

BEFORE THE LIQUOR CONTROL COMMISSION
OF THE STATE OF OREGON

In the Matter of the)	
Proposed Cancellation of the)	
Dispenser Class A (DA))	
License held by:)	FINAL
)	FINDINGS OF FACT,
Richard and Sunya Porter)	CONCLUSIONS OF LAW,
PORTERHOUSE)	AND ORDER
331 Fifth Street)	
Madras, Oregon 97741)	
- - - - -)	
Jefferson County)	

A hearing in the above matter was held on the 26th day of January, 1983, in Madras, Oregon, and on the 16th day of March, 1983, in Portland, Oregon, Oregon, before Hearings Examiner Douglas Crumme'. The Licensees appeared in person and were represented by D. Michael Mills, Attorney at Law. The Commission was represented by legal counsel.

RECORD OF PREVIOUS VIOLATIONS

<u>DATE</u>	<u>OFFENSE</u>	<u>DISPOSITION</u>
Dec 3, 1978	Drinking on Duty	\$300 fine
Jan 21, 1979	Disorderly Premises	Letter of Warning
Jun 14, 1980	Food Service	\$300 fine

The Commission having considered the record of the hearing, the applicable law and regulations, the Proposed Order of the Hearings Examiner, Exceptions to the Proposed Order of the Hearings Examiner, and now being fully advised, makes the following:

FINDINGS OF FACT

1, Richard and Sunya Porter have held a Dispenser Class A (DA) license at the PORTERHOUSE, 331 Fifth Street, Madras, Oregon, at all dates relevant to the Findings of Fact below.

2. The Commission's Enforcement Staff has charged the Licensees with the violation of the following:

- a. ORS 471.375(1) (failed to immediately transmit employee's application for a service permit).
- b. OAR 845-06-045(4) (permitted criminal conduct to occur on licensed premises as evidenced by conviction of bartender Wesley Fine for sale of beer to minors).
- c. ORS 472.180(8) (knowing sale of alcoholic beverages to minors).
- d. OAR 845-06-035(2)(a) (permitted minors to consume alcoholic beverages on licensed premises).
- e. OAR 845-06-035(2)(b) (permitted minors to enter or remain upon licensed premises).
- f. ORS 472.180(10) (two separate counts of licensee conviction of a felony).

(Commission's Exhibits A and B.)

Findings Concerning Failure To
Immediately Submit Service Permit

3. Ron Richards was hired at the Porterhouse and began serving alcoholic beverages as part of his job duties about December 1, 1981.

4. Before Ron Richards started work, Licensee Richard Porter gave him a service permit application and requested that he fill it out. Mr. Richards filled out the application and dated it on November 21, 1981. He then placed the application behind the bar for the Porters to send to the Commission. Mr. Porter told Mr. Richards that ten dollars would be deducted from his salary for the service permit fee.

5. Mr. Richards only filled out and signed the one service permit application dated November 21, 1981.

6. Some time before February 26, 1982, Ron Richards became concerned about not having received word from the Commission regarding his November 21, 1981 service permit application. Mr. Richards talked with Mr. Porter about filling out and sending in a second service permit application. However, no additional application was filled out.

7. OLCC Enforcement Division Sr. Inspectors William Clark and William Bartholomew visited the Porterhouse on February 21, 1982. Mr. Richards was serving and selling alcoholic beverages at the time of the visit. Mr. Richards' November 21, 1981 service permit application was retrieved from the back of the bar. All the copies of the application were still present. None had been sent in to the Commission.

8. Licensee Richard Porter told Mr. Clark and Mr. Bartholomew on February 21, 1982 that the November 21, 1981 service permit application found at the Porterhouse for Ron Richards was a second application that was prepared after word had not been received from the Commission on an earlier service permit application that had been sent in for Mr. Richards.

9. The original of the November 21, 1981 Ron Richards service permit application was submitted to the Commission a few days after Mr. Clark and Mr. Bartholomew visited the premises on February 21, 1982. Mr. Richards was subsequently granted a service permit.

