

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

In the Matter of the Off-Premises)	FINAL FINDINGS OF FACT
Sales License Held by:)	CONCLUSIONS OF LAW
)	AND ORDER
Daryl W. Saunders)	OLCC-09-V-059
dba CS CONVENIENT SERVICES)	
493 S. Kearney)	
Burns, OR 97720)	

HISTORY OF THE CASE

In April 2009, the Oregon Liquor Control Commission (OLCC or Commission) issued a Notice of Proposed License Cancellation to Daryl W. Saunders (Licensee) dba CS Convenient Services, located at 493 S. Kearney, Burns, Oregon. The notice charged Licensee with six violations: two violations of OAR 845-005-0355, failing to comply with restrictions on the license; allowing a person to obtain an interest in the licensed business without Commission approval in violation of OAR 845-006-0475(2); failing to have employees sign and date a required training brochure prior to allowing the employee to sell alcoholic beverages in violation of OAR 845-009-0130(2); permitting alcoholic liquor on the premises which the off-premises sales license does not allow the licensee to sell or serve in violation of OAR 845-006-0345(6); and an advertising violation. Licensee timely requested a hearing.

On June 5, 2009, the Commission referred Licensee's hearing request to the Office of Administrative Hearings. Thereafter, on September 29, 2009, the Commission issued an Amended Notice of Proposed License Cancellation and Proposed Refusal to Renew License. On February 2, 2010, the Commission issued a Second Amended Notice of Proposed License Cancellation and Proposed Refusal to Renew License, deleting the alleged advertising violation.

A contested case hearing was held in this matter in Burns, Oregon, on February 17, 2010, before Administrative Law Judge Alison Greene Webster. Licensee was represented by Foster Glass, Attorney at Law. Becky Voelkel presented the case for the OLCC.

The following witnesses testified on behalf of the OLCC: Officer Jeff Brewer, Burns Police Department; Officer Shawn Heiser, Burns Police Department; OLCC Inspector Stan Fetterhoff; OLCC Investigator Jason Evers; and OLCC Inspector Larry Brown. Licensee testified on his own behalf. In addition, Roger Hill and Jim "Jimmie" Saunders testified on Licensee's behalf.

The record remained open for submission of written closing arguments, and closed on April 2, 2010, upon receipt of OLCC Staff's Rebuttal Closing Argument.

The Administrative Law Judge considered the record of the hearing and the applicable law and issued a Proposed Order mailed April 20, 2010.

Licensee filed Exceptions to the Proposed Order on May 5, 2010. The Administrative Law Judge responded to the Exceptions on May 17, 2010.

On June 18, 2010, 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 and the Administrative Law Judge's Response to Licensee's Exceptions. Based on this review and the preponderance of the evidence, the Commission enters the following:

EVIDENTIARY RULINGS

OLCC Exhibits A1 through A19 and Licensee's Exhibits L1 to L7 were admitted into the record without objection.

ISSUES

1. Whether Licensee failed to comply with a restriction on the license that prohibits Jimmie R. Saunders from participating in the management or operation of the business. OAR 845-005-0355(5).
2. Whether Licensee failed to comply with a restriction on the license that prohibits Jimmie R. Saunders from being on the licensed premises at all times. OAR 845-005-0355(5).
3. Whether Licensee knowingly allowed Jimmie R. Saunders to obtain an interest in the licensed business without prior approval by the Commission in violation of OAR 845-006-0475(2).
4. Whether Licensee failed to have one or more employees read, sign and date the Commission-provided brochure, *What Every Store Clerk Needs to Know About Selling Alcohol*, before allowing the employee to sell alcohol. OAR 845-009-0130(2).
5. Whether Licensee permitted or had alcoholic liquor on the licensed premises which the license does not allow the licensee to sell or serve in violation of OAR 845-006-0345(6).
6. If one or more of the violations are proven, what is the appropriate penalty?
7. Whether the Commission has grounds to refuse to renew Licensee's license under ORS 471.313(4)(g) or (h), based on a poor record of compliance with the liquor laws of this state while licensed and/or for failing to disclose that another person has an ownership interest in the business.
8. If so, whether Licensee has shown good cause to overcome the Commission's refusal to renew the license.

