

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

In the Matter of the Full On-Premises Sales) FINAL FINDINGS OF FACT
License held by:) CONCLUSIONS OF LAW
) AND ORDER
)
Hamad Alnajran) OLCC-14-V-006
Michie Nakamura) OLCC-14-V-041
dba SLIM'S RESTAURANT & LOUNGE)
(F-COM))
8635 N. Lombard)
Portland, OR 97203)

HISTORY OF THE CASE

On November 14, 2013, the Oregon Liquor Control Commission (OLCC or Commission) issued a Notice of Proposed Revocation of Licensed Exterior Area (Revocation Notice) to Hamad Alnajran and Michie Nakamura, dba Slim's Restaurant & Lounge, (collectively, Licensees), located at 8635 N. Lombard, Portland, Oregon. The Notice alleged that Licensees failed to demonstrate that they could adequately supervise an exterior area so as to prevent violations of the liquor laws. As a result, the Commission proposed to revoke its approval of the outdoor area. Licensees timely requested a hearing.

On January 24, 2014, the Commission referred the Revocation Notice case to the Office of Administrative Hearings (OAH). The OAH assigned the case to Senior Administrative Law Judge (ALJ) Alison Greene Webster.

On March 25, 2014, the Commission issued a Notice of Proposed License Suspension/Civil Penalty (Suspension Notice) to Licensees. The Notice alleged that on February 16, 2014, Licensees' employee, Michael Wright, permitted patrons to take open containers of alcoholic beverages from the licensed premises, in violation of OAR 845-006-0345(5). The Notice proposed suspending Licensees' license for nine days or assessing a civil penalty in the amount of \$1,485 for the violation. Licensees timely requested a hearing.

On April 7, 2014, the Commission referred the Suspension Notice case to the OAH. The OAH assigned the case to Senior ALJ Webster. On or about May 5, 2014, the OAH reassigned both cases to Senior ALJ Monica A. Whitaker.

On May 21, 2014, the Commission issued an Amended Notice of Proposed Revocation of Licensed Exterior Area (Amended Revocation Notice) to Licensees.

A contested case hearing convened on July 16, 2014 in Tualatin, Oregon, before ALJ Whitaker. Becky Voelkel presented the case for the Commission. Duke Tufty, Attorney at Law, represented Licensees. The following persons testified: Dustin Ball, Oregon Department of

Administrative Services Policy and Budget Analyst; Commission Inspectors Jason Tallmadge and David Luster; Licensee Hamad Alnajran; Licensee Michie Nakamura; Damon Dimick; Michael Wright; Rachel Bowers; and Rebecca Capelle.¹

The Administrative Law Judge considered the record of the hearing and the applicable law and issued a Proposed Order mailed August 12, 2014.

Licensee filed Exceptions to the Proposed Order on August 27, 2014. Staff filed Comments on the Proposed Order on August 27, 2014. The Administrative Law Judge responded to Licensee's Exceptions and Staff's Comments on September 4, 2014.

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:

ISSUES

1. Whether, on February 16, 2014, Licensees' employee, Michael Wright, permitted patrons to take open containers of alcoholic beverages from the licensed premises, in violation of OAR 845-006-0345(5).
2. If so, whether the Commission may suspend Licensees' license for nine days or assess a civil penalty of \$1,485.
3. Whether the Commission has grounds to revoke its approval for Licensee to sell and serve alcohol at Licensees' sidewalk café area under *former* OAR 845-005-0331(1) and (4)² and, if so, whether Licensees have shown good cause to overcome the revocation.

EVIDENTIARY RULINGS

The Commission's Exhibits A1 through A15 were admitted into the record without objection. Licensees' Exhibits P6 through P15 and P17 through P22 were admitted into the record without objection. Licensees' Exhibits P1 through P5 and P16 were admitted into the record over the Commission's objections.

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¹ Licensees withdrew Josh Tinkle as a witness.

² The version of this rule cited herein was amended by the Commission effective June 1, 2014. The version cited herein was in effect at the time the Commission issued the Notice of Proposed Revocation of Licensed Exterior Area and Amended Notice of Proposed Revocation of Licensed Exterior Area.

FINDINGS OF FACT

1. On November 1, 2006, the Commission issued a Full On-Premises Sales license to Hamad A. Alnajran and Michie Nakamura, dba Slim’s Restaurant and Lounge, located at 8635 N. Lombard, Portland, Oregon (the premises). (Ex. A1.)

