

E – RETAIL AGENTS

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E. RETAIL AGENTS

E.1. Responsibility for Shortages

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Case: *OLCC Agency No. 1182*, OLCC-13-RO-002, April 2014.

Facts: OLCC audit showed Agent was short on inventory. Agent responded by showing that certain items were miscounted or missed, but claimed that other items on the audit were not accurate without additional proof.

Abstract: Commission has the burden to prove that a shortage occurred and the amount of the shortage. The burden then shifts to the agent to show that the shortage could not have been prevented or avoided in the exercise of reasonable care. (Agency No. 103) (OLCC 00-RO-001, August 2000)). For the Commission to be responsible for the shortage, the agent must prove the cause of it.

Key Words/Phrases: Agent, audit, shortage, Audit Discrepancy Report, POS system, accurate, count

Case: *OLCC Agency No. 198*, OLCC-05-RO-007, December 2005.

Facts: Agent had shortages of more than \$33,000. Agent argued that the shortage was due to a warehouse overage. Agent had sued the OLCC for breach of contract, and the court had ruled that Agent owed the OLCC but was entitled to a contested hearing as requested.

Abstract: Agent did not show by a preponderance of the evidence the cause of the shortage. Therefore, Agent did not show the shortage could have been prevented or avoided by the exercise of reasonable care.

The ALJ partially relied upon *OLCC Agency No. 182* (Amended Final Order 92-RO-002, October 1993) in discussing burden of proof allocation. *OLCC Agency No. 182* has not been followed since it was issued in 1993. In all audit shortage cases subsequent to *OLCC Agency No. 182*, the Commission has reverted to its prior precedent, requiring OLCC to prove that a shortage existed and the amount thereof; the agent at all times has borne the burden of either refuting the proof that there is a shortage or proving that the shortage could not have been prevented in the exercise of reasonable care. See, e.g., *OLCC Agency No. 187*, OLCC-93-RO-002, Dec. 1993); *OLCC Agency No. 103*, OLCC-00-RO-001, Aug. 2000; and *OLCC Agency No. 197*, OLCC-05-RO-002, July 2005. It is apparent that *OLCC Agency No. 182* has been implicitly overruled in so far as the allocation of the initial burden regarding proof of shortage. The Commission wishes now to clarify explicitly its overruling of the burden of proof allocation announced in *OLCC Agency No. 182*.

Key Words/Phrases: shortage, burden of proof, overrule

Case: *OLCC Agency No. 197*, OLCC-05-RO-002, July 2005.

Facts: Agent had a shortage of more than \$12,000. Agent argued the shortage was due to mark ups and mark downs, and OLCC did not take these into account.

Abstract: Agent did not show by a preponderance of the evidence the cause of the shortage. Therefore, Agent did not show the shortage could have been prevented or avoided by the exercise of reasonable care.

Key Words/Phrases: Retail Sales Agent Agreement, shortage, audit, cause of shortage

Case: *OLCC Agency No. 198*, OLCC-04-RO-0006, December 2004.

Abstract: Agent was notified of a shortage of approximately \$150,000. Within 30 days, Agent deposited nearly five weeks' worth of liquor sales proceeds and the Commission gave him written notice of the remaining shortage amount

(approximately \$40,000). Agent failed to pay the remaining shortage amount within 30 days. Agent claimed he did not pay the remaining shortage as he doubted the audit's accuracy and disputes the shortage. These defenses are without merit as, under the plain language of the Retail Sales Agent Agreement, the agent is obligated to pay the shortage amount even though he or she has requested a hearing to dispute the shortage. At hearing, the burden of proof is on agent to show that the shortage could not have been prevented or avoided in the exercise of reasonable care. The agent must also prove the cause of the shortage. Failure to follow this process was a deliberate and substantial violation of Section 14(a) of the Agreement, warranting termination under Section 22(d). Additionally or alternatively, Agent violated a policy or procedure of the Commission with regard to liquor sales proceeds or inventory which caused, or is likely to cause, a financial loss to the Commission (his failure to pay the shortage amount denies the Commission the benefit of these funds), constituting good cause to terminate the Agreement under Section (2)(g).

Case: *OLCC Agency No. 16, OLCC-02-RO-004, December 2002.*

Facts: Agent's employee sells to minor decoy through Independence police. Employee served with criminal complaint which was dismissed w/o prejudice. Agent argues that it is not responsible for knowing sale by its employee, and that ORS 471.346(6) violate Equal Protection clauses.

Abstract: Agent contended that the Commission should consider his good record of compliance to mitigate against the penalty of issuance of a notice of violation to Agent, as it does in determining the appropriate penalty for licensees and permittees. The Commission concluded that while the contract contemplates the possibility of mitigation when the agent is faced with termination (Paragraph 24), there is no provision for consideration of mitigation short of a termination action. Pursuant to Paragraphs 22e and 23, a notice of violation is the only appropriate penalty for an individual contractual violation.

Key Words/Phrases: minor, decoy, knowledge, true age, knowing violation, reasonably appears, negligent sale, agent, employee, Equal Protection, reduced penalty to other agents, Retail Sales Agent Agreement, effect of criminal proceeding

Case: *OLCC Agency No. 143, OLCC-02-RO-005, December 2002.*

Abstract: Agent complained in a general way that her training was inadequate and that OLCC staff were unhelpful. She failed to submit any evidence to show that the training was inadequate or that inadequacies in training were related to the violations leading to the termination. Absent some specific connection between acts or omissions of staff and the violations leading to the termination of the Retail Sales Agreement, there is no good cause for suspension in lieu of termination.

