for Licensee and for other companies. Although Robert would hire the security person, Licensee would pay the person providing security services at the end of the night. (Test. of Zaragoza). Marvin Lang heard about the security work at Licensee’s club when he answered an advertisement Robert had put on Craigslist. (Test. of Lang). The other security workers, Steve Clark and Sean Skeldon, were also hired by Robert. (Test. of Clark, Skeldon).

3. Lang did at least one other security job, a wedding, for Robert. Robert told him to report to Licensee’s premises on September 7, 2012. Lang arrived a little early and then began to “work the door” with Clark, a more experienced security person. Working the door involved checking identifications (IDs) to make sure that those seeking to enter were 21 years of age or older, reporting unlawful activity, and quelling any disturbances. Clark asked Lang if he was certified by DPSST, and Lang responded, “What’s that?” (Test. of Lang).

4. Shortly after the club opened, a van full of patrons arrived and Clark and Lang checked their IDs. All but one of the people, the driver, had valid ID. The driver did not have ID and Clark and Lang refused him entrance. Within a few minutes, Manager Cadenas-Lemus came to the door and let the driver in without identification. Shortly thereafter, Zaragoza came out and yelled at Lang, telling him that as the owner he would decide who did and did not come into his club. Lang interpreted Zaragoza’s comments to mean that Zaragoza wanted to allow underage persons into the club. Lang saw a police car driving by and flagged it down. He told Officer Davies, the driver of the police car, that there was possibly an underage person in the premises. (Test. of Lang).

5. Officer Davies called for additional officers, and Officer William Blood responded. When he arrived, Lang and Clark were working the door, checking IDs. Lang was

dressed in regular clothes, but had a lanyard with a Security badge hanging from it. Blood asked Lang and Clark for their DPSST cards, and Clark provided his. Lang said he did not have a certification, and was just checking out the job. Blood told Lang he could not work security without a DPSST card. Zaragoza came out of the building and met with Blood and Lang, telling them that the person they let in to the premises was over the age of 21. Shortly after that, Lang left on his motorcycle. (Test. of Blood; Ex. A6). Blood prepared a report and forwarded it to OLCC. (Ex. A6 at 5).

6. When Lang arrived home, he phoned Robert to tell him what had happened at the licensed premises. Lang said he had not gotten paid for the work, and was not allowed to continue working. Robert said he would call Lang back after he checked out the facts. (Test. of Lang).

7. On September 8, 2012, Robert called Lang back and told him he had worked the problems out with Licensee. Robert told Lang to go back that night without his firearm, and Lang did so. However, when he arrived Cadenas-Lemus told him he could not work without a DPSST card. (Test. of Lang, Cadenas-Lemus). Cadenas-Lemus gave Lang \$20, which Lang believed was payment for the work the night before. (Test. of Lang).

8. In October 2012, OLCC Inspector Paul Rosenow reviewed Officer Blood's police report from the September 7, 2012 event, noting that Lang had provided security services without a DPSST certification. Rosenow contacted Lang and Zaragoza, and ultimately concluded that Licensee had allowed Lang to provide security services without a DPSST certification. (Ex. A7).

9. Sometime after Zaragoza met with Rosenow about the allegation concerning Lang, Zaragoza created an entry in a notebook that he uses as a log book for the club. The entry mistakenly noted the date of the event as occurring on August 31, 2012, and indicated that the police came and Lang was turned away from providing security because he did not have his DPSST certification. There were also entries for September 7 and 8, 2012, which indicated they had been quiet nights with nothing unusual happening. (Test. of Zaragoza, Ex. P1).

CONCLUSIONS OF LAW

1. Licensee violated OAR 845-006-0347(3) by permitting unlawful activity on its premises (allowing an unlicensed person to provide private security services without DPSST certification).

2. The appropriate sanction is a 32 day suspension or a two day suspension and a civil penalty of \$4,950 in lieu of 30 days suspension.

OPINION

OLCC contends that Licensee allowed Lang, a person who did not have DPSST certification, to provide security services at Aroma Restaurant. As the proponent of this position the Commission must present evidence in support of its claim. ORS 183.450(2). It must prove its case by a preponderance of the evidence. *Sobel v. Board of Pharmacy*, 130 Or App 374, 379

(1994), *rev den* 320 Or 588 (1995) (standard of proof under the Administrative Procedures Act is preponderance of evidence absent legislation adopting a different standard). Proof by a preponderance of the evidence means that the fact finder is persuaded that the facts asserted are more likely true than not. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390 (1987).

