OLCC-82-RO-111 1984

BEFORE THE LIQUOR CONTROL COMMISSION
OF THE STATE OF OREGON

| | |
|---|---|
| In the Matter of the Applications for Package Store (PS) Licenses by:<br><br>JUDY L. SOPER Agency #86<br>8616 SW Hall Boulevard<br>Beaverton, Oregon 97005<br>Washington County<br><br>ROBERT E. BARBER #96<br>128 E. Main<br>Hillsboro, Oregon 97123<br>Washington County<br><br>EUGENE SHERWOOD<br>934 SW Salmon Street #200<br>Portland, Oregon<br>Multnomah County<br><br>JAMES L. COMINI #67<br>1328 W. Sixth Street<br>The Dalles, Oregon 97058<br>Wasco County<br>- - - - - - - - - - - - - -<br>Multnomah, Washington, Wasco Counties | FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER |

The hearing in this matter was held before Hearings Examiner Allen R. Scott. Stipulated facts were submitted on October 12, 1983. The record of the hearing remained open for further proceedings, including submission of additional evidence and legal argument, until August 8, 1984. Applicants were represented by John Chally, Attorney at Law, Portland. The Commission was represented by Arnold Silver, Assistant Attorney General.

## RULING ON EVIDENCE

Applicants offered a memorandum from Gene Sandquist to A.G. Rogers dated April 23, 1982. The Staff objected to the

memorandum. The Commission hereby concludes that the memorandum is relevant and admits it into the record.

On December 17, 1984, the Commission considered the record of the hearing, the Proposed Order of the Hearings Examiner, Exceptions to the Proposed Order of the Hearings Examiner, and applicable statutes and regulations. Pursuant to this review, the Commission enters the following:

## FINDINGS OF FACT

1. The Petitioners in this case (hereafter called "Agents") are parties to certain contracts with the Commission identified as follows:

| Agent/ Petitioner | Agency Number | Agency Name | Location |
|---|---|---|---|
| Judy L. Soper | 86 | Progress Liquor Store | 8616 SW Hall Blvd. Beaverton, Oregon |
| Robert E. Barber | 96 | Hillsboro Liquor Store | 128 E. Main Hillsboro, Oregon |
| Eugene Sherwood | 200 | Salmon Street Liquor Store | 934 SW Salmon St. Portland, Oregon |
| James L. Comini | 67 | The Dalles Liquor Store | 1328 W. Sixth St. The Dalles, Oregon |

2. Each of the above contracts is known as an "Exclusive Sales Agency Agreement" (hereafter "Agency Agreement").

3. The Agents were exclusive sales Agents under those Agency agreements at all times pertinent hereto. Each of the Agents was in good standing with the Commission at all times pertinent hereto. That is to say, none of the Agents was the subject of any disciplinary proceeding before the Commission during the times relevant to this present case.

4. Each Agent submitted an application for a Package Store license (hereafter "application"). The Agents submitted applications at the times as follow:

| Agent | Application Date |
|---|---|
| Judy L. Soper | February 10, 1982 |
| Robert E. Barber | February 10, 1982 |
| Eugene Sherwood | April 7, 1982 |
| James L. Comini | February 11, 1982 |

5. At the time these applications were filed, there was no Oregon Administrative Rule prohibiting the application for, or the granting of, a Package Store license (hereafter "License") to exclusive sales agents.

As exclusive sales agents, these petitioning Agents are only entitled to sell the Commission's liquor by the terms of their Agency Agreement. The Agency Agreements provide that they, the Agents, may sell other, so called "related items" only if they appear on a list promulgated by the Commission.

6. Prior to the adoption of OAR 845-05-020(6) (hereafter the "New Rule") the Agents (parties to contracts with the Commission) never sold beer and wine, or attempted to sell beer and wine. Neither did the Agents intend to sell beer and wine when they entered into Exclusive Sales Agent contracts with the Commission.

7. Beer is not a "related item" as that term is defined by OAR 845-10-045. Neither is wine. Beer and wine are hereafter referred to as "Package Store Products." Beer and wine are not "distilled spirits" within the meaning of that rule.

8. The petitioning Agents' applications were not handled in the normal course of the Commission's operations. The Commission instructed its own staff to deny the Agents' applications. This directive of the Commission is hereafter referred to as the "Instruction." Those instructions were issued to the staff at the Commission's August 1982 meeting. Mr. Harl Haas, the then attorney for the Retail Agents Association, requested that the Commission take action on the petitioning Agents' applications forthwith.

The Commission's staff delayed action on the Agents' applications until the staff could determine an effective way to refuse Package Store license applications from all exclusive sales agents, including those of the petitioning Agents.

