

**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
Restaurant Management Group, LLC) OLCC-09-V-028
Sirivanh Vorachith, Member) OLCC-09-V-028A
Raoul Calderon, Member) OLCC-09-V-028B
dba ECLECTIC RESTAURANT/ENVY)
LOUNGE BAR)
204 SW Yamhill Street)
Portland OR 97204)

HISTORY OF THE CASE

On March 3, 2009, the Oregon Liquor Control Commission (OLCC or Commission) issued a Notice of Proposed License Suspension/Civil Penalty to Restaurant Management Group, LLC, Sirivanh Vorachith, Member and Raoul Calderon, Member (Licensee), doing business as Eclectic Restaurant/ Envy Lounge Bar, located at 204 SW Yamhill Street, Portland, Oregon. The Notice alleged that Licensee’s employee failed to verify the age of a person before allowing him to buy or be served an alcoholic beverage when the person reasonably appeared to be under 26 years of age, in violation of OAR 845-006-0335(1)(a)(b)(c), or in the alternative, that Licensee’s employee knowingly sold, gave or otherwise made available alcohol liquor to a person under the age of 21, in violation of ORS 471.410(2). The notice also alleged that Licensee permitted unlawful activity when the employees provided security services as private security professionals at the licensed premises without being certified to do so, in violation of OAR 845-006-0347(3). Licensee made a timely request for hearing.

The Commission referred the request to the Office of Administrative Hearings on March 10, 2009. The case was assigned to Robert L. Goss, Administrative Law Judge (ALJ). On March 30, 2009, the OLCC issued an Amended Notice of Proposed License Suspension/Civil Penalty and Removal from the Responsible Vendor Program. The new notice added a penalty to the original March 3, 2009 notice of removing Licensee from the Responsible Vendor Program. The amended notice alleged that a failure to verify the age of a minor involving aggravating circumstances provided grounds for removal and cited to OAR 845-009-0135(8)(e).

A contested case hearing was held on June 3, 2009 in Tualatin, Oregon, before ALJ Goss. Licensee was represented by Derek Ashton, Attorney. OLCC was represented by Case Presenter Anna Davis. Witnesses for OLCC were: Officer Aaron Schmautz of the Portland Police Bureau and OLCC inspectors Jackie Paul and Shannon Hoffeditz. Witnesses for Licensee were: Raoul Calderon and David Angeles. The record closed on June 3, 2009.

The Administrative Law Judge considered the record of the hearing and the applicable law and issued a Proposed Order mailed August 5, 2009. Staff filed Comments on the Proposed Order on August 20, 2009.

On October 15 and 16, 2009, the Commission considered the record of the hearing, the applicable law, the Proposed Order of the Administrative Law Judge, Staff's Comments on the Proposed Order and the Administrative Law Judge's Response to Staff's Comments. Based on this review and the preponderance of the evidence, the Commission enters the following:

ISSUES

1. Whether Licensee's employee violated OAR 845-006-0335(1)¹ by failing to verify a purchaser's age before selling alcoholic beverages to him when the purchaser appeared to be less than 26 years of age, or alternatively, whether Licensee's employee violated ORS 471.410(2)² by knowingly selling alcoholic beverages to a minor.

2. Whether Licensee violated OAR 845-006-0347(3) by permitting unlawful activity when persons provided professional security services at the licensed premises without being certified to do so.

3. If a violation is proved, what is the appropriate penalty? OAR 845-009-0135(8)(e) and 845-006-0500.

¹ OAR 845-006-0335 provides, in pertinent part:

(1) Age Verification:

(a) ORS 471.130 requires a licensee or permittee to verify the age of a person who wants to buy or be served alcoholic beverages when there is "any reasonable doubt" that the person is at least 21 years old. The Commission requires a licensee or permittee to verify the age of anyone who wants to drink alcoholic beverages, or is in an area prohibited to minors, if there is reasonable doubt that the person is at least 21 years old. "Reasonable doubt" exists if the person appears to be under the age of 26;

(b) Whenever a licensee or permittee verifies age, he/she must verify it as ORS 471.130 requires (statement of age card or the specified items of identification) and must reject any obviously altered document or one which obviously does not identify the person offering it;

(c) Licensees must require all their employees who sell, serve, oversee or control the sale or service of alcoholic beverages to verify age as subsection (a) of this section requires.

