

On February 27, 2015, the Commission considered the record of the hearing, the applicable law, the Proposed Order of the Administrative Law Judge, Licensee's Exceptions to the Proposed Order and the Administrative Law Judge's Response to Licensee's Exceptions. Based on this review and the preponderance of the evidence, the Commission enters the following:

EVIDENTIARY RULINGS

OLCC Exhibits A1 through A23 were admitted without objection. Licensee's Exhibits P2, P3 and P4 were also admitted without objection.

ISSUES

1. Whether, on November 22, 2013, Licensee's employees failed to verify the age of minor Alicia Delos before allowing her to buy or be served an alcoholic beverage when she reasonably appeared to be under 26 years of age in violation of OAR 845-006-0335(1)(a), (b) and (c).
2. If a violation occurred, what is the appropriate sanction and should Licensee be removed from the Responsible Vendor Program?

FINDINGS OF FACT

1. At all times pertinent to this action, Bower & Clancy's Inc., and Robert Bower, President/Director/Stockholder, dba Clancy's held a Full On-Premises Sales license at the premises located at 16066 NW 1st, Sherwood, Oregon. (Ex. A1.)
2. In January 2001, Licensee violated OAR 845-006-0335(1)(a) (b) (c), when an employee failed to verify the age of a person who reasonably appeared under the age of 26. In February 2001, Licensee was given credit for the purchase of age verification equipment in lieu of paying a fine or serving a suspension for the violation of OAR 845-006-0335(1). (Ex. A1.) That same month, the Commission granted Licensee's application for participation in the Responsible Vendor Program. By letter dated February 8, 2001, the Commission notified Licensee that, as an approved Responsible Vendor, Licensee qualified for reduced sanctions should an employee sell alcohol to a minor if all of the Responsible Vendor Program Standards were in place at the time of the sale. (Ex. A2.)
3. On the afternoon and evening of November 22, 2013, the Sherwood Police Department used Hillsboro Police Cadets to conduct a minor decoy operation at several establishments in Sherwood. Licensee's business was among those that Sherwood Police Officer Kristofer Asla and minor Alicia Delos checked for compliance. (Test. of Asla; Exs. A3 and A4.)
4. Minor Alicia Delos was born in 1996, and was 17 years old at the time of the minor decoy operation. On that date, minor Delos was dressed casually in jeans, a light jacket and scarf. She appeared her true age. (Test. of Delos; Exs. A5, A6 and A7.)

5. At approximately 6:00 p.m. on November 22, 2013, Officer Asla (who was dressed in plain clothes and working in an undercover capacity at the time) and minor Delos entered the licensed premises. The place was busy and seating was limited. The two sat at an open table in the back right corner of the establishment (table number three). After a minute or two, employee Devin Lunddom approached the table. He greeted the officer and minor Delos, wiped down the table and asked what they wanted to drink. Minor Delos ordered a “Bud Light.” Officer Asla asked for a glass of water and requested menus. (Test. of Delos; test. of Asla; Exs. A3 and A9.)

6. Employee Lunddom walked over to the bar area, where employee Briana Fergusson was entering orders into the computer. Employee Lunddom told employee Fergusson that table three needed a Bud Light and a water. Employee Lunddom then grabbed two menus, walked back to the table and handed the menus to the officer and minor Delos. (Exs. A9, A14, A15, A16, A17; test. of Delos.)

7. A short time later, employee Fergusson approached the table with a glass of beer in one hand and a glass of water in the other.¹ She asked, “Who ordered the beer?” Minor Delos responded, “Me,” and Officer Asla responded, “Her. The water is mine.” (Test. of Delos; test. of Asla; Ex. A3.) Employee Fergusson set the two drinks down in the middle of the table, with the beer closer to minor Delos and the water closer to Officer Asla. (Ex. A5.) Immediately after placing the drinks on the table, employee Fergusson stepped back from the table. She glanced towards the bar, pivoted away from the table, and took about two steps before Officer Asla called her back to the table. (Test. of Asla; Ex. A9; Ex. P4.)

