

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

<b>In the Matter of the Full On-Premises Sales License Held by:</b>	) <b>FINAL FINDINGS OF FACT</b>
	) <b>CONCLUSIONS OF LAW</b>
	) <b>AND ORDER</b>
<b>B &amp; M, Inc.</b>	) <b>OLCC-08-V-118</b>
<b>Kar Chi Liang,</b>	) <b>OLCC-08-V-118A</b>
<b>President/Director/Stockholder</b>	) <b>OLCC-08-V-118B</b>
<b>Bob Chiou, Sec/Treas/Director/Stockholder</b>	)
<b>dba ROCOCO CEDAR MILL</b>	)
<b>13510 NW Cornell Road</b>	)
<b>Portland OR 97229</b>	)

**HISTORY OF THE CASE**

On December 5, 2008, the Oregon Liquor Control Commission (OLCC or Commission) issued a Notice of Proposed License Suspension to B & M, Inc., Kar Chi Liang, President/Director/Stockholder and Bob Chiou, Secretary/Treasurer/Director/Stockholder (Licensee), doing business as Rococo Cedar Mill, located at 13510 NW Cornell Road, Portland, Oregon. The Notice alleged that Licensee's employee failed to verify a minor's age before allowing the minor to buy or be served an alcoholic beverage when the minor reasonably appeared to be less than 26 years of age, in violation of OAR 845-006-0335(1)(a)(b)(c). The OLCC also charged an alternate violation of ORS 471.410(2) (knowing sale of alcohol to a minor).

Licensee made a timely request for hearing. OLCC referred the hearing request to the Office of Administrative Hearings (OAH) on January 2, 2009. The case was assigned to Administrative Law Judge (ALJ) Robert L. Goss. The case was consolidated for purposes of the hearing with OLCC Case No. 08-V-123, involving the service permit held by Licensee's employee, Cristy Cumiford.

A contested case hearing was held on May 7, 2009, at the OAH offices in Tualatin, Oregon, before ALJ Goss. Licensee was represented by Attorney Seven Parker. OLCC was represented by Case Presenter Becky Voelkel. OLCC Inspector Matt Cobos and Washington County Sheriff's Deputy Theresa Fichter testified on behalf of OLCC. Cristy Cumiford, Sgt. Robert Obenauf of the Washington County Sheriff's Office, Grant Walstrom, Roberto Hill, Maya Swain and Jessie Feathers, testified on Licensee's behalf. The record closed at the end of the hearing.

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

No Exceptions to the Proposed Order were filed within the 15-day period specified in OAR 845-003-0590.

The Commission adopts the Proposed Order of the Administrative Law Judge as the Final Order of the Commission and enters the following based on the preponderance of the evidence:

### ISSUES

1. Whether Licensee's employee violated OAR 845-006-0335(1)<sup>1</sup> 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.

2. Whether Licensee's employee violated ORS 471.410(2)<sup>2</sup> by knowingly selling alcoholic beverages to a minor.

3. If a violation is proved, what is the appropriate penalty? ORS 471.315(1)(a)(A).  
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<sup>1</sup> 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.

<sup>2</sup> 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 A10 were admitted into the record without objection. The record is combined with the record on OLCC Case No. 08-V-123, regarding an employee of Licensee (Permittee Cristy Cumiford).

### **CREDIBILITY DETERMINATION**

The credibility of the testimony of Licensee's employee, Cristy Cumiford is determinative to the outcome of this case. If the Commission believes Ms. Cumiford's testimony that she properly checked the identification (ID) of Abel Zakary Jimenez Jr. (minor Jimenez) and that it indicated that he was over 21, then OLCC's alleged violations have not been proved. If the Commission does not find Ms. Cumiford's testimony to be credible, and therefore find that she did not check minor Jimenez's ID, as alleged by the Commission, then the violations have been substantiated.

The concurring opinion in *Lewis and Clark College v. Bureau of Labor*, 43 Or App 245 (1979), provides a good analysis of factors to be considered in determining credibility:

“credibility (more properly weight) is determinable from a number of factors other than witness demeanor. The credibility, *i.e.*, weight that attaches to testimony can be determined in terms of the inherent probability, or improbability of the testimony, the possible internal inconsistencies, the fact it is or is not corroborated, that it is contradicted by other testimony or evidence and finally that human experience demonstrates it is logically incredible.”