9. On September 13, 1982, representatives of the License and Retail Operation Divisions met with Assistant Attorney General Michael V. Reed for the purpose of determining the best course of action for the Commission's staff to take in order to comply with the Commission's Instruction. Three alternative methods for denying these applications were considered. Those alternatives were as follows:

> (a) Refuse licenses under ORS 471.295;
>
> (b) Grant the licenses. Then, notify the approved Agents that, if they proceeded with the sale of any item not listed in the Administrative Rule, then action would be taken against those Agents for violations of the Rule; and
>
> (c) Adopt a temporary rule containing license criteria which would preclude issuance of a Package Store license to all applicants who were exclusive retail sales agents of the Commission.

(See memo to Commission dated September 13, 1982.)

10. The Commission chose to adopt a new rule, Oregon Administrative Rule 845-05-020(6) (hereafter the "New Rule"). The New Rule was adopted by the Commission on November 30, 1982, was made effective December 3, 1982, and became a permanent rule on March 8, 1983.

11. The New Rule has no provision stating that it shall be applied retroactively.

12. Mr. Harl Haas, then attorney for the Retail Sales Association and the then attorney for these Agents, appeared at the November 30, 1982, Commission hearing to contest the adoption of the New Rule.

13. ORS 183.335 requires any Oregon administrative agency to articulate a statement of need as a precondition to adoption of an Administrative Rule. The Commission articulated a need for the New Rule as follows:

> To establish a criterion by which the Commission can refuse to issue a Package Store license to a retail sales agent holding a contract with the Commission for an exclusive liquor sales agency.

14. The Commission believes each of the petitioning Agents to be a fit and proper person to hold a Package Store license but for the fact that each of the petitioning Agents is a retail sales Agent of the Commission.

15. Each of the petitioning Agents has properly filed an application for a Package Store license. Each of the petitioning Agents has complied with all Commission requirements and regulations governing the issuance of Package Store licenses

with one exception: Each of the petitioning Agents does not comply with the portion of the New Rule which prohibits retail sales agents from holding Package Store licenses.

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

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(6).

This rule (hereinafter referred to as the New Rule) is the crux of the matter. If its application to these cases is proper, it precludes issuance of the Package Store licenses.

Applicants argue that the Commission's denial of their applications is improper for three reasons: that the New Rule was retroactively applied to their applications and that such retroactive application is improper; that the Commission's denial was improper because of bias toward the Applicants and their applications and because of the Commission's prejudgment of the applications; that the OLCC exceeded the scope of its authority in promulgating the New Rule. In the discussion below, these arguments are considered in the order presented.

RETROACTIVITY

Applicants argue that by applying the New Rule to their applications, the Commission was applying the Rule retroactively and, further, that said retroactive application is improper under Oregon law. The Commission's Staff questions whether the application of this New Rule to these matters is

retroactive. Even if it is, the Staff argues, it is a permissible retroactive application.

The facts relating to the question of retroactivity may be summarized as follows. Applicants applied for licenses. After the applications were made, the New Rule was promulgated. The Commission's Staff then denied the applications based upon the New Rule. Applicants then requested and were granted a hearing, which is the subject of this Proposed Order. The question presented by Applicants' retroactivity argument, then, is as a follows: Can the OLCC promulgate an Administrative Rule after application has been made and use the newly promulgated rule to deny the application?

Two Oregon Court of Appeals decisions involving the OLCC provide an analogy to this situation which tends to support the propriety of the Commission's denial.

In the first of these, Sun Ray Dairy v. OLCC, 16 Or App 63, 517 P2d 289 (1973) (hereinafter referred to as Sun Ray I), the Court reversed and remanded an OLCC order denying a Package Store license to an applicant because the OLCC had no Administrative Rule upon which to base its denial.

Following the remand to the OLCC of Sun Ray I, the OLCC promulgated an Administrative Rule applicable to the applicant. It then granted the applicant a rehearing and again denied the application based upon the new rule.

In the second Sun Ray case, Sun Ray Drive-In Dairy v. OLCC, 20 Or App 91 (1975)(Sun Ray II), the Court affirmed the Commission's denial of the application.

In the Sun Ray matters, then, the OLCC promulgated a rule after the application was made and used that rule to deny the application. That procedure is what the Applicants in the case at hand claim is an improper retroactive application of an Administrative Rule. The Court of Appeals, in Sun Ray II, obviously aware of the procedure, does not comment on it. It should be noted that the Court does not specifically deal with the retroactivity issue in Sun Ray II. That case is thus not a specific precedent governing the present case. Nevertheless, the Court's tacit acceptance of the use of a rule promulgated after an application to deny the application is an indication that the procedure followed in the present cases is not legally defective.

Even if the implications of the Sun Ray decisions are ignored, and even if the application of New Rule is considered to be retroactive, the Commission concludes that the use of the New Rule in this case is not improper.

