

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

In the Matter of Service Permit)	FINAL FINDINGS OF FACT
No. 344423 Held By:)	CONCLUSIONS OF LAW
)	AND ORDER
)	
DANIEL GRUSKA)	OLCC-12-V-025
)	
and)	
)	
In the Matter of Service Permit)	
No. 361208 Held By)	
)	
GABRIEL BURTON)	OLCC-12-V-023

HISTORY OF THE CASE

On April 24, 2012, the Oregon Liquor Control Commission (OLCC or Commission) issued Notices of Proposed Service Permit Suspension/Civil Penalty to Daniel Gruska, Service Permit No. 344423 and to Gabriel Burton, Service Permit No. 361208. The Notices charged both permittees of permitting disorderly activity on a licensed premises (Sewick's, located at 4901 SE Hawthorne, Portland, Oregon), in violation of OAR 845-006-0347(2)(a), as defined by OAR 845-006-0347(1)(a). Both Permittee Gruska and Permittee Burton timely requested a hearing.

The Commission referred the Permittees' hearing requests to the Office of Administrative Hearings (OAH) on May 31, 2012. The OAH assigned the matters to Senior Administrative Law Judge (ALJ) Alison Greene Webster. The cases were consolidated for hearing.

ALJ Webster presided over prehearing conferences, held on November 15, 2012 and November 20, 2012. Anna Davis appeared for the OLCC and Permittees appeared without counsel.

ALJ Webster presided over the contested case hearing, held in Tualatin, Oregon on November 27, 2012. Anna Davis presented the case for the OLCC. Permittees Gruska and Burton appeared without counsel.

The following witnesses testified at the hearing: Matthew Kemp; Wesley Krum; Portland Police Officer Michael Strawn; Portland Police Criminalist Vance Nebling; OLCC Inspector Peggy Tarkalson; Permittee Daniel Gruska; and Permittee Gabriel Burton.

The record closed on November 27, 2012, 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 December 13, 2012.

No Exceptions 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 through A6, and Permittees' Exhibit P1 were admitted without objection.

ISSUES

1. Whether, on January 14, 2012, Permittee Gabriel Burton permitted disorderly activity on the licensed premises (Sewick's) or areas the licensee controls that are adjacent to or outside the premises in violation of OAR 845-006-0347(2)(a), as defined by OAR 845-006-0347(1)(a).

2. If so, what is the appropriate sanction for Permittee Burton's violation of OAR 845-006-0347(2)(a)?

3. Whether, on January 14, 2012, Permittee Daniel Gruska permitted disorderly activity on the licensed premises (Sewick's) or areas the licensee controls that are adjacent to or outside the premises in violation of OAR 845-006-0347(2)(a), as defined by OAR 845-006-0347(1)(a).

4. If so, what is the appropriate sanction for Permittee Gruska's violation of OAR 845-006-0347(2)(a)?

FINDINGS OF FACT

1. At all times pertinent to this matter, Daniel Gruska held Service Permit No. 344424. (Ex. A1.) At all times pertinent to this matter, Gabriel Burton held Service Permit No. 361208. (Ex. A2.) And, at all times pertinent to this matter, both Permittee Gruska and Permittee Burton were employed as servers at Sewick's (formerly known as Sewickly's or Sewickly's Addition), a licensed premises located at 4901 SE Hawthorne, Portland, Oregon. Neither Permittee Gruska nor Permittee Burton has training or certification in security work. (Test. of Gruska; test. of Burton; test. of Tarkalson.)

2. On the night of January 13, 2012 and into the early morning hours of January 14, 2012, Gruska and Burton were the only employees on duty at Sewick's. Burton was the on-duty bartender and Gruska was working as a bar back that shift. (Test. of Burton; test. of Gruska.)

3. Patrons Matthew Kemp, Wesley Krum and Andrew Paschall arrived at Sewick's

sometime after 8:00 p.m. on the night of January 13, 2012. They spent the next several hours playing pool at the premises. At one point, Mr. Krum noticed another patron sitting at the bar, Aaron Wolfe (aka "85"), whom he recognized from high school. Mr. Krum and Mr. Wolfe did not speak, though Mr. Krum noticed that Mr. Wolfe appeared to be watching him and his friends. (Test. of Kemp; test. of Krum; Ex. A3 at 5.)

4. At about 1:30 a.m., a group of five people, four men and a woman, entered the premises. Permittee Gruska heard the men in the group "trash talking" to others in the bar area. One of the males ("Ty") mentioned to a nearby patron that he did not like the patron's friend. After a few minutes, one or more of the males in the group, along with Mr. Wolfe, walked over to the pool table area. Both Permittee Gruska and Permittee Burton heard raised voices coming from that direction, and saw the same group of males trying to pick a fight with the patrons playing pool. They also saw about six patrons bumping chests and pushing each other back and forth. Permittee Burton walked over to the group and told them to "calm down" and "break it up." (Ex. A3.) The patrons stopped pushing each other and one said to Permittee Burton, "Okay, it's cool." (Ex. A3.) Thinking that the problem had been addressed, Permittee Burton returned to the bar. (Test. of Gruska; test. of Burton; Ex. A3.)