² ORS 471.410(2) provides:

No one other than the person's parent or guardian shall sell, give or otherwise make available any alcoholic liquor to a person under the age of 21 years. A person violates this subsection who sells, gives or otherwise makes available alcoholic liquor to a person with the knowledge that the person to whom the liquor is made available will violate this subsection.

EVIDENTIARY RULING

OLCC's Exhibits A1 through A16 were admitted into the record. Licensee's exhibits P1 through P15 were admitted to the record.

FINDINGS OF FACT

1. Restaurant Management Group, LLC, Sirivanh Vorachith, and Raoul Calderon, Members, have held a Full On-Premises Sales (F-COM) license at Eclectic Restaurant/ Envy Lounge Bar, 204 SW Yamhill Street, Portland Oregon since November 29, 2007. Licensee is a member of the Responsible Vendor Program. (Ex. A1.)

2. Licensee's F-COM license came with a letter of caution instructing Licensee to operate the licensed premises as proposed in the letter and follow the alcohol monitor plan dated November 28, 2007. The conditions that Licensee agreed to abide by included each patron being properly identified as to age. Licensee's house policy, signed and dated on November 28, 2007, stated "everyone that orders any alcoholic drinks will need and have to show valid, legal ID's on proof of age!!! (21 and up)" and that "Along with the monthly mandatory meetings, we will have an ongoing training of all staff to teach them how to properly read and/or identify all ID's." (Exs. A2 through A4.)

3. On May 3, 2008, Portland Police Officer Friedman contacted security staff at the licensed premises, asking four of them what their duties were. All four identified themselves as security staff and indicated that their duties included intervening with patrons when they are fighting and when necessary physically removing the patrons from the premises. When asked for their DPSST certifications, one of the security staff retrieved his certification for the officer. Another security person, Daniel Fusaro displayed the wrong DPSST paperwork and was told that he needed the correct paperwork to be certified. The other two employees were not DPSST certified and did not have temporary workers permits. Officer Friedman cited three of the four employees with failing to obtain security certification. (Exs. A15 and A16.)

4. On May 28, 2008, OLCC Inspector Tallmadge contacted Member Vorachith, who told the inspector that he left all of the security hiring to the security manager of the licensed premises, Samuelu Aumavae. Member Vorachith told the inspector that the three security personnel that were not DPSST certified no longer worked at the licensed premises and that the security manager had hired new security staff that were all DPSST certified. Member Vorachith also indicated he had been confused about what type of certification his security staff needed, but understood that they needed to have the certification. (Ex. A15.)

5. On June 5, 2008, Inspector Tallmadge issued a Notice of Warning to the Licensee, finding that the Licensee permitted unlawful activity at the licensed premises on May 3, 2008

because three employees performing security services were not DPSST certified. (Exs. A14 and A15 at 1.)³

6. On July 27, 2008, Portland Police officer Aaron Schmautz, of the Portland Police Bureau, observed an intoxicated male lying on the ground at the corner of SW 2nd and Yamhill, directly across the street and approximately 100 feet from the front door of the licensed premises. When Officer Schmautz checked on the person, later identified as minor Mark Aldana, date of birth 1/24/91, the officer noted that Aldana had vomited on himself, that his eyes were rolled back into his head, and that he was not moving. Officer Schmautz confirmed that Aldana was breathing. Minor Aldana told Officer Schmautz that he had “a whole lot” of drinks at the licensed premises. The officer found minor Aldana to be “incredibly drunk,” but lucid, given his intoxication. Officer Schmautz located an ID on minor Aldana’s person with a picture of someone that did not resemble minor Aldana. The ID was issued to Jay-R Kho Udasco, DOB 11-09-1984, with a height of 5’ 04” and 160 pounds. Minor Aldana has a completely different facial shape, is taller (5’ 09”) and lighter in size to the physical description on the Udasco ID. Minor Aldana appeared very youthful looking to Officer Schmautz. During the transport to detox, Officer Schmautz found another ID (Oregon driver permit) on minor Aldana with his name and picture and showing him to be 17 years of age. (Exs. A2, A5, A7 and A8; test. of Officer Schmautz.)

