

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

IN THE MATTER OF) FINAL FINDINGS OF FACT
) CONCLUSIONS OF LAW
ANTONIO RICO & OLIVA RICO) AND ORDER
dba RICO'S GROCERIES)
226 NE 3 rd Street) OLCC-13-V-045
Bend, OR 97701)
)
)

HISTORY OF THE CASE

On May 1, 2013, the Oregon Liquor Control Commission (OLCC or Commission) issued a Notice of Proposed License Cancellation to Antonio Rico and Oliva Rico (collectively Licensees), dba Rico's Groceries, 226 NE 3rd Street, Bend, Oregon, 97701. The OLCC alleged: 1) that Licensees made false statements on their License Renewal Application in order to induce or prevent action by the Commission; 2) that Licensee Antonio Rico was convicted of a felony; and 3) that Licensees failed to have someone on the licensed premises who could communicate effectively with customers and OLCC regulatory employees.

Licensees made a timely request for hearing. The Commission referred the request to the Office of Administrative Hearings on June 14, 2013, and the OAH initially assigned the case to Senior Administrative Law Judge (ALJ) Alison Greene Webster. Hearing was scheduled for November 6, 2013. ALJ Webster held a prehearing conference on October 18, 2013, and rescheduled the hearing to a new date of December 19, 2013. The case was reassigned to ALJ Rick Barber prior to the hearing. An Amended Notice was issued on December 18, 2013, adding the issue of Refusal to Renew the License.

Hearing was held as scheduled on December 19, 2013, in Bend, Oregon, with ALJ Barber presiding. Licensees were represented by Attorney Jered Reid. The Commission was represented by Case Presenter Becky Voelkel. Bend Police Officer Michael Landolt and OLCC Inspector Larry Brown testified for the Commission. Licensees Antonio and Oliva Rico testified on their own behalf. Certified Interpreter Federico Behncke provided Spanish interpretation for Licensee Oliva Rico. The record was held open for the possible addition of new evidence in response to the Commission's Amended Notice,¹ and for oral closing arguments. The parties presented oral arguments by telephone on January 13, 2014, and the hearing record closed on that date.

¹ The Commission presented an Amended Notice to Licensee the day before the hearing, alleging that the facts of the case also justified a refusal to renew Licensee's license. Licensee sought postponement of the hearing, but Licensees were instead given the chance to present additional evidence beyond the hearing date to overcome any surprise caused by the late notice. On December 26, 2013, Mr. Reid indicated that Licensees were not offering additional evidence.

The Administrative Law Judge considered the record of the hearing and the applicable law and issued a Proposed Order mailed March 4, 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:

ISSUES

1. Whether Licensee made false representations or statements in order to induce or prevent action by the Commission, in violation of ORS 471.425(1).
2. Whether Licensee Antonio Rico committed a felony on the licensed premises, in violation of ORS 471.315(1)(a)(J).
3. Whether Licensees failed to have someone on the licensed premises who could communicate effectively with customers and Commission regulatory employees, in violation of OAR 845-006-0426(1).
4. If one or more of the above violations are established, what is the proper sanction?
5. Whether the Commission has grounds to refuse to renew Licensees' Off Premises license under ORS 471.313(4), because of false statements, a felony conviction, and a poor record of compliance.

EVIDENTIARY RULINGS

Exhibits A1 through A15, offered by Commission staff, and Ex. B1, offered by Licensees, were admitted into evidence without objection.

FINDINGS OF FACT

1. Since October 16, 2008, Antonio and Oliva Rico have operated a business known as Rico's Groceries at 226 NE 3rd Street, Bend, OR 97701. Rico's Grocery has had a valid Off-Premises Sales license since that date. Licensees have operated other businesses (Rico's Tacos and Rico's Market) since Antonio Rico was initially licensed with the Commission on January 2, 2004. Oliva Rico was initially licensed on September 23, 2004. (Ex. A1). Licensees are currently operating under a Conditional Letter of Authority pending the decision in this case. (Ex. A2).

