

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

In the Matter of the Service Permit)	FINAL FINDINGS OF FACT
Held by:)	CONCLUSIONS OF LAW
)	AND ORDER
)	
NICOLE DEGROOT)	OLCC-14-V-066
202 SE 188th, APT. 12)	
PORTLAND, OR 97230)	

HISTORY OF THE CASE

On June 25, 2014, the Oregon Liquor Control Commission (OLCC or Commission) issued a Notice of Proposed Service Permit Suspension (Notice) to Nicole DeGroot (Permittee), service permit no. 373555. The Notice charged Permittee with a violation of OAR 845-006-0345(1) (under the influence on duty or, alternatively, drinking on duty), and proposed to suspend Permittee’s permit for 30 days. Permittee timely requested a hearing.

The Commission referred Permittee’s hearing request to the Office of Administrative Hearings (OAH) on September 12, 2014. The OAH assigned the matter to Senior Administrative Law Judge (ALJ) Alison Greene Webster.

ALJ Webster presided over the hearing in this matter in Tualatin, Oregon, on January 6, 2015. Permittee appeared without counsel. Jamie Dickinson presented the case for the OLCC.

The following witnesses testified at the hearing on behalf of OLCC: Gresham Police Officer Adam Wright, OLCC Inspector Neel O’Donnell, and Memory McDaniel. Permittee and Lesa Fleming testified on Permittee’s behalf.

The record closed on January 6, 2015, at the close of the hearing.

The Administrative Law Judge considered the record of the hearing and the applicable law and issued a Proposed Order mailed January 15, 2015.

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 A2 through A4 were offered and admitted into the record without objection. OLCC did not offer Exhibit A1.

ISSUES

1. Whether, on the night of April 12, 2014, Permittee DeGroot was under the influence of intoxicants while on duty at Lydia's, a premises licensed by OLCC, in violation of OAR 845-006-0345(1). Alternatively, whether, on that same work shift, Permittee DeGroot drank alcoholic beverages while on duty at Lydia's, in violation of OAR 845-006-0345(1).
2. If Permittee violated OAR 845-006-0345(1), what is the appropriate sanction?

CREDIBILITY DETERMINATION

The record contains conflicting information concerning Permittee's consumption of alcoholic beverages at Lydia's on the night of April 12, 2014 and whether she exhibited signs and symptoms of intoxication while on duty. The recollection of each witness is different and the testimony of Permittee and her coworker, Lesa Fleming, cannot be reconciled with that of Officer Wright and patron McDaniel. Because Permittee denies consuming alcoholic beverages and/or being under the influence of intoxicants during her shift, a credibility assessment is necessary.

At hearing, Officer Wright testified that, in his opinion, Permittee was under the influence of intoxicants when he contacted her at Lydia's at approximately 9:50 p.m. on April 12. Officer Wright explained that while talking to Permittee inside the premises, he noted she appeared wobbly on her feet and smelled of alcoholic beverages. Permittee was upset, animated and angry as she described to the officer what happened between her and patron McDaniel. Officer Wright testified that when he and Permittee stepped outside the premises, he detected the odor of alcoholic beverages on Permittee's breath as she spoke. He noted that Permittee had watery and bloodshot eyes, slow and deliberate speech and slow movements.

Patron McDaniel testified that she saw Permittee drink two shots of alcoholic beverages at Lydia's that night, which caused Ms. McDaniel to believe, at least initially, that Permittee was a patron rather than a server on duty. Patron McDaniel also testified that Permittee appeared "tipsy," as if she had had a few drinks.

Permittee, on the other hand, testified at hearing that she consumed only one alcoholic beverage, a shot of vodka, at approximately 9:45 p.m., after declaring herself off duty for the night. Permittee also testified that she had not consumed any alcoholic beverages for several days prior to drinking that single shot of vodka. She further testified that she drank the vodka shot only two or three minutes before Officer Wright entered the premises and contacted her. Bartender Lesa Fleming testified that she served Permittee a shot of vodka after Permittee declared that she was done working for the night. Bartender Fleming denied serving any alcoholic beverages to Permittee while Permittee was on duty. Bartender Fleming did not recall what time she served the vodka shot to Permittee, although Fleming knew it was after she called 9-1-1 to report the alleged assault. Bartender Fleming had no knowledge or recollection of Officer Wright responding to Lydia's at 9:50 p.m. and making contact with Permittee inside the bar.

