

BEFORE THE LIQUOR CONTROL COMMISSION
OF THE STATE OF OREGON

In the Matter of the)	
Proposed Suspension of the)	
Dispenser Class A (DA))	
License held by:)	FINAL
)	FINDINGS OF FACT,
William A. Thompson)	CONCLUSIONS OF LAW,
COLUMBIA CAFE AND 3C's CLUB)	AND ORDER
310 Sixth Street)	
Umatilla, Oregon 97882)	
- - - - -)	
Umatilla County)	

A hearing in the above matter was held on the 30th day of November, 1983, in Umatilla, Oregon, before Hearings Examiner Douglas Crumme'. The Licensee appeared in person and was represented by Alex Byler, Attorney at Law, Pendleton. The Commission was not represented by legal counsel.

The Hearings Examiner, having considered the record of the hearing, the applicable law and regulations and being fully advised, issued a Proposed Order dated June 19, 1984.

No Exceptions were filed to the Proposed Order within the fifteen (15) day period specified in OAR 845-03-050.

RECORD OF VIOLATIONS
WITHIN PREVIOUS TWO YEARS

<u>DATE</u>	<u>OFFENSE</u>	<u>DISPOSITION</u>
2-28-82	Permitted loud, noisy or boisterous conduct	5-day suspension

Now, therefore, the Commission hereby adopts the Proposed Order of the Hearings Examiner as the Final Order of the Commission, and enters the following:

FINDINGS OF FACT

1. William Thompson has held a Dispenser Class A (DA) license at the COLUMBIA CAFE AND 3C's CLUB, 310 Sixth Street,

Umatilla, Oregon, at all dates relevant to the Findings of Fact below.

2. The Commission has charged the Licensee with the violation of OAR 845-06-035(2)(b) (permitted minors to enter or remain) on August 20, 1983.

3. Two men identified as Armando Arroyo and Martin Rangel were among the patrons in the lounge of the Columbia Cafe and 3C's Club at about 11:45 p.m. on August 20, 1983.

4. The lounge of the Columbia Cafe and 3C's Club held a No. II minor posting under OAR 845-06-040(3)(b) on August 20, 1983. A No. II minor posting reads, "No minors permitted in this portion of the premises."

5. Mr. Arroyo and Mr. Rangel appeared under 21 years of age on August 20, 1983 because of their youthful facial features and statures.

6. Mr. Arroyo first patronized the Columbia Cafe about three weeks prior to August 20, 1983.

7. Mr. Arroyo was checked for identification on August 20, 1983 by Columbia Cafe employees Sue Burgess and Dorothy Fernandez. Mr. Arroyo produced a plastic-coated identification card that he had shown to Ms. Burgess on two prior occasions and to Ms. Fernandez on one prior occasion. The card had Mr. Arroyo's photo. The card indicated a birthday making Mr. Arroyo over 21 years of age. The card looked like an Oregon driver's license to Ms. Burgess. The card also looked like a driver's license to Ms. Fernandez.

8. Mr. Arroyo had been in the lounge of the Columbia Cafe for about 20 or 30 minutes as of 11:45 p.m. on August 20, 1983, as evidenced by the testimony of Sue Burgess.

9. Mr. Arroyo and Mr. Rangel were taken into custody by the police as they left the Columbia Cafe shortly after a number of police entered the premises at about 11:45 p.m. Mr. Arroyo and Mr. Rangel did not leave together.

10. Mr. Arroyo speaks fairly good English. However, when Mr. Arroyo was interviewed at the police station shortly after 11:45 p.m., he maintained he did not speak English.

11. Mr. Arroyo was interviewed by a Spanish-speaking Umattilla police officer. Mr. Arroyo told the police he had no identification. He had nothing in his pockets when interviewed by the police.

12. The Columbia Cafe was busy at 11:45 p.m. on August 20, 1983. About 70 to 100 patrons were on the premises. A band was playing.

13. Neither the Licensee nor his employees had noticed Martin Rangel at the Columbia Cafe prior to the entry of police into the premises at about 11:45 p.m.