2. On July 28, 2011, members of the Central Oregon Drug Enforcement (CODE) Team executed a search warrant on Rico's Groceries, another business owned by Licensees, and

on Licensees' home in Culver, Oregon, looking for methamphetamine (meth) and evidence of drug dealing. Licensee Antonio Rico and at least one accomplice were arrested, and Rico was charged with three felony counts of delivery and possession of a controlled substance (meth), and one misdemeanor count of Frequenting a Place Where Controlled Substances are Used. (Ex. A7, A8). The methamphetamine seized from the premises and Licensees' other locations had a street value of over \$40,000. (Ex. A5). Antonio Rico was indicted on the three felony charges on August 3, 2011. (Test. of Brown).

3. Licensee Antonio Rico used the licensed premises to sell methamphetamine. He would make arrangements for the sale. Then the person purchasing the drugs would leave the money in a prearranged spot on the licensed premises, such as a cooler in the rear of the premises or under a bucket. After Rico received the money from the buyer, he would leave the meth in the same location on the licensed premises where the money had been hidden. (Ex. A8 at 5).

4. On August 15, 2011, Licensees Antonio and Oliva Rico signed the Commission's License Renewal Application form. The application included Operational Question 2, which states:

(2) Please list all arrests or convictions for any crime, violation, or infraction of any law during the last 18 months even if they are not liquor related for anyone who holds a financial interest in the licensed business. Attach additional sheet of paper to back of form if needed.

(Ex. A4; emphasis in original). Licensee Antonio Rico filled out the form, and did not answer Operational Question 2 or in any way apprise the Commission of his July 28, 2011 arrest. (Test. of Antonio Rico).

5. Licensee Oliva Rico does not speak or write English. She was aware, because Antonio Rico told her, that he was filling out the application for renewal of the liquor license. Antonio Rico read the form to her, and also commented on Operational Question number 2. Antonio Rico filled out the application, without answering question 2, and had Oliva Rico sign the application with him. (Ex. A6).

6. Antonio Rico pled guilty to one count of Delivery of Methamphetamine and the other charges were dismissed. He was sentenced to 13 months in prison. (Ex. A12). He served eight months. (Test. of Antonio Rico).

7. On April 2, 2013, Inspector Brown visited the licensed premises to talk to Licensees. The only person working on the premises was a woman named Medina Martinez. Brown introduced himself to Martinez, showed her his badge and gave her a card. Martinez handed Brown a card written in Spanish and indicated she did not speak English. A bilingual customer offered to interpret for Brown, who asked Martinez whether there was anyone working on the premises who spoke English. Martinez stated that no one spoke English. Brown asked Martinez to have the owner call him. Brown asked Martinez for her identification, and Martinez retrieved a Mexico passport from her car. (Ex. A14). A large percentage of Licensee's customers are Spanish-speaking. (Test. of Antonio Rico).

8. Inspector Brown met with Licensees and took their statements concerning their renewal application. Antonio Rico told Inspector Larry Brown he had left question 2 blank because he was not sure what the charges from the arrest would be, because his attorney was still negotiating with the district attorney. Oliva Rico told Brown, through an interpreter, that Antonio Rico had read the form to her, and had further commented on question 2. Oliva Rico signed the form knowing that question two had been left blank. Oliva Rico was aware her husband had been arrested on July 28, 2011. (Ex. A6; Test. of Brown).

9. The Commission issued its Notice of Proposed License Cancellation on May 1, 2013. The notice alleged three violations (false statement, felony conviction, and failure to have someone present who could communicate with customers and regulatory staff), and sought cancellation of the license. The Commission issued an Amended Notice on December 18, 2013, adding a proposed refusal to renew the license. (Amended Notice).

CONCLUSIONS OF LAW

1. Licensees made false representations or statements in order to induce or prevent action by the Commission, in violation of ORS 471.425(1).

2. Licensee Antonio Rico committed a felony on the licensed premises, in violation of ORS 471.315(1)(a)(J).

3. Licensees have failed to have someone on the licensed premises who could communicate effectively with customers and Commission regulatory employees, in violation of OAR 845-006-0426(1).

4. Licensees' Off-Premises license should be cancelled.

5. The Commission has grounds to refuse to renew Licensees' Off Premises license under ORS 471.313(4), because of false statements, a felony conviction, and a poor record of compliance.