2. On or about August 11, 2008, in connection with a request for approval to sell and serve alcohol at tables on the front sidewalk of the premises, Licensees submitted an “Alcohol Control Plan for Slim’s Restaurant & Lounge Sidewalk Café’s Permit” (the Control Plan) to the Commission. The Control Plan stated, in part:

Slim’s Restaurant and Lounge will implement the following restrictions and guidelines to control and monitor the proposed area and the patrons:

1. Tables will have signs instructing customers to check-in with the bartender inside before being seated.
2. Informing customers that it’s against the law to have someone else join their party before having one of the staff verify that he or she is 21 years or older.
3. Having the area monitored by one of the staff at all times.
4. Having the area well lit during serving hours.
5. Installing multiple cameras to monitor the area at all times.

(Ex. A3.)

3. On October 16, 2008, the Commission approved Licensees’ request to sell and serve alcohol at the five tables approved for sidewalk café seating by the City of Portland. By letter to Licensees dated October 16, 2008, the Commission stated, in part:

This approval is limited to patrons sitting at the sidewalk café tables; you are not allowed to sell or serve alcohol in this area to patrons who are not seated at the sidewalk café tables.

* * * * *

Your staff is responsible for regularly monitoring the sidewalk café seating area, to ensure that only patrons who are seated at the outdoor tables are consuming alcohol. As a licensee, you are also responsible for ensuring that no unlawful, noisy, or disorderly activities are occurring in the outdoor seating area, and that your patrons do not engage in unlawful, noisy, or disorderly activities in the immediate vicinity of the licensed premises.

(Ex. A2.)

4. On July 1, 2012, Portland Police Bureau Officer McGuffey observed several people drinking alcoholic beverages on the sidewalk in front of the premises. He also observed people freely entering and exiting the bar with alcoholic beverages in their hands. Officer McGuffey was at the premises for approximately 20 minutes. For the first 15 minutes he was at the premises, Officer McGuffey did not see an employee attempting to manage the crowd on the sidewalk. Officer McGuffey made contact with one of the people drinking beer on the sidewalk, Christopher Maday. Mr. Maday told Officer McGuffey that he had purchased the beer inside Slim's, walked out the front door with it, and started talking with people on the sidewalk. (Ex. A6.)

5. As a result of a report Officer McGuffey prepared, the Commission, on July 17, 2012, issued a Notice of Violation to Licensees. The Notice cited Licensees for permitting alcohol to leave the premises, in violation of OAR 845-006-0345(5). (Ex. A5 at 1.) Licensees conceded this violation. The Commission fined, and Licensees paid, a civil penalty \$660 for this first Category V violation. (*Id.*)

6. Also on July 17, 2012, Inspector Luster spoke to Mr. Alnajran via telephone concerning alcohol leaving the premises. Inspector Luster reminded Mr. Alnajran that Licensees needed to comply with the Control Plan. (Ex. A5 at 3.)

7. On August 16, 2012, Licensees met with Inspectors Tallmadge and Luster to discuss the July 17, 2012 Notice of Violation. Licensees informed the inspectors that they had increased the number of staff at the premises since receiving the July 2012 violation notice and were considering making t-shirts for their staff to wear to make them more identifiable. (Ex. A7 at 3-4.)

8. On August 18, 2012, Inspector Luster performed an outside observation of the premises. He observed that the outdoor tables were fully occupied. He did not see anyone identifiable as staff present in the outdoor sitting area. In addition, he noted that the front door of the premises was closed. (Ex. A7 at 4.)

9. On August 21, 2012, Inspector Luster spoke to Ms. Nakamura by telephone about his observations outside the premises on August 18, 2012. Inspector Luster expressed his concern that when the front door of the premises was closed, it restricted staff's line of sight and ability to monitor the outdoor area from inside the premises. Ms. Nakamura explained that staff typically closed the front door between 11:00 p.m. and 12:00 a.m. because of noise from the band playing inside. Inspector Luster explained that it was critical that Licensees monitored the sidewalk area. During the conversation, Ms. Nakamura informed Inspector Luster that she would have a sample uniform shirt for him to see, that the shirt would be yellow in color, with the name of the premises, and the word "staff" on it. Ms. Nakamura explained that in the event an employee did not have that shirt to wear, he or she would be required to wear a white towel over his or her shoulders. Finally, Ms. Nakamura informed Inspector Luster that Licensees had hired a "bar back named Stew Post * * * to monitor the sidewalk area." (Ex. A7 at 4.)