Case: *OLCC Agency 198, OLCC-97-RO-003, October 1998.*

Abstract: The successor agent sufficiently demonstrated the cause of that portion of shortage arising within 2 days of close-out audit of predecessor where: (1) Successor agent was not informed to be present for close-out audit by District Representative; (2) Predecessor agent was left alone in the store for one hour after conclusion of audit and the time the successor agent was told to arrive to open the store; and (3) Successor agent could identify as missing specific products which had been present at the closing audit.

The successor agent sufficiently demonstrated the cause of that portion of shortage attributable to successor's operation of the store where: (1) Pricing labels on shelves had not been changed by prior agent for 10 years; (2) Prior agent had unexplained shortages for 10 years; (3) The amount attributable to incorrect shelf pricing was likely to be substantial; (4) Successor agent received no training on changing price labels from OLCC or predecessor agent; and (4) immediately after successor agent corrected problem and changed all labels, shortages ceased.

Successor agent held not responsible for either portion of the shortage under Paragraph (14) of the Retail Sales Agent Agreement as both portions of the shortage were held to be from causes that could not have been prevented or

avoided in the exercise of reasonable care.

Case: *OLCC Agency No. 187*, OLCC-93-RO-002, December 1993.

Abstract: Agent held responsible for shortage where agent could not explain how the shortage occurred.

Case: *OLCC Agency No. 221*, OLCC-92-RO-007-ES, March 1993.

Abstract: The Commission was not persuaded by agent's argument that the amount he needed to repay for shortages should be calculated at cost rather than retail. The Commission concluded that agents are to repay shortages at retail value.

Case: *OLCC Agency No. 182*, October 1993, Amended Final Order October 1993. [Overruled by *OLCC Agency No. 198*, OLCC-05-RO-007, December 2005.]

Abstract: The Commission changed its interpretation of Paragraph 14 of the Retail Sales Agent Agreement. The Commission's past precedent determined that the burden of proof is on the Merchandising Division to prove that a shortage occurred and the amount of the shortage. The Commission no longer intends to follow this precedent. In future contested cases involving shortages in merchandise or inventory, the burden of proof will be on the agent to prove that a shortage does not exist.

Case: *OLCC Agency No. 113*, OLCC-91-RO-005, January 1992.

Abstract: Pursuant to Paragraph 14 of the Retail Sales Agent Agreement, the agent must prove the cause of the loss and that the loss could not have been prevented or avoided in the exercise of reasonable care. The Commission concluded agent was responsible for the loss where agent did not present any information to show the cause of the loss.

Case: *OLCC Agency No. 122*, OLCC-88-RO-001, July 1988.

Abstract: The agent was not responsible for all or part of a loss due to an armed robbery where the agent did not violate the manual provisions because, 1) the excess cash accumulated in a period of less than one hour; and 2) he did not have a reasonable opportunity to remove the cash in excess of \$400 in the 45 minutes preceding the robbery.

Cases: *OLCC Agency No. 230*, OLCC-87-RO-002, December 1987; *OLCC Agency No. 182*, October 1983, Amended Final Order October 1993; *OLCC Agency No. 103*, OLCC-92-RO-004, March 1993.

Abstract: Agent was responsible for a loss of money at the agency because cause of loss was unknown, and therefore agent could not show that the cause of the loss was something he could not prevent by the exercise of reasonable care.

An agent is responsible for shortages that the agent's employees cause, as well as shortages that the agent personally causes.

Cases: *OLCC Agency No. 199*, OLCC-88-RO-002, March 1989; *OLCC Agency No. 197*, OLCC-86-RO-002, October 1986.

Abstract: Where evidence proves that some theft of inventory has occurred, agent must prove shortage is due to theft. The Commission will determine how much of the inventory was stolen and whether the loss due to theft could have been prevented in the exercise of reasonable care.

Case: *OLCC Agency No. 25*, OLCC-RO-001, May 1985.

Abstract: Mitigation not applicable to case involving loss of money from unknown cause at agency.

Case: *OLCC Agency No. 152*, February 1983.

Abstract: Agent was not responsible for initial losses because she could not have reasonably anticipated that someone would travel through her neighbor's ceiling crawl space and pry open one of her wall panels to remove liquor. Agent was responsible for subsequent losses after inventory shortages reasonably put her on notice to investigate and discover the loosened wall panel.

E.2. Termination Grounds

E.2.a. Reporting/Depositing Correct Sales

[\(return to index\)](#)

Case: *OLCC Agency No. 198, OLCC-04-RO-0006, December 2004.*

Facts: Agent was late in depositing a series of liquor sales proceeds for two months, then stopped depositing the proceeds into the state treasury account for slightly over one month, at the end of which he made 30 separate deposits. During this interval, Agent made a total of 55 late payments and had a recent history of 71 late deposits during the latter half of the preceding year.

Abstract: Agent's repeated failures to timely bank all liquor proceeds, as required by Section 13 of the Retail Sales agent Agreement and the Retail Operations manual, were both deliberate and substantial. Additionally or alternatively, Agent violated Commission policy or procedures relating to liquor sales proceeds and caused a financial loss to the Commission. Under either approach (Section 22(d) or Section 22(g)), the Commission determined it had good cause to terminate Agent's contract.

Agent filed late sales reports for five consecutive weeks and submitted no sales reports for the seven following weeks. Agent claimed his conduct was not a substantial and deliberate violation of the Retail Sales Agent Agreement because he had difficulty compiling a complete database for his new POS system and felt he had a lack of support and cooperation from OLCC. The Commission concluded that Agent made a conscious decision to stop sending in weekly sales reports, thus his actions were deliberate. The violation was also substantial considering Agent's history of submitting late sales reports, and the quantity of late and/or missing sales reports during the three month period at issue. Agent violated Section 13(d) of the Retail Sales Agent Agreement and the Retail Operations Manual, and, under Section 22(d) of the Agreement, good cause for termination is established.