In making a credibility determination in an OLCC matter, the Commission has considered the witnesses' demeanor, the probabilities or improbabilities of the testimony, the internal consistency or lack of it in the different witnesses' testimony and the witnesses' motivations for lying. *Town & Country Tavern* (OLCC, Final Order, 85-V-047, April 1986).

After a full review of this record, the Commission finds the testimony of Ms. Cumiford to be credible.

OLCC's basis for not believing Ms. Cumiford's assertion that she properly checked minor Jimenez's ID is based on the inconsistent statements she made to investigators, as well as statements made by others to the investigators that directly contradicted Ms. Cumiford's assertions. Along with Ms. Cumiford's own testimony, several other persons testified on her behalf who were present in the premises at the time of the incident and observed the contact between Ms. Cumiford and minor Jimenez. No one who testified on behalf of the OLCC was actually present at the time of the alleged contact between Ms. Cumiford and minor Jimenez.

Ms. Cumiford admitted at hearing that she told the initial investigating deputy that she had scanned the ID that minor Jimenez presented to her and that the AVE indicated that he was 21. Ms. Cumiford maintained at the hearing that she had not scanned that ID. When asked to explain the inconsistent statement, Ms. Cumiford said that at the time the deputy asked her about

minor Jimenez's ID, she was very focused on what was going on at the time of the altercation and had scanned so many ID's before, that she thought she had possibly scanned it.

Inconsistencies in statements can support a conclusion that the person's testimony is not credible. See *Donn's Den*, (OLCC, Final Order, 94-V-048, December 1989) and *Long Branch*, (OLCC, Final Order, 94-V-048, December 1994). However, the testimony of a witness who has made inconsistent statements about some issues is not wholly impeached and even though less trustworthy, the witness may retain some credibility as to other issues. *Westmoreland v. Iowa Beef Processors*, 70 Or App 642 (1984). Ms. Cumiford admitted to the inconsistent statements and provided a credible accounting for why she was inconsistent. The Commission therefore concludes that Ms. Cumiford's testimony is credible and that, scanning the ID or not, she properly checked that ID that indicated that minor Jimenez was age 21 or older. Her testimony is corroborated by the testimony of several people who actually observed the interaction between Ms. Cumiford and minor Jimenez at issue here. Those people were patrons of the premises and although they know Ms. Cumiford as a bartender, they are not social acquaintances or friends of Ms. Cumiford, with the exception of Grant Walstrom, who was a former bouncer at the premises. Their testimony was relatively consistent. They saw Ms. Cumiford check what appeared to be minor Jimenez's ID. They were all subject to cross-examination by OLCC during their testimony.

OLCC argues that the testimony of Ms. Cumiford's witnesses is suspect, because the witnesses had been drinking that evening and because OLCC believes their statements were inconsistent. The Commission has already addressed the issue of those witnesses' statements and concluded that they were relatively consistent. Also, when weighing the relative credibility of witnesses who had been drinking in this case, the Commission notes that minor Jimenez had a strong odor of an alcoholic beverage when he spoke with Deputy Fichter on the night of the incident and Cassandra Compton also had been drinking that night as well. Minor Jimenez and Ms. Compton were the only persons that made any statements that directly contradicted Ms. Cumiford's testimony that she did indeed check minor Jimenez's ID that night. The Commission also is not persuaded from this record that any of Ms. Cumiford's witnesses were slanting their testimony because of some relationship they might have had with Ms. Cumiford. No such relationships have been shown from this record, other than Ms. Cumiford being the bartender at a location where those witnesses frequent. Based on this record, the live testimony of Ms. Cumiford's witnesses should be afforded at least the same credence as the hearsay statements of minor Jimenez and Ms. Compton, if not more.

The Commission finds the testimony of Ms. Cumiford to be credible and reliable. The Findings of Fact below reflect this credibility determination.