10. On June 29, 2013, at 11:20 p.m., Inspectors Tallmadge, Paul, and Luster were traveling westbound on N. Lombard Street conducting compliance checks of licensed premises

in the area. While passing by the premises, the inspectors observed that the public sidewalk directly in front of the premises was crowded by a large group of patrons whom they believed were consuming alcoholic beverages. The inspectors also observed that the front door to the premises was closed and that there was no one visibly identifiable as staff present in the outdoor area. A few minutes later, when the inspectors approached the premises on foot, they saw five patrons consuming alcoholic beverages while standing on the public sidewalk in front of the premises. (Ex. A7 at 5.)

11. At 11:25 p.m., the inspectors entered the premises. Inspector Luster made contact with bartenders Dimick and Post. Inspector Luster explained to them that they needed to monitor the outdoor patio area. He also reminded them that the patrons consuming alcohol outside must be seated at the approved tables. Inspector Luster further advised that the inspectors had seen five patrons consuming alcohol on the public sidewalk, a violation which could lead to the revocation of the outdoor permit. (Ex. A7 at 5.)

12. On August 30, 2013 at 9:15 p.m., Inspector Luster and Dustin Ball³ were traveling eastbound on North Lombard Street attempting to locate a building for the posting of a public notice. As they drove by the premises, they observed a crowd on the sidewalk in front of the premises. Inspector Luster estimated that there were at least 30 patrons on the public sidewalk consuming alcoholic beverages. They saw that the outdoor tables were full and there was no one visibly identifiable as staff present in the outdoor area. (Ex. A7 at 5.)

13. At approximately 9:20 p.m., Inspector Luster entered the premises and made contact with Mr. Dimick. Inspector Luster asked Mr. Dimick to follow him outside, where he showed Mr. Dimick the crowd of patrons. Mr. Dimick asked the patrons to place their drinks on the tables and to clear the public sidewalk. Inspector Luster reminded Mr. Dimick that the Commission could revoke the outdoor permit if Licensees continued to allow patrons to consume alcoholic beverages outside of the permitted area. (Ex. A7 at 6.) Mr. Dimick explained to Inspector Luster that the employer had tasked an employee, Casey, with sitting in the outdoor area to make sure patrons kept their drinks on the tables, but that Casey had failed to perform his duties that night. (Test. of Dimick.)

14. On September 18, 2013, at 7:03 p.m., Inspectors Paul and Luster walked by the premises to see if Licensees had installed video surveillance cameras to monitor the exterior area. Inspector Luster did not see any video surveillance cameras installed in the exterior area of the premises. As the inspectors approached the premises, Inspector Luster observed an adult white male standing on the sidewalk outside of the licensed area drinking what the inspector believed was beer. Inspector Luster also thought that this person was exhibiting signs of visible intoxication.⁴ At one point, Inspector Luster saw Mr. Alnajran come outside of the premises and

³ Mr. Ball is a Policy and Budget Analyst with the Department of Administrative Services. On August 30, 2013, he was on a “ride along” with Inspector Luster to learn about the field work Commission inspectors perform. (Test. of Ball.)

⁴ Inspector Luster noted that the male had “droopy eyelids, odor of alcohol on his person and was slurring his words as he spoke to another patron who was seated within the licensed area.” (Ex. A6 at 6.)

remove several empty drink glasses from the outdoor tables. Mr. Alnajran went back inside the premises without contacting the adult male standing on the sidewalk. The inspectors stayed at the premises for an additional 10 minutes and did not observe any employees monitoring the outdoor area. (Ex. A7 at 6; test. of Luster.)

15. On October 12, 2013, at approximately 11:55 p.m., Inspectors Paul and Tallmadge arrived at the premises for another check of Licensees' compliance with the Control Plan for the sidewalk seating area. Inspector Paul observed two patrons standing on the sidewalk closer to the curb. Both patrons were holding glasses with what she believed contained beer. At 11:58 p.m., the inspectors parked their vehicle and walked to the premises. They again saw these two patrons standing on the sidewalk drinking what they believed to be beer. They also observed three male patrons standing by one of the outdoor tables holding pint glasses with what they believed to be beer. The inspectors stood outside the front entrance for a few minutes. During this time they smelled a fairly strong odor of marijuana.⁵ The inspectors did not see any staff monitoring the outside of the premises. (Ex. A9 at 1.) At approximately 12:08 a.m., the inspectors observed a staff member exit the premises and step out on the sidewalk to smoke a cigarette. At that time, there were no patrons standing on the sidewalk area with open containers of alcohol. Thereafter, the inspectors left the premises without making contact with Licensees or its employees. (*Id.* at 2.)