14. The Licensee instructs his employees to check young-appearing patrons for Oregon driver's licenses as soon as they enter. If the patron does not have an Oregon driver's license showing a birthdate over 21 years old, the employees are to ask the patron to leave.

15. The Licensee and three other employees were on duty in the lounge of the Columbia Cafe at 11:45 p.m. on August 20, 1983.

16. The Licensee did not have an employee on duty at the door checking identification on August 20, 1983. The Licensee generally does not have a door checker on duty except on New Year's Eve.

17. Prior to August 20, 1983, the Licensee had three doors that allowed access into its lounge. Since that date, the Licensee locks two of the doors at 10:00 p.m. in order to allow better control and scrutiny of those entering.

DISCUSSION

1. Armando Arroyo and Martin Rangel were not present at the hearing as witnesses for the Commission. In lieu of their testimony, the Commission witnesses offered testimony about what Mr. Arroyo and Mr. Rangel had told them outside the hearing concerning their ages and their presence in the Columbia Cafe on August 20, 1983. The Licensee objected to this evidence under ORS 183.450(1). The Commission sustained the Licensee's objection.

ORS 183.450(1) requires that to be admitted in a Commission contested-case hearing, evidence must be of a type "commonly relied upon by reasonably prudent persons in the conduct of their serious affairs." The Commission found that the evidence of Mr. Arroyo's and Mr. Rangel's statements made outside the hearing did not meet the test of ORS 183.450(1) because their statements were unsworn, their statements were not subject to cross-examination, there was no opportunity for the Commission to observe their demeanors to assess credibility, and there was not a sufficient showing that the two gentlemen,

their testimony, or their affidavits were unavailable for the hearing.

The test under ORS 183.450(1) that evidence must be of a type "commonly relied upon by reasonably prudent persons in the conduct of their serious affairs" does not offer the Commission very specific guidance in ruling on particular objections. However, other sections of the Oregon Administrative Procedures Act (APA) (ORS Ch. 183) and case law offer guidance in interpreting the reliability test under ORS 183.450(1).

One section of the APA that offers such guidance is ORS 183.415(7). This section requires testimony in the Commission's hearings to be given under oath. Mr. Arroyo's and Mr. Rangel's statements were not technically testimony since they were not witnesses. It is unlikely, however, that the intent of the legislature was that the importance attached to sworn testimony could be circumvented simply by the declarant's absence from the hearing. Rather, ORS 183.415(7) logically implies that the lack of an oath in statements made outside the hearing is a factor that tends to show unreliability under ORS 183.450(1).

Another section of the APA that offers guidance in interpreting the reliability test under ORS 183.450(1) is ORS 183.450(3). This section provides for the right of cross-examination in a contested case. As with unsworn testimony, the cross-examination requirement under ORS 183.450(3) logically implies that the lack of opportunity for cross-examination of statements made outside the hearing is a factor that tends to show unreliability under ORS 183.450(1).

Case law also offers guidance in ruling on objections under ORS 183.450(1). In Higley v. Edwards, 67 Or App 488, 678 P2d 775 (1984), the Oregon Court of Appeals held that the reliability standard under ORS 183.450(1) was not met by the unsworn, uncorroborated statements of a convicted felon made outside the hearing. Higley, supra at 491-492. The court noted that the credibility of the declarant was central and that the party against whom the statements were offered had no affirmative duty to secure the declarant's attendance at the hearing because the burden of proof was on the proponent of the statements. Higley, supra at 491.

Where credibility is a factor in assessing whether a particular statement is sufficiently reliable for admission under ORS 183.450(1), the Commission is greatly hampered if the statement offered was made outside the hearing and there was no opportunity to observe the declarant's demeanor. Explicit findings about credibility based on substantial evidence are necessary where credibility is a crucial issue in a case. Lewis v. Employment Division, 66 Or App 303, _____ P2d _____ (1984). The inability to assess the credibility of a declarant absent from the hearing is a factor that hinders finding the declarant's statements reliable under ORS 183.450(1).

In the present case, Mr. Arroyo's and Mr. Rangel's statements made outside the hearing raised most of the factors suggesting unreliability cited above.