Findings Concerning Minors

10. Scott Shaw was born on May 3, 1962. Mr. Shaw was 19 years old on February 14, 1982.

11. Wayne Lashbrook was born on January 12, 1962. Mr. Lashbrook was 20 years old on February 12, 1982.

12. Scott Shaw and Wayne Lashbrook entered the pool table and bar area of the Porterhouse at about 1:30 p.m. on February 14, 1982.

13. The pool table and bar area of the Porterhouse holds a No. II Minor Posting under OAR 845-06-040(3). A No. II Minor Posting reads "No Minors Permitted in this Portion of the Premises." OAR 845-06-040(3)(b).

14. After they entered the Porterhouse, Mr. Shaw and Mr. Lashbrook walked to a pool table and racked up the balls. While Mr. Lashbrook stood at the table, Mr. Shaw walked to the bar and ordered two beers from bartender Wesley Fine.

15. Mr. Fine sold the two beers to Mr. Shaw without requesting identification. Mr. Shaw did not display any identification or make any representations concerning his age.

16. Mr. Shaw returned to the pool table with the beers. Mr. Shaw and Mr. Lashbrook consumed from the beers and played pool for 10 or 15 minutes until Officer Thomas Wayne, Madras Police Department, entered and apprehended the two youths.

17. Officer Wayne was acquainted with Mr. Shaw and Mr. Lashbrook and knew they were under 21 years of age.

18. On February 14, 1982, Scott Shaw was about five-feet-nine-inches tall and weighed about 150 pounds. Mr. Shaw was wearing jeans and a T-shirt. He had long hair and a mustache. He had not shaved. He had a tatoo that was visible.

19. Scott Shaw was a truck driver on February 14, 1982. Prior to that he had worked about eight months with a traveling carnival. Mr. Shaw generally associated with older people in the carnival. He went into bars a couple of times when employed with the carnival.

20. Between February 14, 1982 and September, 1982, Scott Shaw visited bars and lounges in Portland nearly every weekend. Of the estimated 100 times he visited bars or lounges during this period, he was asked for identification once.

21. Scott Shaw appeared over 21 years of age in a September, 1982 videotape deposition. At the time of the September, 1982 deposition, he had gained 20 pounds, grown two inches, cut his hair and developed a fuller mustache since February 14, 1982.

22. Wayne Lashbrook was five-feet-nine-inches tall and rather heavy set on February 14, 1982. Mr. Lashbrook was blonde and very clean shaven. Mr. Lashbrook looked younger than Mr. Shaw. Mr. Lashbrook had a youthful face and appeared 17 or 18 years old.

23. Scott Shaw had never shown false identification in the Porterhouse. There is no evidence that Wayne Lashbrook had ever shown false identification in the Porterhouse.

Findings Concerning Felony Convictions

24. On or about November 23, 1981, Licensee Richard A. Porter was convicted in the Jefferson County, Oregon Circuit Court for the charge of "Wrongful Acceptance of Payment from Adult and Family Services Division," a class "C" felony.

25. On or about February 22, 1982, Licensee Richard A. Porter was convicted in the United States District Court for the District of Oregon for the offense of knowingly and intentionally distributing a quantity of codeine phosphate, a Schedule III narcotic drug controlled substance, a Schedule III felony.

26. Mr. Porter's sentence for the November 23, 1981 Oregon conviction listed in Finding of Fact No. 23 above was 90 days in jail and 500 hours of community service. His sentence for the February 22, 1982 U.S. District Court conviction listed in Finding of Fact No. 24 was a three-year prison term with a one year minimum. Mr. Porter had been paroled from federal prison and had served his sentence on the state conviction as of January 26, 1983.

27. Mr. Porter operated a pharmacy in Madras from 1959 until 1980.

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. No licensee of the Commission shall permit any person to mix, sell or serve any alcoholic liquor for consumption on the licensed premises unless such person has a valid service permit issued by the Commission. ORS 471.360(1)(b). However, any person who has not had a permit refused or revoked or whose permit is not under suspension may mix, sell or serve alcoholic liquor for consumption on the licensed premises if the person prepares in duplicate an application for a service permit prior to mixing, selling or serving any alcoholic liquor for consumption on the licensed premises. The licensee shall endorse and immediately transmit the application to the Commission with the required fee. ORS 471.375(1).