16. On October 22, 2013, Inspector Luster completed his investigation and recommended that the Commission revoke its approval allowing Licensees to sell and serve alcohol at the sidewalk café area. Inspector Luster also issued a Notice of Warning Ticket to Licensees for allowing a visibly intoxicated person to consume alcohol (the September 18, 2013 incident) and a Notice of Warning Ticket for permitting unlawful activity on the premises (the October 12, 2013 incident). (Ex. A7 at 1.) Licensees received both warning notices and notice of the inspector's recommendation to revoke the approval to sell and serve alcohol at the sidewalk café area at the same time. (Test. of Alnajran, Nakamura, and Luster.)

17. After receiving both warning notices and the revocation notice, Licensees implemented a policy requiring its employees to set up outdoor crowd control barriers that enclosed the sidewalk café area and separated it from the sidewalk area. (Test. of Alnajran.) In addition, Licensees placed signs on the crowd control barriers stating "NO OUTSIDE BEVERAGES BEYOND THIS POINT." (Test. of Alnajran; Ex. P20; emphasis in original.) Licensees also posted signs stating:

OUTDOOR TABLE RULES

Must Be Seated While Consuming Alcohol

Place Orders Inside

It's a public sidewalk too.

(Ex. P21.)

⁵ The Commission did not include this incident of alleged marijuana use outside the premises in the Amended Notice of Proposed Revocation of Licensed Exterior Area as a basis for the revocation.

18. On February 16, 2014, at 1:45 a.m., Inspector Luster drove by the premises and saw patrons drinking from beer cans while standing on the public sidewalk outside of the licensed area. Inspector Luster also observed a female patron exhibiting what he believed to be signs of visible intoxication. He heard her yelling profanity and saw her holding on to others to maintain her balance. (Ex. A10 at 3; test. of Luster) In addition, he noticed that the front door to the premises was closed. He did not see anyone identifiable as staff outside the premises monitoring or controlling the exterior licensed area. (*Id.*)

19. At 1:48 a.m., Inspector Luster parked his vehicle and approached the premises on foot. He saw that the patrons were still drinking beer outside of the licensed area, that the front door to the premises was closed, and that there were no employees outside monitoring the exterior licensed area. (Ex. A10 at 3; test. of Luster.)

20. At 1:55 a.m., Inspector Luster observed Licensees' employee, Michael Wright, walk out of the front door of the premises and collect empty pint glasses from the outdoor area tables. Mr. Wright interacted with the group of patrons who were standing on the sidewalk and drinking beer, but did not ask them to return to the licensed area with their drinks. After interacting with the patrons, Mr. Wright returned inside the premises and closed the front door. (Ex. A10 at 3; test. of Luster.)

21. At 2:00 a.m. Inspector Luster entered the premises and contacted Mr. Dimick and Mr. Wright. Mr. Wright told Inspector Luster that there is normally a rope set up outside to separate the licensed area from the sidewalk, but he did not put it up that night because it was broken. Inspector Luster informed Mr. Dimick that he had observed several patrons consuming alcoholic beverages outside of the licensed area. (Ex. A10 at 4.)

22. On March 7, 2014, Licensees updated their written "Opening Procedure" to include the following:

- Take out and set up the crowd control stands to enclose front patio area.
- Take the A frame out to the side[]walk (be mindful of the need to have enough area for pedestrians to walk by.

(Ex. P6 at 1.) Since March 7, 2014, Licensees have set up crowd control barriers to enclose the front patio area (sidewalk café area) each day. (Test. of Alnajran.)

23. In April 2014, Licensees had four video surveillance cameras installed in the exterior area around the sidewalk café.⁶ In addition, Licensees installed a closed-circuit television at the end of the bar so that the on-duty bartender(s) could monitor the activity outside of the premises. (Test. of Alnajran.)

⁶ Licensees previously had video surveillance cameras installed on the exterior of the premises to monitor the sidewalk café area, but the cameras were stolen. (Test. of Alnajran.) It is unclear when the cameras were stolen, but the evidence establishes that there were no cameras installed in the exterior area on September 18, 2013. (*See* Ex. A7 at 6.)

