

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

IN THE MATTER OF
THE SERVICE PERMIT HELD BY:

) **FINAL FINDINGS OF FACT**
) **CONCLUSIONS OF LAW**
) **AND ORDER**

JULIANNA MITCHELL
Service Permit No. 399632

)
)OLCC-13-V-103
)

HISTORY OF THE CASE

On August 28, 2013, the Oregon Liquor Control Commission (OLCC or Commission) issued a Notice of Proposed Service Permit Suspension/Civil Penalty to Julianna Mitchell (Permittee). The Notice alleged that Permittee failed to verify the age of a minor, Austin Carter, before allowing him to buy or be served an alcoholic beverage, when Mr. Carter reasonably appeared to be under 26 years of age, in violation of OAR 845-006-0335(1)(a), (b), and (c). The Commission proposed to suspend Permittee's service permit for 10 days or to impose a civil penalty in the amount of \$250. Permittee timely requested a hearing.

On September 30, 2013, the Commission referred the case to the Office of Administrative Hearings (OAH). The OAH assigned the case to Senior Administrative Law Judge (ALJ) Jennifer H. Rackstraw. Thereafter, the OAH reassigned the case to Senior ALJ Monica A. Whitaker.

On May 27, 2014, Permittee, through her attorney, Alexander Hamalian, requested a postponement of the hearing. On May 29, 2014, ALJ Whitaker convened a status conference to discuss the postponement request. Mr. Hamalian represented Permittee. Jamie Dickinson appeared as the Commission's authorized representative. During the status conference, ALJ Whitaker denied the postponement request.

ALJ Whitaker presided over the contested case hearing on June 5, 2014 in Tualatin, Oregon. Ms. Dickinson represented the Commission. Mr. Hamalian represented Permittee.¹ The Commission called OLCC Inspector Neel O'Donnell and minor decoy Austin Carter to testify on its behalf. Permittee testified on her own behalf. The record closed on June 5, 2014 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 June 12, 2014.

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:

¹ Permittee participated in the hearing via telephone.

ISSUES

1. Whether on August 9, 2013, Permittee failed to verify the age of a minor, Austin Carter, when the minor reasonably appeared to be under 26 years of age, in violation of OAR 845-006-0335(1)(a), (b), and (c).

2. If so, what is the appropriate penalty for the violation? OAR 845-006-0500(7)(a)(D) and (b).

EVIDENTIARY RULING

Exhibits A1, A3, and A6, offered by the Commission, were admitted into the record without objection. Exhibits A2, A4, and A5 were admitted into the record over Permittee's objections.

FINDINGS OF FACT

1. The Commission issued Permittee a service permit on January 10, 2012. The permit expires on January 7, 2017. (Ex. A1.)

2. At all times pertinent to this matter, Permittee was employed as a bartender at Big Apple Pizzeria (the premises), located at 1125 NE Kane Dr., Gresham, Oregon. (Ex. A2 at 1.)

3. On August 9, 2013, OLCC inspectors Neel O'Donnell and Hector Caballero organized and conducted minor decoy operations at a number of locations in OLCC's District 6,² which included the premises. (Test. of O'Donnell.)

4. At the beginning of the minor decoy operation, inspectors O'Donnell and Caballero instructed the minor decoy, Austin Carter, to carry only his driver license, to produce it if requested to do so by a clerk, and to answer truthfully if asked his age when he attempted to purchase an alcoholic beverage. (Test. of Carter, O'Donnell.) At the time of the minor decoy operation, Mr. Carter was 18 years old. (Test. of Carter; Ex. A4.)

5. Inspectors O'Donnell and Caballero and Mr. Carter arrived together at the premises at approximately 8:40 p.m. Mr. Carter was wearing a t-shirt and jeans. He was clean shaven with dark and short cropped hair. He had unlined facial features, a youthful appearance, and appeared his true age. (Ex. A3; test. of Carter, O'Donnell.)

6. Mr. Carter entered the premises alone and took a seat at the bar. Shortly thereafter, Inspector O'Donnell entered the premises and sat one or two barstools away from Mr. Carter, while Inspector Caballero waited outside in the vehicle. (Test. of Carter, O'Donnell.) After waiting for approximately five minutes, Permittee walked over to Mr. Carter and asked him what he wanted to drink. Mr. Carter ordered a pint of Coors Light. Permittee did not ask Mr. Carter for his identification when she took his drink order, nor did she ask Mr. Carter his age.

7. After several minutes, Permittee served the Coors Light to Mr. Carter. Permittee did not ask to check Mr. Carter's identification before she served the alcoholic beverage to him. She

² District 6 includes the cities of Fairview, Gresham, and certain areas in Portland.

did not question Mr. Carter about his age. (Test. of Mitchell, O'Donnell, Carter.) Mr. Carter did not represent to Permittee that he was over 21 years of age. (Test. of O'Donnell, Carter.)

