

BEFORE THE LIQUOR CONTROL COMMISSION
OF THE STATE OF OREGON

In the Matter of the)
Proposed Suspension of the)
Restaurant (R))
License held by:)
CB2, Inc.) FINAL
SUPERDELI) FINDINGS OF FACT,
2525 Monroe Street NW) CONCLUSIONS OF LAW,
Corvallis, Oregon 97330) AND ORDER
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Benton County) OLCC-84-V-006

A hearing in the above matter was held on the 6th day of June, in Corvallis, Oregon, before Hearings Examiner Jill Thompson. The Licensee appeared in person and was not represented by legal counsel. 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 October 15, 1984.

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

RECORD OF PREVIOUS VIOLATIONS

NONE.

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. Licensee CB2, Inc. has held a Restaurant (R) license at SUPERDELI, 2525 Monroe Street NW, Corvallis, Oregon, since August 1982.

2. The Commission has charged Licensee with violation of ORS 471.405(1) (operated in way other than license permits), and 471.375(1) (failed to immediately transmit service permit).

3. Licensee's license contains the following restrictions:

(1) Beer and wine will be served only to those patrons who purchase a bona fide meal. (2) For purposes of interpretation - a bona fide meal would be defined as (A) main dish entrees, including lunch and dinner specials, or (B) salad bar, sandwich and soup, six inch submarine sandwich, or 1/2 sandwich.

4. On February 10, 1984, at about 9:45 p.m., two patrons entered the premises, bought pitchers of beer at the bar and took the beer to a table. They were not required to purchase food; however, these patrons had been to the premises earlier that night and had ordered and consumed food. Licensee enforces its license restrictions by requiring patrons to order all food and beverages at the bar. When customers order food Licensee marks the back of their hands with a rubber stamp; patrons cannot get beer or wine service unless they have stamp marks on their hands. Licensee also has a sign in the bar area informing patrons of the necessity to purchase food.

5. About 15 minutes later, two other patrons entered the premises and ordered beer but no food. They were served the beer without being required to order food. Some time after they were served the beer, they ordered some fried potato wedges.

6. Licensee considered potato wedges to be the equivalent of a half sandwich because a single order of potato wedges weighs the same as a half sandwich; Licensee's owners testified that they assumed the restriction would be satisfied by meeting an equal weight standard.

7. On February 10, 1984, Licensee's bartender, who sold and served alcoholic liquor, did not have a service permit, nor had Licensee submitted a service permit application. The bartender had worked for Licensee since December 1983. One of Licensee's owners stated he was holding the application to send in with those of other employees who had just been hired.

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. No person shall peddle or deliver alcoholic liquor to or at any place, where, without a license, alcoholic liquor is sold or offered for sale. No licensee shall sell or offer for sale any alcoholic liquor in a manner, or to a person, other than the license permits the licensee to sell. ORS 471.405(1).

Licensee sold alcoholic liquor in a manner not permitted by its license. There is reliable evidence that the first two patrons, discussed in Finding of Fact 4, had ordered and consumed food with their beer, left for awhile and then returned. The Commission did not allege that had they remained at the premises the entire time they would have been required by the terms of the license to order more food, and it is questionable whether this course of conduct alone would constitute a violation. However, Licensee's conduct toward the other two customers mentioned above is alone sufficient to establish a violation. The patrons discussed in Finding of Fact 5 were not

required to purchase food along with their beverage order. They ordered potato wedges after their beer was served. Licensee's owners considered potato wedges to be the equivalent of a half sandwich.

The Commission is not persuaded that Licensee's testimony regarding the weight factor is credible. In order for Licensee to reasonably conclude that poundage was all the Commission was concerned about in imposing the restriction, the restriction would not be expressed in terms of particular food items (main dish entrees, sandwich, soup, salad bar); rather it would be defined in terms of bulk or weight. The Commission cannot conclude that Licensee made a good faith error which would tend to mitigate its action.

If Licensee had furnished food service which could be considered a reasonable substitute for the items listed on the license restriction, such service might constitute a defense to the charge. However, it is clear that potato wedges are not a reasonable equivalent of the items listed in the restriction in terms of the nature of the items (soup, sandwich, etc.). Even if they could be considered a reasonable substitute, the patrons mentioned in Finding of Fact 5 were not required to order them at the same time they ordered beer.

2. 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 in-

forward and immediately transmit the application to the commission with the fee required by subsection (2) of this section. A copy of the application shall be kept on the licensed premises and shall be made available for immediate inspection by any inspector or investigator employed by the Commission or by any other peace officer until the applicant receives the permit. ORS 471.375(1).

When there has been a violation of this chapter or ORS chapter 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 employe 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).

Licensee employed a bartender to sell and serve alcoholic liquor without immediately transmitting a service permit application. The bartender had worked for approximately two months at the time the Notice of Violation was issued.

ULTIMATE CONCLUSIONS OF LAW

Licensee violated ORS 471.405(1) (operated in manner not permitted by license) and 471.375(1) (failed to immediately transmit service permit). Licensee's efforts, described in Finding of Fact 4, to comply with the license restriction provides a basis for a slight mitigation.

FINAL ORDER

It is hereby ordered that the Restaurant (R) license held by CB2, Inc. at Superdeli, 2525 Monroe Street NW, Corvallis, Oregon, be SUSPENDED for ten (10) days or that Licensee pay a \$650 fine in lieu of suspension.

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

If you choose to pay the fine it must be paid within ten (10) days of the date of this Order, otherwise the suspension must be served.

Dated this 8th day of November, 1984.



Jill Thompson
Hearings Examiner
Hearings Division



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.