24. In late June 2014, Licensees' staff each signed a document titled "Patio Service Policies," which provides:

Patio Service Policies
Slim's Restaurant and Lounge

As an employee of Slim's Restaurant and Lounge, I affirm that I understand and will abide by the following requirements.

1. Barrier. I understand that the barrier enclosing the Sidewalk Café must be set up every day that patrons may sit in the Sidewalk Café. If the weather is sufficiently poor that there is no possibility of patrons using the Sidewalk Café area, I understand that I must receive the approval from either Hamad or Michie before operating without the barriers. In such cases, I understand that patrons may not leave the interior of the premises with an alcoholic beverage or otherwise bring an alcoholic beverage out to the Sidewalk Café area.
2. Signage. I understand that the signage advising patrons about the requirement that no alcohol may be removed from the Sidewalk Café area must be conspicuously visible at all times.
3. Monitoring. I understand that the Sidewalk Café area must be visually monitored at least every 10 minutes and that such monitoring requires that a staff member physically exit the premises and visually observe the entire Sidewalk Café area.
4. Video Camera. I understand that the Sidewalk Café area should be visually monitored as frequently as practical using the video camera system installed directly adjacent to the bar area.
5. Video Camera Not a Substitute for Monitoring the Sidewalk Café from the Exterior. I understand that viewing the Sidewalk Café area from the video camera display is not a substitute for exiting the interior of the premises and actually entering the Sidewalk Café area.
6. Table Maintenance. I understand that empty or otherwise unattended alcoholic beverages should be regularly and promptly removed from the tables in the Sidewalk Café.
7. Patron Noncompliance. I understand that a patron that removes or attempts to remove an alcoholic beverage from the Sidewalk Café area must be told to return to the Sidewalk Café area or interior of the premises. If the patron fails to promptly return to the Sidewalk Café area or interior of the premises, the patron must be asked to return his or her alcoholic beverage and leave the premises for a minimum of 24 hours. Patrons that repeatedly fail to comply with this requirement should be 86'd from the establishment.

(Ex. P7 at 1-7.)

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CONCLUSIONS OF LAW

1. On February 16, 2014, Licensees' employee, Michael Wright, permitted patrons to take open containers of alcoholic beverages from the licensed premises, in violation of OAR 845-006-0345(5).
2. The appropriate sanction for this violation of OAR 845-006-0345(5) is a nine day license suspension or a civil penalty of \$1,485 in lieu of suspension.
3. The Commission has grounds under *former* OAR 845-005-0331(1) and (4) to revoke its approval for Licensees to sell and serve alcohol at Licensees' sidewalk café. Licensees have not shown good cause to overcome the revocation.⁷

OPINION

The Commission contends that on February 16, 2014, Licensees' employee, Michael Wright, permitted patrons to take open containers of alcoholic beverages from the licensed premises. The Commission also contends that on five occasions, Licensees permitted patrons to consume alcoholic beverages outside of the permitted area. The Commission contends that this demonstrates that Licensees are unable to adequately supervise the outdoor area, and that this warrants revocation of its approval to license the outdoor area. As the proponent of these contentions, the Commission bears the burden to prove its allegations by a preponderance of the evidence. ORS 183.450(2) ("The burden of presenting evidence to support a fact or position in a contested case rests on the proponent of the fact or position"); *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); *Metcalf v. AFSD*, 65 Or App 761, 765 (1983) (in the absence of legislation specifying a different standard, the standard of proof in an administrative hearing is preponderance of the evidence). Proof by a preponderance of the evidence means that the fact finder is persuaded that the facts asserted are more likely than not true. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390, 402 (1987).

1. Open containers of alcoholic beverages

OAR 845-006-0345 provides, in part:

The Commission holds licensees accountable for the acts of their agents and employees. (OAR 845-006-0362). No employee or agent of a licensee may violate any provision of this rule. A violation of any section of this rule by an employee or agent of a licensee is considered a violation by the licensee.

* * * * *

⁷ OLCC clarified this sentence by taking out "has shown" which is consistent with the ALJ's conclusion in the opinion section.

(5) Open Containers: No licensee or permittee will permit a person to take an open container of alcoholic beverages from the licensed premises, except as ORS 471.175, 471.178, 471.186, 471.200, 471.223 and 471.227 allow. Except for tastings as allowed in OAR 845-006-0450, no Off-Premises Sales licensee will permit an open container of alcoholic beverages on the licensed premises unless the licensee also holds another license at the premises that allows on-premises consumption. Violation of this section is a Category V violation.