FINDINGS OF FACT

1. In 2006, Jim "Jimmie" Saunders applied for an off-premises sales license for the premises known as CS Convenient Services, located at 493 S. Kearney, Burns, Oregon. The

Commission denied the license application in June 2006, based, in part, upon Saunders' history of using alcohol and controlled substances to excess, his history of arrests and his use of marijuana. The Commission determined that because of his drug and alcohol history, Saunders could not qualify for a liquor license. (Test. of Fetterhoff.)

2. At the time Jim Saunders applied for the off-premises sales license he was the owner of CS Convenient Services, a convenience store, and Burns Outdoor Power Equipment (BOPE), a machine sales and repair shop located at 497 S. Kearney, Burns, Oregon. The two businesses share the same building and are divided by an internal wall. Pursuant to an installment sales contract, Jim Saunders owns the building and the real property on which it sits. (Test. of D. Saunders; test. of J. Saunders.)

3. In July 2006, Jim Saunders transferred title and ownership of CS Convenient Services and BOPE to his brother, Daryl Saunders (Licensee). Licensee accepted control and ownership of the two businesses, but did not assume any prior commitment, debt or responsibility that preceded his taking over the businesses. (Ex. L3.)

4. In July 2006, Licensee signed a residential real estate agreement to purchase a home in Burns, Oregon. The sale was contingent upon Licensee obtaining financing for the purchase. At the time, Licensee was living in Laguna Niguel, California. (Ex. B2.) The sale later fell through a couple of months later because Licensee was unable to secure financing. (Test. of Licensee.) Although at the time Licensee intended to move his residence to Burns, he did not do so. Other issues in California, including the failing health of his elderly parents and employment opportunities, eventually prevented him from making the move. Consequently, at all times pertinent to this matter, Licensee resided in California and occasionally visited Burns. (Test. of Licensee.)

5. In October 2006, Licensee applied for an off-premises sales license for the premises known as CS Convenient Services. (Exs. A16; L1.) OLCC Inspector Stan Fetterhoff was assigned to investigate the license application. In connection with the investigation, Fetterhoff contacted Licensee to discuss the Commission's concerns about Jim Saunders' role in the business.¹ Licensee assured Fetterhoff that he was the owner and operator of both businesses, CS Convenient Services and BOPE. Fetterhoff advised Licensee that the Commission was considering granting the license with restrictions that prohibited Jim Saunders from going into the licensed premises and from participating in CS Convenient Services' business. Fetterhoff explained that because Jim Saunders could not be licensed, he could not participate in the ownership or management of the licensed business. Licensee assured Fetterhoff that although Jim Saunders might work in the BOPE side of the building, he would not be involved in the CS Convenient Services side. Fetterhoff's recommendation that the Commissioners grant the

¹ Because Jim Saunders owned the building and property, he was deemed to have a financial interest in the licensed business pursuant to ORS 471.757 and OAR 845-005-0311(4)(a) (any person who rents or leases property to or for the licensed premises is considered to have a financial interest in the licensed business).

license with the proposed restrictions was based, in part, on his understanding that the two businesses had separate entrances from the street and no internal door between them.² (Test. of Fetterhoff.)

6. On February 6, 2007, Fetterhoff faxed Licensee a letter with the two proposed license restrictions. The restrictions prohibited Jim Saunders from participating in the management or operation in the business and from being on the licensed premises. The letter asked Licensee to accept or decline the restrictions. The following day, Licensee signed and returned the letter, indicating his acceptance of the two restrictions. (Ex. A6.)

7. On February 12, 2007 (and unbeknownst to the Commission at the time), Licensee gave Jim Saunders power of attorney to sign contracts and handle the bank accounts for CS Convenient Services and BOPE. That same day, Licensee left Burns to attend to personal business in California. (Ex. L3 at 3; test. of D. Saunders.)

8. On March 23, 2007, the Commission granted Licensee's application for an off-premises sales license at CS Convenient Services with the following two restrictions:

1. Licensee will not allow Jimmie R. Saunders to participate in the management or operation of the business.
2. Licensee shall prohibit Jimmie R. Saunders from being on the licensed premises at all times.