8. When employee Fergusson stepped back to the table, Officer Asla identified himself as a Sherwood Police Officer. He explained that he was conducting an OLCC operation and that she had just served an alcoholic beverage to a minor decoy. He asked that she go get the premises manager. Employee Fergusson told the officer that when she brought out the beer, she thought, “I hope he (meaning employee Lunddom) had checked the identification.” (Test. of Asla; Ex. A3.)

9. Officer Asla then contacted Officer Hirsch, who was on duty, in uniform and overseeing the minor decoy operation that night. Officer Hirsch entered the licensed premises. He took a photograph of the two drink glasses on table three and interviewed employee Fergusson and the premises manager. Employee Fergusson was upset, and asserted that Officer Asla did not give her enough time to request identification from minor Delos before he broke cover and charged her with serving a minor. The premises manager was also upset at the situation, primarily because employee Lunddom (who also held a service permit) had not asked minor Delos for identification before he told employee Fergusson to bring the drinks to the table. The premises manager told Officers Hirsch and Asla that he was going to fire employee Lunddom because Lunddom “should have known better.” (Exs. A3 and A4; test. of Asla.)

¹ There was conflicting testimony at hearing regarding which drink Fergusson had in which hand, but the video shows that she had the glass of beer in her right hand and water glass in her left hand when she approached the table and set down the drinks. (Ex. A9.)

10. Officer Hirsch issued employee Fergusson a citation for sale of alcohol to a minor.² (Test. of Asla; Ex. A4.) A few days later, the premises' manager, Allen Bower, contacted the OLCC about the citation. On December 4, 2014, manager Bower met with Inspector Bainbridge at OLCC Headquarters. The two reviewed the video footage of employee Fergusson's service of alcohol to minor Delos. Manager Bower asserted that given the circumstances, Licensee should only be given a warning and not charged with a violation. After considering the video, the police reports and employee Fergusson's statement about the incident, Inspector Bainbridge nevertheless elected to proceed with a violation. (Test. of Bainbridge; Exs. A8, P2, P3 and P4.)

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CONCLUSIONS

1. Licensee's employees failed to verify the age of minor Alicia Delos before allowing her to buy or be served an alcoholic beverage when she reasonably appeared to be under 26 years of age in violation of OAR 845-006-0335(1)(a), (b) and (c).

2. For the violation of OAR 845-006-0335(1), the appropriate sanction is a 14 day license suspension or a civil penalty of \$2,310 in lieu of suspension. In addition, Licensee should be removed from the Responsible Vendor Program.

OPINION

1. Violation

The Commission alleges that on November 22, 2013, Licensee's employees, Devon Lunddom and Brianna Fergusson, failed to verify the age of minor Alicia Delos before allowing her to buy or be served an alcoholic beverage when she reasonably appeared to be under 26 years of age in violation of OAR 845-006-0335(1)(a)(b)(c).³ As the proponent of this contention, the

² The violation citation was later dismissed. (Test. of Bainbridge.)

³ OAR 835-006-0335(1) provides:

(1) Age Verification:

(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;

(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;

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).

ORS 471.130 provides, in pertinent part, as follows:

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 persons having reached 21 years of age, shall require such person to produce one of the following pieces of identification: * * *

The Commission enacted OAR 845-006-0335(1)(a) to implement the provisions of ORS 471.130. Pursuant to the rule, “reasonable doubt” exists if the person appears to be under the age of 26.

In this case, the record establishes that on the date in question, minor Delos appeared to be under 26 years of age. Therefore, for purposes of ORS 471.130 and OAR 845-006-0335(1), reasonable doubt existed as to whether she was at least 21 years old. The evidence further establishes that neither employee Lunddom nor employee Fergusson verified minor Delos’ age before employee Fergusson served the minor an alcoholic beverage, *i.e.*, before employee Fergusson set the beer down on the table in front of the minor, backed off and started to walk away.

