

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

IN THE MATTER OF) FINAL FINDING OF FACT
) CONCLUSION OF LAW
Jasper’s Food Management, Inc.; Bruce Davis,) AND ORDER
President/Director; Mike Chamberlin, Vice)
President; William Service, Director; Cordy) OLCC-13-V-058
Jensen, Director; dba JASPER’S , 5608 Main)
Street, Springfield, OR 97478)
)
)

HISTORY OF THE CASE

On June 12, 2013, the Oregon Liquor Control Commission (OLCC or Commission) issued a Notice of Proposed License Suspension/Civil Penalty and Removal From the Responsible Vendor Program (Notice) to Jasper’s Food Management, Inc.; Bruce Davis, President/Director; Mike Chamberlin, Vice President; William Service, Director; Cordy Jensen, Director (collectively Licensee); dba Jasper’s, 5608 Main Street, Springfield, OR 97478. The OLCC alleged that Licensee’s employee failed to verify the age of minor decoy Amber Miller before allowing her to buy an alcoholic beverage, and that Licensee should be removed from the Responsible Vendor Program (RVP).

Licensee made a timely request for hearing. The Commission referred the request to the Office of Administrative Hearings on July 10, 2013. The OAH initially assigned the case to Senior Administrative Law Judge (ALJ) Alison Greene Webster. The case was reassigned to ALJ Rick Barber before the hearing.

A contested case hearing was held on November 19, 2013 in Eugene, Oregon, before ALJ Barber. Licensee was represented by Attorney Michael Mills. Michael Chamberlin was Licensee’s representative at hearing. OLCC was represented by Case Presenter Annabelle Henry. Witnesses for OLCC were: minor decoy Amber Miller and OLCC Inspector Mike Fetterley. The sole witness for Licensee was Susan Herzog, Licensee’s Director of Operations.

The record was held open for written closing arguments. The record closed when the last brief was received on December 31, 2013.

The Administrative Law Judge considered the record of the hearing and the applicable law and issued a Proposed Order mailed February 4, 2014.

Licensee filed Exceptions to the Proposed Order on February 18, 2014. The Administrative Law Judge responded to Licensee’s Exceptions on March 5, 2014.

On April 24, 2014, 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:

ISSUES

1. Whether Licensee's employee failed to verify the age of minor decoy Amber Miller, who reasonably appeared to be under the age of 26, violating OAR 845-006-0335(1)(a)(b)(c).
2. Whether Licensee should be removed from the Responsible Vendor Program pursuant to OAR 845-009-0135(7).
3. If the above violations are established, what is the proper sanction?

EVIDENTIARY RULING

Exhibits A1 through A10 were admitted into evidence without objection. Licensee's Exhibits P1 through P13 were admitted into evidence with the following exceptions and objections. OLCC staff objected to Exhibits P1 through P6, P9, P11 and P13. P1 was admitted with redactions. Pages 9 and 10 of Exhibit P2 were withdrawn by Licensee; the rest of that exhibit was admitted. All other objections were overruled.

FINDINGS OF FACT

1. On August 21, 2006, the Commission approved Licensee's application for the Responsible Vendor Program and sent the following letter to Licensee:

Congratulations! Your application for Responsible Vendor status was approved on August 21, 2006. I have enclosed your Responsible Vendor certificate for your records. Posting the certificate at your business is a visible reminder to your staff and customers that you are committed to preventing alcohol sales to minors.

As an approved Responsible Vendor, you qualify for reduced sanctions should your employee sell alcohol to a minor if **all** of the Responsible Vendor Program standards are in place at the time of the sale. A licensee who personally sells alcohol may also qualify for a reduced sanction, if the sale does not involve significant aggravating circumstances.

(Ex. A2; emphasis in original).

2. On June 19, 2009, one of Licensee's employees in the Springfield store failed to verify the age of a minor to whom she sold an alcoholic beverage. (Ex. A3). In lieu of paying the penalty for the violation in that case, Licensee requested to resolve the issue by purchasing

age verification equipment (AVE). The form Licensee used to request the AVE option stated in part:

Age Verification Option: If this Violation was for failure to verify the age of a minor purchasing alcohol and you have not previously used this option, the Commission allows you to purchase Age Verification Equipment in lieu of or as mitigation toward the sanction for this violation. The Equipment must be used at every point of sale used to sell alcoholic beverages.

(Ex. A4). Another necessary form that Licensee's representative filled out included this statement with the signature line where Licensee's representative signed:

I have not previously used this option and understand that the equipment must be installed at every point of sale in my premises used to sell alcoholic beverages.