5. A few seconds later, after Permittee Burton turned away and returned to the bar, a physical fight broke out between several patrons near the pool tables. Six to eight patrons, including Ty, Mr. Wolfe, and two others in Ty's group (later identified as Matthew Coppernall and "Cassius"), started throwing punches. Two or three in the group picked up pool balls and threw them at other patrons. (Ex. A3; Ex. P1.) During the fight, someone (possibly Mr. Wolfe) intentionally struck Mr. Kemp in the temple with a pool ball. Mr. Kemp was dazed, but came back swinging. He connected with one of the combatants, causing this person to fall. Mr. Kemp then struck another one of the fighters before Mr. Krum dragged him out of the premises. (Test. of Krum.)

6. The fighting continued on the sidewalk in front of the premises. At one point, Mr. Kemp was knocked to the ground, and his attackers (including Ty and Mr. Wolfe) stomped on and kicked him. Eventually, the attackers let up on Mr. Kemp. Mr. Krum and Mr. Paschall then carried Mr. Kemp back to his car in the premises' parking lot. As Mr. Krum and Mr. Paschall were carrying Mr. Kemp around the building to the parking lot, Mr. Coppernall and Cassius came after Mr. Kemp. Mr. Krum and Mr. Paschall pleaded with them to stop. Mr. Coppernall pulled out a gun, and threatened to shoot them. Mr. Krum and Mr. Paschall tried to reason with Mr. Coppernall, noting that Mr. Kemp was "done." (Ex. A3 at 6; test. of Krum.) Mr. Coppernall jumped past them, and used the gun to strike Mr. Kemp on the head, causing further injury to the temple area where Mr. Kemp had been hit with the pool ball. After the attack, Mr. Coppernall, Mr. Wolfe, Ty and Cassius fled on foot. Mr. Krum drove Mr. Kemp to the Portland Adventist Hospital Emergency Room. (Ex. A3 at 6; test. of Krum; test. of Kemp.)

7. At the hospital, Mr. Kemp was treated for lacerations to his head above his left eye and to his lower lip. He was initially admitted as critical, as the doctors were concerned he had a cracked skull. A CAT scan disclosed no fractures or breaks to his skull. Mr. Kemp received staples for the lacerations on his temple and hairline, and stitches for the cuts to his lower lip. (Test. of Kemp; Ex. A3 and A4.)

8. Portland Police Officer Michael Strawn responded to the hospital to investigate the assault. He took statements from Mr. Kemp, Mr. Krum and Mr. Paschall. All three provided similar information about what had happened at Sewick's that night. (Ex. A4; test. of Strawn.) A day or two later, Mr. Kemp went to the Portland Police Forensic Evidence Division to have his injuries and his bloody clothing photographed. (Ex. A5; test. of Nebling.)

9. Neither Permittee Burton nor Permittee Gruska called the police during, or after, the fight at Sewick's. The police showed up, however, a few minutes after the fight was over, and after all of the patrons involved in the fight had left the area. Officers asked Permittee Burton which way the suspects went, and he advised where he had last seen them. The officers left to search for the suspects and did not return to the premises that night. (Ex. A3 at 3; test. of Burton.)

10. Permittee Burton saw six to eight patrons fighting inside the premises, saw pool balls flying and saw Mr. Kemp get hit in the face with the pool ball. When the fighting patrons exited premises, Permittee Burton stepped outside to see that the fighting continued. He tried to break up the fight but, fearing for his safety, he backed off. He saw Mr. Kemp on the ground, being kicked and stomped on by others. He also saw another patron who was bleeding after being hit in the face by a pool ball. (Ex. P1; Ex. A3 at 3; test. of Burton.)

11. Permittee Gruska also saw the patrons fighting inside the premises and pool balls flying. He saw Mr. Kemp being dragged from the premises, and then saw him "savagely beaten" by two or three others. (Ex. A3 at 4.) When Permittee Gruska started to approach them on the sidewalk, one of Mr. Kemp's attackers charged at Permittee Gruska with a bloody pool ball in hand, prompting Permittee Gruska to retreat back inside the premises. In Permittee Gruska's assessment, the fight went on for five to 10 minutes. He saw a second patron bleeding from the head after being hit by a pool ball. (Test. of Gruska; Ex. 3 at 4.)