In *Lewis and Clark College v. Bureau of Labor*, 43 Or App 245 (1979) *rev den* 288 Or 667 (1980), Judge Richardson addressed considerations that may, in a given case, bear on the weight given to a witness's statements. He wrote, in part:

[C]redibility (more properly weight) is determinable from a number of factors other than witness demeanor. The credibility, i.e., weight, that attaches to testimony can be determined in terms of the inherent probability, or improbability of the testimony, the possible internal inconsistencies, the fact it is or is not corroborated, that it is contradicted by other testimony or evidence and finally that human experience demonstrates it is logically incredible. (Richardson, J., concurring in part, dissenting in part).

Id. at 256.

In *Tew v. DMV*, 179 Or App 443 (2002), citing to the above passage from *Lewis and Clark College*, the court cited to several factors that a fact finder may rely upon in assessing the credibility and reliability of various witnesses. As relevant to this matter, the court in *Tew* noted that, in assessing credibility, a fact finder may take note that police officers, as trained observers with the benefit of written reports completed shortly after the incident to refresh their memories of the events in question, are often reliable witnesses. 179 Or App at 449. The court also held that it is appropriate to take into account the well-known fact that alcohol consumption can affect a person's ability to perceive and remember events. *Id.* at 450.

Here, and for the reasons set out below, where the evidence is in dispute, I give the testimony of Permittee and bartender Fleming less weight than that of Officer Wright and patron McDaniel. Officer Wright is a trained observer who is experienced in investigating and evaluating persons who are under the influence of intoxicants. Although he responded to the premises to interview Permittee as a victim of an alleged assault, he noted signs and symptoms of intoxication on Permittee leading him to conclude that Permittee was under the influence of alcoholic beverages. Permittee's intoxication level was not the focus of his investigation, but rather a condition he noted and deemed worthy of mention in his written report.

The testimony of patron McDaniel, *i.e.*, that Permittee consumed two shots while on duty and appeared tipsy, corroborates Officer Wright's testimony regarding Permittee's condition. To accept Permittee's version of events, *i.e.*, that she drank only a single shot of vodka moments before Officer Wright's arrival, one must find that Officer Wright fabricated information regarding his contact with Permittee and wrote a false police report. Furthermore, it strains credulity to suggest that the signs of intoxication that Officer Wright saw on Permittee when he contacted her at 9:50 p.m. resulted from her consumption of a single shot of vodka less than five minutes earlier. The more probable scenario is that Permittee consumed intoxicants in the hour or hours prior to her argument with patron McDaniel. Consequently, in making findings about Permittee's level of intoxication while on duty on the night in issue, I rely primarily on the testimony and written report of Officer Wright.

FINDINGS OF FACT

1. At all times pertinent to this action, Permittee DeGroot was employed as a server at Lydia's Restaurant, a premises in Gresham, Oregon, licensed by the OLCC. Also at all times pertinent to this action, Permittee held a valid OLCC service permit (permit no. 373555). (Test. of DeGroot; Ex. A2.)

2. On the evening of April 12, 2014, Permittee began her shift at Lydia's between 8:30 p.m. and 9:00 p.m. She joined employee Lesa Fleming, who began her bartending shift at Lydia's at approximately 6:00 p.m. that evening. (Test. of DeGroot; test. of Fleming.)

3. Sometime after 9:00 p.m., Memory McDaniel and her boyfriend entered Lydia's to play pool. They ordered alcoholic beverages at the bar from bartender Fleming and went into the pool room. At some point between 9:30 p.m. and 9:45 p.m., Permittee approached Ms. McDaniel and asked if she wanted a drink. Ms. McDaniel did not realize that Permittee was a server on duty asking for her order. Ms. McDaniel had seen Permittee earlier standing at the bar and consuming what Ms. McDaniel assumed to be an alcoholic beverage. Ms. McDaniel thought that Permittee was a patron offering to buy her a drink. When Permittee returned a short time later with a shot of distilled spirits and advised that the drink cost \$7.50, an argument ensued between Permittee, Ms. McDaniel and Ms. McDaniel's boyfriend. Ms. McDaniel and her boyfriend refused to pay for the drink and asserted that Permittee should have done so. The argument culminated with Ms. McDaniel's hand coming into contact with Permittee's face. Immediately thereafter, Ms. McDaniel and her boyfriend left the premises. (Test. of McDaniel; test. of DeGroot; Exs. A3 and A4.)

4. As soon as Ms. McDaniel and her boyfriend left Lydia's (at approximately 9:45 p.m.), bartender Fleming called 9-1-1 to report that a patron had just slapped a server in the face and was now walking away eastbound on E. Burnside. Officers Brooder and Wright were nearby and responded to the call. Officer Brooder located Ms. McDaniel a few blocks from the premises and Officer Wright responded to Lydia's. Officer Wright arrived at Lydia's at approximately 9:50 p.m. and contacted Permittee inside the premises. (Ex. A4; test. of Wright.)