The Licensees violated ORS 471.375(1) by failing to submit an application for Ronald Richards to the Commission at the time Mr. Richards began serving alcoholic beverages as an employee at the Porterhouse on approximately December 1, 1981. Only one permit application was filled out for Mr. Richards. This application was kept on the premises and no portions were mailed to the Commission until after February 21, 1982.

The Commission notes that sometime after the original application was filled out on November 21, 1981, Mr. Richards expressed concern to Mr. Porter that Mr. Richards had not received a reply from the Commission about the application. Mr. Richards' inquiry should have prompted the Licensees to investigate and discover what had become of the application.

The Commission notes in mitigation however that the failure to submit Mr. Richards' permit application occurred during the time Mr. Porter was in the middle of the criminal proceedings that led to his felony convictions on November 23, 1981 and February 22, 1982. The Commission finds that the criminal proceedings substantially diminished the time and energy that Mr. Porter would normally have had available to pay attention to his business at the Porterhouse.

2. No licensee shall permit any gambling activity made unlawful by ORS 167.117 to 167.162, or any other criminal conduct, to occur on the licensed premises. A criminal conviction of the licensee or an employee of the licensee is required to establish a violation of this section by reason of unlawful gambling activity. A criminal conviction is not required to establish a violation of this section by reason of other criminal conduct, but conviction or acquittal on a

related criminal charge may be considered in the hearing on a charge of violating this subsection. An employee of the Commission who observes or has other evidence of a gambling offense or other criminal conduct occurring on licensed premises shall report this information to the police agency having jurisdiction and render reasonable assistance, if requested, in further investigation and prosecution of the conduct. OAR 845-06-045(4).

Assistant Attorney General Reed noted that the Commission's charge against the Licensees under OAR 845-06-045(4) for bartender Wesley Fine's conviction for the sale of beer to Scott Shaw and Wayne Lashbrook was not proper. The reason for Mr. Reed's conclusion is that Mr. Fine's conviction did not require as an element that the sale was knowingly made. ORS 472.180(8) requires that the Commission find a sale to a minor was knowingly made in order to cancel or suspend a license or service permit for the sale. Plaid Pantries, Inc. v. OLCC, 16 Or. App. 199, 517 P2d 1192 (1974). Mr. Fine's conviction alone then is not enough to establish a violation under Plaid Pantries, supra. The charge for the violation of OAR 845-06-045(4) should therefore be dismissed.

3. The Commission may cancel or suspend any license granted, or impose a monetary penalty in lieu of or in addition to said suspension as provided by ORS 472.187, if it finds that the licensee knowingly has sold alcoholic liquor to persons under 21 years of age. ORS 472.180(8). The requirement of "knowledge" is satisfied where there is reasonable ground to believe that the seller knew the purchaser of alcoholic liquor was under the age of 21 years. Plaid Pantries, Inc. v. OLCC, 16 Or. App. 199, 203, 517 P2d 1192 (1974).

There is not reasonable ground to believe that bartender Wesley Fine knew Scott Shaw was under 21 years of age when Mr. Fine sold Mr. Shaw a beer in the Porterhouse on February 14, 1982. There is no evidence that Mr. Fine had ever been told Mr. Shaw's true age. Further, the evidence establishes that Mr. Shaw appeared over 21 years of age on February 14, 1982. Mr. Shaw was a truck driver on that date and had earlier worked in a carnival. He had not shaved. He looked older than his companion Wayne Lashbrook even though Mr. Lashbrook was actually the older of the two. Mr. Shaw appeared over 21 years of age in the September, 1982 videotape deposition. Between February and September, 1982, Mr. Shaw had been in bars an estimated 100 times and was asked for identification but once.

Since the sale to Mr. Shaw was not knowingly made, the charge under ORS 472.180(8) should be dismissed.

4. No licensee or permittee employed by such licensee shall permit a minor, whether or not accompanied by a parent or guardian, to consume any alcoholic beverage upon the licensed premises, whether or not the alcoholic beverage is given to the minor by a parent, guardian or spouse of legal age. OAR 845-06-035(2)(a).

The Licensees did not violate OAR 845-06-035(2)(a) on February 14, 1983 with respect to Scott Shaw because Mr. Shaw appeared at least 21 years of age as noted in Conclusion of Law No. 3 above.