OAR 845-006-0347 states in part:

(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.

* * * * *

(e) Violations of this section other than those described in (3)(b),(3)(c) or (3)(d) are Category III violations.

(Emphasis added).

ORS 181.991(1)(b) makes it a Class A violation to provide security services without certification by DPSST. Thus, as both parties stipulated at hearing, performing security services without a DPSST certification constitutes “unlawful activity” under the rule quoted above. ORS 131.005(6) includes a “violation” as a “criminal action.” Providing private security services by persons who are not DPSST certified is an unlawful activity. *Eclectic Restaurant/Envy Lounge Bar*, (OLCC Final Order, 09-V-028, October 2009).

In order to prevail, OLCC must show that Lang provided security services for Licensee, that he did so without DPSST certification, and that Licensee was aware of Lang’s unlicensed status. For the reasons that follow, the Commission has carried its burden of proof.

The credibility of the witnesses is pivotal to the decision in this case. If Luis Zaragoza, Alonso Cadenas-Lemus and Sean Skeldon’s testimony is accurate, then Lang arrived at Aroma, told Licensee that he was not certified by DPSST, and was told by Licensee that he could not perform security work for Licensee. On the other hand, if Lang and Clark’s testimony is accurate, Lang performed security services for Licensee on September 7, 2012. Each witness’s testimony will be addressed to determine credibility.

Matters Not in Dispute. There are two major points on which all witnesses agree. First, Lang came to Aroma to provide security services on September 7, 2012, at the request of “Robert,” a person who recruited security personnel for Licensee. (Zaragoza’s handwritten note in Exhibit P1 says the event occurred on August 31, 2012, but that discrepancy will be addressed

below). Zaragoza testified that he contracted with Robert to provide security staff for Licensee. Lang, Clark and Skeldon all testified that Robert hired them to provide security for Licensee.

Second, all agree that Lang was not certified through DPSST, and that his lack of certification was discussed when he arrived. This second point is very important because, as noted above, OLCC must show that Licensee had knowledge of Lang's lack of DPSST certification. All of Licensee's witnesses except Clark testified that they were aware of Lang's non-certified status at the beginning of the evening. Cadenas-Lemus testified that he asked Lang, when Lang arrived, if he was DPSST certified, and Lang said he was not. Skeldon testified that Zaragoza asked him to check with the front door personnel (Clark and Lang) to make sure they were DPSST certified, and Skeldon did. He testified that Lang told him he was not certified. Zaragoza testified that he had no contact with Lang, but had Cadenas-Lemus ask him if he was certified at the beginning of the evening.

Thus, although the circumstances described by each witness are different, there appears to be a consensus that Licensee was aware, at the beginning of the night that Lang was not DPSST certified. OLCC has established employer knowledge of Lang's lack of certification, and its failure to take reasonable steps to prevent the unlawful activity. *El Mirador*, (OLCC Final Order, 91-V-150, April 1992).

Credibility. Therefore, the only question left to be determined is whether Lang actually worked security on September 7, 2012. Lang testified that he worked the front door that night, and Clark testified that Lang worked the front door with him. Officer Blood testified that Lang was working the front door when he arrived, and was wearing a lanyard with a Security badge attached. Blood's report corroborates Lang's presence on September 7, 2012, and records how Lang flagged down Officer Davies because he believed Licensee had let an underage person into the licensed premises. Officer Blood reported and testified that Lang was wearing a Security badge on a lanyard and was working the front door when he came to the site. Lang was still wearing the Security lanyard when he met with Blood and Zaragoza.

The only evidence disputing that Lang worked the front door that night comes from three witnesses testifying for Licensee: Zaragoza, Cadenas-Lemus and Skeldon. However, taking their testimony at face value (before actually addressing their credibility), none of the three of them were in a position to testify about whether Lang actually worked security that night.

Again taking the testimony at face value, Zaragoza testified that he never had any contact with Lang that night, so he could not testify from personal knowledge about what Lang did or did not do. Skeldon testified he was working the back door that night and was sent by Zaragoza to tell Lang he could not work. However, Skeldon did not even know that the police came to the establishment that night. Thus, even assuming that he had delivered Zaragoza's message to Lang at the beginning of the shift, he could not testify from personal knowledge about whether Lang ever worked security at the front door.

