BEFORE THE LIQUOR CONTROL COMMISSION
OF THE STATE OF OREGON

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| In the Matter of the Proposed Suspension of the Package Store (PS) License held by:<br><br>Plaid Pantry, Inc.<br>dba PLAID PANTRY No. 13<br>1118 SW Jefferson<br>Portland, Oregon 97205<br>- - - - - - - - - - - - - -<br>Multnomah County | ) | FINAL<br>FINDINGS OF FACT,<br>CONCLUSIONS OF LAW,<br>AND ORDER<br><br>OLCC-84-V-040 |

A hearing in this matter was held on January 3, 1985, in Portland, Oregon, before Hearings Examiner Douglas Crumme'. The Licensee appeared and was not represented by legal counsel. The Commission was not represented by legal counsel.

The Hearings Examiner considered the record of the hearing, the applicable law and issued a Proposed Order dated February 20, 1985.

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

RECORD OF PREVIOUS VIOLATIONS

| DATE | OFFENSE | DISPOSITION |
|---|---|---|
| Nov 2, 1984 | Sale to Minor | 7 day suspension or $455 fine. |

The Commission adopts the Proposed Order of the Hearings Examiner as the Final Order of the Commission, and enters the following:

## FINDINGS OF FACT

1. Plaid Pantry, Inc. has held a Package Store (PS) license at PLAID PANTRY NO. 13, 1118 SW Jefferson, Portland, Oregon, at all dates relevant to the Findings of Fact below.

2. The Commission has charged the Licensee with the violation of the following:

a. ORS 471.315(1)(g) and ORS 471.410(2) (knowing sale to minor).

b. ORS 471.130(1) (failure to check identification or take statement of age).

3. Michael White was born on July 2, 1965. Mr. White was 19 years of age on November 3, 1984.

4. Michael White purchased a six-pack of Budweiser beer at Plaid Pantry Store No. 13 at 1:15 a.m. on November 3, 1984. The clerk who made the sale was James Warney. Mr. Warney looked at Mr. White and then made the sale without asking for identification or asking Mr. White to sign a statement of age form.

5. Michael White appeared under 21 years of age at the time of the sale described above because of Mr. White's youthful facial features and immature demeanor.

6. Mr. White is about 6' 2" tall and weighs about 198 pounds.

7. Mr. White had not shown false identification at any time in Plaid Pantry No. 13.

8. Aside from November 3, 1984, Mr. White had attempted to purchase alcoholic beverages on one other occasion. This was in October, 1983, when Mr. White successfully purchased some beer. He did not show false identification during this purchase.

9. At the time of the sale of beer to Mr. White in Plaid Pantry No. 13 on November 3, 1984, OLCC Inspector Steve Bainbridge was standing in the store, watching the transaction. Mr. Warney knew that Mr. Bainbridge was an OLCC Inspector and was in the store watching the sale.

10. Mr. Bainbridge had visited Plaid Pantry No. 13 at about 9:30 p.m. on November 2, 1984 in connection with a sale of beer to a minor that occurred at that time. That sale was made by a Plaid Pantry employee other than Mr. Warney. However, Mr. Warney was on the premises and talked with Mr. Bainbridge concerning the violation. Mr. Warney had a chance to see the minor after the 9:30 p.m. sale and stated to Mr. Bainbridge that the minor involved in that sale appeared under 21 years of age and should have been checked for identification.

11. Mr. Warney was cooperative with the Commission Inspectors during the investigations both at 9:30 p.m. on November 2, 1984 and at 1:15 a.m. on November 3, 1984.

12. The Licensee had instructed Mr. Warney to require customers purchasing alcoholic beverages who appear under 26 years of age to furnish either a driver's license or an identification card issued by the Oregon Department of Motor Vehicles.

13. The Licensee informs its employees that they will be fired if found to violate the Licensee's policies concerning the sale of alcoholic beverages to youthful-appearing persons.

14. The Licensee fired Mr. Warney after the sales noted above.

15. The Commission's Enforcement Division contacted Plaid Pantry Store No. 13 at least five times during the year previous to November 3, 1984 concerning the problem of adults who are purchasing alcoholic beverages for minors waiting outside.

## DISCUSSION

1. The Commission charged the Licensee under both ORS 471.315(1)(g) and ORS 471.410(2) for the sale to Mr. White. ORS 471.315(1)(g) provides that the Commission may cancel or suspend the license for the knowing sale of alcohol to persons under 21 years of age. ORS 471.410(2), on the other hand, provides that a person commits a Class A Misdemeanor for the sale of alcohol to a person under 21 years of age. ORS 471.410(2) does not on its face require knowledge that the buyer was a minor.

