

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

In the Matter of the Full On-Premises)	FINAL FINDINGS OF FACT
Sales License Held by:)	CONCLUSIONS OF LAW
)	AND ORDER
)	
Sam’s Silver Dollar Pizza, Inc.)	OLCC-13-V-020 and
Sam Macbale, President/Dir/Stockholder)	OLCC-13-L-005
dba SILVER DOLLAR PIZZA)	
501 NW 21 st Avenue)	
Portland, OR 97209)	

HISTORY OF THE CASE

On February 5, 2013, the Oregon Liquor Control Commission (OLCC or Commission) issued a Notice of Proposed License Suspension/Civil Penalty to Sam’s Silver Dollar Pizza, Inc., Sam Macbale, President/Director/Stockholder, dba Silver Dollar Pizza, located at 501 NW 21st Avenue, Portland, Oregon. The Notice charged Licensee with a violation of OAR 845-006-0335(3)(b) (permitted minors in a prohibited area). Licensee timely requested a hearing.

The Commission referred Licensee’s hearing request (case number 13-V-020) to the Office of Administrative Hearings (OAH) on April 9, 2013. The OAH assigned the matter to Senior Administrative Law Judge (ALJ) Richard Barber.

On June 21, 2013, the Commission issued an Amended Notice of Proposed License Suspension to Licensee alleging two additional violations, a second violation of OAR 845-006-0335(3)(b) and a violation of ORS 471.425(1) (false statement). That same date, the Commission also issued to Licensee a Notice of Proposed Refusal to Modify Minor Posting, refusing Licensee’s request to permanently change the minor posting to a Number 3A. Licensee also requested a hearing on this matter (case number 13-L-005). The matters were consolidated for hearing.

On OLCC’s request, ALJ Barber postponed the hearing, originally scheduled for September 12, 2013. On October 8, 2013, OLCC issued a Second Amended Notice of Proposed License Suspension/Civil Penalty in case number 13-V-020 alleging an additional violation.¹ The hearing was then rescheduled for January 13, 2014. Thereafter, on Licensee’s request (and due to Licensee’s counsel’s unavailability on the scheduled hearing date), ALJ Barber postponed the hearing to May 21 and 22, 2014. On May 7, 2014, the cases were reassigned to Senior ALJ Alison Greene Webster.

¹ At hearing, Commission Staff withdrew the additional violation (Violation Number Five) alleged in the Second Amended Notice.

ALJ Webster presided over the hearing in Tualatin, Oregon, on May 21 and 22, 2014. Attorneys Daryl Garner and Ernest Warren, Jr. represented Licensee. Kelly Routt presented the case for the OLCC.

The following witnesses testified at the hearing on behalf of OLCC: OLCC Inspectors Paul Rosenow, John Mereen, Jason Tallmadge, Mark Smith, David Luster and Shannon Hoffeditz; former OLCC Inspector Kevin Wellman; Stylianos “Steel” Tsoumas; and Connor Morales.

The following witnesses testified on Licensee’s behalf: Former OLCC Public Safety and Enforcement Director Rudy Williams; former OLCC Regional Manager Carl Lewis; former employee Matthew Wynn; employee Ronald Macbale; employee Joe Macbale; and corporate principal Sam Macbale.

The evidentiary record remained open until May 27, 2014, for Licensee to submit additional records pertaining to Licensee’s challenge to the Commission’s refusal to modify the minor posting. No additional records were offered within that time frame. The hearing record remained open for receipt of the parties’ closing briefs, and closed on July 7, 2014, upon receipt of OLCC’s Response to Licensee’s Closing Argument.

The Administrative Law Judge considered the record of the hearing and the applicable law and issued a Proposed Order mailed July 21, 2014. Licensee filed Exceptions to the Proposed Order on August 5, 2014. Staff filed Comments on the Proposed Order on August 5, 2014. The Administrative Law Judge responded to Licensee’s Exceptions and Staff’s Comments on August 15, 2014.

On October 23, 2014 the parties were provided an opportunity for oral argument on the filed exceptions and comments. Attorney Garner argued Licensee's Exceptions on behalf of Licensee. Kelly Routt argued Staff's Comments.

On October 23, 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, Staff’s Comments on the Proposed Order and the Administrative Law Judge’s Response to Licensee’s Exceptions and Staff’s Comments. Based on this review and the preponderance of the evidence, the Commission enters the following:

EVIDENTIARY RULINGS

OLCC Exhibits A1 through A21 were admitted at hearing. Exhibits A23 and A24 were withdrawn.

Licensee’s Exhibits P6 through P10 and P12 were admitted at hearing without objection. Exhibits P1, P3, P4, P5 and P11 were excluded as irrelevant. Licensee did not offer Exhibit P2.

ISSUES

1. Whether, from about February 10, 2012 to August 15, 2012, Licensee permitted minors Stylianos Tsoumas and Connor Morales to be on the licensed premises in violation of OAR 845-006-0335(3)(b).
2. Whether, from about November 9, 2012 to February 9, 2013, Licensee permitted minor employee Ronald Macbale to be on the licensed premises in violation of OAR 845-006-0335(3)(b) and whether, from about December 9, 2012 to February 9, 2013, Licensee permitted minor employee Jacob Hull to be on the licensed premises in violation of OAR 845-006-0335(3)(b).
3. Whether, on February 9, 2013, Licensee's employee Ronald Macbale made a false statement or representation to an OLCC inspector in violation of OAR 471.425(1).
4. Whether, from about June 4, 2013 to August 7, 2013, Licensee permitted employee Joe Macbale to mix, sell or serve alcoholic beverages without a valid service permit issued by the Commission in violation of ORS 471.360(1)(b).
5. If one or more violations occurred, what is the appropriate sanction?
6. Whether the Commission is entitled to refuse to modify Licensee's minor posting to allow minors on the premises from 11:00 a.m. to 2:00 a.m. daily.

FINDINGS OF FACT

1. On April 7, 2003, the Commission issued a Full On-Premises sales license to Sam's Silver Dollar Pizza, Inc., Sam Macbale, President, Director and Sole Shareholder, dba Silver Dollar Pizza, located at 501 NW 21st Avenue, Portland, Oregon. (Ex. A1.) The licensed premises has a Number I minor posting, meaning that minors are prohibited from the premises at all times. (Ex. P10; test. of Tallmadge.)
2. The licensed premises is located at the northwest corner of NW 21st Avenue and NW Glisan Street in Portland. Since April 2007, Licensee has had outdoor seating available for patrons on the sidewalk in front of the premises. The seating consists of five picnic tables with benches on the west side of NW 21st and two tables with benches on the north side of NW Glisan. Licensee has approval from the OLCC to sell and serve alcoholic beverages to patrons seated at the outside tables. Minors are not permitted in this outside seating area as the area is considered a part of the licensed premises. (Exs. A2 and A3; test of Wellman.)
3. In February 2012, Stylianos "Steel" Tsoumas, then age 19, entered into a verbal agreement with corporate principal Sam Macbale to operate a food cart, known as "Super Boufo," on the sidewalk in front of the licensed premises. Minor Tsoumas operated the cart, which sold hot dogs and sausages, with his friend, Connor Morales, who was also 19 years old at the time. The two minors began operating the hot dog cart two or three nights a week, usually Thursday, Friday and Saturday nights. They were open for business from about 8:00 p.m. until

3:00 a.m. or 4:00 a.m. They stored the cart in the garage at the back of the licensed premises when it was not in use. The two minors accessed the premises often as part of their food cart business. They used the premises' kitchen for food preparation and stored food in the refrigerators. The minors also went into the premises to use the restroom, to deposit money in the safe, and occasionally to ask the bartender to make change. (Test. of Tsoumas; test. of Morales; Ex. A6.)