(Ex. A4.)

9. Stacey Clark was an employee at the licensed premises until late May 2008. During her employment with CS Convenient Services, she had contact with Jim Saunders on a daily basis. She faxed him the daily cash register totals. Stacey Clark had very limited contact with Licensee. Jim Saunders signed and approved Stacey Clark's time sheets. Jim Saunders also signed Stacey Clark's paychecks from Convenient Services. In April 2008, Jim Saunders approved a pay increase, and noted on Stacey Clark's time sheet, "Change pay scale to 8.00 hr, effective immediately." Mr. Saunders also wrote Stacey Clark the following note during her employment at the store: "Stacey, Keep up the progress. Congratulations on our growing business." At another point, Mr. Saunders wrote: "Stacey, Glad to have you back on a regular schedule." (Ex. A12; test. of Brown.)

10. When Stacey Clark stopped working for CS Convenient Services in 2008, she applied for unemployment benefits. Jim Saunders provided the Oregon Employment Department with information about her employment and her benefits were approved. (Ex. A2.)

² Fetterhoff's understanding of the building layout was incorrect. Although there are separate entrances to CS Convenient Services and BOPE at the front of the building, there are also two doors along the internal wall that connect the two businesses. There is a double glass door close to the front and a single door towards the back of the internal wall. (Ex. L5; test. of D. Saunders.)

11. Stacy Clark's husband, Randy Clark, also worked at the licensed premises on and off between March 2007 and early January 2009. (Ex. A2; test. of Brown; test. of D. Saunders.)

12. On February 28, 2008, Burns Police Officer Jeff Brewer responded to the licensed premises on a report that a store employee was intoxicated. Officer Brewer contacted Randy Clark, the only employee on duty at that time. Officer Brewer determined that Randy Clark was not intoxicated. While Officer Brewer was speaking with Randy Clark, Jim Saunders entered the premises through the internal door from BOPE. Saunders had a clip board in his hand. Officer Brewer, who knew Saunders and had seen him at the store on previous occasions over the years, was unaware of the license restriction prohibiting Saunders from the premises. When Saunders saw Officer Brewer, he explained that he was not supposed to be on the premises. He added that he was only doing the books for the business. He asked that the officer not mention that he was at the premises. (Test. of Brewer.)

13. At about 10:20 a.m. on July 13, 2008, Jim Saunders called the Burns Police to report a burglary at the licensed premises. Saunders reported that someone broke a window, got into the safe and stole several thousand dollars. He added that he suspected an ex-employee took the money. (Exs. A7 and A19.) When Officer Heiser arrived at the licensed premises about an hour later, he contacted Saunders and two employees, Roger Hill and Penny Schmeck in front of the building. Saunders advised the officer that \$2,150 in cash was missing from the safe. He explained that because Mr. Hill had locked the money in the safe the previous evening, and it was gone when Schmeck opened the safe in the morning, the suspect must have known the combination to open the safe. Saunders provided Officer Heiser with a list of seven people, current and former employees, who knew the safe's combination. Saunders added that he did not have insurance to cover the loss and asserted that he did not take the money for himself. (Test. of Heiser; Ex. A7.)

14. Officer Heiser was aware that Saunders was not supposed to be on the licensed premises, but gave him permission to enter the premises for purposes of assisting in the burglary investigation. Officer Heiser dusted the point of entry and the safe for fingerprints, but did not obtain any viable ones. Officer Heiser also interviewed the seven people named by Saunders, including Stacey and Randy Clark. All denied any involvement in the burglary. (Test. of Heiser; Ex. A7.)

15. BOPE and CS Convenient Services share the same telephone number. The phone bill, electricity bill, water bill and sewer bill for both premises are paid out of BOPE's bank account. On September 3, 2008, OLCC Inspector Brown called the licensed premises, and Roger Hill answered the phone by saying "Burns Outdoor Power Equipment." Inspector Brown asked for Convenient Services. Hill explained, "That's us also." (Test. of Brown; Ex. A2.)