### **FINDINGS OF FACT**

1. B & M, Inc., Kar Chi Liang, Corporate Principal, and Bob Chiou, Corporate Principal, (Licensee), have held a Full On-Premises Sales License (F-Com) at Rococo Cedar Mill, 13510 NW Cornell Road, Portland, Oregon, since 2001. The license issued to Licensee was originally a Class A license, which was converted to the F-Com license in 2001. (Ex. A1.)

2. On November 9, 2006, an employee of Licensee served alcohol without a permit (Category III violation). Licensee paid a fine of \$1,650.00 for the violation on February 8, 2007. (Ex. A1.)

3. On December 16, 2007, an employee of Licensee failed to verify the age of a person appearing under 26 years of age (Category III violation). Licensee was given credit for purchasing Age Verification Equipment (AVE) and paid a fine of \$1,320 for the violation on March 13, 2008. (Ex. A1.)

4. On August 26, 2008, Abel Zakary Jimenez Jr., DOB 09/09/87 (minor Jimenez), entered the premises at between 10 PM and midnight, with his father, Abel Jimenez Sr., and a friend, Cassandra Compton. (Ex. A4, test. of Cumiford.)

5. Cristy Cumiford was the bartender on duty at the premises that evening. Ms. Cumiford holds an OLCC service permit. Ms. Cumiford has worked for the most part as a bartender at the premises for the last 10 years. Ms. Cumiford did not have any prior violations with the OLCC before this incident. (Test. of Cumiford.)

6. Ms. Compton ordered two rum and cokes from Ms. Cumiford, who then asked Ms. Compton to show her ID. Ms. Compton was over the age of 21. Ms. Cumiford then asked Ms. Compton who the drinks were for and Ms. Compton replied that one was for her and one was for Mr. Jimenez Sr., who did not appear under age 26. Ms. Cumiford asked Ms. Compton to send up minor Jimenez to her so that she could check his ID as well. (Test. of Cumiford.)

7. Minor Jimenez then came to the bar and ordered a pitcher of beer. Ms. Cumiford asked for minor Jimenez's ID. Ms. Cumiford did not know at that time the real name of minor Jimenez. The ID provided by minor Jimenez appeared to be an Oregon motor vehicle operator's license which indicated a Hispanic name other than Jimenez, and listed a date of birth that indicated that the person was over 21 years old. The ID did not have a red border that would indicate that the ID was for a person under age 21. The picture on the ID appeared to Ms. Cumiford to be that of minor Jimenez. The ID also had an extra address label on it, reflecting a change of address with DMV. (Test. of Cumiford.)

8. When minor Jimenez came to the bar and presented his ID to Ms. Cumiford, he told Ms. Cumiford that he knew why she was requiring him to produce an ID, because he was a bartender. Ms. Cumiford thought it strange that minor Jimenez did not subsequently tip Ms. Cumiford for the purchase of the beer, as it has been her experience that persons in the industry are usually very good at tipping other bartenders. (Test. of Cumiford.)

9. Due to the address label on the ID presented by minor Jimenez, Ms. Cumiford was unable to run the ID through the Age Verification Equipment (AVE) that was located on the premises. From past experience, Ms. Cumiford knew that an address label attached to an ID would cause the particular model of AVE available to her on the premises to jam and not be usable. (Test. of Cumiford.)

10. Ms. Cumiford knows Mr. Jimenez Sr. by name, as he had been a patron of the premises in the past. Although she did not know him by name, Ms. Cumiford was aware that minor Jimenez had been in the premises in the past as well, but not when she was on duty. When minor Jimenez presented ID to Ms. Cumiford on the evening of August 26, 2008, Ms. Cumiford was not aware that he was the son of Mr. Jimenez Sr. (Test. of Cumiford.)

11. Ms. Cumiford always looks at the name on an ID when she checks it. Although she does not recall the last name used on minor Jimenez's ID, she is sure that it was not Jimenez, nor was Mr. Jimenez's middle name of Zakary part of the name on the ID. Ms. Cumiford is sure of this because she would have realized that minor Jimenez was related to Jimenez Sr. if the Jimenez name was used on the ID. Also, Ms. Cumiford's boyfriend's name is Zachary, and she would have remembered if that name had been used on the ID. Ms. Cumiford's cousin's last name is Jimenez, and she would have recognized such a name if used on the ID presented by minor Jimenez. (Test. of Cumiford.)