7. At detox, Officer Schmautz asked minor Aldana about the Udasco ID. Minor Aldana said he used it to get into the licensed premises. He explained that he had presented it to the only white bouncer at the door. He was admitted into the licensed premises and served alcohol. (Exs. A2 and A5; test. of Officer Schmautz.)

8. Officer Schmautz contacted Daniel Fusaro, a security employee of the licensed premises and confirmed that Fusaro was the only white male working the door that night. Fusaro told Officer Schmautz that he was surprised that he would let something like that slip. Fusaro was unable to provide DPSST certification to the officer when asked, but told the officer that the establishment had a temporary slip for him. (Exs. A2 and A5; test. of Officer Schmautz.)

9. On September 17, 2008, OLCC Inspector Jackie Paul emailed the attorney for the licensed premises, asking for information and employee statements for the above noted incident. Further contact was made between Inspector Paul and counsel, as well as Member Vorachith, however no substantive conversations occurred. The attorney never provided any response and Member Vorachith told Inspector Paul that all concerns and questions should go through counsel, as he wanted to make sure that any questions he answered would not damage his reputation. (Exs. A2; test. of Inspector Paul.)

10. On December 31, 2008, Officer Schmautz submitted a supplemental report to Inspector Paul regarding the July 27, 2008 incident. On a follow up investigation, Officer Schmautz contacted minor Aldana on December 26, 2008 and asked him about the night of July 27, 2008. Minor Aldana told Officer Schmautz that he entered into the licensed premises using

³ In the Proposed Order, this finding reflected that a Notice of Violation, rather than a Notice of Warning, had been issued. Following Comments by staff seeking to correct the nature of the Notice issued, the Administrative Law Judge, in his Response to Comments, agreed that the correction should be made.

someone else's ID, that he had found it on the ground and decided to use it. Minor Aldana showed the ID to the white bouncer, and was never asked again for ID once he entered the licensed premises. Minor Aldana was served approximately six shots of hard liquor and did not drink at any other location. (Exs. A2 and A5.)

11. On January 17, 2009, OLCC Inspector Hoffeditz conducted a walk-through of the licensed premises along with Sergeant Tim Robinson of the Portland Police Bureau. Inspector Hoffeditz was greeted at the door by Shawn Pierce, who identified himself as the security manager of the licensed premises. Mr. Pierce was wearing a shirt that said "Security" on the back. Mr. Pierce was controlling access of patrons to the licensed premises. (Ex. A10; test. of Inspector Hoffeditz.)

12. Mr. Pierce told Inspector Hoffeditz that his duties included reporting illegal activity and going "hands-on" with patrons who had been ejected from the premises. When asked for his DPSST card, Mr. Pierce told the inspector that he did not know anything about DPSST requirements. (Exs. A10 and A11; test. of Inspector Hoffeditz.)

13. Mr. Pierce told the Inspector that he was hired as the security manager by "Johnny," known to the inspector as Corporate Principal Sirivanh Vorachith. Mr. Pierce also told the inspector that there were probably three to four security personnel inside the premises who were not certified. (Exs. A10 and A11; test. of Inspector Hoffeditz.)

14. As part of the walk-through, Inspector Hoffeditz also contacted Christopher Moore, who was also providing security services at the licensed premises. Moore was wearing a shirt with the word "Security" printed on the back. Moore understood his duties to include controlling access to the premises, reporting unlawful/illegal activities and going "hands-on" with patrons when needed. Moore was also unable to provide any DPSST certification when asked by the inspector. (Exs. A10 and A12; test. of Inspector Hoffeditz.)