Case: *OLCC Agency No. 218, OLCC-95-RO-002, February 1996.*

Abstract: The Commissioners terminated an Agency Agreement for good cause, under Paragraph 22, where the agent intentionally violated Commission policy regarding liquor sales proceeds by not making daily deposits of sales proceeds on 11 dates. The record showed that a shortage of approximately \$35,500 occurred during this time period.

Case: *OLCC Agency No. 169, OLCC-86-RO-003, March 1987.*

Abstract: Agent substantially and deliberately failed to properly report and deposit correct daily sales where agent did not make a good faith effort to determine actual sales. Instead, agent simply reported and deposited his cash in the till on some days, even though he knew that a large discrepancy was developing between his reported sales and his inventory depletion. On other days, agent added personal funds to the cash in the till because he realized there was a need to make up for deposit shortages that had occurred on earlier dates.

Agent's failure to submit his daily sales reports on time to the Commission on ten occasions two years prior to the hearing was not a deliberate and substantial violation of Section IV (D)(3) of the Retail Operations Manual, where the reports were late because of extenuating circumstances.

Agent's failure to deposit daily sales on time, as required under Section IV (E)(2)(a) of the Retail Operations Manual, was a substantial and deliberate violation where deposits were late on 59 occasions over a three-year period and where there was no explanation why the majority of the deposits were late.

Case: *OLCC Agency No. 142, September 1983.*

Abstract: The Commission terminated an Agency Agreement based upon findings that agent had permitted a substantial and deliberate violation of regulations and written policy and because agent had intentionally misappropriated money.

E.2.b. Proper Accounting

[\(return to index\)](#)

Case: *OLCC Agency No. 169, OLCC-86-RO-003, March 1987.*

Abstract: Agent failed to be responsible and account to the Commission for all liquor and monies, as required under Section III (L) of the Retail Operations Manual, where agent knew that his method of computing daily sales to report and deposit was inaccurate and unreliable.

E.2.c. Recording Sales

[*\(return to index\)*](#)

Case: *OLCC Agency No. 169, OLCC-86-RO-003, March 1987.*

Abstract: Evidence did not show that agent failed to record sales on days where he reported and deposited more sales than he recorded, when the explanation for the discrepancy was that agent was adding personal funds to his deposits in order to make up for accrued shortages from previous days.

E.2.d. Retaining Records

[\(return to index\)](#)

Case: *OLCC Agency No. 169, OLCC-86-RO-003, March 1987.*

Abstract: Agent did not fail to retain "daily agency cash and summary reports," as required under Section II (F) of the Retail Operations Manual, where agent may have failed to keep his daily computer cash and summary reports on 11 days, but agent kept his cash register tapes that also showed cash and summary information for the 11 days.

E.2.e. Miscellaneous

[\(return to index\)](#)

Case: *OLCC Agency No. 63, OLCC-06-RO-001, September 2006.*

Facts: Agent in Milton-Freewater had series of unsatisfactory evaluations for store appearance. Agent had been working for or in connection with the OLCC in some capacity since the 1970s.

Abstract: Agent has provided excuses for his failure to comply. However, none of the excuses provide an adequate defense to the charges that have been brought, particularly when some of the issues have been going on for years. The Commission is persuaded that the preponderance of the evidence establishes that Agent has not complied with the corrective actions required by his evaluation. Moreover, by failing to comply, he has not conducted his business according to the Manual and has therefore failed to use his “best efforts” to maintain the “condition and appearance of store,” contrary to paragraphs 6(a) and (b) of the Agreement.

The things that the OLCC alleges the agent failed to maintain are nearly the same things OLCC alleges he failed to correct. As such, a separate analysis of the two violations is unnecessary in the final order.

Key Words/Phrases: agent, retail Sales Agent Agreement, Retail Operations manual, store appearance, signage, corrective action

Case: *OLCC Agency No. 198, OLCC-04-RO-0006, December 2004.*

Abstract: Agent was notified of a shortage of approximately \$150,000. Within 30 days, Agent deposited nearly five weeks’ worth of liquor sales proceeds and the Commission gave him written notice of the remaining shortage amount (approximately \$40,000). Agent failed to pay the remaining shortage amount within 30 days. Agent claimed he did not pay the remaining shortage as he doubted the audit’s accuracy and disputes the shortage. These defenses are without merit as, under the plain language of the Retail Sales Agent Agreement, the agent is obligated to pay the shortage amount even though he or she has requested a hearing to dispute the shortage. At hearing, the burden of proof is on agent to show that the shortage could not have been prevented or avoided in the exercise of reasonable care. The agent must also prove the cause of the shortage. Failure to follow this process was a deliberate and substantial violation of Section 14(a) of the Agreement, warranting termination under Section 22(d). Additionally or alternatively, Agent violated a policy or procedure of the Commission with regard to liquor sales proceeds or inventory which caused, or is likely to cause, a financial loss to the Commission (his failure to pay the shortage amount denies the Commission the benefit of these funds), constituting good cause to terminate the Agreement under Section (2)(g).

Case: *OLCC Agency No. 143, OLCC-02-RO-005, December 2002.*

Abstract: Agent complained in a general way that her training was inadequate and that OLCC staff were unhelpful. She failed to submit any evidence to show that the training was inadequate or that inadequacies in training were related to the violations leading to the termination. Absent some specific connection between acts or omissions of staff and the violations leading to the termination of the Retail Sales Agreement, there is no good cause for suspension in lieu of termination.

Case: *OLCC Agency No. 16, OLCC-02-RO-004, December 2002.*

Facts: Agent's employee sells to minor decoy through Independence police. Employee served with criminal complaint which was dismissed w/o prejudice. Agent argues that it is not responsible for knowing sale by its employee, and that ORS 471.346(6) violate Equal Protection clauses.