12. Jessie Feathers, Maya Swain and Roberto Hill were sitting at the bar when minor Jimenez produced ID for Ms. Cumiford. Grant Walstrom arrived after the ID check. Grant Walstrom had been employed as a security person at the premises in the past, and had checked an ID presented by minor Jimenez more than once. Mr. Walstrom did not know at those times the actual name of minor Jimenez and does not recall the name that was on the ID presented by minor Jimenez, only that it indicated that he was over 21. (Test. of Walstrom, Feathers, Swain, and Hill.)

13. Ms. Cumiford did not serve any more alcohol to minor Jimenez, Jimenez Sr., or to Ms. Compton. (Test. of Cumiford.)

14. Later that evening, (approximately 2:15 AM on August 27, 2008) minor Jimenez was involved in an assault on Grant Walstrom outside the premises. (Ex. A3, A4; test. of Fichter.)

15. The police were called and Deputy Theresa Fichter of the Washington County Sheriff's Office arrived on the scene to investigate. During her questioning of minor Jimenez, she obtained an ID from him that identified him as Mr. Jimenez and indicated that he was 20 years old at the time. The ID had the red box on it indicating that the person was under age 21. (Test. of Fichter; Ex. A4.)

16. Minor Jimenez told Deputy Fichter that he had been drinking earlier in the premises but had not been carded by the bartender. Deputy Fichter noted that minor Jimenez had a strong odor of an alcoholic beverage coming from his breath. Deputy Fichter spoke with Ms. Cumiford, who told the deputy that she had scanned minor Jimenez's ID when he came into the bar and that it said he was over 21. When shown the ID that Deputy Fichter took from minor Jimenez, Ms. Cumiford told the deputy that it was not the ID that minor Jimenez had presented to her and that she would have noticed the "big red box around it." (Ex. A4; test. of Fichter.)

17. Sgt. Robert Obenauf of the Washington County Sheriff's Office was also on the scene of the assault. To see if another ID for minor Jimenez existed, Sgt. Obenauf asked Mr. Jimenez Sr. for minor Jimenez's wallet, of which Jimenez Sr. had possession. Jimenez Sr.

refused to turn over the wallet to Sgt. Obenauf. No further efforts were made to obtain minor Jimenez's wallet. (Test. of Obenauf; Ex. A4.)

18. Cassandra Compton told Deputy Fichter during her investigation that neither she nor minor Jimenez were carded at the bar by Ms. Cumiford. (Ex. A4; test. of Fichter.)

19. On September 10, 2008, OLCC Inspectors Cobos and Smith went to the premises and interviewed Ms. Cumiford about the incident on August 26-27. Ms. Cumiford told the inspectors that she had seen Mr. Jimenez Sr. drinking alcohol in the bar on previous occasions. Mr. Jimenez Sr. is noticeable because he is confined to a wheelchair. Ms. Cumiford also told the inspectors that she had asked minor Jimenez for ID on the night in question, and that he had presented her with an ID that indicated that he was over 21. (Test. of Cobos; Ex. A3.)

20. During her conversation with the inspectors, Ms. Cumiford was not sure if she had used the AVE to verify minor Jimenez's age. Ms. Cumiford denied telling Deputy Fichter that she had used the scanner. (Test. of Cobos; Ex. A3.)

21. After obtaining data from the AVE on the premises, the OLCC inspectors verified that Ms. Cumiford had not scanned minor Jimenez's ID. (Test. of Cobos; Exs. A3, A7 through A9.)

22. On November 4, 2008, Inspector Cobos interviewed Cassandra Compton. Ms. Compton told the inspector that she had been with minor Jimenez on several occasions when he had gained entrance to other bars without being asked for ID. Ms. Compton also stated that minor Jimenez did not have fake ID and that if he was ever asked for ID, he would just leave. (Test. of Cobos; Ex. A3.)

23. Ms. Compton also told Inspector Cobos that she had watched minor Jimenez go to the bar at the premises and that Ms. Cumiford did not check his ID. (Test. of Cobos; Ex. A3.)