Licensee argues that Officer Asla did not give employee Fergusson a reasonable opportunity to ask for minor Delos’ identification before he identified himself and informed her of the violation, but that contention is belied by the evidence. Though only a second or two elapsed between Fergusson’s service of alcohol to minor Delos and Officer Asla breaking cover, the fact remains that employee Fergusson failed to verify minor Delos’ age *before* she served the minor an alcoholic beverage. Employee Fergusson set the beer down on the table and was stepping away from the table when the officer called out to her and asked that she return. The violation of OAR 845-006-0335(1) has been proven. Pursuant to OAR 845-006-0362, Licensee bears responsibility for the violation.

2. Sanction

A violation of OAR 845-006-0335(1) is a Category III violation; the standard penalty for a first Category III violation is a 10 day suspension or a \$1,650 civil penalty. Although vendors in the Responsible Vendor Program are eligible for reduced sanctions, the Responsible Vendor rule, OAR 845-009-0135(7)(b), requires removal from the program under certain circumstances, including the sale to a minor or the failure to properly verify age “if aggravating circumstances (as referenced in subsection (3)(g)) are present.” Subsection (3)(g), in turn, provides that “[a]ggravating circumstances include, but are not limited to, an intentional sale to a minor;

(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.

multiple employees or patrons involved in the violation; the violation results in death or personal injury; the sale was made to a person under age 18 who appeared to be under the age of 21 when the sale was made.”

In this case, OLCC alleges that Licensee’s violation of OAR 845-006-0335(1) involves aggravating circumstances, thereby requiring Licensee’s removal from the Responsible Vendor Program. First, OLCC asserts that two employees were involved in the violation.⁴ Second, OLCC notes that Licensee has previously been allowed to purchase age verification equipment as an offset to a penalty for a previous fail to verify age violation and then did not use that equipment to prevent the current violation.⁵ OLCC further contends that because OAR 845-009-0135(7)(b) requires that Licensee be removed from the Responsible Vendor Program, Licensee is not eligible for a reduced sanction. OLCC proposes suspension of Licensee’s license for 14 days (10 days plus 2 days for each aggravating factor) or imposition of a civil penalty of \$2,310 (\$1,650 plus \$660 for the aggravating factors).⁶

Licensee, on the other hand, contends that an increase in the sanction is not warranted on the basis of more than one employee’s involvement in the violation because only one employee (Fergusson) committed a violation in this case. Licensee argues that although employee Lunddom took the minor’s drink order without asking to see her identification, he did not sell or serve her alcohol and therefore, he did not violate the liquor law. Licensee further contends that to the extent OAR 845-006-0335(1) is construed to encompass employees who do not sell or serve alcohol to the minor, the rule exceeds the scope of ORS 471.130 and is therefore invalid.

OLCC responds that employee Lunddom, who at the time had a permit to sell and serve alcoholic beverages, was “involved in the violation” because he took the minor’s drink order without verifying that she was at least 21 years old. OLCC further notes that under OAR 845-006-0335(1)(c) and Commission final order precedent, Lunddom had an obligation to verify the minor’s age at the time she ordered an alcoholic beverage.

It is undisputed that Lunddom was involved in the transaction because he took the minor’s drink order and then told employee Fergusson to deliver a Bud Light to the table where the minor and Officer Asla were seated. However, as Licensee notes, Lunddom did not *serve* the minor the alcoholic beverage. There is no evidence that he took payment for the beer. Given these circumstances, the question becomes whether Lunddom’s act of taking the minor’s drink order and passing the information on to the server constitutes involvement in the *sale* of alcoholic beverages to a minor within the purview of ORS 471.130(1) and OAR 845-006-0335(1). If Lunddom was involved in the sale, then he was involved in the violation, and

⁴ Both OAR 845-009-0135(3)(g) and OAR 845-009-500(7)(c) identify more than one employee’s involvement in the violation as an aggravating circumstance.

⁵ OAR 845-006-0500(7)(c) identifies “failure to use age verification equipment which was purchased as an offset to a previous penalty” as an aggravating circumstance.

⁶ Based on case precedent, the Commission will add two days (or \$330) to the penalty for each proven aggravating circumstance and will deduct two days for each proven mitigating circumstance. *Parrilla Grill* (OLCC Final Order, 01-V-082, August 2002).

aggravation of the sanction is warranted on this basis.