(Ex. A5). On that same form, where the Commission accepted the purchase of AVE as satisfaction of the entire sanction, the form stated:

This notice confirms your purchase of age verification equipment to resolve all or part of an OLCC Violation Notice for failure to verify the age of a minor. Your entire or partial sanction for this violation is the purchase and use of age verification equipment. Under OAR 845-009-0140, this equipment must be used at every point of sale in the premises where alcohol is sold and be in use no later than 30 days from the date the OLCC Notice Violation was issued. If the equipment is not in use by day 30, your license may be suspended. You are eligible for this resolution only one time.

(*Id.*).

3. On July 30, 2009, the Commission sent a letter to Licensee, summarizing the approval of the AVE purchase. The letter stated in part:

Our records indicate that you have purchased or intend to purchase age verification equipment from the document you signed on July 16, 2009. In accordance with OAR 845-009-0140, this equipment must be used at every point of sale in the premises where alcohol is sold and be in use no later than 30 days from the date the OLCC Violation Notice was issued.

(Ex. A6).

4. On May 9, 2013, OLCC Inspector Michael Fetterley sent minor decoy Amber Miller into Licensee's Springfield store to purchase an alcoholic beverage. Miller, born July 10, 1994, was 18 years old at the time of the decoy operation and looked younger than 26 years of age. (Ex. A9 at 3; Ex. A7; Test. of Fetterley). Miller requested a "Bud Light" from Licensee's employee. The employee asked for identification, and Miller presented her Oregon driver license to the employee. The employee reviewed the license, which had the red border and the

information that Miller would not be 21 years old until 2015, then handed the license back to Miller. The employee did not use the AVE equipment to verify Miller's age. The employee asked if Miller wanted "regular" or "platinum" Bud Light, and Miller told her she wanted platinum. The employee handed her the beer. Miller paid for the beer and left the premises. (Ex. A8; Test. of Miller).

5. On May 25, 2013, Fetterley presented a Notice of Violation to Licensee. (Ex. A9). On June 12, 2013, the Commission issued its Notice in this case, assessing a suspension/civil penalty for failing to verify the age of Miller before selling her an alcoholic beverage and removing Licensee from the Responsible Vendor Program. The Notice stated in part:

OAR 845-009-0135(7)(b) requires that a licensee be removed from the Responsible Vendor Program if aggravating circumstances were involved at the time of a violation for failure to verify the age of a minor. It is an aggravating circumstance that Licensee has previously been allowed to purchase age verification equipment as an offset to a penalty for a previous failure to verify the age of a minor and the age verification equipment was not used to prevent the current violation.

Because Licensee is required to be removed from the Responsible Vendor Program, Licensee is not eligible for a reduced sanction based on Category III(a).

(Notice at 1-2).

6. It is Commission policy, in cases where AVE has been purchased in lieu of other penalty after sale to a minor, to consider the failure to use AVE on a subsequent violation as an aggravating factor in the second case. (Test. of Fetterley).

CONCLUSIONS OF LAW

1. Licensee's employee failed to verify the age of minor decoy Amber Miller, who reasonably appeared to be under the age of 26, violating OAR 845-006-0335(1)(a)(b)(c).

2. Licensee should be removed from the Responsible Vendor Program pursuant to OAR 845-009-0135.

3. The appropriate sanction is a 12 day suspension or a civil penalty of \$1,980.

OPINION

Commission staff contends that Licensee's employee failed to verify a minor decoy's age before selling or serving her an alcoholic beverage in violation of OAR 845-006-0335(1)(a), (b) and (c). Commission staff seeks to remove Licensee from the Responsible Vendor Program (RVP), and to impose a sanction of license suspension or civil penalty. As the proponent of these assertions Commission staff 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).

The underlying facts of this case are not disputed. Licensee concedes that its employee failed, on May 9, 2013, to verify the age of decoy Amber Miller before selling her an alcoholic beverage. Licensee does not contest that Miller was under the age of 21 and reasonably appeared to be under 26 years of age. Finally, Licensee concedes that it had age verification equipment (AVE) on the premises and that the employee failed to use it in the sale to Miller. Consequently, Commission staff has proven that Licensee's employee failed to verify Miller's age, in violation of OAR 845-006-0335(1)(a)(b)(c).

At hearing, Licensee's primary contention was that it should not be removed from the RVP because of its employee's failure to use the AVE during the sale to Miller. Licensee contends that the Commission's decision to remove Licensee from the Program was unfair and unlawful and should be reversed. Conversely, Commission staff contends that aggravating circumstances relating to the sale of the alcoholic beverage to Miller require Licensee's removal from the RVP.