### **CONCLUSIONS OF LAW**

1. Licensee's employee did not violate OAR 845-006-0335(1), in that she did attempt to verify a minor's age before selling him alcoholic beverages when the minor appeared to be less than 26 years of age.
2. Licensee's employee did not knowingly sell alcoholic beverages to a minor in violation of ORS 471.410(2).
3. The two violations should be dismissed.

### **OPINION**

The Commission alleged that Licensee's employee, Cristy Cumiford failed to verify minor Jimenez's age before allowing him to buy or be served alcoholic beverages in violation of OAR 845-006-0335(1)(a), (b) and (c). In the alternative, the Commission also alleges that Ms.

Cumiford knowingly sold alcoholic beverages to minor Jimenez in violation of ORS 471.410(2). The Commission has the burden of proving its charges by a preponderance of the evidence. ORS 183.450(2); *Cook v. Employment Div.*, 47 Or App 437 (1980) (in the absence of legislation specifying a different standard, the standard of proof in administrative hearings is preponderance of the evidence).

In *7 Eleven No. 15133A* (OLCC Final Order, 97-V-066, April 1998), the Commission concluded that the charge against a Licensee for sale to minor should be dismissed because a preponderance of the evidence failed to establish that the minor had presented convincing false identification. See also *Handy Pantry*, (OLCC Final Order, 88-V-005, May 1988), *Prefetto's Pizza*, (OLCC Final Order, 86-V-035, January 1987); *Hilyard Street Market*, (OLCC Final Order, 84-V-010, November 1984).

The burden of proving that the false identification was convincing is on the Licensee. *17th & Lincoln Market*, (OLCC Final Order, 91-V-060, December 1991). In that case, a licensee failed to prove that the false identification was a motor vehicle operator's license or an identification card issued by the Oregon Motor Vehicles Division. The Commission concluded the licensee therefore failed to meet the burden of proof for proving a defense of false identification.

As more fully discussed in the Credibility Determination above, the Commission has found that Ms Cumiford's version of events regarding her interaction with minor Jimenez, as evidenced by her testimony at hearing is more credible than the hearsay statements made by minor Jimenez and Ms. Compton, as related in the written reports admitted into the record. The Findings of Fact above reflect that credibility determination. The Commission has found that Ms. Cumiford did properly check minor Jimenez's ID on the night in question, and that it was an Oregon motor vehicle operator's license that indicated that the operator was over 21 years of age. It appears from this record that the ID that Ms. Cumiford checked was a false ID showing minor Jimenez's picture, a false name, and a date of birth that indicated the holder was over age 21. The ID appeared to Ms. Cumiford to be legitimate and there is nothing in the evidence to suggest otherwise.

Ms. Cumiford did not run the ID through the AVE equipment available to her on the premises, as that equipment had not worked properly in the past when she inserted an ID with an address change label attached to it for scanning. Given the circumstances shown, the Commission concludes that Ms. Cumiford took all reasonable steps to verify minor Jimenez's age before selling him alcohol, and that the ID minor Jimenez showed to her indicated that he was over 21. Therefore, Licensee's employee did "verify" minor Jimenez's age before allowing him to buy or be served alcoholic beverages (OAR 845-006-0335(1)(a)(b)(c)), and that employee did not knowingly sell alcoholic beverages to a minor (ORS 471.410(2)). The Commission has not proved that either violation has occurred. Both violations should be dismissed.

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**FINAL ORDER**

The Commission orders that the charges that B & M, Inc., Kar Chi Liang, President/Director/Stockholder and Bob Chiou, Secretary/Treasurer/Director/Stockholder (Licensee), doing business as Rococo Cedar Mill, located at 13510 NW Cornell Road, Portland, Oregon, violated OAR 845-006-0335(1)(a)(b)(c) or ORS 471.410(2) be DISMISSED.

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

Dated this 25<sup>th</sup> day of June, 2009.

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

Mailed this 25<sup>th</sup> day of June, 2009.

THIS ORDER IS EFFECTIVE ON THE DATE MAILED.

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.