16. On September 4, 2008, Inspector Brown visited the licensed premises. He saw a sign posted on the counter stating: "Please make checks payable to BOPE. Thank you. A 5% fee is added to all 'card' purchases. Thank you. Mngmt." (Ex. A9.) Inspector Brown asked the employee on duty, Laura Baca, about the sign. She explained that the store's previous bookkeeper had bounced about \$17,000 in checks in the CS Convenient Services account, so

now all checks for purchases at the licensed premises were being deposited into the BOPE account until they could straighten out the overdrawn account. Baca added that although both the BOPE and CS Convenient Services bank accounts were in Licensee's name, Jim Saunders had signing authority for the accounts. (Test. of Brown; Ex. A2.)

17. On October 20, 2008, OLCC Investigator Jason Evers stopped by the licensed premises. Evers saw the employee on duty, Jessica Breshears, sell a six pack of beer to one customer, and a 24 pack of beer to another. Without identifying himself as an OLCC investigator, Evers asked Breshears, "Who owns this place?" She answered, "His name is Jim Saunders." After Evers identified himself, he questioned Breshears further. She advised that she had been working at the licensed premises for about three weeks and that she was "technically" an employee of BOPE. She explained that Jim Saunders "filters his employees to this side" to cover shifts at the licensed premises. Evers asked Breshears if she had read and signed the OLCC store clerk brochure. She responded in the negative, explaining that she was not familiar with any OLCC brochures. (Test. of Evers; Ex. A17.)

18. Licensee does not carry workers' compensation insurance. Employees who work at the licensed premises are covered under a policy in Jim Saunders' name, for a business located at 497 S. Kearney Avenue, Burns. In 2008, Jim Saunders had workers' compensation insurance through SAIF Corporation. The policy summary indicated that Jim Saunders had three employee classifications: machine shop worker, office clerical and "grocery/prov-convenience retail." (Ex. A10.)

19. Although Licensee did not pay Jim Saunders any salary for his services, Jim Saunders participated in the management and operation of the business. In addition to approving time sheets and signing payroll checks, Jim Saunders determined which employees would work at the licensed premises. He used BOPE employees to cover shifts. He oversaw the daily cash register receipts and the business' books. He also dealt with the beer distributors and other suppliers and made decisions on whether to carry certain products. (Ex. 3; test. of Saunders.)

20. In addition to the instances discussed above, Jim Saunders was on the licensed premises on other occasions after March 23, 2007. At times when the store was closed for business, Jim Saunders would enter the building through the CS Convenient Services door to access the BOPE side, because the outside double door entrance to BOPE was locked or otherwise inoperable. On occasions while the licensed premises was open for business, Jim Saunders entered the convenience store side to retrieve paperwork, access information on computer or cash register and/or perform maintenance on the convenience store's fixtures and equipment. For example, one time when an employee mentioned that she smelled something burning, Jim Saunders went in and determined that a cooler compressor was "on the fritz." He unplugged the cooler. At another time, in the latter part of 2008, Jim Saunders was on the premises to move and rearrange the coolers. (Test. of D. Saunders; test. of J. Saunders; test. of Hill).

21. On one or more occasions before he stopped drinking, Jim Saunders had Stacey and/or Randy Clark buy him whiskey at the Burns Liquor Store. Saunders barred himself from the liquor store, so he asked the Clarks to procure the whiskey and deliver it to him. (Test. of J. Saunders.)

22. BOPE and CS Convenient Services employee Roger Hill read, signed and dated the Commission-provided brochure, *What Every Store Clerk Needs to Know About Selling Alcohol*, on April 27, 2006, eleven months before Licensee was granted the license. (Ex. L6; test. of Hill.) When Inspector Brown asked Hill for his signed brochure during the inspector's September 4, 2008 visit to the licensed premises, Hill was unable to produce it. Hill did not recall that he read and signed the brochure two and a half years earlier, and told the inspector that he had not done so. The inspector provided Hill with several copies of the brochure and warned him that all employees were required to read and sign it before selling alcohol. (Test. of Brown; Ex. A2; test. of Hill.)