Cadenas-Lemus testified that he met with Lang when he arrived, discovered he was not DPSST certified, and told him he could not work. He testified that Lang asked if he could stay and talk with his "friend." Cadenas-Lemus said that he could wait, and then went back inside.

Thus, Cadenas-Lemus was also not around the front door to see whether Lang worked security that night.

Thus, none of the three witnesses could testify from personal knowledge whether Lang worked the front door that night or not. The most persuasive evidence about what Lang was doing on the premises came from Lang's testimony, Blood's testimony, and Clark's testimony. Lang testified that he worked security on September 7, 2012, until the police officer told him he could not do the work without the certification. Blood's testimony and report show that Lang was wearing a security badge on a lanyard when he flagged down the police car. Finally, Clark testified that he and Lange "worked the front door."

Therefore, the evidence shows that Licensee was aware of Lang's lack of certification, and also shows that Lang worked security on September 7, 2012. Licensee's primary argument is that, if Lang worked security that night, it was without Licensee's permission. For the reasons that follow, the testimony of Licensee's witnesses is not considered credible.

Luis Zaragoza. Zaragoza, the managing member of the LLC, testified that he had Cadenas-Lemus tell Lang he could not work. Zaragoza testified that he never met Lang, and he presented a log book showing that Lang was not certified and had been turned away from the security job.

However, the log book was clearly fabricated. It shows that the incident with the police and Lang happened on August 31, 2012—one week before the event actually occurred. Zaragoza testified that he always enters information into the log book on the same night or the next morning. This date error shows that at least the entries for that week and the ones after were added later. It is probable that the entry was fabricated in order to cast doubt on Lang's assertions and the Commission's charges.

Zaragoza's testimony that he had no contact with Lang is further impeached by Officer Blood's testimony. Blood testified that he met with Zaragoza and Lang outside, and that Lang was wearing his security lanyard. There is no reason to question Blood's credibility.

Finally, Zaragoza claims that he sent Cadenas-Lemus to tell Lang he could not work.² However, for the reasons discussed below, Cadenas-Lemus is likewise lacking in credibility.

Cadenas-Lemus and Skeldon. Cadenas-Lemus and Skeldon also testified that Lang was informed he was not able to provide security services without the proper certification. However, their testimony conflicted with Zaragoza and with each other.

Cadenas-Lemus testified that he personally went to the door at around 10:05 pm, and asked Lang for his identification and DPSST certification. When Lang said he did not have it, Cadenas-Lemus testified that he told Lang he could not work. Cadenas-Lemus testified that Lang asked if he could stay at the door and talk to his "friend," and Cadenas-Lemus told him he could, but reminded him he was not working security.

² That testimony, incidentally, impeaches the testimony of Skeldon, who claimed that Zaragoza sent him to tell Lang he could not work.

However, besides being too convenient to be accurate, Cadenas-Lemus's testimony is not supported by the facts. Lang had no friends at the licensed premises that night. Cadenas-Lemus may have thought Lang and Clark were friends, but they did not know each other before that night. Lang could not remember Clark's name at hearing. Thus, the statement that Lang wanted to stay and talk to his "friend" is untrue.

Cadenas-Lemus's testimony also conflicted with Skeldon's testimony. Skeldon testified that he had been working for Licensee, as of the date of the hearing in April, for five months. When he was reminded that the incident in question had occurred *nine* months before the hearing, he changed his testimony to state that the night when Lang was there was his first night at the licensed premises. He testified he was working the back door, and was unaware that the police even came that night.

Skeldon testified that "Luis" (Zaragoza) asked him to check if Lang was certified by DPSST. Skeldon testified that he asked Lang, that Lang said he was not certified, and that Luis sent Skeldon back out to Lang to tell him he had to leave.

The stories of Cadenas-Lemus and Skeldon contradict each other, and are contradicted by Lang's testimony. Skeldon's testimony about his interaction with Zaragoza and Lang—and his claim that the owner sent him, on his first night, to deliver the message to Lang—is not believable. It is not plausible that Zaragoza would send Skeldon, a security person on the premises for the first time, to check the papers of another security person. Zaragoza did not testify to those facts. Skeldon's testimony was impeached by the other witnesses who testified, including Licensee's other witnesses.