The argument might be made that traditional hearsay rules should be considered and that Mr. Arroyo's and Mr. Rangel's

out-of-hearing statements should be admitted because they fall within the hearsay exception for declarations against interest. Portions of their statements could be considered declarations against interest because they were subject to potential penal liability under ORS 471.430(3) by admitting being minors in a bar.

The traditional hearsay rules do not apply per se to the Commission's contested-case hearings under ORS Chapter 183. Higley, supra at 491. However, even if the ruling on the Licensee's objection was made under the general Oregon law on hearsay, the objection should still be sustained, as explained below.

Oregon's general law on hearsay is set forth in the Oregon Evidence Code.¹

The Code admits hearsay declarations against interest under an exception to the general hearsay rule (ORS 40.455) only if the person that made the out-of-court statements is unavailable. ORS 40.465(3)(c).

The Code defines unavailability in part as follows:

(1) . . . "Unavailability as a witness" includes situations in which the declarant:

. . .

(e) Is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance (or in the case of an exception

¹ The Oregon Evidence Code (ORS 40.010 to ORS 40.585) applies in criminal and civil proceedings in Oregon Courts generally, although the Code does not apply to the Commission's contested cases. ORS 40.015, ORS 183.450.

under paragraph (b), (c) or (d) of subsection (3) of this section, the declarant's attendance or testimony) by process or other reasonable means. ORS 40.465(1)(e).

The parenthetical expression in ORS 40.465(1)(e) applies to declarations against interest. ORS 40.465(3)(c). The effect of the parenthetical expression, as explained in the Legislative Commentary to the Code, " . . . is to require the proponent of the hearsay to attempt to depose the declarant, as well as to seek the declarant's attendance, before the person will be considered unavailable." Kirkpatrick, Oregon Evidence at 408 (1982).

If the Commission were to base its ruling on the Licensee's objection under the Oregon Evidence Code, then, the Commission would need to consider whether there had been a showing that Mr. Arroyo and Mr. Rangel or their testimony were unavailable for the hearing.

The Commission concluded that the Commission did not make a reasonable showing that either Mr. Arroyo or Mr. Rangel were unavailable.

The Commission's efforts to locate Mr. Arroyo were limited to asking the Umatilla police if they knew where Mr. Arroyo was. The police advised that to the best of their knowledge, based on an attempt to serve a warrant at the last known address for Mr. Arroyo on October 5, 1983, he was no longer in the area. The attempt to serve the warrant on October 5, 1983 involved a uniformed police officer going to the home address that Mr. Arroyo had given on August 20, 1983. A female answered the door. She said Mr. Arroyo had moved and she did not

know where he was. The Umatilla police also ran a computer check on Mr. Arroyo through the Department of Motor Vehicles, but failed to find any information. The Enforcement Division made no further attempts to locate Mr. Arroyo. The record does not show any attempts to locate him through his parents, (whose names he gave the police on August 20, 1983), through his former neighbors or through nearby law enforcement agencies.

The effort to locate Mr. Arroyo was not one of the Commission making continuing attempts to follow up on available leads through the date of the hearing. State v. Anderson, 42 Or App 29, 31-34, 599 P2d 1230 (1979).² Even assuming that Mr.

² State v. Anderson, supra involved a statute then in effect (ORS 41.900(8)) that allowed reported testimony of an out-of-state witness where the reported testimony was from a former proceeding between the same parties and related to the same matter. The court applied the facts in Anderson to the holding in State v. Smyth, 286 Or 293, 593 P2d 1166 (1979).

In Smyth, supra the court held that in light of a criminal defendant's right to confrontation of witnesses under Article 1, section 11 of the Oregon Constitution, the state must make a good faith effort to secure the witness for trial before reported testimony of the absent witness will be admitted. The court held in Smyth, supra at 301 that the state had not shown a good faith effort because it had failed to request the voluntary attendance at trial of two witnesses located outside the state.