CONCLUSIONS

1. Licensee failed to comply with the restriction on the license that prohibits Jimmie R. Saunders from participating in the management or operation of the business.

2. Licensee failed to comply with the restriction on the license that prohibits Jimmie R. Saunders from being on the licensed premises at all times.

3. Licensee knowingly allowed Jimmie R. Saunders to obtain an interest in the licensed business without prior approval by the Commission in violation of OAR 845-006-0475(2).

4. Licensee failed to have one or more employees read, sign and date the Commission-provided brochure before allowing the employee to sell alcohol.

5. The evidence fails to establish that Licensee permitted or had alcoholic liquor on the licensed premises which the license does not allow the licensee to sell or serve.

6. The appropriate penalty is cancellation of the license.

7. The Commission has grounds to refuse to renew Licensee's license under ORS 471.313(4)(g) or (h).

8. Licensee has not shown good cause to overcome the Commission's refusal to renew the license.

OPINION

A. Violations.

The Commission has charged Licensee with five violations of the liquor laws. As the proponent of these contentions, the Commission bears the burden of proof. ORS 183.450(2); *Harris v. SAIF*, 292 Or 683, 690 (1982) (general rule regarding allocation of burden of proof is

that the burden is on the proponent of the fact or position). The Commission also proposes to cancel Licensee's license based on the alleged violations, primarily the alleged license restriction violations and Jim Saunders alleged unauthorized interest in the licensed business. Pursuant to ORS 471.315(1)(a)(A), the Commission has the authority to cancel or suspend a license, or to impose a civil penalty in lieu of or in addition to suspension if it has reasonable grounds to believe that a licensee violated any provision of ORS Chapter 471, ORS 474.115 or any Commission rule.

1. Restriction Violation Number One – Jim Saunders' Participation in the Management or Operation of the Business

As set out above, Commission Staff asserts that, in violation of OAR 845-005-0355(5), Licensee failed to comply with the restriction on the license that prohibits Jimmie R. Saunders from participating in the management or operation of the business.

OAR 845-005-0355(5) provides as follows:

A licensee or permittee who has a restricted license or permit must exercise license or permit privileges only in compliance with the restriction(s). Failure to comply with the restriction(s) is a Category I violation.

The evidence establishes that, contrary to terms of the restriction, Jim Saunders participated in the management or operation of the business. "Participate" means to take part in something (as an enterprise or activity) or to have a part or share in something. *Webster's Third New Int'l Dictionary* at 1646 (2002 ed.). "Management" means the act or art of managing: the conducting or supervising of something (as a business). *Id.* at 1372. And the definition of "operation" includes a doing or performing especially of action, an exertion of power or influence and/or the quality or state of being functional. *Id.* at 1581.

With regard to the licensed business, Jim Saunders performed a variety of functions. Among other things, he hired and fired employees. He decided which employees would work at the licensed premises (as opposed to BOPE) and when. He approved employee time sheets and determined when and whether an employee was entitled to a pay increase. He reviewed the register receipts daily, he oversaw the business' books and banking and signed payroll checks. He dealt with the beer distributor and made decisions on whether to carry certain products. He also provided workers' compensation coverage to Licensee's employees. These activities constitute participating in the management or operation of the business. Thus, this violation of OAR 845-005-0355(5) has been established.³

³ In his closing argument, Licensee questioned the legality of and factual basis for the license restrictions prohibiting Jim Saunders' from participating in the management or operation and from being on the licensed premises. Licensee specifically agreed to the restrictions before the license was issued, and did not request a hearing to dispute them. Licensee may not now collaterally attack the validity of the license restrictions.

2. Restriction Violation Number Two – Jim Saunders’ Presence on the Licensed Premises

OLCC Staff also asserts that, in violation of OAR 845-005-0355(5), Licensee failed to comply with the restriction on the license that prohibits Jimmie R. Saunders “from being on the licensed premises at all times.”