OPINION

Commission staff contends that Licensees Antonio and Oliva Rico made false representations in their August 2011 License Renewal Application in order to induce or prevent action by the Commission, and further contends that Licensee Antonio Rico committed a felony on the licensed premises. Commission staff further contends that Licensees failed to have someone on the licensed premises who could effectively communicate with customers and Commission regulatory staff. Finally, Commission staff argues the Commission has a basis to refuse to renew the license under the factors listed in ORS 471.313(4).

As the proponent of those contentions, OLCC bears the burden of proof. 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).

1. False Representation or Statement

Licensees made a false representation on their August 2011 application. Commission staff contends that Licensees made a false statement on their application when they failed to include information about Antonio Rico's July 28, 2011 arrest on drug charges on the renewal application. The evidence establishes that Licensees failed to apprise the Commission of Antonio's arrest in the application signed on August 15, 2011, less than three weeks after the arrest. That omission—the failure to answer question two on the application—was a false statement.

Commission staff contends that Licensees violated ORS 471.425, which states in part:

(1) No person shall make false representations or statements to the Oregon Liquor Control Commission in order to induce or prevent action by the commission.

The Commission agrees with staff.

Antonio Rico. Antonio's violation is clearly established by the evidence. Although he argued that he was uncertain of the criminal charges arising from his arrest because his attorney was negotiating with the district attorney's office, he was fully aware he had been arrested, and that the charges involved drugs. Antonio filled out and signed the application form on August 15, 2011, less than three weeks after his arrest and less than two weeks after he had been indicted on the charges. Antonio Rico knew he had been arrested and he knew or should have known the charges against him. His testimony to the contrary is not credible.

Moreover, the form required the applicants to list all *arrests*. Thus, even if Antonio was not clear on the actual charges, it was his responsibility to apprise the Commission of the arrest. Despite his arguments to the contrary, Antonio's decision to not answer question 2 was intentional. Antonio understood the question and chose not to answer it.

However, even if the omission had been unintentional, the more important question is whether the omission was material. Intentionality is only one of the factors used to determine whether an omission (or false representation) was material. As the Commission stated in *Shell Food Mart*:

* * * Prior Commission cases have held that a false statement need not be intentional, but must be material. See *Shan Creek Café* (OLCC, Final Order, 05-L-005, February 2006); *H2O Martini Bar & Restaurant* (OLCC, Final Order, 05-V-012, December 2005). A false statement is material if the subject of the false statement is a basis for the Commission to refuse, cancel or suspend a license. *Trocadero Inn* (OLCC, Final Order, 90-V-055, February 1991). Material false

statements are those which inhibit the Commission's ability to investigate a person's eligibility for a license. *Punjab Tavern* (OLCC, Final Order, 91-L-105, April 1992). The Commission has also held that a false statement is material if it was made intentionally. *AM/PM Market No. 756* (OLCC, Final Order, 95-L-031, July 1996). A false statement is intentional when the person making the statement intended to mislead the Commission. *Thomas Creek Steak and Seafood* (OLCC, Final Order, 00-L008, April 2001).

Shell Food Mart (OLCC Final Order, 08-V-060, September 2009). Under the Commission's cases, then, one of the key questions is whether the false statement or representation concerned a matter which could lead to refusal, suspension or cancellation of a license.

Antonio was arrested for several felonies involving the possession and delivery of controlled substances. ORS 471.315(1) states in part:

471.315 Grounds for cancellation or suspension of license or imposition of civil penalty. (1) The Oregon Liquor Control Commission may cancel or suspend any license issued under this chapter, or impose a civil penalty in lieu of or in addition to suspension as provided by ORS 471.322, if the commission finds or has reasonable ground to believe any of the following to be true:

(a) That the licensee:

* * * * *

(J) *Since the granting of the license, has been convicted of a felony, of violating any of the liquor laws of this state, general or local, or of any misdemeanor or violation of any municipal ordinance committed on the licensed premises.*

(Emphasis added).

The subject of Antonio's false statement in this case was his arrest on felony charges—charges that would ultimately lead to a felony conviction and a sentence of 13 months in prison. Because the subject of the false statement was a matter that could lead to cancellation or suspension of the license under ORS 471.315, the false statement was material. Commission staff has shown that Antonio Rico made a false statement in order to induce or prevent action by the Commission.

