

**BEFORE THE LIQUOR CONTROL COMMISSION
OF THE STATE OF OREGON**

In the Matter of the Full On-Premises Sales) FINAL FINDINGS OF FACT
License Held By:) CONCLUSIONS OF LAW
) AND ORDER
BING’S RESTAURANT, INC.) OLCC-08-V-057
SUE JOE, PRES/DIR/STOCKHOLDER) OLCC 08-V-057 A
PAUL JOE, STOCKHOLDER) OLCC 08-V-057 B
ROSEMARY JOE, STOCKHOLDER) OLCC 08-V-057 C
LISA JOE, STOCKHOLDER) OLCC 08-V-057 D
dba BING’S RESTAURANT)
58209 S Columbia River Hwy)
St. Helens, OR 97051)

HISTORY OF THE CASE

On June 4, 2008, the Oregon Liquor Control Commission (OLCC or Commission) issued a Notice of Proposed License Suspension to Bing’s Restaurant, Inc., Sue Joe, President/Director/Stockholder, Paul Joe, Stockholder, Rosemary Joe, Stockholder and Lisa Joe, Stockholder, dba Bing’s Restaurant, located at 58209 S. Columbia River Hwy., St. Helens, Oregon. The OLCC alleged Licensee and its employees, agents or representatives refused to admit police officers to the licensed premises after the officers identified themselves and asked to enter the premises, which was or appeared to be closed, in order to conduct a reasonable search to ensure compliance with alcoholic beverage laws, in violation of OAR 845-006-0345(4)(b).

Licensee made a timely request for a hearing. The Commission referred the request to the Office of Administrative Hearings on July 17, 2008. The case was assigned originally to Alison Green Webster, Administrative Law Judge (ALJ). A prehearing conference was held on February 9, 2009. Licensee and Corporate Principals were represented by Attorney, David Williamson. The OLCC was represented by Kelly Routt, Case Presenter. Subsequent to the prehearing conference, the case was reassigned to ALJ Robert L. Goss.

A contested case hearing was held on February 12, 2009 in St. Helens, Oregon, before ALJ Goss. Licensee and Corporate Principals were represented by Attorney, David Williamson. OLCC was represented by Kelly Routt, Case Presenter. Witnesses for OLCC were: OLCC Inspector Kevin Wellman, St. Helens Police Department Sergeant Rick Graham, St. Helens Police Officer Dow Tobin, Former Columbia County Deputy Patrick Dean and Columbia County Deputy Josh Harper. No witnesses were called by Licensee. The record closed on February 12, 2009.

The Administrative Law Judge considered the record of the hearing and the applicable law and issued a Proposed Order mailed March 4, 2009.

Licensee filed Exceptions to the Proposed Order on March 19, 2009. Staff filed Comments on the Proposed Order on March 19, 2009. The Administrative Law Judge responded to Licensee's Exceptions and Staff's Comments on March 25, 2009.

On April 16, 2009, the Commission considered the record of the hearing, the applicable law, the Proposed Order of the Administrative Law Judge, Licensee's Exceptions to the Proposed Order, Staff's Comments on the Proposed Order and the Administrative Law Judge's Response to Licensee's Exceptions and Staff's Comments. Based on this review and the preponderance of the evidence, the Commission enters the following:

ISSUES

1. Whether Corporate Principal Paul Joe refused to admit police officers into the licensed premises after the officers identified themselves and asked to enter the premises, which was or appeared to be closed, in order to conduct a reasonable search to ensure compliance with alcoholic beverage laws. OAR 845-006-0345(4)(b).
2. If a violation is proved, what is the appropriate penalty? OAR 845-006-0500.

EVIDENTIARY RULING

OLCC's Exhibits A1 through A7 were admitted into the record without objection. Licensee's Exhibits P1 through P3 and P5 through P10 were offered and admitted to the record without objection. Licensee did not offer Exhibit P4.

FINDINGS OF FACT

1. Bing's Restaurant, Inc., Sue Joe, President/Director/Stockholder, Paul Joe, Stockholder, Rosemary Joe, Stockholder and Lisa Joe, Stockholder have held a Full On-Premises Sales License at Bing's Restaurant, 58209 S. Columbia River Hwy., St. Helens, Oregon since 2001. The business had previously held a Class A Dispenser license since 1997, which was converted to the Full On-Premises Sale license in 2001. The business includes a restaurant, bar and lounge. There is no history of complaints filed with OLCC prior to the incident at issue here. (Ex. A1; test. of Wellman.)