8. Mr. Carter did not consume the Coors Light. He attempted to pay Permittee for the alcoholic beverage, but she was busy and told him she would return for the payment. After several minutes, Permittee returned and Mr. Carter paid for his beverage. Permittee remitted the change to Mr. Carter, at which time Mr. Carter gave the change and the Coors Light to Inspector O'Donnell. (Test. of Carter, O'Donnell.) Immediately thereafter, Mr. O'Donnell contacted Permittee. She admitted to making the sale to Mr. Carter without asking for or checking his identification or verifying his age. Permittee told Mr. O'Donnell that she thought Mr. Carter appeared to be 30 years old. (Test. of O'Donnell.)

CONCLUSIONS OF LAW

1. Permittee failed to verify the age of a minor, Austin Carter, when the minor reasonably appeared to be under 26 years of age, in violation of OAR 845-006-0335(1)(a), (b), and (c).

2. The appropriate penalty for the violation is a 10-day service permit suspension or a civil penalty in the amount of \$250.

OPINION

1. Violation

The Commission asserts that Permittee violated OAR 845-006-0335(1)(a), (b), and (c) when she failed to verify minor decoy Austin Carter's age before allowing him to buy an alcoholic beverage when he reasonably appeared to be under 26 years of age. As the proponent of this contention, the Commission bears the burden of proof. ORS 183.450(2); *Harris v SAIF*, 292 Or 683, 690 (1983) (general rule regarding allocation of burden of proof is that the burden is on the proponent of the fact or position); *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 true. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390, 402 (1987).

OAR 845-006-0335(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;

(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.

The Commission has determined that a violation occurs where a licensee or permittee sells to a minor without first checking the minor purchaser's identification to verify that he or she is at least 21 years old. *See, e.g., Teri's Town Tavern*, (OLCC Final Order, 00-V-018, November 2000.) Permittee conceded that she did not verify Mr. Carter's age when she allowed him to order the alcoholic beverage and when she served and accepted payment for the beverage.

The next question is whether Mr. Carter reasonably appeared to be under the age of 26 when he purchased the beer on August 9, 2013. As noted above, Permittee testified that she believed Mr. Carter was over 26 years old. The subjective belief of the server and witnesses is not determinative, however. *Trails Inn Restaurant & Lounge* (OLCC, Final Order, 02-V-004, June 2004). Both in person and in the photograph taken on August 9, 2013, Mr. Carter has youthful, unlined facial features. He is clean shaven, with short cropped dark hair. Although Mr. Carter is relatively large in stature, a person's height and/or weight is not a reliable indicator of whether the person is at least 21 years old. *See Quincy Store* (OLCC, Final Order, 02-L-001, December 2002), *aff'd Ban v. OLCC*, 196 Or App 545 (2004). Given Mr. Carter's youthful facial features, I find that on August 9, 2013, he appeared his true age of 19.

Permittee also argued that the minor decoy operation was entrapment. The Commission has previously concluded that the use of decoys is a permissible method in the enforcement of criminal law. In *Murryhill Thriftway* (OLCC Final Order, 98-V-027, April 1999), the Commission concluded that the use of decoys becomes invalid only when badgering or importuning takes place to an extent and degree that it is likely to induce an otherwise law abiding person to commit a crime. No badgering or importuning has been alleged or took place in this case. Therefore, Permittee's allegation of entrapment fails.

For these reasons, the Commission has proven that Permittee failed to verify the age of a minor before selling alcohol to the minor, in violation of OAR 845-006-0335(1)(a), (b), and (c).

2. Penalty

Commission staff proposes to suspend Permittee's service permit for 10 days or to impose a civil penalty in the amount of \$250. A violation of OAR 845-006-0335(1) is a Category III violation. OAR 845-006-0500(7)(a)(D). Under the Commissions' guidelines, the standard penalty for a service permittee's Category III violation is a 10-day suspension or a civil penalty in the amount of \$250. OAR 845-006-0500(7)(b). However, 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. OAR 845-006-0500(7)(c).³

³ OAR 845-006-0500(7)(c) provides:

Here, the Commission did not allege any basis on which to aggravate the standard penalty, and Permittee did not present any mitigating circumstances to reduce the penalty. Consequently, the standard penalty of a 10-day suspension or a civil penalty in the amount of \$250 is appropriate.

FINAL ORDER

The Commission orders that for the violation of OAR 845-006-0335(1)(a), (b), and (c) (failure to verify age), the Oregon Liquor Control Commission shall impose upon Julianna Mitchell a 10-day suspension of her service permit or a civil penalty in the amount of \$250.

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 26 day of August, 2014.

/s/ Steven Marks

Steven Marks

Executive Director

OREGON LIQUOR CONTROL COMMISSION

Mailed this 26 day of August, 2014.

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.

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.