Commission Staff's Contentions. Removal from the RVP must be based upon OAR 845-009-0135, which states in part:

Responsible Vendor Program

(1) Purpose. ORS 471.344 requires the Commission to establish a Responsible Vendor Program (program) for retail licensees, including the positive measures a licensee must take to participate in the program. The purpose of this rule is to set standards and procedures for program participation.

* * * * *

(3) Program Standards. To qualify as a Responsible Vendor, a licensee must:

(a) Train each employee in alcohol sales. For training purposes, an employee is any person whose responsibilities include the sale or service of alcohol. Except for an on-premises employee who has a valid service permit, each employee must:

* * * * *

(b) Accept only identification allowed in ORS 471.130.

(c) In an area visible to employees, post the house policies on alcohol sales and checking identification. The licensee must have each employee read and sign the house policies which must include at a minimum:

* * * * *

(d) Permanently post signs reminding patrons and employees of the legal requirements for selling alcohol. The signs must include:

* * * * *

(f) Have no prior Category I or II violation within the last five years for the licensee personally.

(g) Have no aggravating circumstances surrounding a violation for failing to verify the age of a minor or selling alcohol to a minor. For purposes of this rule, aggravating circumstances do not include licensee's personal involvement in the violation. Aggravating circumstances include, but are not limited to, an intentional sale to a minor; 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.

* * * * *

(6) Sanctions. If the licensee's employee sells to a minor and the licensee is a certified Responsible Vendor who has all program standards in place, the Commission will not cancel the license of the licensee, or deny issuance of a license to the person who holds the retail license. The licensee will be eligible for reduced sanctions based on OAR 845-006-0500, Suspensions and Civil Penalties.

(7) Licensee Removal from Program and Reinstatement. The licensee is removed from the program in the following circumstances:

(a) For a sale to a minor or failure to properly verify identification by a licensee or employee, if the licensee did not have all of the Responsible Vendor standards, except for the posting requirements in subsection (3)(c) and (3)(d), in place at the time of the violation. The licensee may reapply for the program one year after the violation is ratified.

(b) For a sale to a minor or failure to properly verify identification by a licensee or employee, if aggravating circumstances (as referenced in subsection (3)(g)) are present. The licensee may reapply for the program in one year.

(c) For a second sale to a minor or failure to properly verify identification by a licensee personally within a two year period. The licensee may reapply for the program in one year.

(d) For a Category I or II violation by the licensee personally. The licensee may not reapply for the program. For a Category I or II violation by an employee, the licensee is removed from the program, but may reapply for the program in one year.

(Emphasis added). Subsection (7) is the portion of the rule addressing removal from the RVP. The emphasized portion of the rule indicates that the sale of an alcoholic beverage to a minor or a failure to verify identification can require removal from the RVP if “aggravating circumstances (as referenced in subsection (3)(g)) are present.”

The essence of the Commission staff’s contention is that there were aggravating circumstances present because Licensee had AVE equipment installed, but the employee failed to use the AVE when selling the beer to Miller.

Commission Staff’s Arguments. Inspector Fetterley testified that a failure to use the AVE—in the specific circumstance where it was purchased in lieu of a previous penalty and not used to prevent a second sale to a minor—traditionally has been considered an aggravating circumstance under Commission policy. Commission staff also contends that Licensee’s failure to use the AVE equipment on May 9, 2013 was an aggravating factor under OAR 845-009-0135(7)(c), quoted above.

Licensee’s Arguments. Licensee contends that the failure to use the AVE is not an aggravating circumstance under the quoted rule for several different reasons. Each argument will be addressed below.

1. Insufficient Notice. Licensee makes two notice arguments here, and the first is clearly rebutted by the evidence in this record. Although Licensee argues that it was not aware that it must use the AVE equipment at all times after the purchase in 2009, the Commission’s documentation demonstrates that Licensee was given ample notice that the AVE must be purchased and *in use* within 30 days of the violation.¹

The second notice issue is more subtle. Licensee argues that, even if it had reasonable notice that the AVE must be used, it did not have notice that *failure* to use it would be considered an aggravating circumstance such that it would be removed from the RVP. In essence, Licensee is arguing that removal from the RVP is not fair because the Commission never told Licensee that it could happen. (Arg. at 4).

Licensee has been part of the RVP since 2006 and, pursuant to that program, received a reduced sanction when a previous employee in the Springfield store sold an alcoholic beverage

¹ Although raised as an issue, Licensee ultimately conceded that the documents presented at hearing provided a reasonable expectation that the AVE should be used, and should have been used on May 9, 2013.

to a minor decoy in 2009. In lieu of paying the penalty on that case, Licensee elected to purchase AVE equipment. As noted, the documents Licensee signed and the later information provided to Licensee made it clear that the resolution of that 2009 sale to a minor required the actual use of the AVE. There is no contrary evidence.