2. On December 11, 2007, at approximately 2:00 a.m., the police were dispatched to the licensed premises to assist a Columbia County Sheriff's deputy regarding a fight. The information received by dispatch was that five to ten people were involved in a fight in the parking lot, and one person was being kicked. (Ex. A3; test. of Tobin.)

3. Officer Dow Tobin of the St. Helens Police Dept. arrived on the scene followed by Oregon State Trooper Oxenrider. The initial call was a Columbia County call because the premises is actually located outside the city limits of St. Helens, but there were no deputies immediately available, so Officer Tobin and Trooper Oxenrider took over the initial response to the call. Both officers were in uniform and operating marked patrol vehicles. Officer Tobin immediately recognized a male leaning against a wall of the premises as a minor, Juan Rosales

Emanuel, date of birth 06/04/89. Officer Tobin had arrested Mr. Emanuel in the past for minor in possession of alcohol and was aware that he was still 18 or 19 years old. Officer Tobin noted that Mr. Emanuel had injuries to his left eye, his shirt was ripped, and he was talking on a cell phone. (Ex. A3; test. of Tobin.)

4. Mr. Emanuel saw Officer Tobin and Trooper Oxenrider and ran away from them towards the rear of the premises, along the west side of the business. Officer Tobin and Trooper Oxenrider pursued Mr. Emanuel in their patrol vehicles with their overhead lights activated. Mr. Emanuel turned and ran along the north side of the premises to a door being held open by an unknown male. Mr. Emanuel went inside the premises. Officer Tobin called out to the unknown male to hold the door open but the unknown male shrugged his shoulders, said "Sorry," and then closed the door. (Ex. A3; test. of Tobin.)

5. Officer Tobin and Trooper Oxenrider knocked on the door and identified themselves. They ordered those inside to open the door but received no response. Officer Tobin was aware that there was a minor on the premises that had been involved in a fight in the premises parking lot. (Ex. A3; test. of Tobin.)

6. Officer Tobin and Trooper Oxenrider walked around the outside of the building and determined all exterior doors were locked. Officer Tobin determined that the premises was closed to the public. Neither officer saw anyone else outside of the building at that time, although there were several vehicles parked in the parking lot. (Ex. A3; test. of Tobin.)

7. Officer Tobin and Trooper Oxenrider went to the west side of the premises and saw two windows that provided a view into a storage room and kitchen of the premises. Officer Tobin saw persons moving around in the storage room, but when those persons saw the officers, they turned off the light and hid. (Ex. A3; test. of Tobin.)

8. Officer Tobin and Trooper Oxenrider then saw several people in the kitchen area who appeared to be hiding behind a counter and under a bread rack. (Ex. A3; test. of Tobin.)

9. After several minutes, Officer Tobin moved to the front of the building to speak to a person that had entered the parking lot. While speaking to the person, Officer Tobin saw a young male moving toward the entrance of the building as if preparing to leave. However, when that young male saw Officer Tobin, he went back into the lounge portion of the premises. (Ex. A3; test. of Tobin.)

10. Officer Tobin returned to the kitchen area and saw several people inside, one of whom appeared to be a minor female. Officer Tobin also saw Mr. Emanuel walking in the kitchen area wearing only underwear and socks, with visible injuries to his face and back. Officer Tobin knocked on the window and called Mr. Emanuel's name. Mr. Emanuel looked at Officer Tobin and walked away. Mr. Emanuel's movements were slow and methodical and he appeared intoxicated to Officer Tobin. (Ex. A3; test. of Tobin.)