15. Inspector Hoffeditz also contacted Charles Sigmun, who told the inspector that he had been hired by Pierce to work security at the premises and had worked at the licensed premises for one and a half months. Sigmun was wearing a shirt with the word "Security" printed on the back. Sigmun told the inspector that his duties included controlling access to the premises and reporting illegal activities. Sigmun was unable to provide the inspector with DPSST certification. (Exs. A10 and A13; test. of Inspector Hoffeditz.)

16. Inspector Hoffeditz subsequently contacted DPSST and confirmed that Sean Pierce, Christopher Moore and Charles Sigmun had not received DPSST certification. (Ex. A10; test. of Inspector Hoffeditz.)

17. On January 24, 2009, Inspector Hoffeditz met with Pierce at the licensed premises. Pierce confirmed that Sigmun's duties included going "hands-on" to escort patrons out of the premises and monitoring the "VIP" section of the licensed premises. Pierce also told the inspector that all staff were now in compliance with DPSST certification requirements. He produced a DPSST security application form showing that the training and application packet had been completed. (Ex. A10; test. of Inspector Hoffeditz.)

18. On January 27, 2009, Inspector Hoffeditz had a telephone conversation with Corporate Principal Vorachith, who admitted hiring Pierce to conduct security services at the licensed premises. Vorachith told the inspector that he asked Pierce if he was certified and Pierce said he was. (Ex. A10; test. of Inspector Hoffeditz.)

19. David Angeles, a consultant and unlicensed investor in Licensee, was and is involved in the day-to-day operations of the licensed premises. Mr. Angeles was the person who hired Pierce for security at the licensed premises after Vorachith referred Pierce to him. Mr. Angeles understood from Pierce that he was “very well licensed” when he interviewed Pierce for the head of security position. (Test. of Angeles.)

20. Mr. Angeles has been trying to be more proactive in having better security at the licensed premises, including having meetings with police, obtaining more training for security personnel, hiring more ID checkers and using a stamp system to identify patrons. (Test. of Angeles.)

CONCLUSIONS OF LAW

1. Licensee’s employee violated OAR 845-006-0335(1) by failing to verify a purchaser’s age before selling alcoholic beverages to him when the purchaser appeared to be less than 26 years of age. The alternative charge of a violation of ORS 471.410(2) should be dismissed.

2. Licensee violated OAR 845-006-0347(3) by permitting unlawful activity when persons provided professional security services at the licensed premises without being certified to do so.

3. A 52 day suspension is an appropriate penalty, with the option of paying \$7,590.00 in lieu of 46 days of the suspension, with six days of the suspension mandatory. Removal of Licensee from the Responsible Vendor Program is also an appropriate penalty.

OPINION

Before addressing the actual violations at issue here, Licensee raises a general argument, that the OLCC engaged in selective enforcement, thereby depriving Licensee of its equal protection rights.

Prior OLCC decisions do not support the argument. In *The Blue Parrot* (OLCC, Final Order, 03-V-043, June 2004), the Commission held that the mere fact that there are differences in how cases are prosecuted does not of itself constitute prohibited discrimination. A selective enforcement claim arises only if there is no coherent, rational, or systematic policy for choosing to enforce in some cases, but not others, without any attempt to strive for consistency among similar cases. Licensee has not provided evidence to factually support a contention of selective enforcement. Licensee’s argument is not persuasive.

Violation One: Failure to verify the age of a person who reasonably appeared to be under 26 years of age.

OLCC has alleged that Licensee's employee failed to verify the age of a minor patron before serving or selling alcoholic beverages to him on July 27, 2008, in violation of OAR 845-006-0335(1)(a)(b)(c).