Two recent Court of Appeals opinions relate to the retroactive application of rules by State agencies. Although the Court reversed the agencies' orders in both cases, the reasoning of these two decisions supports a conclusion that the OLCC's application of the New Rule is not impermissible in this case.

In the first of these cases, Gooderham v. AFSD, 64 Or App 104 (1983), the Court considered a rule which was specifically made retroactive by a clause in the rule. The Court noted that

a retroactive rule is not per se invalid, and indicated that the test of validity of such a rule is one of "reasonableness."

The second of these cases, Guerrero v. AFSD, 67 Or App 119 (1984), is more directly pertinent in that the Court was considering a rule which, like the New Rule, does not have a specific retroactivity clause. The Court first notes that the fact that the rule contains no retroactivity clause does not prevent retroactive application if that "is reasonable under the circumstances." Guerrero, supra 67 Or App at 122. The Court then adopts a test found in Derenco, Inc. v. Benj. Franklin Fed. Savings and Loan, 281 Or 533, 557 P2d 447 (1978) to determine whether a regulation which says nothing about retroactivity may be applied retroactively:

> "Statutes or regulations which say nothing about retroactive application are not applied retroactively if such a construction will impair existing rights, create new obligations or impose additional duties with respect to past transactions." 281 Or at 539 n.7.

Under the Guerrero analysis, the application of the New Rule to Applicants in this case is not improper. The only claim of prejudice or of the impairment of "existing rights" that Applicants make is that the change in the rule changes their "status as applicants." By this, Applicants mean, apparently, that they had a better chance to obtain the license in question before the New Rule was enacted than they did after. It is obviously true that the New Rule changed the standards under which the applications would be judged. That is, of course, why the New Rule was promulgated; Applicants' argument

is simply another way of saying that the retroactive application of the rule has, in fact, a retroactive effect. Any retroactive application of a rule changes something. To conclude that the very fact of change makes the retroactive application improper would mean that no rule could be applied retroactively, a conclusion that the courts reject.

Applicants have thus not established that the use of the New Rule to deny their applications is unreasonable. The only possible harm to them is that they went to the trouble of applying based upon their hope that they would receive a license. That harm is not of such magnitude that it makes the retroactive application of the New Rule unreasonable.

The facts in the case at hand are distinguishable from those in Gooderham and Guerrero. In both of those cases, the Court of Appeals notes that the petitioners are recipients of public assistance and that the public assistance benefits constitute a means of subsistence for them. The retroactive application of the rules in those cases affected the availability of such benefits to the petitioners. That fact affords the petitioners, according to the Court, a special status. Gooderham, supra, at 110; Guerrero, supra, at 123. The special nature of the petitioners' interest formed an important basis for the Court's conclusion that petitioners were prejudiced by the retroactive application of the rules involved.

In the case at hand, Applicants claim no analogous interest. Their only interest affected by the retroactive application of the New Rule is the possibility of receiving a liquor

license. That is an interest far removed from the subsistence interests involved in Gooderham and Guerrero.

It is also noted that the retroactive application of the New Rule in this case did not prejudice the Applicants in a procedural sense as did the retroactive application of the rule in Guerrero. The Court held there that the fact that the rule involved was promulgated after the administrative hearing prevented petitioner from being fully informed of her "rights and remedies" prior to the hearing as required by ORS 183.413(1). In the case at hand, the New Rule was in effect prior to the Applicants' request for a hearing in this matter, and thus no similar procedural defect is present. In other words, when Applicants requested a hearing, and during the hearing, Applicants were aware of the New Rule and were able to fully litigate the facts and law relevant to it.

The Commission concludes that the application of the New Rule to Applicants' cases is not an improper retroactive application of the Rule.

BIAS AND PREJUDICE

Applicants claim that bias on the part of a Commissioner and prejudice on the part of the Commission's staff violate the due process clause of the 14th Amendment to the United States Constitution. The Commission is not persuaded by either claim.

Applicants claim that the Chairman of the OLCC, William Hedlund, exhibited bias toward Applicants and their applications and vowed retribution against the Applicants in future

proceedings before the Commission. This claim is based upon statements made at a July 18, 1983, OLCC meeting at which the Commission considered Applicants' petition for a declaratory ruling on the new rule. At most, the partial transcript of that meeting offered in evidence indicates that Mr. Hedlund believed that the agency contracts under which Applicants operate liquor stores precluded them from having Package Store licenses. Nothing in the transcript indicates that Mr. Hedlund has a personal or pecuniary interest in the matter or is otherwise unable to judge the matter fairly on its merits. See U.S. v. Morgan, 313 US 409, 421 (1941); Hortonville Joint School District v. Hortonville Educational Association, 426 US 482 (1976). Applicants have failed to carry their burden of showing actual bias. Bougham v. Board of Engineering Examiners, 46 Or App 287, 290 (1980).