4. In March 2012, OLCC received a complaint from an anonymous source regarding the licensed premises. The complainant alleged that Licensee had leased space on the sidewalk in front of the premises to a hot dog cart. The complainant also alleged that the person who was operating the hot dog stand was 19 years old, and that he (the minor) was going into the premises to use the restroom. (Ex. A5; test. of Tallmadge.)

5. On the afternoon of April 13, 2012, OLCC Inspector Tallmadge went to the premises to investigate the complaint. There, the inspector spoke to corporate principal Sam Macbale about the hot dog cart. The hot dog cart was not operating at that time, but Mr. Macbale confirmed that he did have a 19-year-old person selling hot dogs from a food cart outside the premises on Fridays and Saturdays. Mr. Macbale also told the inspector that the minor did not come into the premises for any reason. Inspector Tallmadge reminded Mr. Macbale that minors were prohibited from the premises and could not enter at any time. The inspector also advised Mr. Macbale that minors who purchased hot dogs from the cart could not sit or loiter around in the outside seating area. (Ex. A5; test. of Tallmadge.)

6. In mid-June 2012, minors Tsoumas and Morales expanded the food cart's operations to seven days a week. They opened for business earlier in the day (at about 2:00 p.m.) and remained open until 3:00 a.m. to 4:00 a.m., after the bars in the area had closed for the night. Minors Tsoumas and Morales continued to access the premises every day that they operated the food cart.² They often sat at the outdoor picnic tables when the cart was not busy. After closing down the cart for the night, they went into the premises to count the money and access the safe. On occasion, they remained at the premises after the premises had closed for business to socialize with Licensee's staff. (Test. of Tsoumas; test. of Morales; Exs. A6, A7, A8, A9 and A10.)

7. At some point, Mr. Macbale and minor Tsoumas formalized their verbal agreement with a written contract. Mr. Macbale had minor Tsoumas sign a Temporary Lease Agreement, in which Mr. Macbale agreed to rent space to minor Tsoumas for a hot dog cart outside the licensed premises for \$100 per week. The agreement also stated that the cart and the equipment were the property of Silver Dollar Pizza, and that the lease could be cancelled by either party at any time. (Ex. P8; test. of Tsoumas.)

8. In late August 2012, Mr. Macbale cancelled the lease agreement. Mr. Macbale advised minor Tsoumas that he was terminating the agreement because his landlord was giving him trouble. Minor Tsoumas and minor Morales were angry with Mr. Macbale for terminating

² In June 2012, minors Tsoumas and Morales also began to store some of their food and supplies in the kitchen of Underdog Sports Bar, a licensed premises across the street also owned by Mr. Macbale. (Test. of Tsoumas; test. of Morales; Ex. A6.)

the lease agreement. Knowing that Mr. Macbale had been in violation of the liquor laws for the prior six months by allowing them to access the premises, the minors decided to report the violation to the OLCC. (Test. of Tsoumas; test. of Morales.)

9. On September 27, 2012, minors Tsoumas and Morales met with OLCC Inspectors Paul Rosenow and Mark Smith at OLCC headquarters. The minors told the inspectors about their hot dog cart business. They advised that they had accessed the premises daily and frequently while they were operating the cart. They also advised the inspectors that Mr. Macbale knew that they had frequently entered the premises in connection with the operation of the food cart and for other reasons, and that he approved of them doing so. (Ex. A6; test. of Tsoumas.)

10. On October 18, 2012, Inspector Rosenow spoke with Mr. Macbale via telephone regarding minor Tsoumas' and minor Morales' allegations. Mr. Macbale acknowledged that the minors had continued to access the kitchen and garage areas of the premises, even after Inspector Tallmadge had warned him about minors on the premises months before. During the conversation, Mr. Macbale denied that the minors had entered the main business area of the premises, and denied that the bartenders had made change for them. (Ex. A6; test. of Rosenow.)

11. On October 30, 2012, Inspectors Rosenow and Smith met with Mr. Macbale at the premises. Mr. Macbale showed the inspectors the garage and kitchen areas of the premises. The inspectors noted that the garage area connected directly to the kitchen. The inspectors did not see any way to open the garage door from the exterior. Mr. Macbale told the inspectors that he had ended the lease agreement with the minors because he did not like them. (Ex. A6; test of Rosenow.)

12. In late 2012, Mr. Macbale hired his then-17 year old son, Ronald Macbale, to work as a cook in the premises' kitchen. Around the same time, Mr. Macbale also hired Jacob Hull, then 20 years of age, to work as a cook in the premises' kitchen. Minor Hull also occasionally worked across the street at the Underdog Sports Bar. Ronald Macbale and Jacob Hull began operating the hot dog cart in front of the licensed premises. (Ex. A11; test. of R. Macbale.)

13. On January 16, 2013, OLCC sent Licensee a Notice of Violation, alleging that from February to August 2012, Licensee had permitted minors on the premises in violation of OAR 845-006-0335(3)(b). (Ex. A13.)

14. On January 19, 2013, upon receiving the Notice of Violation, Mr. Macbale contacted Inspector Rosenow. Mr. Macbale questioned the alleged violation, and asserted his belief that minors could lawfully access the garage and kitchen areas of the premises. Inspector Rosenow advised Mr. Macbale that minors were prohibited from the premises at all times, including minors who were employees. Mr. Macbale argued with the inspector about minor employees being an exception to the minors prohibited rule. He advised that he wanted his minor son to work in the kitchen. Inspector Rosenow advised Mr. Macbale that OLCC would have to approve a modification of Licensee's minor posting before any minors were permitted on the premises. Inspector Rosenow also advised Mr. Macbale that no minors were permitted on the premises unless or until the Commission approved the premises' minor posting change.

(Test. of Rosenow; Ex. A11.)

15. On or about January 22, 2013, Mr. Macbale contacted the OLCC and spoke with then-Regional Manager Carl Lewis. Mr. Macbale told Mr. Lewis that he had questions about having minors on the premises, as he wanted his minor son to work at the premises. Lewis told Mr. Macbale to submit a request for a minor posting change. During the conversation, Lewis described to Mr. Macbale the standards and requirements for various minor postings. Thereafter, Mr. Macbale submitted a written request to the Commission. He wrote: "Please be informed that I'm requesting to change from no minors permitted to minors permitted. The video poker machines are in a separate room and are not clearly visible to our customers." (Ex. A16; test. of Lewis.)