On May 9, 2013, Licensee's employee failed to use the AVE when she sold the alcoholic beverage to Miller. Besides being a violation of law to sell to the minor decoy, the failure to use the AVE was a violation of the previous agreement between the Commission and Licensee.

Therefore, although Licensee argues fairness and lack of notice, it is logical that the failure to abide by the 2009 agreement would have consequences. Licensee's notice and fairness arguments are unpersuasive.

2. Interpretation of the OAR. Licensee further argues that the Commission may not rely upon the aggravating circumstances language of subsection (3)(g) of OAR 845-009-0135 because that subsection involves qualifications for entry into the RVP, not removal. However, this argument ignores the direct language of the rule in subsection (7)(c), in the removal section of the RVP rule, which requires the use of subsection (3)(g) in determining aggravating circumstances. The Commission staff correctly relied upon subsection (3)(g).

Second, Licensee argues that it would be an unreasonable interpretation of (3)(g) to include the failure to use AVE in a subsequent purchase as an aggravating factor because the specific circumstances mentioned in that subsection were much more "egregious" than the failure to use AVE.

However, there is nothing in the language of the rule that sets an egregiousness level for aggravating circumstances. The rule includes, but is not limited to, four specific instances that constitute aggravating circumstances. Because the rule expressly states that the determination of aggravating circumstances is "not limited to" these four instances, the Commission is able to determine what other matters might be considered aggravating circumstances.

In the present case, the Commission concluded that the failure to use AVE after it had been purchased in lieu of a previous penalty was an aggravating circumstance under subsection (3)(g). Inspector Fetterley testified that the Commission regularly treats the failure to use AVE in a sale to a minor, when the AVE had been purchased in lieu of a previous penalty, as an aggravating circumstance. In *Hunters R.V. Park*, Final Order OLCC-06-V-068 (February 2007), the Commission determined that the failure to use AVE in that circumstance was an aggravating circumstance. Finally, OAR 845-006-0500(7)(c) specifically includes "failure to use age verification equipment which was purchased as an offset to a previous penalty" as a basis for aggravation.²

² Licensee argues that OAR 845-006-0500(7)(c) does not apply. Whether or not it applies directly to this case, it shows that the Commission has historically considered this circumstance as aggravating. OAR 845-006-0500(7)(c) 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

3. Application of OAR 845-006-0500(7)(c). Although addressed briefly in the previous section and in the footnote, the applicability of this rule needs further clarification. Licensee argues that the listing of aggravating circumstances in this rule is inapplicable to the question of removal from the RVP because the RVP rule has its own list of aggravating circumstances. Commission staff argue that the “provisions of the Responsible Vendor Program do not excuse Licensee from the provisions of OAR 845-006-0500.” (Arg. at 4).

While the Commission is correct that OAR 845-006-0500 applies to members of the RVP, the pertinent question is whether those factors, and particularly the factors in subsection (7)(c), are the basis for determining removal from the RVP. They are not. Removal from the RVP is based upon an analysis of aggravating circumstances under OAR 845-009-0135(7), which specifically addresses removal from the RVP, and specifically incorporates subsection (3)(g) of the same rule.

However, as discussed more fully above, the “not limited to” clause in (3)(g) allows the Commission to determine whether other factors might be aggravating as well. When determining other circumstances that the Commission considers aggravating, it is not inappropriate to look at other examples of aggravating circumstances in the rules, even if the rule does not specifically apply. Thus, even if OAR 845-006-0500 does not directly apply, the Commission is not precluded from considering other aggravating circumstances, including those from a different administrative rule.

4. Policy Considerations. Licensee’s final arguments are essentially requests concerning the Commission’s policies. First, Licensee argues that the Commission “should not continue an interpretation of the RVP rule that discourages the use of AVE to mitigate penalties as does the interpretation now argued by staff.” (Arg. at 10). This argument is not logical. Although Licensee contends that purchase of the AVE will be discouraged because of the potential later removal from the RVP, it is more reasonable to believe that licensees, given the chance to avoid a sanction by purchasing AVE, will actually use the AVE to prevent future violations. Even if a licensee did not see the logic of that approach, the requirement of use made at the time of the AVE purchase should persuade a licensee to use the equipment.

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.

(Emphasis added). Thus, even if not directly applicable, the language of that rule supports the longstanding interpretation that makes the failure to use AVE in a subsequent sale an aggravating circumstance.

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.