The Commission has held in this situation that the charges under the two provisions should be merged into a single charge under ORS 471.315(1)(g). There should not be an additional charge under ORS 471.410(2). OLCC Final Order, OLCC-84-V-022, Southland Corporation and Raymond and Mary Hasslebacher, 7-Eleven Store No. 20806, November, 1984.

2. The Licensee had originally requested a hearing on charges for sale to a minor arising from the incident at 9:30 p.m. on November 2, 1984. However, at the hearing, the Licensee withdrew its request for hearing on that matter. Therefore, the charges on that matter were remanded to the Enforcement Division for its disposition.

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The commission may cancel or suspend any license, or impose a monetary penalty in lieu of or in addition to suspension as provided by ORS 471.322, if it finds or has reasonable ground to believe any of the following to be true:

(1) That the licensee:

. . .

(g) Knowingly has sold alcoholic liquor to persons under 21 years of age or to persons visibly intoxicated at the time of sale. ORS 471.315(1)(g).

The requirement of "knowledge" under ORS 471.315(1)(g) may be imputed to the Licensee through the knowledge of Licensee's employee. Taylor's Coffee Shop, 28 Or App 701, 706, 560 P2d 693 (1977); OAR 845-06-025. The requirement of "knowledge" is satisfied when there is reasonable ground to believe that 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).

In the instant matter, it is apparent that clerk James Warney did not know that Michael White was under 21 years of age when the sale was made. Mr. Warney would not have made the

sale if he knew Mr. White was under 21, because Mr. Warney also knew Inspector Bainbridge was standing right there. It is extremely unlikely that Mr. Warney would have knowingly subjected himself to criminal charges and dismissal from his job. Mr. Warney had been cooperative and forthright with the Commission's Inspectors when they had visited the premises a few hours earlier that night. There is no reason to suspect that Mr. Warney suddenly lost his concern about committing a violation.

However, there was reasonable ground to believe Mr. White was under 21 years of age because he appeared under 21 years old at the time of sale. Mr. Warney's conclusion that Mr. White was at least 21 years old was unreasonable, given Mr. White's appearance. Therefore, there was a violation of ORS 471.315(1)(g).

> 2. All licensees and permittees of the commission, before selling or serving alcoholic liquor to any person about whom there is any reasonable doubt of the person's having reached 21 years of age, shall require such person to produce the person's motor vehicle operator's license or if the license does not bear a photograph of the operator, then an identification card issued to the person under ORS 482.900. However, if the person has no motor vehicle operator's license or an identification card, the permittee or licensee shall require such person to make a written statement of age and furnish evidence of the person's true age and identity. ORS 471.130(1).

The Licensee violated ORS 471.130(1) in the case of the sale of alcoholic beverages to Michael White on November 3, 1984. Mr. White appeared under 21 years of age at the time of

this sale. There was, therefore, reasonable doubt that he was at least 21 years of age. He should have been asked for identification and if none was furnished, he should have been required to fill out a statement of age form. These steps were not followed. Consequently, there was a violation.

## ULTIMATE CONCLUSIONS OF LAW

> 1. When there has been a violation of this chapter [ORS Chapter 471] 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).

The Commission may cancel or suspend the Licensee's license for the violation of ORS 471.130(1) (failure to check identification or take statement of age) and ORS 471.315(1)(g) (knowing sale to a minor).

Mitigation is indicated regarding the violations. The Licensee had advised clerk Warney in procedures to follow to avoid sales of alcoholic beverages to minors. Mr. Warney was cooperative with the Commission's inspectors and showed a conscientious, cooperative attitude when the Commission's inspectors visited Plaid Pantry No. 13 during this violation and on a separate matter approximately four hours earlier that evening. Mr. Warney probably committed this violation because of a lapse in judgment rather than because of a disregard for the law. Mr. Warney knew that Inspector Bainbridge was in the

store watching the sale to Mr. White. Although Mr. White appeared under 21 years of age at the time of the sale, the question of how old he appeared was a somewhat close question. He is a fairly large young man. He successfully purchased alcoholic beverages on one occassion in 1983.

## FINAL ORDER

The Commission orders that the Package Store (PS) license held by Plaid Pantry, Inc. at Plaid Pantry No. 13, 1118 SW Jefferson, Portland, Oregon, be SUSPENDED for five (5) days or that a fine of $325 be paid in lieu of said suspension.

It is further ordered that 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 13th day of March, 1985.

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.