16. On January 31, 2013, Mr. Macbale and Inspector Rosenow had a second conversation about Licensee's request to change the minor posting at the premises. The inspector asked that Mr. Macbale provide additional details about his request, such as the hours in which he wanted minors permitted on the premises. The inspector told Mr. Macbale that minors could not be present at times when drinking is the predominant activity at the premises. Mr. Macbale said that he wanted to have a minor working there until 2:00 a.m. Inspector Rosenow advised Mr. Macbale that his minor posting change request was being assessed, but had not yet been approved. (Ex. A11; recording of phone conversation.)

17. Later that same date, Mr. Macbale submitted an amended request to change the premises' minor posting to the OLCC. The request stated:

Please be informed that I'm requesting to change from no minors permitted to minors permitted from 11:00 AM until 2:00 AM; this will allow kitchen help who is under 21 years old to work in the kitchen until closing at 2:00 and we do not need any workers to work in the bar area who is under 21 of age. As far as customers who are under 21 I would leave this to the directions and recommendation of the OLCC.

The video poker machines are in a separate room and are not clearly visible to our customers.

Thank you for your consideration

Silver Dollar Pizza
Sam Macbale

PS Please disregard the first letter that was faxed earlier.

(Ex. A17.)

18. At about 10:00 p.m. on February 6, 2013, as a result of Mr. Macbale's request to change the minor posting from a number I (minors prohibited) to a number III (minors allowed), OLCC Inspectors Rosenow and Merreen went to the premises to assess whether eating food, or

drinking was the predominant activity at the premises at that time of night. The inspectors saw four patrons in the premises. Two patrons appeared to be drinking alcoholic beverages. None of the four patrons were consuming food. (Ex. A19; test. of Rosenow.)

19. Two days later, at about 9:00 p.m. on February 8, 2013, Inspectors Rosenow, Mereen and Smith went to the premises for another assessment. While there, the inspectors counted approximately 40 patrons at the premises. The inspectors determined that most of the patrons were drinking. They did not see anyone consuming food. The inspectors also noticed a young male (later identified as minor Ronald Macbale) working at the food cart in front of the premises in the outdoor seating area. The inspectors were working undercover, and did not contact the minor or anyone else at the premises that night. (Test. of Rosenow; test. of Mereen; Exs. A11 and A19.)

20. At about 8:00 p.m. the following night, February 9, 2013, the inspectors returned to the premises for additional assessment and observations. The inspectors were watching the premises from their car, which was parked along NW Glisan just to the east of NW 21st. At about 8:35 p.m., Inspector Mereen telephoned the premises and asked what time the hot dog cart would be operating that night. He was told that the person who ran the cart was preparing things inside the premises, and would be setting up outside shortly. At about 8:45 p.m., the inspectors saw two young males (minor Ronald Macbale and minor Jacob Hull) bring the hot dog cart out from the garage door to a spot in front of the premises in the outdoor seating area. (Test. of Rosenow; test. of Smith; test. of Mereen; Ex. A11.)

21. Over the next 25 minutes or so, the inspectors saw both minors reenter and exit the premises through the south entrance door (on NW Glisan). They also saw minor Hull enter Underdog Sports Bar across the street, into an area prohibited to minors. At about 9:10 p.m., the inspectors broke cover and made contact with minors Macbale and Hull out in front of the premises. Inspector Rosenow spoke to minor Macbale while Inspectors Mereen and Smith spoke with minor Hull. (Test. of Rosenow; test. of Smith; test. of Mereen; Ex. A11.)

22. Inspector Rosenow was wearing his OLCC badge and he identified himself as being from the OLCC. He advised minor Macbale that they were there to ensure that no minors were entering the licensed premises. He asked minor Macbale his age and asked to see his identification. Minor Ronald Macbale told the inspector he was 17 years old. He claimed that he had never been inside the premises. He added that someone else brought the hot dog cart supplies outside for him to set up. Inspector Rosenow asked again whether minor Macbale had been inside the licensed premises at any time that evening. Minor Macbale said "No," and explained that he knew that he was not allowed inside the licensed premises. The inspector then told minor Macbale that the inspectors had been outside observing the premises for a while that night, and that they had seen him entering and exiting the premises. Minor Macbale then admitted that he had been untruthful. He told Inspector Rosenow that he usually enters the premises through the garage and accesses the kitchen for supplies for the hot dog cart. Minor Macbale also said that he had been an employee of Licensee for about three months, and was paid hourly. (Test. of Rosenow; test. of R. Macbale; Ex. A11.)

23. Meanwhile, Inspector Smith spoke with minor Hull, who was initially hesitant to answer the inspector's questions. Minor Hull was uncooperative and kept putting his hands in his pockets, prompting the inspector to pat him down and handcuff him for safety reasons. Minor Hull admitted that he was under age 21. He reported that he worked as a cook at the licensed premises and as a "bar back" across the street at Underdog Sports Bar. (Test. of Smith; test. of Meren; Ex. A11.)

24. After interviewing the two minors, the inspectors spoke to the premises' bartender, Joe Macbale. Joe Macbale explained to Inspector Rosenow that he was an employee, and he served as the manager when, as was the case that night, Sam Macbale was out of town. Joe Macbale told the inspector that he thought minors were permitted in the garage and kitchen areas of the premises. Inspector Rosenow advised Joe Macbale that minors were prohibited in all areas of the premises. The inspector also advised him that Licensee could not have minors operating the hot dog cart because the cart was in a prohibited area. The inspector suggested that the cart could be moved out of the prohibited area to another location on the sidewalk, if permitted by the City of Portland's regulations. Joe Macbale said that he did not have any additional employees available to run the hot dog cart, so he shut it down for the night. (Test. of Rosenow; test. of J. Macbale; Ex. A11.)

25. On February 12, 2013, upon returning to town, Sam Macbale went to OLCC Headquarters demanding to meet with then-Regional Manager Lewis. Mr. Macbale was upset about what had transpired at the licensed premises on the night of February 9, while he was out of town. Mr. Lewis was unavailable, so Mr. Macbale met instead with Rudy Williams, the then-Public Safety and Enforcement Director for OLCC. Mr. Macbale told Mr. Williams that he was angry and surprised about the inspectors' visit to the premises on February 9. Mr. Macbale said that he had requested a face-to-face meeting with Inspector Rosenow and the inspector had yet to get back to him to set up the meeting. Mr. Macbale was upset that the inspectors had come to the premises for an assessment while he was out of town. Mr. Macbale also alleged that the inspectors had been overly aggressive and threatening to his staff, and that they had used expletives during this visit to the premises. Mr. Williams advised Mr. Macbale that he would pass the information on to Mr. Lewis, and that he would follow up with the inspectors regarding the allegations of misconduct. Mr. Williams also told Mr. Macbale that the violation was "righteous," because he had been unlawfully permitting minors on the licensed premises. (Test. of Williams.)

26. At some point in late February or March 2013, Mr. Macbale spoke to Mr. Lewis again about his concerns. During this discussion, Mr. Macbale claimed that he had never been told that he could not have minors working in the kitchen area. Mr. Macbale again complained about the inspectors' actions on the night of February 9. He also complained that he was not being treated fairly with regard to his request to change the minor posting. Mr. Macbale told Mr. Lewis that he wanted to have his youngest son (Ronald) work at the premises. Macbale provided Mr. Lewis with copies of records and receipts showing the amount of food sales at the premises. Thereafter, Mr. Lewis undertook an internal investigation into the inspectors' conduct during their February 9 visit to the premises. (Test. of Lewis.)