Neither Commission Staff nor Licensee have cited to any Commission case directly on point, and there are few, if any, cases that discuss what constitutes a sale under the liquor law and what constitutes involvement in the violation for purposes of OAR 845-009-0135(3)(g) and/or OAR 845-006-500(7)(c).

In *Giovanni's Mountain Pizza* (OLCC Final Order, 03-V-013 & 018, February 2004), the Commission noted that “[t]he essential components of a sale are an agreement to sell/purchase coupled with the exchange of valuable consideration.” Final Order at 6-7. There, the Commission found that where an employee took an order for beer from two minors and then immediately accepted payment from the minors, the employee violated ORS 471.360(1) even though she was not the one who served the beers to the minors.

In *Handy Food Mart* (OLCC Final Order, 98-V-029, April 1999), a licensee argued that OAR 845-006-0335(1)(a) did not apply to grocery store clerks who were not licensees. The Commission held that the rule applied to all sellers of alcoholic beverages, not just to licensees and permittees. In rejecting the licensee’s challenge to the validity of OAR 845-006-0335(1), the Commission held as follows:

Because the original intent of the statute on which the rule is based [ORS 471.130] was to prevent the sale of alcohol to minors, *the Commission is persuaded that all sellers of alcohol are required to verify the age of a young-looking patron before selling alcohol to him or her. When a licensee fails to ensure that his or her employees abide by the rule, the licensee has violated the rule.*

(Final Order at 18, emphasis added.)

In this case, by taking the minor’s drink order and directing the server to deliver the beer to the table, employee Lunddom was involved in the sale. While he did not take money from the minor or ring the sale into the register, he was nevertheless involved in the sale because his acceptance of her alcoholic beverage order constituted an implicit agreement to sell, an essential component of a sale. Both ORS 471.130(1) and OAR 845-006-0335(1) obligate all licensees and permittees of the OLCC to verify the age of a young looking person before selling or serving alcohol to that person. Because employee Lunddom failed to verify minor Delos’ age before he told employee Fergusson to deliver an alcoholic beverage to her, he was in fact “involved in the violation” for purposes of OAR 845-009-0135(3)(g) and OAR 845-009-500(7)(c).⁷

Because there were multiple employees involved in the violation for failing to verify age,

⁷ As Licensee asserts, the violation of OAR 845-006-0335(1) in this case occurred upon employee Fergusson’s service of alcohol to minor Delos. While employee Lunddom was “involved in the violation” (for the reasons explained above) and while he had an obligation to verify minor Delos’ age when she ordered an alcoholic beverage, his actions alone do not amount to a violation. In other words, had employee Fergusson asked to check the minor’s identification and refused to serve her an alcoholic beverage, the Commission would not have charged Licensee with a violation of the rule.

Licensee must be removed from the Responsible Vendor Program. OAR 845-009-0135(7)(b).

In addition, the record establishes that in 2001, Licensee was given credit for the purchase of age verification equipment in lieu of paying a fine or serving a suspension for the violation of OAR 845-006-0335(1). As Commission Staff notes, Licensee's employees' failure to use that age verification equipment to prevent the violation at issue in this case constitutes an aggravating factor under OAR 845-006-0500(7)(c).

Accordingly, Commission Staff's proposed penalty calculation is correct. For the violation of OAR 845-006-0335(1), Licensee is subject to a 14 day suspension (10 days plus aggravation of 4 days) or a civil penalty of \$2,310 (\$1,650 + \$660) in lieu of the 14 day suspension.

FINAL ORDER

The Commission orders that for the violation of OAR 845-006-0335(1) (failure to verify age), the Full On-Premises Sales license held by Bower & Clancy, Inc., Robert Bower, President/Director/Stockholder, dba Clancy's, 16066 NW 1st, Sherwood, Oregon, be **SUSPENDED** for 14 days, or that Licensee be **FINED** \$2,310 in lieu of suspension.

It is further ordered that Licensee is removed from the Responsible Vendor Program.

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 March, 2015

/s/ Steven Marks
Steven Marks
Executive Director
OREGON LIQUOR CONTROL COMMISSION

Mailed this 10th day of March, 2015

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.