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BEFORE THE LIQUOR CONTROL COMMISSION
OF THE STATE OF OREGON

In the Matter of the)	
Application for a)	
Package Store (PS))	
License by:)	
)	FINAL
Thomas C. and Sandra L. Matthews)	FINDINGS OF FACT,
POWELL LIQUOR STORE,)	CONCLUSIONS OF LAW,
OLCC AGENCY 183)	AND ORDER
3965 SE Powell Boulevard)	
Portland, OR 97202)	
-----)	
Multnomah County)	

A hearing in the above matter was held on the 18th day of March, 1983, in Portland, Oregon, before Hearings Examiner Jill Thompson. The Applicants appeared in person and were not represented by legal counsel. The Commission was represented by legal counsel. The Commission having considered the record of the hearing, the Proposed Order of the Hearings Examiner, and the entirety of the Criteria for the Issuance and Maintenance of Licenses and applicable statutes and regulations, enters the following:

FINDINGS OF FACT

1. Applicant Thomas Matthews is the agent for OLCC AGENCY 183, which is an exclusive agency. Applicant's contract with the OLCC expires November 1, 1989.
2. Applicants applied in January, 1982 for a Package Store (PS) license, to be utilized on the agency premises.
3. On December 9, 1982, Commission staff recommended the application be denied based on OAR 845-05-020(6), which prohibits granting PS licenses to exclusive agencies.

4. The agency's 1982 gross sales were approximately \$2,000,000.

5. Thomas Matthews' contract with the OLCC includes the following provisions:

"Agent will devote full time to operation of the agency and will sell only liquor and any other items approved by the Commission, except that if the agent has a nonexclusive agency, agent may operate the agency as an adjunct to another business . . .

. . .

The Commission may change a nonexclusive agency to an exclusive agency, and vice versa, in accordance with standards set forth in its rules.

6. Mr. Matthews' lessor is Tradewell Stores, Inc. His lease contains the following clause: "Any item not acceptable to Tradewell will be discontinued from the liquor store."

DISCUSSION

During the hearing, Mr. Matthews and his witness offered testimony regarding public demand for beer and wine at his agency. Mr. Matthews also testified that wine is a common mixer for drinks using distilled liquors, and would thus be a natural addition to his inventory.

Mr. Matthews raised a number of arguments challenging the validity of the rule itself and the policy it expresses. He argued that the rule is defective for the following reasons:

1. It violates that provision of ORS 471.030(2) which states ". . . it is the policy of this state to encourage the development of all Oregon industry."

2. The rule was retroactively applied to applications filed prior to rule adoption.
3. Applications for PS licenses by exclusive agents were delayed for the sole purpose of adopting a rule which would prevent approval of the applications.
4. The rule improperly discriminates against exclusive agents.
5. The public need for beer and wine is inconvenienced by the rule.

Mr. Matthews also stated that the 1983 Legislature is considering a bill which would allow OLCC exclusive agents to hold PS licenses, and requested that any final decision on his application be delayed pending the outcome of legislative action.

The arguments raised above are not reviewable in a contested case proceeding, which is a vehicle for determining controverted facts. Arguments attacking the policy or validity of a rule do not constitute controverted facts. In the contested case setting, the Commission must presume the Commission's rules are valid. The Commission also presumes Mr. Matthews' arguments were raised and deliberated prior to adoption of the rule. Other channels exist for obtaining agency or judicial review of the validity of the rule.

The Commission argued that the terms of the contract between Mr. Matthews and the OLCC do not permit the sale of items allowed to PS licensees. While this is true, the contract language cited in Finding of Fact No. 5 merely reflects the truism that the agent is subject to Commission rules regarding items

an exclusive agent may sell. But, regardless of the axiomatic tone of the contract clauses referred to above, the language does serve to inhibit any reasonable expectation by exclusive agents that they have a property right to a PS license. In that regard, Mr. Matthews has granted Tradewell a veto power over his entire inventory, whether stocked as a result of his existing agency contract or a PS license, were he to receive one (Finding of Fact No. 6).

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Criteria precluding issuing a license. The following criteria shall preclude issuing a license:

. . .

(6) The applicant is a retail sales agent of the Commission with a contract for an exclusive agency, or seeks to exercise the privileges of the license in the premises of an exclusive sales agent. OAR 845-05-020.

Applicant Thomas Matthews is an exclusive retail sales agent of the OLCC. Both applicants seek to utilize a PS license on the agency premises.

2. (1) A retail sales agent with a contract for an exclusive agency is prohibited from selling, giving away, or otherwise making available in an agency store any item which is not designated in this rule as "related" to the sale of alcoholic liquors.
 - (2) Related items include the following:
 - (a) Ice and mixers;
 - (b) Foods such as olives, onions, and cherries which are used in drinks;

(c) Bartender's guides, shakers, strainers, mixing spoons, swizzle sticks, and similar paraphernalia used in the preparation of drinks;

(d) Glassware, coasters, straws, napkins, and other such items associated with the drinking of alcoholic liquors;

(e) Items such as chewing gum, breath mints, and tobacco products.

(3) A retail sales agent with a contract for an exclusive agency shall not conduct any wholesale business, nor any other business not authorized by statute or by rule of the Commission, out of the agency store. OAR 845-15-045.

Sales of beer and wine permitted by a PS license are not "related items" allowed to be sold by exclusive retail sales agents. The above rule became effective January 1, 1981.

ULTIMATE CONCLUSIONS OF LAW

The Matthews' PS license application is precluded by the standards contained in OAR 845-05-020 and 845-15-045, as Thomas Matthews is an exclusive retail sales agent of the OLCC, seeking to sell items not related to the sale of alcoholic liquor.

FINAL ORDER

It is hereby ordered that the application for a Package Store (PS) license by Thomas C. and Sandra L. Matthews at the POWELL LIQUOR STORE, OLCC Agency 183, 3965 SE Powell Boulevard, Portland, Oregon, be DENIED.

It is further ordered that due notice of such action, stating the reasons therefor, be given as provided by law.

Dated this 23rd day of May, 1983.



C. Dean Smith
Administrator
OREGON LIQUOR CONTROL COMMISSION

NOTICE: You are entitled to Judicial Review of this Order. Judicial Review may be obtained by filing a Petition for Review within 60 days from the service of this Order. Judicial Review is pursuant to the Provisions of ORS Chapter 183.