12. Permittee Gruska thought about calling the police, but he heard patrons shouting that the police were on their way. After Mr. Kemp was carried away from the front sidewalk, Permittee Gruska saw two other patrons standing in the doorway yelling and threatening each other. Permittee Gruska stepped in between them and told them to leave. One of the two patrons spit in Permittee Gruska's face, and then spit on the other patron before leaving the premises. At this point, Mr. Gruska thought "screw this." He went back inside the premises and told the remaining patrons to leave. Mr. Gruska did not speak to the police when they arrived a short time later. (Test. of Gruska; Ex. A3 at 4; Ex. P1.)

CONCLUSIONS

1. Permittee Gabriel Burton permitted disorderly activity on the licensed premises or areas the licensee controls that are adjacent to or outside the premises on January 14, 2012 in violation of OAR 845-006-0347(2)(a), as defined by OAR 845-006-0347(1)(a).

2. The appropriate sanction for Permittee Burton's violation is a 12 day service permit suspension, or a civil penalty of \$300 in lieu of suspension.

3. Permittee Daniel Gruska permitted disorderly activity on the licensed premises or areas the licensee controls that are adjacent to or outside the premises on January 14, 2012 in violation of OAR 845-006-0347(2)(a), as defined by OAR 845-006-0347(1)(a).

4. The appropriate sanction for Permittee Gruska's violation is a 12 day service permit suspension, or a civil penalty of \$300 in lieu of suspension.

OPINION

A. Violation

As set out above, the Commission asserts that on January 14, 2012, Permittees Gruska and Burton permitted disorderly activities on the licensed premises or areas the licensee controls that are adjacent to or outside the premises in violation of OAR 845-006-0347(2)(a), as defined by OAR 845-006-0347(1)(a), when several patrons fought inside the premises, and the fighting continued outside the premises. As the proponent of this contention, the Commission bears the burden of proof. ORS 183.450(2); *Harris v. SAIF*, 292 Or 683, 690 (1982) (general rule regarding allocation of burden of proof is that the burden is on the proponent of the fact or position).

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

Noisy, Disorderly or Unlawful Activity and Drinking Alcohol Outside the Premises

(1) Definitions. As used in this rule:

(a) "Disorderly activities" are those that harass, threaten or physically harm another person;

* * *

(2) Noisy or Disorderly Activity:

(a) No licensee or permittee will permit noisy or disorderly activities on the licensed premises or in areas the licensee controls that are adjacent to or outside the premises;

(b) Violation of this section is a Category III violation.

To prove these violations, the Commission must show that disorderly activities occurred, that the permittees had knowledge of the conditions that resulted in the disorderly activities, and that the permittees did not take reasonable steps to prevent the disorderly activities. *Corral Pastime* (OLCC Final Order, 89-V-165, May 1991); *The Old Hitch'en Post Restaurant & Lounge* (OLCC Final Order, 93-V-038, March 1994).

In this case, it is undisputed that “disorderly activities” occurred, both inside and out in front of the licensed premises,¹ on the date in issue. Several patrons were involved in a physical fight and at least one patron, Mr. Kemp, sustained serious injury in the melee. The evidence also establishes that Permittee Gruska and Permittee Burton had knowledge of the conditions that resulted in the disorderly activities. Indeed, both permittees were aware that a group of patrons were “trash talking” others in the bar area, and that these same patrons went over to the pool table area looking to start a fight. Both Permittees heard raised voices, and saw patrons bumping chests and pushing each other back and forth. Moments after Permittee Burton told these patrons to calm down, both permittees saw several patrons physically fighting, saw pool balls flying and saw someone strike Mr. Kemp in the head with a pool ball. They also saw Mr. Kemp sustain a further beating after he was pushed to the ground on the sidewalk in front of the premises.

Having established that disorderly activities occurred, and that both permittees had knowledge of the conditions, the remaining issue is whether Permittee Gruska and/or Permittee Burton permitted the disorderly activities inside and immediately outside the premises by failing to take reasonable steps to prevent or control the disorder.

The Commission has held that a violation of this nature occurs when a service permittee does nothing to intervene in a fight and does not call the police. *Red Garter Family Pizza* (OLCC Final Order, 88-V-057, January 1989). The Commission has also held that no violation occurred when, instead of going to the phone to call the police, the service permittee took steps to intervene directly in the altercation and physically separate the people fighting. *Reston Red’s Tavern* (OLCC Final Order, 89-V-059, August 1989); *see also The Old Hitch’en Post*, Final Order at 13.