11. Deputy Joseph Harper of the Columbia County Sheriff's Office responded to the scene of the fight around 3:00 a.m. The deputy had heard the radio traffic regarding the earlier

officer's attempts to gain entry into the premises. After talking with the St. Helens officers and learning of their unsuccessful attempts to gain access to the business, Deputy Harper went around the building to see if he could gain entry. The deputy was also aware that the St. Helens officers had specifically described one of the individuals inside the premises as being a minor. The deputy tried the doors and found that they were locked. Deputy Harper could see persons sitting in the bar area of the restaurant. The deputy, who was in uniform displaying a badge, motioned to people to come and let him into the building, but the people looked at him, and ignored him. The deputy intended to investigate not only the earlier fight, but also possible offenses of minor in possession and furnishing alcohol to a minor. Deputy Harper went around to other windows and saw other people inside, all who continued to ignore his request to let them in. Some of the persons inside appeared to be less than 21 years old, although none appeared to be less than 18 years old. Of the persons inside the premises appearing under 21, some appeared intoxicated.¹ The deputy saw them staggering and holding on to furniture for balance. The deputy also observed various persons in the lounge area of the premises drinking from what appeared to be long neck beer bottles. None of those people appeared to be under 21 years of age. (Ex. A6; test. of Harper, test. of Wellman.)

12. Other Columbia County Sheriff's deputies arrived on the scene and informed Officer Tobin that they did not have authorization to make a forced entry into the building. Officer Tobin cleared the scene at approximately 3:15 a.m. (Ex. A3; test. of Tobin.)

13. None of the officers who were at the premises during the fight call that morning saw Corporate Principal Paul Joe or any other employee or principal of the business. (Test. of Tobin, Harper.)

14. At about 6:20 a.m., on that same day, officers from St. Helens police and deputies from Columbia County were called back to the premises to assist Columbia County Fire and Rescue, who were responding to a fire that was burning in the premises. The firefighters reported several people who were interfering with their firefighting. (Ex. A6; test. of Harper and Graham.)

15. Sgt. Graham of the St. Helens Police Dept. was the first to arrive and he immediately noted Licensee Paul Joe standing in front of the building, talking on a cell phone. Sgt. Graham spoke with Division Fire Chief Youngberg, who pointed out a Mr. Ferguson, who was interfering with the firefighters by standing on the roof of the premises and attempting to extinguish the fire with a garden hose. Sgt. Graham spoke to Ferguson and noted that he appeared intoxicated. Ferguson told Sgt. Graham that he was at a Christmas party at the premises, noticed the fire and went into the building to tell Corporate Principal Paul Joe about the fire. (Ex. A4; test. of Graham.)

16. Sgt. Graham then spoke with Corporate Principal Paul Joe, whom he knew from past contacts was an owner of the business. Joe was seated in the passenger seat of a vehicle. Licensee Joe had blood stains on his sweatshirt. Joe told Sgt. Graham that he had been at a

¹ With the concurrence of the Administrative Law Judge, the word "appeared" has been inserted to complete the sentence. See Comments of Staff and Response to Agency Comments and Licensee's Exceptions.

private Christmas party on the premises when he learned that that there was a fire. Joe also told Sgt. Graham that the blood came from breaking up a fight earlier, and that he had personally gotten into the middle of the fight to break it up. (Ex. A4; test. of Graham.)

17. Sgt. Graham asked Corporate Principal Joe if he was referring to the fight that occurred earlier that morning to which the officers had responded and Joe nodded his head. Sgt. Graham asked Joe why did not open the door when police officers were trying to gain access and Joe replied, "I don't want to talk about that." Sgt. Graham reminded Joe that he had an obligation to grant entry to law enforcement officers to conduct investigations. Joe did not respond. (Ex. A4; test. of Graham.)

18. Deputy Dean of the Columbia County Sheriff's Office contacted Mr. Ferguson, who was visibly intoxicated. Ferguson had slurred speech, belligerent demeanor and difficulty with balance. (Ex. A5; test. of Dean.)

19. Deputy Dean was aware of the fight at the premises earlier in the morning from reading the dispatch calls. Deputy Dean was also aware from conversations with Sgt. Graham that Corporate Principal Joe had admitted that he was on the premises at the time of the fight and had not allowed access to the premises to the earlier officers. Deputy Dean contacted Joe and asked him about the earlier fight and the blood on his shirt. Joe told the deputy that he had been on the premises when the fire started and that it had started in a vent. Joe declined at that time to comment further. Joe was arrested for "Obstructing Governmental or Judicial Administration". Joe asked Deputy Dean why he was being arrested and was informed that he had not granted access to the police officers earlier. Joe replied, "I didn't know I had to." (Ex. A5; test. of Dean.)²

CONCLUSIONS OF LAW

1. Corporate Principal Paul Joe refused to admit police officers to the licensed premises after the officers identified themselves and asked to enter the premises, which was or appeared to be closed, in order to conduct a reasonable search to ensure compliance with alcoholic beverage laws. OAR 845-006-0345(4)(b).