Oliva Rico. Oliva Rico signed the application form containing the false statement—the omission of Antonio's arrest record. Oliva told Inspector Brown (through a Spanish interpreter) that Antonio read the application form to her, and that he "commented" on question 2. Knowing that the application did not contain the required information about Antonio's arrest just three weeks earlier, Oliva nevertheless signed the application form.

Licenseses argue that Antonio did not read the document to Oliva, and that he just told Oliva that it contained the same questions as past forms. Exhibit A6, the recording of Brown's

initial interview with Oliva says otherwise. When Brown asked if Oliva had read the document, her interpreted reply was, “Antonio read it to me.” When Brown asked her about question 2, she said, “He commented on that; yes.” Oliva’s comments to Brown at the time of the interview were more accurate than Licensees’ testimony at hearing.

OAR 845-006-0362 states:

Responsibility of Licensees for Conduct of Others

Each licensee may be held responsible for violation of any liquor control law or administrative rule or regulation of the Commission affecting his license privileges and for any act or omission of his servant, agent, employee, or representative in violation of any law, municipal ordinance, administrative rule, or regulation affecting his license privileges.

Oliva Rico put her signature to an application that contained a false statement, and that statement (as addressed more fully above) was material. Her knowing reliance upon Antonio Rico’s false representation constitutes a false statement on her part as well, and she would nevertheless be held responsible for Antonio’s violation under this rule.

Commission staff has established that both licensees made material false statements.

2. Licensee Antonio Rico’s Felony Conviction

Licensee Antonio Rico pled guilty to one Count of Delivering Methamphetamine and was sentenced to 13 months in prison, serving eight months. As ORS 471.315 (quoted above) indicates, the commission of a felony is a violation that can lead to cancellation or suspension of the license.

Although the statute does not require a showing that the felony conviction was connected with the license, in this case the evidence shows that Antonio Rico was actually using the licensed premises as the location to sell the methamphetamine. Drug buyers would leave their money at various places on the licensed premises, and Antonio Rico would leave the meth they had purchased in the same locations.

Licensee Antonio Rico argued that no drugs were found on the licensed premises at the time of the search and his arrest. Nevertheless, police did find over \$40,000 of methamphetamine and discovered that, as noted above, the licensed premises was the location for most of the sales. Commission staff has proved this violation.

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3. Failure of Effective Communication

OAR 845-006-0426 states:

Public Interest and Convenience Reasons for Cancellation or Suspension

(1) ORS 471.315(1)(d) allows the Commission to cancel or suspend a license for public convenience or necessity reasons. Under this authority, the Commission requires a licensee to have someone who can communicate effectively with customers and Commission regulatory employees. This person must be on the licensed premises during the licensee[']s business hours. "Communicate effectively" means:

(a) Knowing how to lawfully sell and serve alcoholic beverages and communicating this to customers;

(b) Understanding Commission regulatory employees when the employees explain lawful sale and service of alcoholic beverages and responding in a way the employee understands.

(2) Failure of a licensee to comply with section (1) of this rule is a Category III violation.

Inspector Brown came to the licensed premises on April 2, 2013, but was unable to speak with Licensees' employee because she spoke only Spanish. Commission staff contends that Licensees' failure to have someone on the licensed premises who could communicate with regulatory staff violates the rule quoted above, and I agree.

Licensees contend, and the record supports, that most of the patrons of the licensed premises are Spanish-speaking and would have no problems with an employee who spoke only Spanish. However, the ability to communicate with *most* of the patrons does not meet the requirements of the rule. Licensees must communicate effectively with customers and with Commission staff. Licensees' employee was unable to do so, and the rule was violated.

4. License Cancellation

Having established all three violations, Commission staff seeks to cancel Licensees license on two grounds. Violation number two (Antonio Rico's felony conviction) makes him ineligible for a license and is a Category I violation. Pursuant to the chart enacted through OAR 845-006-0500(7)(b), cancellation is the recommended sanction for the first violation.