In *Portsmouth Club* (OLCC Final Order, 93-V-034, October 1993), the Commission held that a permittee did not permit disorderly activities where he did not have reason to know that a fight was about to occur; he was inside the premises when the fight occurred outside; he reasonably believed that his co-bartender had control of the situation occurring outside; and he took steps to maintain order inside the premises by directing the remaining patrons to leave by another door. Conversely, in *Corral Pastime*, Final Order at 4-8, the Commission held that a licensee permitted disorderly activities where there was a known threat of physical harm and the licensee did not take steps to separate the two men involved or to remove either or both of them from the premises. The licensee was present and within earshot as the two patrons engaged in a heated verbal exchange for several minutes and it appeared their exchange might, and subsequently did, escalate into a physical fight. The Commission found that the licensee should have called the police for assistance or taken other steps to prevent the disorderly activities. In *Vickie Shafer* (OLCC Final Order, 88-V-133, May 1989), the Commission found a permittee did not take reasonable steps to control a patron’s disorderly activity where she did nothing but watch the patron as he angrily approached and threatened other patrons. The Commission noted that the permittee did not ask the disorderly patron to leave the premises or attempt to dissuade him from threatening the other patrons.

¹ Recently, in *The Crown Room* (OLCC Final Order, 11-V-071, October 2012), the Commission confirmed that the sidewalk in front of, or adjacent to, a licensed premises is an area within the licensee’s control.

Here, as noted above, before the physical fight erupted, Permittee Burton told the patrons who were posturing and bumping chests to calm down and break it up but, after that, he took no further steps to prevent the violence that ensued. He did not attempt to remove the problem patrons from the premises before the physical fight began. He did not call the police. When he saw Mr. Kemp being beaten on the sidewalk outside the premises, Permittee Burton backed off, fearing for his own safety. While the Commission does not expect a licensee or permittee to put himself or herself at risk by intervening in a physical altercation, it does expect the licensee or permittee to take steps to prevent or minimize disorder, such as immediately calling the police for assistance, and announcing the police are on the way. In this case, because Permittee Burton did not call the police, and did nothing else to maintain control of the premises where there was a threat of physical harm to persons, he permitted disorderly activities under the Commission's rules.

Permittee Gruska also did not take reasonable steps to prevent or minimize the disorderly activities occurring inside and immediately outside the premises. Again, while he was not required to intervene to break up the fighting or otherwise place himself in harm's way, the Commission expects that, if he is aware of a threat of disorderly activity, he take some action to prevent it. In this case, he could, and should, have called the police for assistance as soon as the fighting started inside the premises. After the initial fight inside the premises, and after seeing Mr. Kemp further beaten on the front sidewalk, Permittee Gruska did deescalate a verbal exchange between two other patrons, but this conduct did not cure his earlier failure to act. Also, under the circumstances, it was not reasonable for him to rely on a patron's comment that the police were on their way. Because Permittee Gruska did not take steps to control the premises, such as calling the police at the outset of the fighting and/or announcing to the combatants that the police were on the way, he permitted disorderly activities under the Commission's rules.

The Commission has established that both Permittee Burton and Permittee Gruska permitted disorderly activities on licensed premises or in areas the licensee controls that are adjacent to or outside the premises in violation of OAR 845-006-0347(2)(a).

B. Sanction

A violation of 845-006-0347 is a Category III violation. For service permit holders, the standard penalty for a first Category III violation is a 10 day suspension or a \$250 civil penalty. OAR 845-006-0500(7)(a)(D) and 7(b) and Exhibit 1 to OAR 845-006-0500(7).

In the Notices, the Commission proposed to suspend Permittee Gruska's and Permittee Burton's service permits for 12 days each, or in the alternative, assess each of them a civil penalty of \$300. The Commission proposed to aggravate the standard penalty for each of them for an additional two days suspension (or an additional \$50 penalty) because a patron sustained serious injuries in the incident. Pursuant to OAR 845-006-0500(7)(c), the Commission has the discretion to take into account the particular circumstances of each case, and to increase or decrease the sanction where there are aggravating or mitigating circumstances. The Commission may mitigate a sanction where there is "extraordinary cooperation in the violation investigation that shows the licensee or permittee accepts responsibility." *Id.* Among the reasons for which

the Commission may aggravate a sanction is where “the violation resulted in injury or death.”
Id.

As discussed above, Mr. Kemp was “savagely beaten” and was seriously injured during the fighting at Sewick’s. This condition justifies aggravation of the sanction. Though permittees cooperated in the violation investigation, the record fails to establish extraordinary cooperation. Consequently, for the violation of OAR 845-006-0347(2)(a), both Permittee Gruska and Permittee Burton are each subject to a 12 day service permit suspension, or a penalty of \$300.

FINAL ORDER

The Commission orders that for the violation of OAR 845-006-0347(2), the Commission suspend the Service Permit held by Gabriel Burton for 12 days, or assess a civil penalty of \$300.

It is further ordered that for the violation of OAR 845-006-0347(2), the Commission suspend the Service Permit held by Daniel Gruska for 12 days, or assess a civil penalty of \$300.

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 9th day of January 2013

/s/ Merle Lindsey

Merle Lindsey

Interim Executive Director

OREGON LIQUOR CONTROL COMMISSION

Mailed this 10th day of January 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.