2. The appropriate penalty for a violation of OAR 845-006-0345(4)(b) is a 30 day license suspension.

OPINION

I. Violation

The Commission has charged Licensee with violating OAR 845-006-0345(4)(b), which states, "Examination of premises that are or appear closed occurs only when there is reason to believe an alcoholic beverage law violation is occurring. No licensee or permittee will refuse or

² Due to a typographical error in the Proposed Order, this Finding of Fact (FOF) was numbered as 18 (creating two FOFs bearing that number). The number for this FOF has been corrected to 19, the next number in sequence.

fail to promptly admit a Commission regulatory employee or police officer to the licensed premises when the regulatory employee or officer identifies him/herself and asks to enter to conduct a reasonable search to ensure compliance with the alcoholic beverage laws.”

Under OAR 845-006-0301, a “licensee” includes officers and directors of a corporation and certain shareholders. The Commission issues licenses to both the corporate (or other business) entity and the individuals who qualify under the rule as licensees. The corporation and individuals are licensees under a single license, with equal responsibility for violations committed by any licensee (corporate or individual) holding the license. Both the corporate entity and its individual corporate principals are licensees and are jointly and severally liable for violations of their servants, agents, employees or representatives. OAR 845-006-0362. The individual licensees are personally liable not on the basis of their status as corporate principals, but because their license has been issued to them directly in their personal capacity. (*Lava Lanes of Medford*, OLCC, Final Order, 04-V-007, February, 2005); *Jiffy Mart*, OLCC, Final Order, 04-V-027, February 2005).

Here, the Commission has proven, through Paul Joe’s own admissions, that he was at the licensed premises during the fight in the premises’ parking lot and was also present during the subsequent fire incident. The Commission concludes from this record that Paul Joe was inside the premises during the time that Officer Tobin and Deputy Harper were attempting to gain entry to the premises. Mr. Joe told Deputy Harper after being arrested that he did not know he had to let the police into the premises, when asked why he had not done so. The comment is telling, in that Joe does not deny being in the premises while the police were trying to gain entry. Joe was therefore aware that the police were trying to gain entry, he just did not believe he had to let them in. Joe also told the police that he was at the premises for a Christmas party, which appeared to be continuing while the officers were trying to gain entry.

The premises was clearly closed at the time the police wished to gain entry. The doors were locked and Mr. Joe himself told the police that they were having a private Christmas party.

The remaining issue is whether the officers had reason to believe that violations of alcoholic beverage laws were occurring on the premises when they sought to enter those premises. Deputy Harper, one of the officers who was denied access to the premises after the fight saw persons inside who he reasonably believed were under 21 years of age. Some of those minors also appeared intoxicated, based on their staggering walk and poor balance. Harper also saw others inside drinking from what appeared to be beer bottles. The deputy was concerned that there may be minors in possession of alcohol, either through consumption or otherwise, and that adults in the premises may be furnishing alcohol to those minors. Deputy Harper further believed that there had been disorderly conduct on the premises.

The standard of “reason to believe” is essentially the same as “probable cause” or “reasonable grounds.” There is extensive case law describing that standard. Probable cause is the same quantum of evidence as reasonable grounds, *Thorp v. MVD*, 4 Or App 552 (1971), and arises if there is a substantial objective basis for believing it more likely than not that the person has committed an offense. In addition, the officer must have a subjective belief that the person has committed an offense. *State v. Owens*, 302 Or 196 (1986); and *State v. Hayes*, 99 Or App

322 (1989). The determination of probable cause is a legal, not a factual, conclusion. Probable cause does not require certainty. *State v. Herbert*, 302 Or 237 (1986).