5. Officer Wright asked Permittee about the incident. As they were talking in the bar area, Officer Wright noted that Permittee was not visibly injured, but was upset, animated and angry that a patron had slapped her. Officer Wright also noted that Permittee appeared wobbly and that she smelled of alcoholic beverages. When Officer Wright and Permittee went outside and walked to the officer's patrol vehicle to get a victim's rights pamphlet for Permittee, Officer Wright observed Permittee exhibiting additional signs of intoxication. The officer detected an odor of alcoholic beverages on Permittee's breath, which became stronger as she spoke. Permittee also had watery and bloodshot eyes, slow and deliberate speech and slow movements. (Test. of Wright; Ex. A4.)

6. At the time of his contact with Permittee, Officer Wright had been a police officer with the City of Gresham for more than four years. He has training and experience in recognizing intoxication and impairment, including completing a course in advanced roadside impaired driving enforcement (ARIDE). He has participated in more than 100 driving under the

influence (DUII) investigations. In Officer Wright's opinion, Permittee was under the influence of intoxicants when he contacted her at Lydia's on the night of April 12, 2014. Had she been operating a motor vehicle at the time, Officer Wright would have arrested her for the offense of DUII. (Test. of Wright.)

7. After interviewing both Permittee and patron McDaniel about the incident, Officer Wright issued patron McDaniel a citation for Harassment. In his written report about the incident, Officer Wright described the signs of intoxication he had observed on Permittee. He also wrote that Permittee "appeared to be under the influence of an alcoholic beverage." (Ex. A4.)

8. OLCC Inspector Neel O'Donnell received a copy of the police report regarding the incident at Lydia's on April 12, 2014 and patron McDaniel's citation for Harassment. The officer's report also indicated that patron McDaniel was only 20 years old and not in possession of any false identification at the time. In investigating whether Lydia's employees had violated the liquor laws by permitting a minor in an area prohibited to minors, the inspector also interviewed Officer Wright, patron McDaniel and Permittee about Officer Wright's determination that Permittee appeared to be under the influence of an alcoholic beverage. Officer Wright provided the inspector with additional details about Permittee's condition and appearance on the night in issue. The officer advised the inspector that Permittee swayed and could not walk straight. Patron McDaniel told the inspector that she saw Permittee drinking shots at the bar and that Permittee appeared "loaded." (Ex. A3 at 5.) When the inspector later confronted Permittee with this information, she denied consuming any alcoholic beverages while working. (*Id.*; test. of O'Donnell.)

CONCLUSIONS

1. Permittee DeGroot was under the influence of intoxicants while on duty at Lydia's on the night of April 12, 2014, in violation of OAR 845-006-0345(1). The alternate violation for drinking on duty should be dismissed.

2. The appropriate sanction for Permittee's violation of OAR 845-006-0345(1) is a 30-day suspension of Permittee's service permit.

OPINION

1. Violation

As set out above, Commission staff alleges that on the night of April 12, 2014, Permittee DeGroot was under the influence of intoxicants while on duty at Lydia's in violation of OAR 845-006-0345(1). As an alternative violation, Commission staff asserts that Permittee drank alcoholic beverages while on duty in violation of OAR 845-006-0345(1).

OAR 845-006-0345 addresses prohibited conduct. Pursuant to subsection (1) of the rule, "No licensee or permittee will drink or be under the influence of intoxicants while on duty." The rule defines "on duty" as "from the beginning of a work shift that involves the sale or

service of alcoholic beverages, checking identification or controlling conduct on the premises, to the end of the shift including coffee and meal breaks.” OAR 845-006-0345(1)(a).

The Commission has made a distinction between “drinking on duty” and being “under the influence of intoxicants on duty” for purposes of sanctioning a licensee for violating OAR 845-006-0345(1)(a). The Commission has designated “drinking on duty” as a Category III violation, whereas it has designated being “under the influence of intoxicants while on duty” as a more serious Category II violation.¹ OAR 845-006-0500(7), Exhibit 1.

By prior Final Order precedent, the Commission has held that a person is “under the influence of intoxicating liquor” when that person:

displays not only all well-known and easily-recognized conditions and degrees of intoxication, but any abnormal mental or physical condition which is the result of indulging in any degree in intoxicating liquors, which tends to deprive one of that clearness of intellect and control of himself which he would otherwise possess.

Bill's Place (OLCC, Final Order, 88-V-001, July 1988), citing *Black's Law Dictionary* (Fifth ed. 1979). Under the influence of intoxicants is a different, and lesser, standard than visible intoxication. *Undefeated Sports Bar* (OLCC Final Order, 14-V-013, August 2014).