Applying the State v. Smyth, supra holding in State v. Anderson, supra, the Court of Appeals found the state had shown a good faith effort to secure the witnesses for trial where various leads were pursued through the date of trial in an attempt to locate the witnesses. The court distinguished these facts from the state acting with casual indifference, or waiting until the last minute to begin the search, or making a half-hearted perfunctory attempt, or ignoring substantial positive leads, or making no attempt to bring witnesses into state for trial where their whereabouts outside the state are known. State v. Anderson, supra at 34.

Arroyo had left Oregon and could not be subpoenaed, he could have been located in order to ask him to voluntarily attend the hearing, or to take his deposition³, or to take his affidavit to offer as evidence under the procedures outlined in OAR 845-03-045(5) and (6).⁴

With respect to Martin Rangel, the Commission made no effort to locate him because he said on August 20, 1983 that he was living and working on a named ranch near Prosser, Washington. No attempt was made to determine his whereabouts at the

³ The Commission and its agents are authorized to take depositions in other states. ORS 471.760.

⁴ OAR 845-03-045(5) and (6) provide as follows:

(5) Any time 10 days or more before a hearing, any party may serve on an opposing party a copy of any affidavit, certificate or other document the party proposes to introduce in evidence. Unless the opposing party requests cross-examination of the affiant, certificate preparer, or other document preparer or custodian, within 5 days prior to hearing the affidavit or certificate may be offered and received with the same effect as oral testimony.

(6) If the opposing party requests cross-examination of the affiant, certificate preparer, or other document preparer or custodian as provided in section (5) of this rule and the opposing party is informed within 5 days prior to the hearing that the person will not appear for cross-examination, the affidavit, certificate or other document may be received in evidence provided the Commission or the hearings officer determines that:

(a) The contents of the affidavit, certificates or other document is of a type commonly relied upon by reasonably prudent persons in the conduct of their serious affairs; and

(b) The party requesting cross-examination would not be unduly prejudiced or injured by lack of cross-examination.

time of the November 30, 1983 hearing. Thus the effort to locate Mr. Rangel was also not one of the Commission making continuing attempts to follow up available leads through the date of the hearing. State v. Anderson, supra. Even assuming Mr. Rangel was still living at the ranch near Prosser, Washington and could not be subpoenaed, no attempt was made to request him to voluntarily attend the hearing, or to depose him in Washington⁵, or to take his affidavit to offer as evidence under the procedures outlined in OAR 845-03-045(5) and (6)⁶.

Because there was not a sufficient showing of the unavailability of Mr. Arroyo and Mr. Rangel or their testimony for the hearing, the Commission should sustain the Licensee's objections to the out-of-hearing statements attributed to them even if traditional hearsay rules are considered as a basis to make a ruling under ORS 183.450(1).

2. The excluded statements of Mr. Arroyo and Mr. Rangel were preserved for the record in the event the Commission makes a different determination on the admissibility of the evidence. Their statements concerned their ages, how long they were in the Columbia Cafe, and whether they were asked for identification by the Licensee.

3. No evidence from any witness indicated whether Mr. Arroyo or Mr. Rangel were in the immediate company of spouses over 21 years of age in the Columbia Cafe.

⁵ See footnote No. 3.

⁶ See footnote No. 4.

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. 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. A minor spouse may enter or remain upon the licensed premises or a portion thereof if in the immediate company of a spouse who has reached the age of 21 years. OAR 845-06-035(2)(b).

The record fails to establish how old Mr. Arroyo and Mr. Rangel were, or that they did not show valid identification to the Licensee, or whether they were in the immediate company of spouses over 21 years of age in the premises. The charges for the violation of OAR 845-06-035(2)(b) have therefore not been proven.

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 charge against the Licensee for the violation of OAR 845-06-035(2)(b) (permitted minors to enter or remain) should be dismissed as noted in the Conclusion of Law above.

FINAL ORDER

It is hereby ordered that the charges against William Thompson for the violation of OAR 845-06-035(2)(b) (permitted minors to enter or remain) at the Columbia Cafe and 30's Club, 310 Sixth Street, Umatilla, Oregon, be DISMISSED.

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

Dated this 11th day of July, 1984.

Douglas Crumme
Douglas Crumme
Hearings Examiner
Hearings Division

William A. Thomas for C. Dean Smith
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.