Licensees hold a Full On-Premises Sales license under ORS 471.175. Pursuant to that statute, “all alcoholic beverages sold under the license must be consumed on the licensed premises.” ORS 471.175(1). Here, the record establishes that on February 16, 2014, patrons consumed alcoholic beverages sold under the license off the licensed premises. These patrons were drinking from open cans of beer while standing on the public sidewalk outside of the licensed area.

To find that Licensees permitted this activity, the evidence must prove knowledge of the proscribed activity and the failure to take reasonable steps to prevent or control the proscribed activity. *See, e.g., Don Juan’s* (OLCC Final Order, 88-V-003, May 1988). The evidence establishes that Licensees’ employee, Michael Wright, came outside and collected empty pint glasses from the outdoor area tables. While doing so, he saw and interacted with the group of patrons who were consuming beer outside of the licensed area. Mr. Wright did not ask the patrons to return to the licensed area with their alcoholic beverages.

The Commission has established that Licensees’ employee, Mr. Wright, permitted patrons to take open containers of alcoholic beverages from the licensed premises, in violation of OAR 845-006-0345(5).

2. Penalty

As a result of the above violation, Commission Staff proposes to suspend Licensees’ license for nine days or to impose a civil penalty in the amount of \$1,485. A violation of OAR 845-006-0345(5) is a Category V violation. Under the Commission’s guidelines, the standard penalty for a Category V violation is a three-day suspension or a \$495 civil penalty for the first violation of this type and a seven-day suspension or a \$1,155 civil penalty for the second violation of this type within two years. OAR 845-006-0500(7)(a)(G) and (b).

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). Grounds for aggravation of the penalty include: a prior warning about compliance problems; repeated failure to comply with laws; and the violation involved more than one patron or employee. By case precedent, the Commission will add two days to the suspension (or \$330 to the civil 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). Here, Commission Staff proposes aggravation of the standard penalty because Licensees’ violation involved multiple patrons.

This is Licensees' second violation for allowing patrons to take open containers of alcoholic beverages from the licensed premises within two years. Because this second violation involved multiple patrons, it is appropriate to add two days to the suspension, for a total of nine days, or to add \$330 to the civil penalty, for a total of \$1,485.

3. *Revocation of approval to sell and serve alcohol at sidewalk café and good cause*

a. *Basis to revoke*

The Commission argues that Licensees have failed to demonstrate adequate supervision of the sidewalk café area so as to prevent violations of the liquor laws for the reasons that follow.

Former OAR 845-005-0331, titled "Licensing Exterior Areas," provides, in part:

(1) The Commission shall refuse to license an exterior area, and may revoke its approval of an outdoor area previously licensed, for any of the reasons listed in this rule unless the applicant shows good cause that outweighs the refusal basis. The following sections state the refusal reasons that apply to exterior areas.

* * * * *

(4) The applicant or licensee fails to demonstrate that there will be adequate supervision of the area so as to prevent violations of the liquor laws.

On June 29, 2013, Inspectors Tallmadge, Paul, and Luster observed five patrons consuming alcoholic beverages on the public sidewalk in front of the premises. At that time, Licensees did not have staff outside monitoring the sidewalk café. On August 30, 2013, Inspector Luster observed patrons consuming alcoholic beverages on the public sidewalk in front of the premises. The outdoor tables were full and there was no staff present in the outdoor area monitoring the sidewalk café. On September 18, 2013, Inspector Luster observed a man standing on the sidewalk area outside of the licensed area drinking what the inspector believed was beer. Although Mr. Alnajran came outside of the premises and removed several empty drink glasses from the outdoor tables, he did not make any contact with this person. On October 12, 2013, Inspectors Paul and Tallmadge observed two male patrons standing on the sidewalk in front of the premises holding glasses containing what the inspectors believed to be beer. They also observed three male patrons standing by one of the outdoor tables holding pint glasses with what they believed to be beer. The inspectors did not see any staff outside of the premises monitoring the sidewalk café during their October 12, 2013 visit. Finally, on February 16, 2014, Inspector Luster observed patrons drinking from beer cans while standing on the public sidewalk outside of the licensed area.