Licensees' false statement is a Category II violation, which would normally carry a 30-day suspension under the rules. However, Commission staff contends that Licensee's intentional false statement should aggravate the sanction and that cancellation is likewise the appropriate sanction for that violation. The violation categories are set under OAR 845-006-0500, which states in part:

Suspensions and Civil Penalties

(1) The Commission cancels or suspends a license under its authority in:

(a) ORS 471.315 for violations of any provision of ORS Chapter 471 or any administrative rule (chapter 845) the Commission adopts pursuant to these chapters;

* * * * *

(7) Violation Categories:

(a) The Commission has the following violation categories:

(A) I -- Violations that make licensee ineligible for a license;

(B) II -- Violations that create an immediate threat to public health or safety;

(C) II(a) -- Violations for unlawful drug activity;

(D) III -- Violations that create a potential threat to public health or safety OR violations of the tied house or financial assistance prohibitions;

(E) III(a) -- Violations for the sale of alcohol to a minor or failure to check identification when the retail licensee qualifies under the Responsible Vendor Program;

(F) IV -- Violations that create a climate conducive to abuses associated with the sale or service of alcoholic beverages;

(G) V -- Violations inconsistent with the orderly regulation of the sale or service of alcoholic beverages.

(b) Exhibit 1 lists the proposed sanctions for the first and subsequent violations within each category described in subsection (7)(a) of this rule. Exhibit 1 also gives the categories for the most common violations[.]

Commission staff contends that Antonio Rico's felony conviction is a Category I violation under this rule and the Commission agrees. Because cancellation is the appropriate sanction under the exhibit to subsection (7)(b), the license should be cancelled on that basis alone.

Licensees' false statement was a Category II violation, which would normally entail a 30 day suspension on a first violation. However, Commission staff contends that the intentional nature of Antonio Rico's false statement should be considered an aggravating factor, and should lead to an additional ground for cancellation. The Commission agrees with staff, and this violation is a secondary basis for cancellation of the license.

Licensees' third violation, which falls under Category III, will bear no penalty because of the cancellation of the license.

5. Refusal to Renew License

ORS 471.313 states in part:

Grounds for refusing to issue license. The Oregon Liquor Control Commission may refuse to license any applicant under the provisions of this chapter if the commission has reasonable ground to believe any of the following to be true:

* * * * *

(4) That the applicant:

* * * * *

(b) Has made false statements to the commission.

* * * * *

(d) Has been convicted of violating a general or local law of this state or another state, or of violating a federal law, if the conviction is substantially related to the fitness and ability of the applicant to lawfully carry out activities under the license.

* * * * *

(g) Did not have a good record of compliance with the alcoholic liquor laws of this state and the rules of the commission when previously licensed.

The three subsections quoted here are the three bases cited by the Commission for refusing to renew Licensees' liquor license. The first two have been addressed above in the analysis of the cancellation issues, and the third (record of compliance) is also based on that analysis.

False Statements. Antonio Rico intentionally left information concerning his arrest off of Licensee's application signed and submitted on August 15, 2011. Antonio read the application to Oliva Rico, and she signed the document knowing it was incomplete and, therefore, false. These false statements are grounds for refusal to renew just as they were grounds, under the circumstances of this case, for cancellation of the license.

Felony Conviction. Antonio Rico pled guilty and was convicted of Delivery of Methamphetamine, a Felony.

When a license is refused because of a felony conviction, the Commission must consider any intervening circumstances since the commission of the crime. OAR 845-005-0325(5). In

this case, there are no intervening circumstances between the commission of the crime and the conviction, and no such circumstances were argued by Licensee.

Moreover, the fact that the felony involved controlled substances and occurred on the licensed premises (selling and delivering methamphetamine out of the licensed premises), makes the argument for cancellation even stronger.

Record of Poor Compliance. Although there had been no prior compliance issues with Licensee, the false statements on the application and the felony conviction—for delivering methamphetamine using the licensed premises—are sufficiently severe that the Commission is justified to interpret Licensee’s previous record of compliance as a poor one.

Commission staff has established that the Commission has a reasonable basis to refuse to renew Licensee’s license.

FINAL ORDER

The Commission orders the following:

That the Off-Premises Sales license issued to Antonio Rico and Oliva Rico, dba Rico’s Groceries, be CANCELLED.

That the application to renew the Off-Premises Sales License held by Antonio Rico and Oliva Rico, dba Rico’s Groceries, be REFUSED.

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

Dated this 7th day of April 2014

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

Mailed this 7th day of April 2014

THIS ORDER IS EFFECTIVE AT 7:00 AM ON THE 12th DAY OF April, 2014.

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.