Abstract: Agent contended that the Commission should consider his good record of compliance to mitigate against the penalty of issuance of a notice of violation to Agent, as it does in determining the appropriate penalty for licensees and permittees. The Commission concluded that while the contract contemplates the possibility of mitigation when the agent is faced with termination (Paragraph 24), there is no provision for consideration of mitigation short of a termination action. Pursuant to Paragraphs 22e and 23, a notice of violation is the only appropriate penalty for an individual contractual violation.

Key Words/Phrases: minor, decoy, knowledge, true age, knowing violation, reasonably appears, negligent sale, agent, employee, Equal Protection, reduced penalty to other agents, Retail Sales Agent Agreement, effect of criminal proceeding

Case: *OLCC Agency No. 221, OLCC-92-RO-007-ES, March 1993.*

Abstract: Pursuant to Paragraph 22(c) of the agreement, agent was insolvent and unable to pay his retail liquor store debts where he did not have money to pay store rent and employee wages.

Agent was charged with committing a "substantial and deliberate" violation because he failed to pay the amount of a shortage within 30 days, as required by the contract. The Commission concluded that "deliberate" means willful, intentional or purposeful, and that agent did not act deliberately. The Commission concluded that agent failed to pay the shortage because he simply did not have the money to pay it.

E.3. Fine/Suspension in Lieu of Termination

[\(return to index\)](#)

Case: *OLCC Agency No. 16*, OLCC-02-RO-004, December 2002.

Facts: Agent's employee sells to minor decoy through Independence police. Employee served with criminal complaint which was dismissed w/o prejudice. Agent argues that it is not responsible for knowing sale by its employee, and that ORS 471.346(6) violate Equal Protection clauses.

Abstract: Agent contended that the Commission should consider his good record of compliance to mitigate against the penalty of issuance of a notice of violation to Agent, as it does in determining the appropriate penalty for licensees and permittees. The Commission concluded that while the contract contemplates the possibility of mitigation when the agent is faced with termination (Paragraph 24), there is no provision for consideration of mitigation short of a termination action. Pursuant to Paragraphs 22e and 23, a notice of violation is the only appropriate penalty for an individual contractual violation.

Key Words/Phrases: minor, decoy, knowledge, true age, knowing violation, reasonably appears, negligent sale, agent, employee, Equal Protection, reduced penalty to other agents, Retail Sales Agent Agreement, effect of criminal proceeding

Case: *OLCC Agency No. 143*, OLCC-02-RO-005, December 2002.

Abstract: Agent complained in a general way that her training was inadequate and that OLCC staff were unhelpful. She failed to submit any evidence to show that the training was inadequate or that inadequacies in training were related to the violations leading to the termination. Absent some specific connection between acts or omissions of staff and the violations leading to the termination of the Retail Sales Agreement, there is no good cause for suspension in lieu of termination.

Case: *OLCC Agency No. 218*, OLCC-95-RO-002, February 1996.

Abstract: There were no good-cause reasons to suspend the agent, under Paragraph 24, instead of terminating the Agency Agreement where the record failed to show that the agent made a good-faith effort to comply with the Commission's requirements regarding sales proceeds. The agent deliberately failed to make deposits of sales proceeds on 11 dates.

Case: *OLCC Agency No. 193*, OLCC-92-RO-001, April 1993.

Abstract: Retail sales agent violated Paragraph 22(e) of the Retail Sales Agent Agreement with the Commission by failing to complete and return the 1990 Cost Survey for exclusive agents within the time frame required by the Commission. Although Paragraph 23 of the Retail Sales Agent Agreement only provides for a Notice of Violation for any infraction of the agreement, the Commission suspended the Notice of Violation and instead issued a Letter of Warning to agent because agent had eventually returned the survey, albeit late.

Case: *OLCC Agency No. 221*, OLCC-92-RO-007-ES, March 1993.

Abstract: The Commission concluded that agent showed good-cause reasons pursuant to Paragraph (24) why he should not be terminated where the following circumstances existed. Agent attempted to pay the shortage by applying for a bank loan, and when that was denied he attempted to give the Commission a security interest in his equipment and fixtures; agent had repaid approximately \$10,900 of the \$14,000 shortage through the Commission's withholding of his compensation checks; the shortage did not occur due to any dishonesty on agent's part; and the Commission's performance evaluation of agent stated that agent had done a very good job in the operation of his agency.

Case: *OLCC Agency No. 74*, OLCC-90-RO-001, April 1991.

Abstract: Agent received one Notice of Violation pursuant to Paragraphs (22)(e) and (23) of Retail Sales Agent Agreement for violation of sale to minor.

Case: *OLCC Agency No. 193*, OLCC-89-RO-002, January 1990.

Abstract: Where an agent had not yet committed enough violations to raise the possibility of being sanctioned with termination under Section 22(e) of the Retail Sales Agent Agreement, the Commission would not determine whether mitigating circumstances surrounding the current violation would weigh in favor of suspension rather than termination in a future termination proceeding.

Case: *OLCC Agency No. 169*, OLCC-86-RO-003, March 1987.

Abstract: A fine or suspension was not justified instead of contract termination where an agent violated sales reporting and depositing procedures over a five-month period without advising the Commission and where agent was less than forthcoming when Commission eventually became aware of the problem.

Agent's late deposits of sale proceeds, the most recent of which was nearly two years old, was not a sufficient basis, in itself, to support termination of the Agency Agreement where there had been no problem with late deposits since.

E.4. Violations

E.4.a. Sales to Minors/Failure to Verify Age

[\(return to index\)](#)

Case: *OLCC Agency No. 178*, OLCC-06-RO-004, March 2007.