The above incidents, when considered in the aggregate, establish that Licensees have failed to demonstrate adequate supervision of the sidewalk café area so as to prevent violations

of the liquor laws. As discussed above, it is a violation of OAR 845-006-0345(5) to allow a person to take an open container of alcoholic beverages from the licensee's premises. If Licensees had adequately supervised that area, it is unlikely that the inspectors would have seen these repeated instances of patrons consuming alcoholic beverages on the sidewalk outside of the licensed area. Therefore, the Commission has established that it has a basis to revoke its approval for Licensees to sell and serve alcohol in the sidewalk café area.

b. Good cause

Pursuant to *former* OAR 845-005-0331(1), Licensees may overcome the revocation if they can show good cause to outweigh the revocation basis. The Commission's statutes and rules do not define what constitutes "good cause" in this context. At hearing, Commission Staff did not offer an interpretation of "good cause." Rather, the Staff argued that the steps Licensees have recently taken to demonstrate that they can adequately supervise the exterior area amount to "too little too late."

In the license renewal context, the Commission has, by final order precedent, identified several factors to be considered in determining whether there is good cause to overcome a poor record of compliance. While a license renewal is not at issue in this case, those good cause factors are instructive and provide significant guidance in this case. In determining whether good cause exists to renew the license where there have been compliance issues in the past, the Commission has considered the following factors, among others:

- Lengthy period(s) of time without violations as a licensee;
- The nature/seriousness of the violation;
- Whether the licensee took immediate corrective steps following the violation;
- Time passage since latest violation;
- Whether the incident was isolated;
- Whether the violation is aggravated or mitigated; and
- Acceptance of responsibility versus evasion of responsibility for the violation.

US Market #145 (OLCC Final Order at 16-17, 11-V-009, February 2012) (identifying nine good cause factors the Commission will consider in determining whether there is good cause to overcome a poor record of compliance); *see also Mt. Angel Market & Deli* (OLCC Final Order, 12-V-003, July 2013 (same)).

Here, as discussed below, the factors weigh against a finding of good cause to overcome revocation of the approval to sell and serve alcohol in the sidewalk café area.

(a) *Period of time without violations:* As found above, Licensees were first licensed on November 1, 2006 and received the Commission's approval to sell and serve alcohol at the sidewalk café tables on October 16, 2008. On July 17, 2012, the Commission issued a Notice of Violation to Licensees for permitting alcohol to leave the premises, in violation of OAR 845-006-0345(5). Licensees conceded the violation. Since that time, the Commission observed five

additional instances of patrons consuming alcoholic beverages outside of the licensed area in violation of OAR 845-006-0345(5) – on June 29, August 30, September 28, and October 12, 2013 and on February 16, 2014. This factor weighs against Licensees.

(b) *Nature/seriousness of the violation:* The Commission’s October 2008 approval provided that Licensees were “responsible for regularly monitoring the sidewalk café area, to ensure that only patrons who were seated at the outdoor tables were consuming alcohol.” (Ex. A2.) Similarly, Licensees’ August 2008 Control Plan obligated Licensees to have the outside area “monitored by one of the staff at all times.” (Ex. A3.) The Control Plan also required Licensees to install multiple cameras to monitor the areas at all times. Licensees’ repeated failure to adhere to the terms of the Commission’s approval and to their own Control Plan constitute serious breaches.⁸ Thus, this factor also weighs against Licensees.

(c) *Whether the licensee took immediate corrective steps following the violation:* Licensee has the burden to demonstrate that corrective steps were immediate. *Mt. Angel Market & Deli*, Final Order at 17, note 17. On July 17, 2012, in connection with notifying Licensees of the open container violation, Inspector Luster reminded Mr. Alnajran that Licensees needed to follow their Control Plan. As discussed above, under the Control Plan, Licensees were obligated to have a staff person monitor the sidewalk café area at all times and to install multiple cameras to monitor the area at all times.

On August 16, 2012, Licensees met with Inspectors Tallmadge and Luster to discuss the July 17, 2012 Notice of Violation. Licensees informed the inspectors that they had increased the number of staff at the premises since receiving the July 2012 Notice of Violation. On August 21, 2012, Ms. Nakamura informed Inspector Luster that Licensees would have t-shirts for staff to wear and that they had hired an employee to monitor the sidewalk café area. On June 29 and again on August 30, 2013, Inspector Luster spoke to Licensees’ employees regarding the need to monitor the sidewalk café area.