Given Zaragoza's alteration of the log book and the conflicting stories of Licensee's witnesses—all designed to cast doubt on Lang's presence working security on September 7, 2012—I conclude that Zaragoza, Cadenas-Lemus and Skeldon all lack credibility.

The credible testimony of Lang, Blood and Clark demonstrates that Licensee permitted unlawful activity on its premises when it allowed Lang, who was not certified with DPSST, to provide security services.

Relationship between Lang and Licensee. Licensee contends that it never employed Lang and cannot be held responsible for his actions. The evidence shows that Licensee had entrusted its hiring of security personnel to "Robert," the person who hired Lang as well as Clark and Skeldon. Licensee may not insulate itself from responsibility for having appropriate security staff by using a third party to provide security (whether as employee or as an independent contractor). *Eclectic Restaurant*, Final Order at 11.

The Penalty. The Commission has established violation categories and proposed sanctions for violations in each category. The sanctions are guidelines, and may be decreased or increased based upon whether the Commission finds aggravating or mitigating circumstances. OAR 845-006-0500 states in part:

(8) The Commission increases sanctions based on successive violations in the same category within a two-year period. For example, if a licensee or permittee, who has committed one Category III violation and one Category IV violation within the past two years, commits another Category III violation, the Commission assesses the sanction at the second level for the pending Class III violation. Numerous violations within the two-year period, regardless of the type, may indicate such a disregard for the law or failure to control the premises so as to warrant cancellation of the license or permit.

Pursuant to OAR 845-006-0347(2), permitting unlawful activity on the premises is a Category III violation. The standard penalty for a first violation is a 10 day suspension or a civil penalty in the amount of \$1,650. The standard penalty for a second violation within two years is a 30 day suspension or a civil penalty of \$4,950.

The OLCC issued a Notice of Proposed License Suspension to Licensee on July 31, 2012, for the earlier June 2012 incident. The incident involved in this case, which occurred on September 7, 2012, involved the same conduct by Licensee. Therefore, because Licensee committed a second Category III violation within two years, Licensee is required to serve a 30-day suspension or pay a civil penalty of \$4,950.00 in lieu of the suspension.

Aggravating Circumstances. OLCC staff also contends that Zaragoza made efforts to cover up the second violation, and that the attempt at concealment is an aggravating factor. The rule quoted above also states:

(c) These sanctions are guidelines. *If the Commission finds aggravating or mitigating circumstances, it may assess a greater or lesser sanction.* Some of the reasons the Commission may mitigate a sanction are: good faith effort to prevent a violation; and extraordinary cooperation in the violation investigation that shows the licensee or permittee accepts responsibility. *Some of the reasons the Commission may aggravate a sanction are:* a prior warning about compliance problems; repeated failure to comply with laws; failure to use age verification equipment which was purchased as an offset to a previous penalty; *efforts to conceal a violation;* intentional violations; the violation involved more than one patron or employee; the violation involved a juvenile; and the violation resulted in injury or death. The Commission may always increase or decrease a sanction to prevent inequity or to take account of particular circumstances in the case.

OAR 845-006-0500(7)(c)(emphasis added). I agree with the OLCC staff.

In addition to his non-credible testimony, Zaragoza also falsified his log book in an effort to discredit Lang's testimony and to avoid responsibility for the violation. Those efforts to conceal Licensee's violation merit the additional two days of mandatory suspension.

FINAL ORDER

The Commission orders that for the violation of OAR 845-006-0347(3) the Full On-Premises Sales License held by Aroma Restaurant, LLC, Luis Zaragoza, Managing Member and Jose Navarro Perez, Member, dba Aroma Restaurant, located at 311 SW 17th Avenue, Hillsboro, Oregon, be SUSPENDED for 32 days or that Licensee pay a civil penalty of \$4,950 in lieu of 30 days suspension plus serve two days mandatory suspension.

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

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

Dated this 20th day of June 2013

/s/ Merle Lindsey

Merle Lindsey

Interim Executive Director

OREGON LIQUOR CONTROL COMMISSION

Mailed this 21st day of June 2013

THIS ORDER IS EFFECTIVE ON THE DATE MAILED. Any monetary fine or civil penalty set out in the order shall be due and payable 10 days after the date of mailing.

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.