27. On March 16, 2013, OLCC Inspectors Dave Luster and Jackie Paul went to the licensed premises for a follow up assessment on Licensee's request to change the minor posting. The inspectors arrived at about 8:33 p.m., and remained inside the premises for about five minutes. During that time, Inspector Luster counted about 60 patrons in the premises. He noted that many patrons were consuming what appeared to be alcoholic beverages, including the night's drink special, pitchers of green beer. Inspector Luster did not see any patrons consuming food during this visit. (Test. of Luster; Ex. A20.)

28. As part of his investigation into the inspectors' conduct at the licensed premises on the night of February 9, Mr. Lewis also visited the licensed premises on a couple of occasions. When he was there during dinner hours (before 8:00 p.m.), he saw many patrons consuming food. When he was there between 8:00 p.m. and 10:00 p.m., he also saw patrons consuming food and drinking, although after about 9:00 p.m., it was evident to Mr. Lewis that drinking was the predominant activity at the licensed premises. As to Mr. Macbale's complaint about the inspectors' conduct, Mr. Lewis determined that the allegations were unsubstantiated.³ (Test. of Lewis.)

29. On June 4, 2013, OLCC sent Licensee another Notice of Violation, alleging that on February 9, 2013, Licensee permitted minors in a prohibited area in violation of OAR 845-006-0335(3)(b) and that Licensee's employee had made a false statement to the Commission in violation of ORS 471.425(1). (Ex. A14.) On June 21, 2013, OLCC followed up the Notice of Violation with an Amended Notice of Proposed License Suspension/Civil Penalty, which included charges for three violations. That same date, OLCC also sent Licensee a Notice of Proposed Refusal to Modify Minor Posting. (Pleadings.)

30. For the period of June 5, 2013 to August 8, 2013, Licensee's employee Joe Macbale worked as a bartender at the licensed premises without a valid service permit issued by the Commission. Joe Macbale's service permit expired on June 4, 2013 and was not timely renewed. (Ex. A22; stipulation.)

31. On October 8, 2013, OLCC issued a Second Amended Notice of Proposed License Suspension/Civil Penalty to Licensee. That notice included charges arising out of Joe Macbale's failure to have a valid service permit. (Stipulation.)

CONCLUSIONS

1. From about February 10, 2012 to August 15, 2012, Licensee permitted minors Stylianos Tsoumas and Connor Morales to be on the licensed premises in violation of OAR 845-006-0335(3)(b).

2. From late 2012 to February 9, 2013, Licensee permitted minors Jacob Hull and Ronald Macbale to be on the licensed premises in violation of OAR 845-006-0335(3)(b).

³ Mr. Lewis did, however, consider the inspectors' investigation regarding the minor posting change to be somewhat sloppy, because the assessment visits during February and March were so quick and Inspector Rosenow did not ask to review, or take into account, Licensee's food sale receipts. (Test. of Lewis.)

3. On February 9, 2013, Licensee's employee Ronald Macbale made a false statement or representation to an OLCC inspector in violation of OAR 471.425(1).

4. From about June 4, 2013 to August 7, 2013, Licensee permitted employee Joe Macbale to mix, sell, or serve alcoholic beverages without a valid service permit issued by the Commission in violation of ORS 471.360(1)(b).

5. The appropriate sanction for these four proven violations is a 69-day license suspension, or civil penalties in the amount of \$6,435 in lieu of 39 days suspension plus 30 days mandatory suspension.

6. The Commission is entitled to refuse to modify Licensee's minor posting to allow minors on the premises from 11:00 a.m. to 2:00 a.m. daily.

OPINION

As set out above, Commission Staff alleges that Licensee is responsible for four violations of the liquor laws. Specifically, Staff alleges that: (1) for the period of about February 10, 2012 to August 15, 2012, Licensee permitted minors Steel Tsoumas and Connor Morales to be on the licensed premises in violation of OAR 845-006-0335(3)(b); (2) from late 2012 to February 9, 2013, Licensee permitted minors Ronald Macbale and Jacob Hull to be on the licensed premises in violation of OAR 845-006-0335(3)(b); (3) on February 9, 2013, employee Ronald Macbale made a false representation or statement to the Commission in violation of ORS 471.425(1); and (4) for the period of June 5, 2013 through August 7, 2013, Licensee permitted employee Joe Macbale to mix, sell or serve alcoholic beverages without a valid permit in violation of ORS 471.360(1)(b). As the proponent of these contentions, the 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). However, as to Licensee's alleged defenses to the violations, Licensee bears the burden of proof.

As to the second matter, Licensee's challenge to the Commission's refusal to modify the minor posting at the premises, Licensee bears the burden of proof. ORS 193.450. To overcome the refusal, Licensee must show that for the business hours at issue, eating food rather than drinking is the predominant activity at the premises.

A. Violations

Violation 1: Permitted Minors in a Prohibited Area, February 10, 2012 to August 15, 2012

OAR 845-006-0335(3)(b) provides as follows: "No licensee, permittee, or licensee's employee will permit a minor: * * * (b) To be on licensed premises or an area of the licensed premises prohibited to minors, except as provided in ORS 471.430, 471.480, 471.482, and this rule."

In *Lava Lanes of Medford* (OLCC Final Order, 04-V-007, February 2005) the Commission set out the test for “permitting” in the context of OAR 845-006-0335(3)(b):

“Permitting” is proved by establishing that the licensee or permittee had knowledge of or had sufficient time and opportunity to detect and determine the minor’s presence at the premises. * * * It is not necessary to show that the licensee had knowledge of the presence of the minor on the premises; the licensee also permits a minor to remain if the licensee had sufficient time and opportunity to detect the minor.

Final Order at 6, citations omitted.

In this case, Licensee has a Number I Minor Posting, meaning that no minors are permitted anywhere on the premises. As explained in OAR 845-006-0340(5)(a), “[t]he Commission assigns this posting to an entire premises where there is a drinking environment or drinking alcohol does or is likely to predominate most of the time.”

The evidence establishes, and Licensee does not dispute, that minors Tsoumas and Morales accessed the premises frequently during the approximately six months that they operated the hot dog cart in front of the licensed premises. They did so primarily in connection with the operation of their food cart business but also, on occasion, to socialize with Licensee’s staff after business hours. Mr. Macbale knew, at the time, that the minors were accessing the premises in connection with the operation of the food cart. Thus, the record establishes that Licensee permitted minors Tsoumas and Morales to be on the licensed premises in violation of OAR 845-006-0335(3)(b).

Licensee’s Alleged Affirmative Defenses to Violation 1. Licensee asserts two defenses to this violation. As explained below, neither defense has merit.

(a) *“Legitimate Business Purpose” Exception*

Licensee contends that the minors’ frequent accessing of the premises did not violate OAR 845-006-0335(3)(b) because the minors had a legitimate business purpose for being on the premises. Specifically, citing to OAR 845-006-0335(5), Licensee contends that minors Tsoumas and Morales were “vendors” who, under this rule, were permitted on the premises despite the premises’ Number I Minor Posting. Licensee is mistaken.