OAR 845-006-0335 provides, in relevant part:

(1) Age Verification:

(a) ORS 471.130 requires a licensee or permittee to verify the age of a person who wants to buy or be served alcoholic beverages when there is "any reasonable doubt" that the person is at least 21 years old. The Commission requires a licensee or permittee to verify the age of anyone who wants to drink alcoholic beverages or is in an area prohibited to minors if there is reasonable doubt that the person is at least 21 years old. "Reasonable doubt" exists if the person appears to be under the age of 26;

(b) Whenever a licensee or permittee verifies age, he/she must verify it as ORS 471.130 requires (statement of age card or the specified items of identification) and must reject any obviously altered document or one which obviously does not identify the person offering it;

(c) Licensees must require all their employees who sell, serve, oversee or control the sale or service of alcoholic beverages to verify age as subsection (a) of this section requires.

OLCC has provided adequate evidence to support the conclusion that Licensee's employee failed to verify the age of a patron who appeared to be less than 26 years of age. Licensee's main contention is that OLCC's case is too weak to support that conclusion. OLCC offered the testimony of a police officer who spoke directly to the minor, both on the night of the incident, as well as again months later. Both times, the minor stated that he gained entry into the licensed premises and was served multiple drinks. The minor stated that he was checked by the ID checker at the front door of the licensed premises, and was never checked again by the bartender who repeatedly served him alcoholic drinks. The minor also appeared very young to the officer, younger than 21 years of age. A photograph of the minor was also admitted, corroborating the youthful appearance of the minor. Licensee's allegations that the minor may not have been in the licensed premises at all on the evening of the incident is not supported by any substantive evidence in the record. Licensee did not call as a witness or offer any statements from either the ID checker at the door of the licensed premises, the bartender who served him the alcoholic drinks, or minor Aldana.

While firsthand evidence might have been more probative of the minor's age and appearance, the absence of that evidence does not diminish the probative value of the evidence,

upon which the agency relied in this proceeding. *Sugar Pine Inn* (OLCC, Final Order, 02-V-052, July 2003).

Licensee also alleges that OLCC's delay in taking action in this case was unreasonable and impaired Licensee's ability to present a defense ("laches"). *Rise v. Steckel*, 59 Or App 675 (1982) described the elements of a "laches" defense:

Laches has three elements: (1) the plaintiff must delay asserting his claim for an unreasonable length of time (2) with full knowledge of all relevant facts, (3) resulting in such substantial prejudice to the defendant that it would be inequitable for the court to grant relief.

In another case involving a claim of laches, the Commission held that it was not barred from terminating an agency agreement because agent submitted late deposits, the last of which occurred two years prior to the hearing. The agent had not taken any significant disadvantageous change in position since the Commission could have first asserted the late deposits as a termination ground. Further, the passage of time since the violations had not been shown to result in the loss of any critical evidence. *Carl Shoemaker, OLCC Agency No. 169* (OLCC, Final Order, 86-RO-003, March 1987).

The original Notice of Proposed Suspension was issued by the OLCC on March 3, 2009. The original incident occurred on July 27, 2008. An OLCC inspector attempted to contact Licensee and/or its attorney, starting on September 17, 2008, about the incident, but Licensee was not willing to discuss the matter with the inspector. Officer Schmautz, who had originally contacted minor Aldana in July 2008, had a follow up conversation with him in December, 2008. That information was forwarded to OLCC. A total of eight months passed from the original incident until OLCC issued its original suspension notice. However, OLCC did not begin investigating the matter until a month and a half later, so the time was approximately six months from investigation to notice. Six months is not an unreasonable amount of time for OLCC to go from investigation to action. OLCC also did not receive further information until after Officer Schmautz's December 2008 contact with minor Aldana. OLCC had yet to develop full knowledge of all the relevant facts until receipt of that information. This record also has no evidence to support Licensee's allegations that it was substantially prejudiced by the delay. Licensee did not contend that it was unable to locate minor Aldana for testimony at hearing. Licensee's claim of laches is not supported by this record.

A violation of OAR 845-006-0335(1)(a)(b)(c) has been shown. The alternate violation of ORS 471.410(2) should be dismissed.

Violation Two: Permitting unlawful activity (Security employees' lack of DPSST certification).