The courts have consistently applied a low threshold of evidence to arguments that there were inadequate "reasonable grounds" to believe an offense has occurred. In *Thorp*, the court reviewed the standard for reasonable grounds to believe intoxication and held that if the facts support the inference that a person is under the influence of intoxicants, the officer has reasonable grounds. Facts supporting the inference need not be sufficient to support a conviction, and provide reasonable grounds even when the inference is rebuttable by the person's explanations. *Arndt v. MVD*, 80 Or App 389 (1986) and *State v. Spruill*, 151 Or App 87 (1997).

Based on the totality of the circumstances, the Commission concludes that the officers had a reasonable belief that there were minors in possession of alcohol on the premises, that adults were furnishing alcohol to those minors and that Licensee was permitting disorderly conduct on the premises. All of these situations constitute violations of the alcoholic beverage laws: ORS 471.430, (Minor in Possession), ORS 471.410, (Serving Minor) and OAR 845-006-0347, (Permitting Disorderly Activity). See *Lloyd's Café*, (OLCC, Final Order, 86-V-041, January 1987). Gaining entry into the closed premises would have been a reasonable search to investigate those alleged violations.

A violation of OAR 845-006-0345(4)(b) has been established.

II. Penalty

The Commission has authority under ORS 471.315(1)(a)(A)³ to cancel, suspend, or fine a licensee for the violation proved in this case. Violation of OAR 845-006-0345(4)(b) is a Category II violation under the Commission's penalty rule. OAR 845-006-0500(7). This is Licensee's first Category II violation within two years. The standard penalty for the first Category II violation within two years is a 30 day license suspension. Therefore, the standard penalty would be appropriate, absent aggravating or mitigating circumstances. The Commission may increase or decrease the standard sanction if aggravating or mitigating circumstances are found. OAR 845-006-0500(7). The Commission has proven one aggravation circumstance (Licensee Paul Joe's personal involvement in the violation). *P-Mart* (OLCC, Final Order, 92-V-098, April 1993). OLCC has also shown one mitigating circumstance (Lengthy record of good compliance with the Commission). *Beehive Grocery & Deli*, (OLCC, Final Order, 86-V-064, April 1987). The aggravating circumstance would add two days to the suspension, the mitigating circumstance would subtract two days of the suspension. In effect, the aggravating and mitigating circumstances cancel each other out.

³ ORS 471.315(1)(a)(A) provides that the Commission "may cancel or suspend any license * * * or impose a civil penalty in lieu of or in addition to suspension * * * if it finds or has reasonable ground to believe any of the following to be true:

(a) That the licensee:

(A) has violated any provision of this chapter or * * * any rule of the commission adopted pursuant thereto."

The Commission concludes that the appropriate penalty for the violation in this case is a 30-day license suspension.

FINAL ORDER

The Commission orders that the license held by Bing’s Restaurant, Inc., Sue Joe, President/Director/Stockholder, Paul Joe, Stockholder, Rosemary Joe, Stockholder, and Lisa Joe, Stockholder, dba Bing’s Restaurant, located at 58209 S. Columbia River Hwy., St. Helens, Oregon be SUSPENDED for thirty (30) days for violation of OAR 845-006-0345(4)(b)

It is further ordered that notice of this action, including the reasons for it, be given.

Dated this 22nd day of April, 2009.

/s/ Stephen A. Pharo
Stephen A. Pharo
Executive Director
OREGON LIQUOR CONTROL COMMISSION

Mailed this 22nd day of April, 2009.

THIS ORDER IS EFFECTIVE ON THE DATE MAILED. Any monetary fine or civil penalty set out in the order shall be due and payable 10 days after the date of mailing.

NOTICE: You are entitled to judicial review of this Order. Judicial review may be obtained by filing a petition for judicial review within 60 days from the service of this Order. Judicial review is pursuant to the provisions of ORS Chapter 183.

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**APPENDIX A
LIST OF EXHIBITS CITED**

- Ex. A1: OLCC License History for Bing's Restaurant.
- Ex. A3: St. Helens Police Report from Officer Tobin (12/11/07).
- Ex. A4: St. Helens Police Report from Sgt. Graham (12/11/07)
- Ex. A5 Columbia County Sheriff's Office Report from Deputy Dean (12/11/07)/
- Ex. A6 Columbia County Sheriff's Office Report from Deputy Harper (12/11/070).