Facts: Agent's employee sold alcohol to a minor decoy. Employee scanned the minor's true ID into the register and it displayed she was under 21, but the employee misread it. Agent complained to the manufacturer of the scanner regarding the similarity of the displayed words "over 21" and "under 21" and as a result the manufacturer changed the scanner to lock up the register if the ID was "under 21." Agent argued for mitigation due to his good faith efforts to prevent violations (installing age verification equipment and employee training), the age verification software's shortcomings, and history of compliance (over 10 years).

Abstract: Violation proven, and mitigation not warranted because the Retail Sales Agreement does not contemplate mitigation for a first violation. See *OLCC Agency 16* and *OLCC Agency 184* (OLCC, Final Order, 06-RO-002, August 2006).

Key Words/Phrases: Retail Sales Agent Agreement, mitigation, minor decoy, history of compliance good faith efforts to prevent violations, employee training, age verification equipment

Case: *Agency 184*, OLCC-06-Ro-002, August 2006.

Facts: Agent's employee sold alcohol to a minor. Agent argued that given the number of mitigating circumstances (20 year history of compliance, good faith efforts to prevent a violation and acknowledgement of the violation) he would have gotten a warning if he'd been a licensee.

Abstract: As stated in *OLCC Agency 16*, the Commission has not applied mitigation, as that term is used in the context of penalties in contested cases for licensees and permittees, to penalties for agents involved in contested cases. Therefore, the standard penalty of a Notice of Violation is the appropriate penalty for the violation that has been proved in this case. See also, *OLCC Agency 193* (Amended Final Order, 98-RO-001, August 1999) (a Notice of Violation is an appropriate sanction even though the agent had a good record of compliance and took steps to avoid violations).

Key Words/Phrases: Retail Sales Agent Agreement, mitigation, termination of employee, minor sale

Case: *OLCC Agency No. 60*, OLCC-04-RO-005, December 2004.

Abstract: The time necessary to conduct a package sales transaction is, generally, of short duration. This fact does not relieve licensees and liquor agents of the affirmative duty to observe anyone who purchases alcoholic liquor to ensure that the purchaser is not visibly intoxicated or a minor. Licensees and agents have that affirmative duty, independent of the type of license or length of transaction.

Case: *OLCC Agency No. 17*, OLCC-04-RO-0002, July 2004.

Abstract: The "knowing" standard in ORS 471.315(1)(a)(G) applies to sanctioning licensees, but does not apply to sanctioning liquor agents for violations of ORS 471.410. Penalties for agents are prescribed in the Retail Sales Agent Agreement and include sanctioning an agent for the conduct of an employee, whether that conduct is willful or negligent (pursuant to Paragraph 11).

Case: *OLCC Agency No. 183, OLCC-03-RO-002, October 2003.*

Abstract: Agent is located in a city with a population of 20,000 or more. Agent challenged the minor decoy operation leading to the sale to a minor on the basis of the method used to generate the random sample required by ORS 471.346 and OAR 845-009-0200(3). Agent claimed that failure to remove from the random sample pool those licensees and agents randomly selected and visited in past operations was inequitable and discriminatory. The Commission upheld the random number generator method for selection of premises to be visited in a decoy operation and further held that removal of premises previously visited from the random sample pool would have violated ORS 471.346 and OAR 845-009-0200.

Agent challenged the penalty of a notice of violation for sale to a minor as excessive on two basis: (1) that one notice of violation would disqualify him from applying for a second store; and (2) there is no opportunity for mitigation of penalty for a notice of violation. The Commission determined that the Agent's "excessive punishment" argument likely stemmed from the Eighth Amendment to the United States Constitution and/or Article I, Section 16 of the Oregon Constitution. Because both constitutional provisions apply only to criminal cases, they are inapplicable to OLCC's proceeding.

Case: *OLCC Agency No. 16, OLCC-02-RO-004, December 2002.*

Facts: Agent's employee sells to minor decoy through Independence police. Employee served with criminal complaint which was dismissed w/o prejudice. Agent argues that it is not responsible for knowing sale by its employee, and that ORS 471.346(6) violate Equal Protection clauses.

Abstract: The second sentence of ORS 471.410(2) applies to sales of alcohol to adults and requires an element of knowledge on the part of the seller that the adult is buying the alcohol for a minor. The prohibition on sales to minors in the first sentence of ORS 471.410(2) does not require an element of knowledge for there to be a violation. The element of knowledge is imported into a violation for licensees through the administrative penalty statute, ORS 471.315(1)(a)(G). In order for a penalty to be imposed on licensees for sale to a minor under ORS 471.410(2), the licensee must make the sale "knowingly." It is not necessary to prove that the seller of alcoholic liquor to a minor knew that the purchase was a minor in order to violate ORS 471.410(2) when that statute is applied to OLCC agents. For agents, a negligent sale can also constitute a violation of the statute pursuant to Paragraph 11 of the Retail Sales Agent Agreement.

From the plain language and legislative history of ORS 471.346, as well as the simultaneous amendments to ORS 471.430 and ORS 165.805, minor decoy operations are clearly permissible in this state.

The provisions of ORS 471.346(3) do not apply to decoy operations in cities of populations of less than 20,000. Because Agent is located in a city with a population of less than 20,000, the statutory subsection does not apply in this case.

The distinction in treatment drawn in ORS 471.346(3), between requiring uniform decoy operation standards for sellers located in areas of more than 20,000 people and exempting sellers from those standards in areas of less than 20,000 people, does not violate either Article I, Section 20 of the Oregon Constitution or the Equal Protection clause of the Fourteenth amendment to the U.S. Constitution. The legislature had the authority to act, the class distinction was based on personal characteristics (geographic location) that are not immutable and the disparate treatment occasioned by the distinction has a rational basis.