OAR 845-006-0335(5) provides as follows:

(5) Minor Vendor or Contractor. A minor, other than a licensee’s employee, who has a legitimate business purpose, may be in the area of the licensed premises normally prohibited to minors. (For example, a minor who is a plumber may repair the plumbing in a prohibited area).

Only a few Commission cases have interpreted this provision and its interplay with OAR 845-006-0335(3)(b). In *Beer Nutz* (OLCC Final Order, 92-V-003, May 1992), the Commission

held that a minor entering a prohibited area for the purpose of arranging employment is a legitimate business purpose that is not prohibited by Commission rule or precedent. There, the Commission found no violation where a minor entertainer, who was an independent contractor and not an employee of the licensee, accessed an area prohibited to minors on one occasion, for about 20 minutes, to discuss her work schedule with the licensee. The Commission explained as follows:

The record in this case shows that [the minor entertainer] used the premises' rest room, held several brief conversations with two patrons, and ate a corn dog while she waited to speak with Licensee. These activities were incidental to the business nature of the visit. The Commission concludes that the brevity and business focus of [the minor entertainer's] visit did not require her to restrict her presence on the premises to the premises' dressing room.

Final Order at 11.

Thereafter, in *Boogie Woogies/Stars Cabaret* (OLCC Final Order, 01-V-051, September 2002), the Commission held that the exception in OAR 845-006-0335(5) did not apply to minor entertainers, but rather to visits by contractors, persons who remain on the premises only briefly and for a specific purpose unrelated to the licensee's core business:

The exception in OAR 845-006-0335(5) is intended to apply to visits by contractors, such as plumbers, and only for as long as necessary to complete the contracting task. The plumber would not be allowed under this section to remain in the prohibited area to solicit further work. * * * OAR 845-006-0335(5) does not cover the minor dancers' regular and repeated work at Licensees' premises because [ORS 471.482(3)] talks about the minor not remaining longer than necessary. This section contemplates short visits by contractors who were not involved in the Licensees' core business, such as plumbers and other contractors *who are on the premises for short periods and for reasons not related to Licensees' core business.*

Final Order at 16 (emphasis added).⁴

Despite Licensee's contention, the exception set out in OAR 845-006-0335(5) does not apply to minors Tsoumas and Morales under the circumstances presented in this case. The two minors may have had a legitimate business purpose on many occasions when they accessed the licensed premises, but that purpose was for the operation of *their* business (the Super Boufo food cart) rather than to benefit Licensee's business, or to perform duties on Licensee's behalf. Furthermore, as the Commission noted in *Boogie Woogies/Stars Cabaret*, the exception set out in OAR 845-006-0335(5) does not apply to minors who regularly and repeatedly work at the licensed premises. Rather, the exception applies to minors who enter the premises only briefly

⁴ In *Boogie Woogies/Stars Cabaret*, the Commission also held that OAR 845-006-0335(5) did not apply because the licensee failed to show that the minor entertainers at issue were independent contractors and not employees. Final Order at 16-17.

and for reasons unrelated to a licensee's core business.⁵ While the rule is not limited solely to the stated example (a minor who is a plumber repairing the plumbing in a prohibited area), it is limited to the situation in which a minor needs to access a prohibited area for a short period of time to perform a discrete task on the licensee's behalf, such as equipment installation or repair, building construction or remodel, or a meeting or interview with the licensee.

During the six months that minors Tsoumas and Morales operated the hot dog cart, they repeatedly and regularly entered the licensed premises. The minors were "vendors" in the sense that they offered hot dogs for sale to passersby on the sidewalk, but they were not a vendor or supplier to Licensee as contemplated by OAR 845-006-0335(5). As noted above, the minors were not on the premises to benefit Licensee's business. The minors accessed the licensed premises for their own purposes – to retrieve the cart, to store and prepare food in the kitchen, to use the restroom, to make change, and to socialize with Licensee's employees after hours. Also, unlike the situation discussed in *Boogie Woogies/Stars Cabaret*, the minors' purpose in accessing the premises was related to Licensee's core business. Like Licensee, minors Tsoumas and Morales engaged in the preparation and sale of food at the licensed premises, albeit hot dogs rather than pizza. For these reasons, OAR 845-006-0335(5) does not insulate Licensee from the violation of OAR 845-006-0335(3)(b).

(b) *Laches*

Licensee next contends that the Commission unreasonably delayed charging Licensee with this violation, and is now barred from doing so under the doctrine of laches. Licensee's contention is unpersuasive.

The Commission has held that a charge may be dismissed where there was a substantial delay in the matter and witnesses crucial to a full and fair record are no longer available. *Mountain View Market* (OLCC Final Order, 91-V-119, August 1992).⁶ The Commission has also found no unreasonable delay where the notice of violation was issued eight months after the incident and the witnesses were available for hearing and subject to cross-examination. *OLCC Agency 1158* (OLCC Final Order, 09-RO-002, December 2009); *see also Full Moon Bar & Grill* (OLCC Final Order, 10-V-047, April 2011) (holding that the licensee received reasonable notice of the charged violation where the notice was issued about four and a half months after the incident and the licensee had not shown any disadvantageous change in position or any loss of evidence due to the four and a half month interval; the crucial witnesses were available for hearing and subject to cross examination).

⁵ The authorizing legislation, ORS 471.482(3), states: "The commission by rule may permit access to prohibited areas by any minor for nonalcoholic liquor employment purposes as long as the minor does not remain longer than is necessary to perform the duties."

⁶ In *Mountain View Market*, approximately 14 months passed between the date of the alleged incident and the date of the notice of proposed license suspension. The record further established that one witness had died and three other witnesses were no longer available. Given these circumstances, the Commission determined that the charge should be dismissed. Final Order at 13-14.

Here, as discussed above, this violation of OAR 845-006-0335(3)(b) occurred repeatedly from February 2012 through late August 2012. The OLCC received a complaint about a minor on the premises in March 2012 and Inspector Tallmadge investigated the complaint in April 2012. At that time, the inspector spoke with Mr. Macbale, who asserted that the minor did not come into the premises for any reason. In September 2012, after Mr. Macbale terminated the lease agreement, minors Tsoumas and Morales advised the OLCC that they had accessed prohibited areas frequently during the six or so months that they were operating the food cart. Inspector Rosenow investigated the minors' claims. He interviewed Mr. Macbale, visited the premises, and followed up with the minors. On January 16, 2013, the inspector sent Licensee a Notice of Violation, alleging that Licensee permitted the two minors on the premises in violation of OAR 845-006-0335(3)(b) during that six month period. Three weeks later, on February 5, 2013, Commission Staff issued the Notice of Proposed License Suspension/Civil Penalty to Licensee. Given these circumstances, Licensee received notice of the charged violation within a reasonable time frame.

Due to subsequent charges and postponements requested by both sides, the hearing took place in May 2014, 15 months after this first violation was charged. However, despite the delay in convening the hearing, the crucial witnesses to this violation were still available and subject to cross-examination. Licensee has not shown that the OLCC delayed asserting the claim for an unreasonable length of time. Licensee also has not shown any substantial prejudice, such as a disadvantageous change in position or loss of critical evidence. Consequently, the doctrine of laches is inapplicable, and provides no defense to Violation 1.