Despite Ms. Nakamura’s stated intentions, the record fails to demonstrate that Licensees took immediate corrective steps following the July 2012 violation. Licensees presented no evidence to show that they implemented the use of t-shirts for staff to wear. There is no evidence that Licensees had an employee posted outside of the premises to monitor the sidewalk café area. If Licensees had hired an employee to do so, it is highly unlikely the observed conduct would have continued to repeatedly occur. Moreover, Licensees waited until after receiving the notice of revocation in October 2013 before implementing the use of crowd control stands to enclose the sidewalk café area from the public sidewalk. Licensees waited until April 2014 to replace the video surveillance cameras to monitor the sidewalk café area. Licensees waited until June 2014 to implement a written policy for its employees to sign regarding the sidewalk café area. The evidence does not establish that Licensees took immediate corrective steps following the violations. Rather, the evidence establishes that they did not take corrective action until multiple violations had occurred. This factor weighs against Licensees.

⁸ Licensees’ failure to adhere to the Commission’s approval and its own Control Plan is akin to failing to comply with a restriction on the license. As set out in OAR 845-005-0355(5), the failure to comply with a license restriction is a Category I violation, the most serious of violations.

(d) *Time passage since latest violation:* As explained above, the latest violation occurred in February 2014. The hearing took place five months later in July 2014. In *US Market #145*, OLCC Final Order, 11-V-009, February 2012, and *U.S. Market #130*, OLCC Final Order, 12-V-017, July 2013, the Commission established that the passage of seven months from the last violation to the time of hearing was a neutral factor. The Commission determines that five months of time weighs against a finding of good cause to overcome revocation of the approval to sell and serve alcohol in the sidewalk café area. Five months is not a lengthy period of time for a licensee to have shown that the offending conduct has changed or that licensee can operate without future violations; such periods would weigh in licensee's favor. Neither is it a period in which it is uncertain whether licensee would be able to continue to operate without violations, which would be neutral. Five months without a violation, especially given the record of behavior before us, is not enough time to unequivocally show that licensee can continue to operate in the future without violations. Therefore, this factor weighs against Licensees.⁹

(e) *Whether the incident was isolated:* As previously discussed, since July 2012, there have been five instances in which inspectors have observed a lack of monitoring by staff and patrons consuming alcoholic beverages and what was believed to be alcoholic beverages outside the licensed sidewalk café area – on June 29, August 30, September 18, and October 12, 2013 and February 16, 2014. The incidents were not isolated. Consequently, this factor weighs against Licensees.

(f) *Whether the violation is aggravated or mitigated:* As found above, there is a basis to aggravate the February 16, 2014 violation of OAR 845-006-0345(5) because it involved a group of patrons consuming alcoholic beverages outside the licensed area. Also, on previous visits during 2013 the inspectors saw groups of patrons consuming what appeared to be alcoholic beverages while standing on the sidewalk outside the licensed area. Licensees have shown no basis for mitigation. Therefore, this factor also weighs against a finding of good cause.

(g) *Acceptance of responsibility versus evasion of responsibility for the violation:* At hearing, Licensees accepted responsibility for the violations and provided evidence of the corrective steps they have taken to correct the violations. This factor weighs in Licensees' favor.

Only one of the seven factors discussed above weighs in Licensees' favor of good cause. The remaining six factors weigh against Licensees. Considering staff's repeated failure to regularly monitor the sidewalk café area, the number of instances in which inspectors have observed patrons consuming alcoholic beverages outside the licensed sidewalk café area, the length of time Licensees had to take corrective action, and in light of the relevant good cause factors discussed above, Licensees have not shown good cause to overcome the revocation of the approval for Licensees to sell and serve alcohol in the sidewalk café area. Therefore, the approval should be revoked.

⁹ The ALJ viewed this good cause factor as being neutral in the Proposed Order. In her response to Licensee's exceptions and staff's comments, the ALJ adhered to her determination that a five-month passage of time since the latest violation is a neutral factor. For the reasons stated above, the Commission finds that a five-month passage of time weighs against Licensees.

FINAL ORDER

The Commission orders that for the violation of OAR 845-006-0345(5), the Full On-Premises Sales License held by Hamad Alnajran and Michie Nakamura, dba Slim's Restaurant and Lounge, located at 8635 N. Lombard, Portland, Oregon, shall be SUSPENDED for nine days, or Licensees shall be FINED \$1,485 in lieu of suspension.

The Commission's approval for Licensees to sell and serve alcohol in the outdoor sidewalk café area is hereby REVOKED.

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

Dated this 7th day of November, 2014.

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

Mailed this 10th 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.