The Licensees did violate OAR 845-06-035(2)(a) with respect to Wayne Lashbrook. Mr. Lashbrook appeared under 21 years of age. Bartender Fine should have therefore requested identification before allowing Mr. Lashbrook to consume beer.

5. No licensee or permittee employed by such licensee shall permit a minor, whether or not accompanied by a parent or guardian, to enter or remain upon the licensed premises, or a portion of the licensed premises that has been posted by the Commission as provided by Rule 845-06-040 as being prohibited to the use of minors, except as provided by Sections (3) and (4) of this rule. OAR 845-06-035(2)(b).

The Licensees did not violate OAR 845-06-035(2)(b) on February 14, 1983 with respect to Scott Shaw. Mr. Shaw's appearance did not raise reasonable doubt that he was under 21 years of age, as noted in Conclusion of Law No. 3 above.

The Licensees did violate OAR 845-06-035(2)(b) in the case of Wayne Lashbrook. Mr. Lashbrook's appearance raised reasonable doubt that he was 21 years of age. Bartender Fine should have therefore requested identification before allowing Mr. Lashbrook to enter and remain in the No. II posted pool table area of the Porterhouse.

6. The Commission may cancel or suspend any license granted, or impose a monetary penalty in lieu of or in addition to suspension as provided by ORS 472.187, if it finds that the licensee, since the granting of the license, has been convicted of a felony or has been convicted of violating any of the liquor laws of this state, general or local, or has been convicted of any misdemeanor or violation of any municipal ordinance where such misdemeanor or violation or municipal ordinance was committed on the licensed premises. ORS 472.180(10).

Licensee Richard Porter has been convicted of two felonies. On November 23, 1981, he was convicted of "Wrongful Acceptance of Payment from Adult and Family Services Division," a class "C" felony. On February 2, 1982, he was convicted of

knowingly and intentionally distributing a quantity of codeine phosphate, a Schedule III narcotic drug controlled substance, a Schedule III felony. The Commission may consequently cancel or suspend Mr. Porter's interest in the DA license at the Porter-house because of these two convictions.

The Licensees did not offer any particular evidence that the felony convictions of Richard A. Porter were mitigated by other circumstances.

ULTIMATE CONCLUSIONS OF LAW

When there has been a violation of ORS Chapter 471 or 472, or any rule adopted thereunder, upon any premises licensed by the Commission, the Commission may revoke or suspend either the service permit of the employee who violated the law or rule or the license of the licensee upon whose premises the violation occurred, or both the permit and the license. ORS 471.385(3).

The Commission may cancel or suspend the Licensees' DA license for the violations of:

- a. ORS 471.375(1) (failed to immediately transmit employee's application for a service permit).
- b. OAR 845-06-035(2)(a) (permitted minor to consume on licensed premises); and OAR 845-06-035(2)(b) (permitted minor to enter or remain on licensed premises).
- c. ORS 472.180(10) (licensee convicted of a felony).

The Commission should dismiss the charges against the Licensees for the violations of:

- a. OAR 845-06-045(4) (permitted criminal conduct to occur on licensed premises).
- b. ORS 472.180(8) (knowing sale to minor).

FINAL ORDER

1. It is hereby ordered that the Dispenser Class A license held by Richard and Sunya Porter at the Porterhouse, 331 Fifth Street, Madras, Oregon, be SUSPENDED for 30 days or that a fine of \$1,950 be paid in lieu of said suspension for the violation of OAR 845-06-035(2)(a) and (b). The Commission deems the 30-day suspension for this violation to have been served during the now-revoked emergency closure of the Porterhouse from July 27, 1983 through October 24, 1983.

2. It is further ordered that the Licensees be issued a Letter of Reprimand for the violation of ORS 471.375(1).

3. It is further ordered that the charges against the Licensees for the violation of OAR 845-06-045(4) and ORS 472.180(8) be dismissed.

4. It is further ordered that the interest held by Richard Porter in the Dispenser Class A license at the Porterhouse be cancelled for the violation of ORS 472.180(10).

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

Dated this 24th day of October, 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.