Violation 2: Permitted Minors in a Prohibited Area, late 2012 to February 9, 2013

The evidence also establishes (and Licensee apparently concedes) that from late 2012 until February 9, 2013, minors Ronald Macbale and Jacob Hull frequently accessed the premises in connection with their work in the kitchen and for purposes of operating the hot dog stand. The evidence further demonstrates that Mr. Macbale knew and approved of them doing so. He believed, mistakenly, that he could employ minors at Silver Dollar Pizza, so long as they did not enter the bar area of the premises. The violation is established, despite Mr. Macbale's misunderstanding of the law.

Licensee's Alleged Affirmative Defenses to Violation 2. Licensee asserts two affirmative defenses to this violation of OAR 845-006-0335(3)(b): estoppel and claim preclusion. However, as explained below, neither defense has merit.

(a) Estoppel.

In support of his estoppel claim, Mr. Macbale contends that he was misled by OLCC inspectors who, he claims, did not make it clear to him that he could not have minors working at the licensed premises. Specifically, Mr. Macbale asserts that Inspector Hoffeditz knew that he had hired his minor son to work in the kitchen of a restaurant he owned previously, and she did not tell him that he could not do so.⁷ Mr. Macbale further asserts that, with regard to the hot dog

⁷ Unlike the licensed premises at issue, Mr. Macbale's previously owned premises, Sammy's, had a Number III minor posting. Under a Number III posting, minors are permitted in certain areas of the

cart at Silver Dollar Pizza, Inspector Tallmadge told him that minors who purchased hot dogs could not use the outdoor seating area, but the inspector did not specifically tell him that minors could not operate the cart.

The theory of equitable estoppel “requires proof of a false representation, (1) of which the other party was ignorant, (2) made with knowledge of the facts, (3) made with the intention that it would induce action by the other party, and (4) that induced the other party to act upon it.” *Interstate Bar & Grill* (OLCC Final Order, 9-V-027, September 2009) (citing *Wilkinson v. PERB*, 188 Or App 97, 102 (2003)). While the circumstances are rare, equitable estoppel may apply to government agencies. *Employment Div. v. Western Graphics Corp.*, 76 Or App 608 (1985). But, at a minimum, it must be shown that the agency knowingly made a false or misleading statement on which an individual justifiably and detrimentally relied. *Mannelin v. DMV*, 176 Or App 9, 14 (2001) (citing *Coos County v. State of Oregon*, 303 Or 173, 180-81 (1987)). There must also be a showing that the representations made by the state agency were within its lawful power to make. *Wilkinson*, 188 Or App at 103.

Simply stated, Licensee has not met the requirements of estoppel in this case. There is no evidence that any OLCC inspector advised Mr. Macbale that he could employ minors to work in the kitchen at the licensed premises. The fact that Mr. Macbale believed otherwise, and that he did not appreciate the difference between Silver Dollar Pizza’s Number I Minor Posting (“no minors permitted anywhere on the premises”) and his prior restaurant location’s Number III posting (“minors allowed in this area”), does not establish the requisite false representation. Equitable estoppel does not apply, and does not bar OLCC from charging Licensee with Violation 2.

(b) *Claim Preclusion*

Licensee next asserts that, under principles of claim preclusion, OLCC is barred from charging Licensee with Violation 2 based on the fact that OLCC also charged Mr. Macbale’s other premises, Underdogs Sports Bar, with a violation based on minors Ron Macbale and Jacob Hull entering that premises on February 9, 2013.

In *Rennie v. Freeway Transport*, 294 Or 319, 323 (1982), the Supreme Court described claim preclusion as follows:

[A] plaintiff who has prosecuted one action against a defendant through to a final judgment * * * is barred * * * from prosecuting another action against the same defendant where the claim in the second action is one which is based on the same factual transaction that was at issue in the first, seeks a remedy additional or alternative to the one sought earlier, and is of such a nature as could have been joined in the first action.

Claim preclusion is not applicable in this case for several reasons. First, there is no

premises, and prohibited only in those areas, such as a separate lounge, where drinking alcohol is the predominant activity. See OAR 845-006-0340(5)(c).

evidence in the record to establish that OLCC charged Underdogs Sports Bar with a violation of OAR 845-006-0335(3)(b) and/or that the violation was adjudicated. More importantly, even if Underdogs Sports Bar had an adjudicated violation for permitting minors on the premises on February 9, 2013, that violation does not involve “the same defendant.” Although Mr. Macbale is a principal in both businesses, Underdogs Sports Bar is a separate legal entity. It holds a separate license at a separate location. Claim preclusion can only apply where the parties are identical. Any enforcement action that the OLCC may have brought against Underdogs Sports Bar involved a different licensee and different facts (*i.e.* the minors’ unlawful entry into that premises). An action against Underdogs Sports Bar, does not preclude OLCC from charging this Licensee with a violation based on minors Hull and Macbale’s unlawful entry into Silver Dollar Pizza. Similarly, any criminal citations that the inspectors may have issued to the minors based on their entry into prohibited areas would have no bearing on this enforcement action.

In short, the evidence persuasively establishes that Licensee permitted minors Hull and Macbale to be on the licensed premises from late 2012 to February 9, 2013 in violation of OAR 845-006-0355(3)(b).

Violation 3: False Statement

Commission Staff alleges that Licensee’s employee, minor Ronald Macbale, violated ORS 471.425(1) by making a false statement to induce or prevent action by the Commission when, on February 9, 2013, he told an OLCC inspector that he had not been inside the licensed premises.

ORS 471.425(1) provides: “No person shall make false representations or statements to the Oregon Liquor Control Commission in order to induce or prevent action by the commission.” Prior Commission cases establish that a false statement to the Commission need not be intentional, but must be material. *See Shan Creek Café* (OLCC Final Order, 05-L-005, February 2006); *H20 Martini Bar & Restaurant* (OLCC Final Order, 05-V-012, December 2005). As the Commission recently confirmed in *9th Street Grocery* (OLCC Final Order, 13-V-058, May 2014), a false statement is material if the subject of the false statement concerns a matter that could lead to the refusal, suspension, or cancellation of a license. *See also Fajitas Mexican Restaurant* (OLCC Final Order, 12-V-077, August 2013). 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-L-008, April 2001).

Here, it is undisputed that Ronald Macbale made a false statement to Inspector Rosenow. During the interview on February 9, 2012, minor Macbale claimed that he had not been inside the licensed premises at any time that evening. The false statement was both intentional and material. It was intentional, because minor Macbale intended to mislead the inspector. It was material because it pertained to a suspected violation of OAR 845-006-0335(3)(b), a matter that could lead to suspension or cancellation of Licensee’s license. The fact that minor Macbale corrected his false statement when Inspector Rosenow confronted him with contrary evidence

(i.e., that the inspectors had just watched him enter and exit the premises) does not obviate the violation. *Mac Club* (OLCC Final Order, 04-V-065, July 2005).