OLCC alleges that Licensee permitted unlawful activity in violation of OAR 845-006-0347(3), when employees performed private security services at the premises without DPSST certification.

OAR 845-006-0347(3) provides, in part:

(3) Unlawful Activity:

(a) No licensee or permittee will permit any unlawful activity on the licensed premises or in areas the licensee controls that are adjacent to or outside the premises. Unlawful activity includes any activity that violates a criminal statute. Examples include, but are not limited to, crimes related to prostitution, public indecency, controlled substances and gambling. The Commission does not require a conviction to establish a violation of this section except as ORS 471.315 and 471.700 requires.

* * * *

ORS 181.991(1)(b) makes it a Class A violation if a person provides private security services as a private security professional without being certified to do so under ORS 181.878. A “criminal action” is defined in ORS 131.005(6) as “an action at law by means of which a person is accused of the commission of a violation, misdemeanor or felony.” Providing private security services by persons who are not DPSST certified is an unlawful activity for purposes of this violation.

Licensee does not dispute that three persons who were acting as private security providers for Licensee (Shawn Pierce, Charles Sigmun and Christopher Moore) were not DPSST certified when an OLCC inspector did an off-premises walk-through check of their status on January 17, 2009. Failure to be certified while acting as security for the licensed premises is an unlawful act. ORS 181.991, 181.873(1)(b), OAR 259-060-0015(1)(a). No actual conviction is required in order for the proscribed activity to be considered unlawful. OAR 845-006-0347(3)(a).

Licensee first contends that the three individuals were not employees of Licensee, but were instead independent contractors providing security services for Licensee, and therefore the Licensee is not liable for their unlawful activities. Licensee cites to *Satyricon* (OLCC, Final Order, 88-V-060, December 1988). In that case, a band was performing at a licensed premises and had selected a person of its choice to work at the door of the licensed premises and to collect the band cover charge. The licensee in that case had not selected the person who was collecting the cover charge and did not pay him. The door person sold cocaine to an undercover police officer, which led to an OLCC hearing involving unlawful activity of the “employee.” The Commission concluded that the person was not an employee for purposes of that sanction, because the licensee did not have the power or right to control or direct the person in how his work was to be performed.

Satyricon is distinguishable from this case. Here, the three persons acting as security for the licensed premises were doing so at the behest of Licensee. Licensee hired Shawn Pierce to provide private security services at the licensed premises. Pierce then hired Sigmun and Moore. Licensee cannot insulate itself from liability for unlawful activity just because it may have hired a third party to provide security services. Substance rather than form determines whether an independent contractor relationship or an employment relationship exists. *Wells v. Carlson*, 78

Or App 536 (1986). Licensee paid Pierce to provide security services. While the testimony of Licensee and others on Licensee's behalf was that little or no oversight was provided over Mr. Pierce's security activities while working for Licensee, Licensee is still ultimately responsible for the security on the premises.

Licensee also argues that "double jeopardy" applies to this case, in that the security persons have already been prosecuted criminally for failing to be DPSST certified, and therefore OLCC is barred from maintaining a separate prosecution for the same conduct. An OLCC sanction is not a criminal prosecution, but an administrative sanction. The Oregon courts have generally held that administrative sanctions are not separate prosecutions for purposes of double jeopardy under either the Oregon or Federal constitution. *Mannelin v. DMV*, 176 Or App 9 (2000), citing to *State v. Phillips*, 138 Or App 468 (1996). Licensee's argument is not persuasive.

The next question is whether Licensee permitted the unlawful activity. "Permitting" involves two elements. First the evidence must prove that the licensee had knowledge of the proscribed activity. The Commission may infer knowledge where the nature of the proscribed activity was such that it would have been evident to persons working in the establishment. *Taylor's Coffee Shop v. OLCC*, 28 Or App 701 (1977). Second, the evidence must prove that the licensee failed to take reasonable steps to prevent or control the proscribed activity. *Don Juan's*, (OLCC, Final Order, 88-V-003, May 1988). *Tacoma Cafe* (OLCC, Final Order, 86-ES-001, October 1986).