It would also appear that this claim of bias is premature. The matter involved in this contested case has not reached the Commission, and may never reach the Commission (see OAR 845-03-050(5)). If it does, one cannot assume how individual Commissioners will vote or what the bases for the decision will be.

The Commission concludes that Applicants' claim of bias is not substantiated.

Applicants also claim that the Commission's staff has "prejudged" the question of whether Package Store licenses should be granted to exclusive agents. The evidence of this

supposed prejudgment is a staff memorandum in 1982 which discusses methods by which applications for Package Store licenses by exclusive agents may be denied. Obviously, the determination of the criteria to be used in considering an application for a Package Store license is a policy question. It is the job of the OLCC to make policy decisions of this kind. Certainly, any policy decision regarding qualifications for licenses will affect individual applicants or potential applicants. This is not prejudice. Nothing in the cases cited by Applicant indicates that a policy decision by an agency constitutes a violation of due process.

Applicants' claim of prejudgment also appears to relate, in part, to the alleged prejudgment by the Staff of the construction to be given applicable statutes. Applicants provide no evidence which would support this claim other than a memorandum (Exhibit M) which outlines the Staff's consideration of methods to refuse the licenses. If one assumes that this memorandum indicates that the Staff had a view of the meaning of applicable statutes, it is still not clear why this is "prejudgment," as opposed to reasoned consideration. Nothing in the cases cited by Applicants indicates that it is a violation of due process for an agency to have a view of the meaning of the statutes that govern its operation, although such views will inevitably have an impact on people regulated by the agency.

The Commission concludes that Applicants have not shown any violation of the due process clause of the 14th Amendment to the United States Constitution.

SCOPE OF AUTHORITY

Applicants claim that the OLCC exceeded the scope of its authority in promulgating the New Rule. Applicants base their argument on ORS 471.750 and ORS 471.005. ORS 471.750 reads as follows:

> The commission shall establish such stores and warehouses in such places in the state as in its judgment are required by public convenience or necessity, for the sale of spiritous liquors containing over four percent of alcohol by weight, in sealed containers for consumption off the premises. It shall keep on hand in such stores or warehouses such quantities and kinds of alcoholic liquors as are reasonably required to supply the public demand. Any person qualified to purchase such liquors from the commission has the right to present to the commission, or at any of its stores, an application for any kind or brand of alcoholic liquor which he may desire and which may be manufactured or obtainable in any place in the United States, and the commission shall obtain such liquor and sell it to the applicant. No such store shall be established in any county or incorporated city of this state where a local prohibitory law is in effect. The stores shall be closed on Sundays and any legal holidays or any state or national election days designated by the commission. The advertising of the sale of liquors by the commission or window display in its stores are prohibited, except that the commission may provide for appropriate signs on windows or front denoting the fact that it is a store of the commission, and may post within the store appropriate price lists. The commission may appoint agents in the sale of said liquor under such agreement as the commission may negotiate with said agents or their representative. ORS 471.750.

ORS 471.005(1) defines an alcoholic liquor as any beverage containing more than one half of one percent alcohol by volume. Applicants argue from these two statutes that the OLCC is required to provide all forms of alcoholic liquor, including beer and wine, to agents, such as Applicants. Thus, Applicants argue, the New Rule, which precludes issuance of Package Store licenses to exclusive agents, violates the statutory authority of the Commission.

The Commission is not persuaded by Applicants' arguments. ORS 471.750 cannot be read to create any sort of right in exclusive agents to hold Package Store licenses. It authorizes the Commission to establish liquor stores and directs the Commission to meet the public demand for liquor through such stores and through the filling of orders placed by customers. It does not require the use of agents, such as Applicants, for any of these tasks, although it gives the Commission discretion to appoint such agents.

Even if the statute can be read as a requirement that the Commission sell beer and wine, a dubious reading, that fact would not require the Commission to do so through exclusive agents such as Applicants or to grant Package Store licenses to such agents. In other words, the statute, no matter how read, does not make the New Rule a departure from the statutory authority of the Commission.

The Commission concludes that Applicants' claim that the New Rule is outside the Commission's scope of authority is not persuasive.

The Commission concludes that the New Rule (OAR 845-05-020(6) is a valid rule as applied to Applicants and that it precludes the issuance of Package Store licenses to them.

## ULTIMATE CONCLUSIONS OF LAW

The application should be denied because Applicants are exclusive agents of the Commission who are precluded under OAR 845-05-020(6) from having Package Store licenses.

## FINAL ORDER

It is hereby ordered that the applications for Package Store licenses by Judy L. Soper, Robert E. Barber, Eugene Sherwood and James L. Comini, in the trade names, respectively, PROGRESS LIQUOR STORE, HILLSBORO LIQUOR STORE, SALMON STREET LIQUOR STORE, and THE DALLES LIQUOR STORE, be DENIED.

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

Dated this 21st day of December, 1984.

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.