Licensee's Affirmative Defenses to Violation 3. Licensee contends that no violation of ORS 471.425(1) can be established because: (1) minor Macbale did not realize he was talking to an OLCC inspector; (2) the inspectors knew his statement was false, and therefore could not have been misled; and (3) the false statement was made outside the scope of minor Macbale's employment and not to further Licensee's interest; and (4) minor Macbale was entrapped into making the false statement by the inspector's questioning of him during the interview. As set out below, none of these contentions have merit.

Minor Macbale's claim that he did not, at the time, know that he was lying to an OLCC inspector is not persuasive. The evidence demonstrates that Inspector Rosenow was wearing his OLCC badge, and that he identified himself as being from the OLCC. He began the interview by asking minor Macbale for his age and identification. Even if minor Macbale did not see the badge, or did not hear Inspector Rosenow say he was from the OLCC, it was obvious from the inspector's questions to minor Macbale that the inspector was investigating a violation of the liquor laws.⁸ Minor Macbale understood at the time that he was making a false statement to a person with the authority to enforce the liquor laws. By his own admission, minor Macbale claimed that he had never been inside the premises because he wanted to avoid a violation ticket. Minor Macbale knew that he had been inside the premises that night. He knew that minors were prohibited on the premises, and he knew that his entry into the premises violated the law. It is not as if minor Macbale believed that he was engaged in a casual conversation with a patron, or a random stranger off the street. A preponderance of the evidence establishes that minor Macbale made the false statement to prevent enforcement action by the Commission.

Second, the fact that the inspectors had previously seen minor Macbale access an area prohibited to minors and therefore knew that his denial was false does not provide a defense to the violation of ORS 471.425(1). As the Commission found in *Fajitas Mexican Restaurant*, Final Order at 12, the statute focuses on the person's conduct and not on the Commission's actual knowledge. Minor Macbale's duty to be honest and straightforward during his interview with the inspector was not abridged by the fact that the inspector had seen him enter the premises a few minutes earlier. As discussed above, minor Macbale's false statement was both intentional and material, as the Commission has construed those terms.

Third, despite Licensee's contention, the record fails to show that minor Macbale acted outside the scope of his employment when he denied entering the premises. Pursuant to OAR 845-006-0362,⁹ a licensee may be held responsible for the acts, omissions, and liquor law

⁸ Minor Macbale testified that the inspector asked him his age, and what he was doing at the licensed premises, but did not say that he was from the OLCC. Minor Macbale further testified that he assumed the inspectors were the police, and that he denied ever going inside the premises because "the last thing I wanted to get was a ticket." (Testimony of R. Macbale.)

⁹ OAR 845-006-0362 provides as follows:

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

violations of its employees. Although the rule is stated in the permissive (“each licensee may be held responsible”), the Commission has consistently held licensees responsible for the actions of employees who violate the liquor laws. *See, e.g., Cal Sport* (OLCC Final Order, 03-V-008, December 2003) (holding that the Commission did not abuse its discretion in holding the licensee responsible for an employee’s sale to a minor); *see also Hunter’s RV Park* (OLCC Final Order, 06-V-68, February 2007) (holding the licensee responsible for the unauthorized actions by the licensee’s representative or servant).

In this case, minor Macbale was on duty at the licensed premises when he spoke with Inspector Rosenow and made the false statement. Although minor Macbale’s false statement may have been motivated, in part, by his fear of his father, and his fear of being cited for entering premises prohibited to minors, it was also designed to benefit Licensee, *i.e.*, to inhibit the OLCC from taking action against his employer. Under OAR 845-006-0362 (as well as under common law principles of respondeat superior), Licensee bears responsibility for minor Macbale’s violation of ORS 471.425(1).

Finally, Licensee has not proven its allegations of “penalty entrapment” with regard to minor Macbale’s false statement. Penalty entrapment occurs when a person is entrapped to commit a greater offense that subjects the person to a greater penalty. Under ORS 161.275(2), “entrapment” occurs when a person commits a crime because that person was induced to do so by a law enforcement official or by another person acting in cooperation with a law enforcement official, for the purpose of obtaining evidence to be used in a criminal prosecution. “Induced” means that the person did not contemplate and would not otherwise have engaged in the proscribed conduct. *Id. See also United Gas & Food Mart* (OLCC Final Order, 01-V-047/049, February 2002).¹⁰ Merely affording a person the opportunity to commit an offense does not constitute entrapment. Final Order at 10.

Licensee has not shown that minor Macbale was entrapped into making a false statement. Although a violation of ORS 471.425(1) is a more serious offense than a violation of OAR 845-006-0335(3)(b),¹¹ there was no entrapment in this case. When Inspector Rosenow asked minor Macbale his age and asked to see his identification, minor Macbale said he was 17. He then claimed that he had never been inside the premises. The inspector sought clarification, and specifically asked whether minor Macbale had been inside the premises that night. Minor

any law, municipal ordinance, administrative rule, or regulation affecting his license privileges.

¹⁰ In *United Gas & Food Mart*, the Commission held that the use of minor decoys merely afforded the licensee’s clerks an opportunity to commit an offense, which does not constitute entrapment. Final Order at 10.

¹¹ The violation of ORS 471.425(1) is also separate from the violation of OAR 845-006-0335(3)(b). *See, e.g., La Burrita Mini Market* (OLCC Final Order, 09-V-082, June 2010), where the Commission sanctioned the licensee for failing to verify the age of a minor before allowing the minor to buy an alcoholic beverage and for making a false statement during the inspector’s investigation into the sale to the minor. *See also H2O Martini Bar & Restaurant* (OLCC Final Order, 05-V-012, December 2005) (licensee held liable for permitting a minor to be on the licensed premises and for making a false statement, *i.e.*, for falsely denying that the minor had been on the premises that night).

Macbale responded in the negative, and explained that he knew he was not allowed inside. While the inspector's questioning afforded minor Macbale the opportunity to lie, the questioning did not induce or entrap him into violating the liquor law. The record fails to show any conduct on behalf of the inspector that could be construed as badgering or coaxing the minor into falsely claiming he had never set foot inside the premises. Therefore, Licensee's defense of penalty entrapment fails.

Violation 4: Employee Without a Valid Service Permit

Commission Staff alleged that from about June 4, 2013 to about August 7, 2013, Licensee permitted employee Joe Macbale to mix, sell or serve alcoholic beverages without a valid service permit issued by the Commission in violation of ORS 471.360(1)(b). Licensee stipulated to this violation at hearing. Licensee conceded that Joe Macbale mixed, sold or served alcoholic beverages at the premises without a valid service permit during the time period alleged.

B. Sanction

As found above, Commission Staff has proven the four violations alleged in the notice. Licensee has not established any of the alleged affirmative defenses.

Pursuant to OAR 845-006-0500(7)(a) and (b), Violations 1 and 2 (permitting minors on the premises) are Category IV violations. Violation 3 (false statement) is a Category II violation, and Violation 4 (employee without a valid service permit) is a Category III violation.

