

BEFORE THE LIQUOR CONTROL COMMISSION
OF THE STATE OF OREGON

In the Matter of the
Proposed Suspension of the
Dispenser Class B
License held by:

Elks BPOE #2032
dba MILWAUKIE ELKS
13121 SE McLoughlin Blvd.
PO Box 22242
Milwaukie, Oregon 97222
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Clackamas County

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) FINAL
) FINDINGS OF FACT,
) CONCLUSIONS OF LAW,
) AND ORDER
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) OLCC-85-V-008
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A hearing in this matter was held on April 12, 1985, in Portland, Oregon, before Hearings Examiner Allen R. Scott. The Licensee appeared and was not represented by legal counsel. The Commission was represented by legal counsel.

On July 22, 1985, the Commission considered the record of the hearing, the applicable law, the Proposed Order of the Hearings Examiner, Exceptions to the Proposed Order of the Hearings Examiner, and Response to Exceptions. Based on this review, the Commission makes the following:

FINDINGS OF FACT

1. Licensee has held a Dispenser Class B license at all times relevant to this matter.
2. Licensee has been charged with violation of ORS 472.310(1) (employee sold or made available alcoholic liquor to persons other than permitted by the license as provided in ORS

472.110(3) and ORS 472.010(8)). The penalty proposed by the staff is a suspension of the license for 15 days or payment of a \$975 fine in lieu of the suspension.

3. On January 25, 1985, the Servetus Club held a dance at the Milwaukie Elks' facility. Some of those attending the dance were members of the Elks, while many were not.

4. At approximately 11:15 p.m. on January 25, 1985, OLCC Inspectors Julie Bouck and Ed Simon went to the premises. They first approached a desk manned by Elks at the main door and stated that they were there for the dance and were not members of the Elks. They were directed down a hall to the ballroom where the dance was being held.

5. At the door to the ballroom, Inspectors Bouck and Simon paid a \$5 charge for non-Servetus members and were given name tags stating "Non-Member Servetus."

6. They then entered the ballroom. They were approached by a cocktail waitress, Anna Garcia. They told her they were not members of the Elks. She stated, "No problem, I'll get my Elk." She then took their order.

7. A few minutes later, a man who identified himself as "George" and who said he was an Elk approached them and stated that he would be their "banker." When the waitress came with the drinks, Inspector Simon gave money to George, who gave it to the cocktail waitress. She then returned the change to George, who gave it to Inspector Simon. The waitress then

served the drinks, which contained alcoholic liquor, to Inspectors Bouck and Simon.

8. At least two other non-Elk participants in the Servetus dance were served alcoholic liquor by the same method.

9. Prior to the dance, the manager of the Elks club instructed all employees who were involved in the sale or service of alcoholic liquor that only Elks were to be served alcoholic drinks. At the time of the dance, Elks manned the outside door and checked people entering for Elk membership. Those who were members were stamped on the hand.

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

It shall be unlawful:

(1) For any person to peddle or deliver alcoholic liquor to or at any place where, without a license, alcoholic liquor is sold or offered for sale, or for any licensee to sell or offer for sale, any alcoholic liquor of a kind, in a manner, or to a person other than his license permits him to sell. ORS 472.310(1).

The Commission had no rule relating to service to non-members in DB premises at the time of this incident and thus relies on the above statute in conjunction with ORS 472.110(3) and ORS 472.010(8).¹ ORS 472.110(3) states that DB licenses may be issued to private clubs, fraternal organizations, and

¹A rule relating to service to guests in DB establishments became effective February 7, 1985. The Commission believes that, as this rule calls for penalties for violation of its provisions, it should not be applied retroactively.

veterans' organizations. It sets out the type of liquor that may be sold and the type of entertainment which may be allowed on such premises. It does not define the persons to whom the liquor may be sold. ORS 472.010(8) defines the words "private club" and refers to the physical premises of such clubs as being "suitable and adequate for the reasonable and comfortable use and accommodation of its members and their guests. . . ." Although the statute does not explicitly limit service to members and their guests, it may reasonably be taken as a directive that service be so limited.²

The evidence establishes that on January 25, 1985, at approximately 11:15 p.m., OLCC Inspectors who were not members of the Elks or guests of the Elks were sold alcoholic liquor on the premises.³ The evidence also establishes that sales to other people who were not members or guests were also made on this occasion, although the extent of such practice cannot be determined. The Commission concludes that Licensee has violated the statutes noted above.

²The Commission previously reached this conclusion in Elks, Inc., BPO Condon Lodge #1869, May 1984.

³Licensee entered a "guilty" plea to the charge and did not claim that the OLCC inspectors were guests or that the use of a member of the Elks as a conduit for the purchase of the alcoholic liquor would make them guests. See 34 Opinions of The Oregon Attorney General 1165 for conclusion that a guest is a person "individually invited by a club member."

The staff asserted in the "Notice of Charges and Proposed Penalty" that this violation was aggravated and that the penalty should therefore be enhanced. This assertion was based upon the fact that the manager of the club had been warned on two occasions prior to this dance that it would be a violation to serve alcoholic liquor to people who were neither members nor guests. The staff therefore originally asserted that these instructions had been deliberately ignored. At the hearing, however, legal counsel to the staff noted that the evidence indicated that the management had in fact taken steps to prevent improper sales. The Commission agrees that good faith attempts were made to prevent the violations involved in this matter. Although the attempts were obviously not altogether successful, the fact that such steps were taken establishes that the violation was not deliberate on the part of the management. The Commission concludes that there is no basis for aggravation of the penalty.

ULTIMATE CONCLUSIONS OF LAW

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:

(1) That the licensee has violated any provision of this chapter or any rule of the commission adopted pursuant thereto. ORS 472.180(1).

The Commission concludes that the Licensee violated ORS 472.310(1). The Commission further concludes that the violation is not aggravated and that the appropriate penalty is that

recommended by the Commission's penalty schedule for the first violation within the past two years.

FINAL ORDER

The Commission orders that the Dispenser Class B license held by Elks BPOE No. 2032 in the trade name Milwaukie Elks, 13121 SE McLoughlin Boulevard, Milwaukie, Oregon, be SUSPENDED for seven (7) days or that Licensee pay a fine of \$455 in lieu of the suspension.

It is further ordered that due notice of this action, including the reasons for it, 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 26th day of July, 1985.



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.