By case precedent, the Commission has defined what "permit" means in the context of the unlawful activity rule. In *Jiffy Mart* (OLCC, Final Order, 04-V-027, February 2005), the issue was whether the licensee permitted unlawful activity on the licensed premises, when, unbeknownst to the licensee, an employee sold marijuana to a police informant. In holding the licensee liable for wrongful acts of its employees, the Commission found:

"Permitting" involves two elements. First, the evidence must prove that the licensee had knowledge of the proscribed activity. Second, the evidence must show the licensee failed to take reasonable steps to prevent or control the unlawful activity. * * *.

With regard to the knowledge element, it is unnecessary to prove the licensee had actual knowledge of the unlawful activity to prove the violation. * * * The Commission may impute the knowledge of the licensee's employees to the licensee, or may infer knowledge where the nature of the proscribed activity was such that it would have been evident to persons working in the establishment. * * *.

The conduct of employees may also be imputed to the licensee in determining a failure to take reasonable steps to prevent the activity. Where the licensee's employee is engaged in the criminal act, the Commission need not consider whether the wrongdoer took steps to prevent their own wrongful act.

Final Order at 6.

Consequently, under the *Jiffy Mart* standard, even if the licensee is unaware of the misconduct at the time it occurred and not in a position to prevent or control it, the Commission will hold a licensee liable for the unlawful activity because it will impute both the employee's knowledge and the employee's conduct to the licensee in determining whether the activity was permitted. See also, *Jiggles* (OLCC, Final Order, 88-V-004, August 1988) (licensee had knowledge because the knowledge of the employees, who were the actual wrongdoers, was imputed to the licensee). The Commission has also found that a licensee had knowledge of the illegal activity where the licensee knew about the ongoing criminal enterprise by a specific person, but did not know about the specific illegal act charged. *El Mirador Mexican Restaurant*, (OLCC, Final Order, 91-V-150, May 1992).

In this case, Licensee hired, through Mr. Angeles, Pierce to perform certain security services and knew that he was performing those services along with other security personnel. Even if Licensee did not directly supervise Moore and Sigmund, the Commission may infer knowledge where the nature of the proscribed activity was such that it would have been evident to persons working in the establishment, as was the case here. Pierce, Moore and Sigmund all wore red shirts with the word "Security" displayed on them.

Licensee also knew that DPSST certification of security personnel for the licensed premises was required, as he had previously received a Notice of Warning in May 2008.

Penalty

OLCC proposes a 52 day suspension, or a civil penalty of \$7,590 in lieu of 46 days of the suspension, with the remaining six days of suspension mandatory.

OAR 845-006-0500(7)(a)(D) defines violations that create a potential threat to public health or safety or violations of the tied house or financial assistance as Category III violations. Subsection (7)(a)(E) defines violations for the sale of alcohol to a minor or failure to check identification when the retail licensee qualifies under the Responsible Vendor Program as Category IIIa violations. Exhibit 1 of the rule specifically lists violations of both OAR 845-006-0347(3) (Permitted Unlawful Activity) and OAR 845-006-0335(1) (Failure to Verify Age of a Minor) as Category III violations. The lesser sanctions described in Category IIIa, do not apply here, because Licensee is required to be removed from the Responsible Vendor Program, due to the aggravating circumstances involved. OAR 845-009-0135(8)(e). Those aggravating circumstances are discussed below.

In this case, the Commission has proven the two violations charged. Licensee is responsible for the acts and omissions of its employees in violation of any law or rule affecting the license privileges. OAR 845-006-0362.

The standard penalty for a first Category III violation is a 10 day suspension or \$1,650 civil penalty. The standard penalty for a second Category III violation within two years is a 30 day suspension or a \$4,950 civil penalty. The violations in this case are Licensee's first and

second Category III violations. The standard penalties would be appropriate, absent mitigating or aggravating circumstances. OLCC has charged aggravating circumstances.