Pursuant to OAR 845-006-0500(7)(c), if the Commission finds aggravating or mitigating circumstances, it may assess a greater or lesser sanction than what is set out as a standard sanction in Exhibit 1 to OAR 845-006-0500(7)(b). Grounds for mitigation include good faith efforts to prevent a violation and extraordinary cooperation in the Commission's violation investigation. Grounds for aggravation of the penalty include: a prior warning about compliance problems; repeated failure to comply with laws; the violation involved more than one patron or employee; and the violation involved a juvenile. By case precedent, the Commission has also found a basis for aggravation where the licensee personally committed the violation. *See, e.g., P-Mart* (OLCC, Final Order OLCC-92-V-098, April 1993). Also, by case precedent, the Commission will add two days 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).

Violation 1. The standard sanction for a first violation of OAR 845-006-0335(3)(b) (permitting minors on the premises) is a seven-day license suspension or a \$1,155 civil penalty. Exhibit 1 to OAR 845-006-0500(7). Commission Staff asserts that the sanction for Violation 1 should be increased because Sam Macbale was personally involved in the violation, the violation involved two minors, and was repeated. Thus, Commission Staff seeks to add six days (two days for each of the three aggravating factors) or \$990 to the standard sanction, for a total sanction of 13 days' suspension or a \$2,145 civil penalty for Violation 1.

The record establishes that Mr. Macbale was involved in the violation. He leased the food

cart to minors Tsoumas and Morales knowing that they were underage. He also knew that they frequently accessed the premises in connection with their food cart business. The violation involved more than one minor, and it occurred repeatedly over the course of several months. Consequently, for Violation 1, a suspension of 13 days or a \$2,145 civil penalty is appropriate.

Violation 2. The standard sanction for a second violation of OAR 845-006-0335(3)(b) within two years is a 10-day license suspension or a civil penalty of \$1,650. Exhibit 1 to OAR 845-006-0500(7). Commission Staff asserts that the sanction for Violation 2 should be increased because the violation involved two minors, one of which was a juvenile, and because the violation occurred repeatedly. Thus, for Violation 2, the Commission proposes to add another six days, for a total sanction of a 16-day suspension or a civil penalty of \$2,640.

As above, the record establishes that this violation also involved two minors, employees Ronald Macbale and Jacob Hull. Minor Macbale was only 17 years old at the time, making him a juvenile. And, like Violation 1, this violation was repeated. From late 2012 to February 9, 2013, the minors accessed the premises frequently in the course of their employment as cooks at the licensed premises. Accordingly, for Violation 2, a suspension of 16 days or a civil penalty of \$2,640 is warranted.

Violation 3. The standard sanction for a first violation of ORS 471.425(1) (false statement) is a 30-day license suspension. Exhibit 1 to OAR 845-006-0500(7). Commission Staff has not asserted any basis for increasing or decreasing this sanction. Licensee has not demonstrated any basis for mitigation. Consequently, for Violation 3, Licensee is subject to a 30-day license suspension.

Violation 4. The standard sanction for a first violation of ORS 471.360(1)(b) (employee without a service permit) is a 10-day license suspension or a civil penalty of \$1,650. Exhibit 1 to OAR 845-006-0500(7). Licensee stipulated to this violation, and Commission Staff has not asserted any basis for aggravation or mitigation of the sanction. Accordingly, for Violation 4, Licensee is subject to a 10-day suspension or \$1,650 civil penalty.

In summary, for all four established violations, Licensee is subject to a 69-day suspension, or civil penalties in the amount of \$6,435 in lieu of 39 days' suspension plus 30 days' mandatory suspension.

C. Refusal to Modify Minor Posting

Finally, as discussed above, in June 2013, the Commission formally refused Licensee's request to permanently change the minor posting at the premises to a Number III-A to allow minors on the premises from 11:00 a.m. to 2:00 a.m. daily. The Commission found that the licensed premises has a drinking environment and that for the business hours requested, drinking alcohol is the predominant activity.

Pursuant to OAR 845-006-0340(5)(d), the Commission uses a Number III-A minor posting (minors allowed during certain hours and/or on certain days) "to allow minors in a premises, room, or area during times when there is no drinking environment and drinking alcohol

does not predominate and to prohibit minors during times when there is a drinking environment or drinking alcohol does or is likely to predominate.” The Commission has defined “drinking environment” as follows:

“Drinking environment” means the Commission determines that there is a combination of conditions or factors in a premises, room, or area which make it likely that minors will obtain alcohol or which create an environment where drinking alcohol is or appears to be the predominant activity. Some examples of factors that contribute to a drinking environment include but are not limited to cocktail tables, a bar, bar equipment and accessories, dim lighting, alcohol advertising, events or entertainment primarily targeted to adults, and events or operations where the monitoring of patron behavior is or could be insufficient to prevent minors from obtaining alcohol.

OAR 845-006-0340(2)(c). The Commission has defined “drinking predominates” as “more people are, or at times are likely to be, drinking alcohol than not drinking alcohol.” OAR 845-006-0340(2)(b). And, “eating food is the predominant activity” means “more people eat food than drink alcohol.” OAR 845-006-0340(2)(a).

Although Licensee presented some evidence that consuming food is the predominant activity at the premises during the lunch and/or dinner hours, Licensee has not shown that eating food is the predominant activity after 8:00 p.m. To the contrary, the record is replete with evidence that, from about 8:00 p.m. to close, drinking predominates, making the licensed premises a drinking environment as defined above. Consequently, on this record, the Commission appropriately refused to permanently change the premises’ minor posting to a Number III-A to allow minors on the premises from 11:00 a.m. until 2:00 a.m. daily.

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FINAL ORDER

The Commission orders that for the first violation of OAR 845-006-0335(3)(b) (permitting a minor in a prohibited area),¹² the Full On-Premises Sales License held by Sam's Silver Dollar Pizza, Inc., Sam Macbale, President/Director/Stockholder, dba Silver Dollar Pizza, located at 501 NW 21st Avenue, Portland, Oregon, shall be SUSPENDED for 13 days, or Licensee shall be FINED \$2,145 in lieu of suspension.

For the second violation of OAR 845-006-0335(3)(b) (permitting a minor in a prohibited area),¹³ the Full On-Premises Sales License held by Sam's Silver Dollar Pizza, Inc., shall be SUSPENDED for 16 days, or Licensee shall be FINED \$2,640 in lieu of suspension.

For the violation of ORS 471.425(1) (false statement) on February 9, 2013, the Full On-Premises Sales License held by Sam's Silver Dollar Pizza, Inc., shall be SUSPENDED for 30 days.

For the violation of ORS 471.360(1)(b) (employee without service permit), the Full On-Premises Sales License held by Sam's Silver Dollar Pizza, Inc., shall be SUSPENDED for 10 days, or Licensee shall be FINED \$1,650 in lieu of suspension.

And, finally, the request to modify the minor posting to a number IIIA to allow minors on the licensed premises from 11:00 a.m. to 2:00 a.m. daily is REFUSED.

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

Dated this 4th day of November, 2014.

/s/ Steven Marks

Steven Marks

Executive Director

OREGON LIQUOR CONTROL COMMISSION

Mailed this 5th day of November, 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.

¹² The ALJ had originally listed this violation as OAR 845-006-0345(1) (being under the influence of intoxicants on duty), which the ALJ acknowledged was a scrivener's error in her response to Licensee's exceptions and staff's comments on the Proposed Order.

¹³ See comment above