In *Eagle's Nest* (OLCC Final Order, 85-V-052, February 1986), the Commission found that a person was under the influence of intoxicating liquor when he was disoriented, unsteady on his feet, spoke with a slur and smelled of alcoholic beverages. In *Bill's Place*, the Commission held that a licensee was in violation of the pertinent rule when he exhibited slurred speech and was argumentative and belligerent with an OLCC inspector. Final Order at 6. In *Voodoo Lounge Bar & Grill* (OLCC Final Order, 06-V-041, February 2007), the Commission determined that a permittee was under the influence of intoxicants on duty when she had the odor of alcoholic beverages on her breath and person, slurred speech, poor enunciation and swaying balance. And, in *Undefeated Sports Bar*, the Commission found that a licensee who had the odor of alcoholic beverages on his breath, bloodshot and glassy eyes, slurred speech, slow movements and unsteady balance was under the influence of intoxicants in violation of OAR 845-006-0345(1). Final Order at 6.

In this case, a preponderance of the evidence establishes that when Officer Wright contacted Permittee at the licensed premises at approximately 9:50 p.m. on the night in issue, she was upset, animated and angry as a result of the altercation with patron McDaniel. Permittee was wobbly on her feet and smelled of alcoholic beverages. Officer Wright determined, after speaking with Permittee outside the premises, that the odor of alcoholic beverages was coming from Permittee's breath, rather than from a drink spilled on her clothing. Permittee also had watery and bloodshot eyes, slow and deliberate speech and slow movements. This evidence is sufficient to prove that Permittee was under the influence of intoxicants for purposes of OAR 845-006-0345(1)(a).

¹ Pursuant to OAR 845-006-0500(7)(a)(B) and (D), Category II violations “create an *immediate threat* to public health or safety,” whereas Category III violations “create a *potential threat* to public health or safety.” (Emphasis added.)

Permittee's contention that she was not under the influence of intoxicants while on duty, *i.e.*, while she was serving alcoholic beverages, is unpersuasive. Indeed, assuming, for the sake of argument only, that Permittee did consume a shot of distilled spirits in the less than five-minute period between patron McDaniel leaving the premises and Officer Wright's arrival, a preponderance of the evidence indicates that Permittee was intoxicated before that point, specifically, when she served patron McDaniel the \$7.50 shot of distilled spirits between 9:30 and 9:45 p.m. All of the following events occurred in quick succession and within an approximate fifteen minute period: Permittee's service of the shot to McDaniel, the argument about payment, the alleged act constituting harassment, the call to 9-1-1, and the officer's contact with Permittee at Lydia's. Based on Permittee's appearance and demeanor at the time of her contact with the officer, it is reasonable to conclude she was under the influence 15 minutes earlier, when she was on duty, serving and/or selling alcoholic beverages to patrons of Lydia's. The testimony of patron McDaniel, *i.e.*, that Permittee appeared "tipsy" also supports the determination that Permittee was intoxicated on duty.²

Consequently, the record demonstrates that, more likely than not, Permittee was under the influence of intoxicants while on duty at Lydia's on the night of April 12, 2014. The violation of OAR 845-006-0345(1)(a) has been proven.

2. Sanction

As discussed above, a violation of OAR 845-006-0345(1)(a) (under the influence of intoxicants while on duty) is a Category II violation. The standard penalty for a first Category II violation is a 30-day license or permit suspension. Although the Commission has the discretion to take into account the particular circumstances of each case and increase or decrease the sanction where there are aggravating or mitigating circumstances, the Commission has not alleged any such circumstances in this case.

The Commission proposes to suspend Permittee's permit for 30 days for this first violation of OAR 845-006-0345(1). Permittee did not argue for mitigation, and a review of the record shows no aggravating or mitigating circumstances pertaining to Permittee. Therefore, the standard penalty of a 30-day suspension is appropriate.

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² In *Voodoo Lounge*, the Commission noted that whether a person is under the influence of alcohol is a matter of common knowledge about which a lay witness is competent to render an opinion. Final Order at 8 (citing *State v. Bybee*, 131 Or App 492 (1994) and *State v. Rand*, 166 Or 396 (1941)).

FINAL ORDER

The Commission orders that for the violation of OAR 845-006-0345(1)(a) (under the influence of intoxicants while on duty) the Commission suspend the service permit of Nicole DeGroot (permit no. 373555) for 30 days.

Because it has been found that Permittee was under the influence of intoxicants while on duty, in violation of OAR 845-006-0345(1)(a), the alternate alleged violation for drinking on duty shall be dismissed.

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

Dated this 9th day of February, 2015

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

Mailed this 13th day of February, 2015

THIS ORDER IS EFFECTIVE ON THE DATE MAILED. The suspension will begin at 7:00 AM on February 28, 2015 and end at 7:00 AM on March 30, 2015.

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.