OLCC contends that an additional 12 days of suspension be imposed in this case for aggravating circumstances. OAR 845-006-0500(7)(c) describes some of the aggravating and mitigating circumstances that can apply when determining a sanction:

* * * If the Commission finds aggravating or mitigating circumstances, it may assess a greater or lesser sanction. Some of the reasons the Commission may mitigate a sanction are: good faith effort to prevent a violation; and extraordinary cooperation in the violation investigation that shows the licensee or permittee accepts responsibility. Some of the reasons the Commission may aggravate a sanction are: **a prior warning about compliance problems**; repeated failure to comply with laws; failure to use age verification equipment which was purchased as an offset to a previous penalty; efforts to conceal a violation; intentional violations; **the violation involved more than one patron or employee**; **the violation involved a juvenile**; and the violation resulted in injury or death. The Commission may always increase or decrease a sanction to prevent inequity or to take account of particular circumstances in the case. (Emphasis supplied.)

The aggravating circumstances as demonstrated by the evidence were:

* Minor Aldana was a juvenile under the age of 18 when he was admitted into the premises.

* Minor Aldana was served multiple alcoholic beverages.

* Two employees (door checker and server) were involved in Violation Number One.

* Licensee had also previously received a Notice of Warning Ticket for security employees without DPSST certification.

* Three employees were involved in Violation Number Two (two aggravating factors).

OLCC has not proffered any mitigating factors, nor has the Commission discerned any from this record.

The fact that security personnel later obtained the required DPSST certification does not mitigate the penalty. An action taken by a licensee to prevent future violations is not mitigation when the action taken is simply what is required to comply with law. *Tony's Tavern* (OLCC, Final Order, 06-V-012, August, 2006).

The aggravating factors shown in this record are specifically described in the rule and are appropriately applied in this case. Three aggravating factors apply to Violation Number One (failure to verify age), and three aggravating factors apply to Violation Number Two (unlawful activity). OAR 845-009-0135(8)(e) requires that a licensee be removed from the Responsible

Vendor Program if aggravating circumstances were involved at the time of a violation for failure to verify the age of a minor. As discussed above, the evidence demonstrates three aggravating circumstances relating to Violation Number One (failure to verify age). Licensee should be removed from the Responsible Vendor Program and is, accordingly, ineligible for the reduced penalty afforded by Category IIIa for Violation Number One.

Past practice and precedent dictate that the standard conversion factor for each mitigating or aggravating factor is two days suspension or \$330 civil penalty. A civil penalty for any individual violation may not exceed \$5,000. ORS 471.322. Accordingly, any aggravated penalty imposed for a single violation in excess of \$4,950 must be in the form of mandatory suspension days.

For Violation Number One, the appropriate penalty is \$2,640 or 16 days suspension (standard penalty of \$1,650 or 10 days suspension plus aggravation of \$990 or six days suspension). For Violation Number Two, the appropriate penalty is \$4,950 or 30 days suspension (standard) plus six days mandatory suspension (aggravation). The total penalty, for both violations, is \$7,590 or 46 days suspension plus six days mandatory suspension.

FINAL ORDER

The Commission orders that the Full On-Premises Sales license held by Restaurant Management Group, LLC, Sirivanh Vorachith, Member and Raoul Calderon, Member (Licensee), doing business as Eclectic Restaurant/Envy Lounge Bar, located at 204 SW Yamhill Street, Portland, be suspended for 52 days or that Licensee pay a civil penalty of \$7,590 in lieu of 46 days of suspension plus serve six days mandatory suspension for violations of OAR 845-006-0335(1)(a)(b)(c) and 845-006-0347(3).

The alternate charge of a violation of ORS 471.410(2) is dismissed.

Licensee shall be removed from the Responsible Vendor Program.

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

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

Dated this 26th day of October, 2009.

/s/ Rudy Williams for:
Stephen A. Pharo
Executive Director
OREGON LIQUOR CONTROL COMMISSION

Mailed this 26th day of October, 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.