Key Words/Phrases: minor, decoy, knowledge, true age, knowing, reasonably appears, negligent sale, agent, employee, Equal Protection, reduced penalty to other agents, Retail Sales Agent Agreement, criminal proceeding

Case: *OLCC Agency No. 91, OLCC-98-RO-005, November 1999.*

Facts: Agent's employee sells to minor decoy without asking for identification. Minor looked true age of 18. Employee testified that the minor looked like another customer, who was over 21 and regularly purchased alcohol. Agent asked OLCC staff whether he was required to continue to request ID for customers who regularly made purchases and was told there was no such requirement.

Abstract: Where a liquor agent's employee sold liquor to a minor who, because of the similarity of appearance, the employee mistakenly believed to be a regular customer whose age was known, the Commission concluded that the employee negligently sold to the minor, even though the minor was very similar in appearance to the regular customer, because the minor patron objectively appeared to be his true age of 18 years. Agent received a Notice of Violation of the Retail Sales Agent Agreement pursuant to Paragraphs (22)e and (23) of the Agreement for the employee's violation of ORS 471.410(2).

Key Words/Phrases: minor, decoy, sting, mistake, mistaken identification, negligence, age, similar appearance, age verification, negligent sale, Retail Sales Agent Agreement

Case: *OLCC Agency No. 193, OLCC-98-RO-001, August 1999.*

Abstract: The Commission determined that a sale to a minor by an agent's employee under ORS 471.410(2) was a violation of the Retail Sales Agent Agreement where the sale was negligent, but not "knowing." The Retail Sales Agent Agreement subjects the agent to liability for the employee's act whether committed willfully or negligently. ORS 471.410(2) does not, by its own terms, require a "knowing" violation. [Note: ORS 471.410(2) does not contain a requirement that the sale to minor be "knowing"; the "knowing" requirement enters for licensees, permittees and clerks via ORS 471.315(1)(a)(G), the penalty provision for such sales.

Subject licensees, permittees and clerks may only be sanctioned by the Commission for a "knowing" sale. For agents, the sanction is determined by the contract. The contract allows a sanction to agent for the acts or omissions of employees, within the course and scope of their duties, whether negligent or willful.]

Case: *OLCC Agency No. 155, OLCC-97-RO-001, January 1998.*

Abstract: The proscription of ORS 471.410(2) applies to every person not the parent or guardian of a minor, consequently it applies to liquor agents. Because Paragraph (7)(b) of the Retail Sales Agent Agreement mandates that an agent comply with and be subject to statutes of the state of Oregon, a violation of ORS 471.410(2) constitutes a violation of Paragraph (7)(b), subjecting the agent to a Notice of Violation pursuant to Paragraph (22)(e) of the Agreement. Additionally, the Retail Operations Manual is incorporated by reference into Paragraph (7)(b) of the Agreement. The Retail Operations Manual advises agents they must not sell alcoholic liquor to minors and must verify the age of customers who look younger than 26 years of age. The text of ORS 471.410 and OAR 845-006-0035(1) is recited in full in the Retail Operations Manual. Incorporation into the Retail Operations Manual, and, thereby, the Agreement itself, eliminates any doubt that the Commission intended that agents comply with liquor laws governing sales to minors and age verification.

Agent argued that only acts committed by a liquor agent could result in violation of the Retail Sales Agent Agreement and a sanction against the liquor agent. The Commission concluded that Paragraph (11), imposing on agent responsibility for the acts and omissions of store personnel within the course and scope of their duties when in violation of the Agreement (whether willful or negligent), read in combination with Paragraph (7)(b), mandating compliance with all statutes, rules, policies, and procedures of the Commission, impose liability on the agent for the acts and omissions of store personnel in violation of statutes, rules, etc., when those acts or omissions are within the scope of the employee's duties, whether omitted or committed willfully or negligently.

The requirements of OAR 845-006-0035(1) apply to retail sales agents because of the incorporation of its requirements into the Retail Operations Manual. The Retail Operations Manual is incorporated into Paragraph (7)(b) of the Retail Sales Agent Agreement by reference. Violation of OAR 845-006-0035(1) constitutes a violation of the Retail Sales Agent Agreement.

E.4.b. Sales to Visibly Intoxicated Persons

[\(return to index\)](#)

Case: *OLCC Agency No. 49*, OLCC-04-RO-003, December 2004.

Abstract: To establish a negligent sale of alcohol to a VIP, the preponderance of the evidence must show that there were visible signs of intoxication which the seller had some opportunity to observe. Actual observation is not required. There must be visible signs of intoxication before a duty to prevent such a sale attaches. If a sale is made after the duty attaches, it is a negligent sale. See also *Agency No. 60*, OLCC-04-RO-005, December 2004.

Case: *OLCC Agency No. 60*, OLCC-04-RO-005, December 2004.

Abstract: It is possible for a retrograde extrapolation of BAC levels to be coordinated with the signs of visible intoxication most likely displayed at the time of sale when all relevant variables affecting absorption and dissipation are addressed and when the extrapolation covers the time of sale. Results of a BAC test were not given weight in terms of correlation with visible signs of intoxication at the time of sale in this case because the relevant variables affecting absorption and dissipation of alcohol were not sufficiently addressed and the extrapolation did not clearly cover the time of sale.

It is not always required that there be testimony from a third-party eyewitness to the signs displayed at the time of the sale in order to find that signs were displayed and that those signs were sufficient to alert the clerk to the patron's intoxication. Prior cases involving both package stores and a liquor store have arrived at that outcome from other sources. In *7-Eleven No. 23980*, March 1984, the fact that the clerk acknowledged the patron was wearing socks without shoes (in November) and he could tell she had consumed some alcohol, coupled with police observations of intoxication 45 minutes before the purchase, was sufficient to infer signs of visible intoxication were present at the time of the sale. In *7-Eleven No. 20806*, November, 1984, patron's state of intoxication at jail 30 minutes before the sale, coupled with the clerk's acknowledgment of an odor of alcohol and slight swaying, should have put the clerk on notice to investigate further before making the sale. In *Kelsey's Korner*, October 1997, the Commission announced it would infer that signs of visible intoxication were displayed within the store if signs of visible intoxication were observed both before and after the patron was in the store. In *Agency No. 17*, July 2004, the patron was observed driving erratically, evidencing intoxication, before and after the sale of alcohol; signs of visible intoxication while in the store were inferred where, in particular, patron would have been required to engage in conversation with the clerk to ask for the product (all product was behind the counter). In *Costless Market*, April 2003, a review of the store's videotape of the transaction supplied the proof of visible intoxication at the time of the sale. It is also possible for a retrograde extrapolation of BAC levels to be coordinated with the signs of visible intoxication most likely displayed at the time of sale when all relevant variables affecting absorption and dissipation are addressed and when the extrapolation covers the time of sale.

The time necessary to conduct a package sales transaction is, generally, of short duration. This fact does not relieve licensees and liquor agents of the affirmative duty to observe anyone who purchases alcoholic liquor to ensure that the purchaser is not visibly intoxicated or a minor. Licensees and agents have that affirmative duty, independent of the type of license or length of transaction.

Case: *OLCC Agency No. 17*, OLCC-04-RO-0002, July 2004.

Abstract: The sale of alcoholic liquor to a visibly intoxicated person, prohibited by ORS 471.410(1), constitutes a violation of Paragraph 7(b) of the Retail Sales Agent Agreement.

The "knowing" standard in ORS 471.315(1)(a)(G) applies to sanctioning licensees, but does not apply to sanctioning liquor agents for violations of ORS 471.410. Penalties for agents are prescribed in the Retail Sales Agent Agreement

and include sanctioning an agent for the conduct of an employee, whether that conduct is willful or negligent

Agent's employee made a negligent sale of alcohol to a visibly intoxicated person where the alleged VIP had to walk at least five steps to the counter and was required to speak to the clerk to order his selection from behind the counter. The walking and conversation should have given some indication of the customer's intoxication, considering the signs of intoxication he displayed before entering, and after leaving, the store (erratic driving, staggering, slow and slurred speech, strong odor of alcohol, and bloodshot/red eyes).

E.4.c. Miscellaneous (Failure to Return Cost Survey)

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Case: *OLCC Agency No. 1113*, OLCC-07-RO-001, January 2008.

Facts: Agent accepted bank card payments from licensees in violation of Retail Sales Agent Agreement. Agent stopped allowing it once notified by the OLCC. Agent argued the rules were not clear, and not uniformly applied to other agents. Agent also argued that the penalty was too severe.

Abstract: The Commission has previously determined that mitigation of a Notice of Violation for agents is not appropriate in a contested case leading to final order. *OLCC Agency 16* (OLCC, Final Order, 02-RO-0023, December 2002, at 24-25) (agent's 30 year licensing relationship with OLCC and no violations in 15 years as agent did not warrant mitigating penalty for sale to a minor); *see also, OLCC Agency 184* (OLCC, Final Order, 06-RO-002, August 2006) (20 year history of compliance with liquor laws, good faith efforts to prevent a violation and his acknowledgment of the violation did not warrant mitigating penalty); *OLCC Agency 193* (OLCC Amended Final Order, 98-RO-001, August 1999) (a Notice of Violation is an appropriate sanction even though the agent had a good record of compliance and took steps to avoid violations). Following prior OLCC case precedent and in the absence of any provision in the Retail Sales Agent Agreement contemplating mitigation for an agent's first violation of the liquor laws, the standard penalty of a Notice of Violation is appropriate for the violation in this case.

Key Words/Phrases: Retail Sales Agent Agreement, bank card transactions, mitigation

Case: *OLCC Agency No. 193*, OLCC-04-RO-004, April 2005.

Facts: Agent requested an audit be rescheduled due to a pre-arranged trip out of town. Agent had a history of being unavailable for audits and being difficult for the agency. Agent believed he had the right to be present for audits because he was responsible for shortages. OLCC believed it could conduct audits with two days' notice or less per the Retail Sales Agent Agreement, and shouldn't be held to the literal standard of "48 hours" as stated in the Agreement.

Abstract: Failure to provide 48-hours' notice does not obviate the need for agent to cooperate in the audit.

The Retail Operations Manual (ROM) requires that OLCC give liquor agents 48 hours' notice of an audit (absent exceptions not relevant to this case). While Agent was given fewer than 48 hours' notice, the ROM requirement does not operate as a condition precedent to the obligations of Paragraph 15 of the Retail Sales Agent Agreement (regarding reasonable care and agent cooperation with audits). Therefore, receipt by the Agent of less than 48 hours' notice does not warrant dismissal of an NVT for failure to cooperate with an audit.

Paragraph 15 of the Retail Sales Agent Agreement requires OLCC to use reasonable care to avoid interference with Agent's service to the public and business operations while carrying out an audit. The Commission concluded that the OLCC uses reasonable care to avoid interference with an agent's service to the public and business operations when, in scheduling the audit, it takes into account operational facets such as the size of the store inventory (impacts the amount of time the audit will take), the hours of operation of the store (impacts service to the public), and the liquor inventory delivery schedule (time counterproductive to an audit). OLCC considered those factors in scheduling the audit in this case. An agent's scheduling preferences or desire to be personally present for the audit need not be accommodated by the auditors in order to exercise reasonable care.

The OLCC auditors conduct audits of 239 state liquor stores twice annually (for a total of 478 audits) throughout the state. The unique desires of 239 individual agents cannot be accommodated if the auditors are to efficiently audit all of the state liquor stores on a timely basis. The Commission concludes that OLCC uses reasonable care to avoid interference with Agent's service to the public and business operations when, in scheduling the audit, it takes into

account operational facets such as the size of the store inventory (impacts the amount of time the audit will take), the hours of operation of the store (impacts service to the public), and the liquor inventory delivery schedule (time counterproductive to an audit).

Paragraph 11 of the Retail Sales Agent Agreement requires that agents employ a sufficient number of personnel to operate the store efficiently and without unreasonable inconvenience to the public and in compliance with the agreement. One of the requirements of the Agreement is to submit to regular audits and to cooperate with the audits. Paragraph 15. In addition to providing sufficient staffing to serve the public, agents must also provide sufficient staffing for audits, either by being personally present or by delegating the responsibility to an employee. An agent may not refuse an audit because the agent insists on being personally present. An agent's failure to appear at the scheduled audit or to make arrangements to have a representative present demonstrates a lack of cooperation with the audit and constitutes a violation of the Retail Sales Agent Agreement.

Key Words/Phrases: Retail Sales Agent Agreement, audit standards, notice of audit

Case: *OLCC Agency No. 198, OLCC-04-RO-0006, December 2004.*

Abstract: Agent violated Section 7(a) of the Retail Sales Agent Agreement, the hours of operation requirements set out in the Retail Operations Manual, and OAR 845-015-0140, by voluntarily closing his store for business. Agent claimed it was futile for him to remain open in the absence of adequate inventory to serve his clients (OLCC did not fill his order and deliver product). The Commission concluded that there is no exception to the hours of operation requirements for lack of inventory, but even if there were, Agent would not qualify as he still had valuable inventory to sell on the date he closed his business. Agent violated the Agreement and the Commission's hours of operation policy. This violation was both deliberate and substantial, providing good cause for termination.

E.5. Grounds for Termination

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Case: *OLCC Agency No. 183*, OLCC-03-RO-002, October 2003.

Abstract: Agent challenged the penalty of a notice of violation for sale to a minor as excessive on two basis: (1) that one notice of violation would disqualify him from applying for a second store; and (2) there is no opportunity for mitigation of penalty for a notice of violation. The Commission determined that the Agent’s “excessive punishment” argument likely stemmed from the Eighth Amendment to the United States Constitution and/or Article I, Section 16 of the Oregon Constitution. Because both constitutional provisions apply only to criminal cases, they are inapplicable to OLCC’s proceeding.

Case: *OLCC Agency No. 16*, OLCC-02-RO-004, December 2002.

Abstract: Agent contended that the Commission should consider his good record of compliance to mitigate against the penalty of issuance of a notice of violation to Agent, as it does in determining the appropriate penalty for licensees and permittees. The Commission concluded that while the contract contemplates the possibility of mitigation when the agent is faced with termination (Paragraph 24), there is no provision for consideration of mitigation short of a termination action. Pursuant to Paragraphs 22e and 23, a notice of violation is the only appropriate penalty for an individual contractual violation.

Key Words/Phrases: minor, decoy, knowledge, true age, knowing violation, reasonably appears, negligent sale, agent, employee, Equal Protection, reduced penalty to other agents, Retail Sales Agent Agreement, effect of criminal proceeding

Case: *OLCC Agency No. 155*, OLCC-97-RO-001, January 1998.

Abstract: The requirements of OAR 845-006-0035(1) apply to retail sales agents because of the incorporation of its requirements into the Retail Operations Manual. The Retail Operations Manual is incorporated into Paragraph (7)(b) of the Retail Sales Agent Agreement by reference. Violation of OAR 845-006-0035(1) constitutes a violation of the Retail Sales Agent Agreement.

Agent argued that only acts committed by a liquor agent could result in violation of the Retail Sales Agent Agreement and a sanction against the liquor agent. The Commission concluded that Paragraph (11), imposing on agent responsibility for the acts and omissions of store personnel within the course and scope of their duties when in violation of the Agreement (whether willful or negligent), read in combination with Paragraph (7)(b), mandating compliance with all statutes, rules, policies, and procedures of the Commission, impose liability on the agent for the acts and omissions of store personnel in violation of statutes, rules, etc., when those acts or omissions are within the scope of the employee’s duties, whether omitted or committed willfully or negligently.

The Commission’s administrative enforcement proceedings are civil actions, rather than quasi-criminal proceedings, according to advice provided to the Commission by its legal counsel. See *Dillinger’s Pub*, OLCC-97-V-038/039, October 1997. In the context of retail liquor agents, the Commission concluded that proceedings by the Commission to enforce paragraph (22) of the Retail Sales Agent Agreement are also not quasi-criminal, but civil in nature.

Case: *OLCC Agency No.* , OLCC-92-RO-001, April 1993.

Abstract: Failure to return the 1990 Cost Survey for exclusive agents within the time provided by the Commission violates Paragraph 16 of the Retail Sales Agent Agreement and warrants a Letter of Warning.

Case: *Carlson v. 6 Reservation Ranch*, 118 Or App 512, 848 P2d 616 (1993).

Abstract: When terms of a document at issue are ambiguous, the meaning of specific terms becomes a question of fact precluding summary judgment. A provision in a document is ambiguous if it has no definite significance and if it is capable of more than one sensible and reasonable interpretation. A provision is unambiguous if its meaning is so clear as to preclude doubt by a reasonable person.

Case: *Thompson v. Bolliger, Hampton & Tarlow*, 118 Or App 700, 849 P2d 526 (1993).

Abstract: A person is not paid "at a fixed rate," within the meaning of ORS 652.210(2), if the relevant contract makes the actual amount of his compensation depend on the financial condition of the corporation.

An agreement to share profits and losses is a key element of partnership.

Whether a person is an "employee," within the meaning of ORS 652.210(2), depends on the substance of the employment relationship, as evidenced by the relevant contract.

The trial court is not free to ignore unambiguous contract provisions in order to remedy what it perceives to be an unanticipated inequity.