The evidence establishes that Jim Saunders has been on the licensed premises on several occasions since the license was issued to Licensee on March 26, 2007. For example, Saunders entered the licensed premises during business hours on February 28, 2008, when Officer Brewer was there investigating a report of an intoxicated clerk on duty. By his own admission, Saunders has been inside the licensed premises to retrieve paperwork, to access information on the computer or cash register and to perform maintenance on the store’s fixtures and equipment. Again, by his own admission, both before and after business hours, Saunders has used the outside entrance to the licensed premises to access the building. He walked through the licensed premises to get to the internal door to the BOPE side of the building. Recognizing that the restriction prohibits Saunders from being on the licensed premises *at all times*, the evidence establishes that there have been multiple violations of this restriction since March 2007. This second violation of OAR 845-005-0344(5) has been proven as well.

3. Unauthorized Interest in the Licensed Business

Next, OLCC Staff alleges that Licensee violated OAR 845-006-0475(2)⁴ by knowingly allowing Jim Saunders to obtain an interest in the licensed business without prior Commission approval. Specifically, the Commission alleges that Licensee allowed Jim Saunders to obtain an unauthorized interest in the licensed business by: (1) receiving compensation that is out of the ordinary for the services rendered as specified in OAR 845-005-0311(3)(b); (2) contracting to manage or operate any part of the licensed premises other than as an employee as specified in OAR 845-005-0311(3)(c); and/or (3) investing money or other property in the licensed business as specified in OAR 845-005-0311(3)(d).⁵

⁴ OAR 845-006-0475(2) provides, in part, as follows:

(2) All licensees:

(a) Except as this rule allows, no person will obtain an interest in a licensed business as defined in OAR 845-005-0311 without prior Commission approval;

* * *

(c) The Commission may suspend or cancel a license if the licensee fails to notify the Commission, obtain prior approval or to take corrective action as this rule requires.

⁵ OAR 845-005-0311 provides as follows:

a. Receives compensation "out of the ordinary."

As set out in OAR 845-005-0311(3)(b), compensation "out of the ordinary" includes both over and under compensations. In *H-Market No. 2* (OLCC Final Order, 96-V-008, December 1997), the Commission held that two persons who wanted to purchase the business from the licensee and who worked without pay at the licensed market for nine hours a day, seven days a week for about six months had an unapproved interest in the business under this subparagraph because they were under compensated out of the ordinary for services rendered.

Here, as set out in the findings above, Jim Saunders has, for years, been performing numerous duties on behalf of the licensed business without pay. At the request of Licensee and since March 2007, Jim Saunders has reviewed the daily cash register receipts and supervised the business' bookkeeping. He has approved time sheets and signed payroll checks. He has determined which BOPE employees would cover shifts at the licensed premises. He has also dealt with the beer distributor and other suppliers and functioned as Licensee's representative in that regard. Because Jim Saunders was not compensated for the services he provided to the licensed business, this lack of compensation was "out of the ordinary" for such services, giving him an unapproved interest in the business pursuant to OAR 845-005-0311(3)(b).

(1) True name on application: Applications for licenses must specify the real and true names of all persons who own or have an interest in the business proposed to be licensed by the Commission, and these persons or in the case of corporations, a duly authorized officer, must sign the application.

(2) License privileges: The license privileges are available only to the persons specified in the application and only for the premises designated on the license.

(3) Interest in the business: For purposes of section (1) of this rule, the following persons have an "interest in the business":

* * * * *

(b) A person who does not receive any of the profits but receives compensation that is out of the ordinary for the services rendered. "Out of the ordinary" includes both over and under compensations;

(c) Any person or firm who contracts to provide food service or to manage or operate any part of the licensed premises, other than as an employee;

(d) Any person who invests money or other property in the licensed business, other than a stockholder. Any stockholder who owns ten percent or more stock must receive Commission approval (OAR 845-006-0475). For purposes of this subsection, a bona fide loan that entitles the lender to a return of only the principal and interest on the principal is not an investment.

b. Contracts to manage or operate the premises, other than as an employee.

Pursuant to OAR 845-005-0311(3)(c) a person who contracts to manage or operate any part of the licensed premises other than as an employee shall be deemed to have an interest in the licensed business. While there must be evidence of some agreement or contract, there is no requirement that the contract be written. *See e.g., Woahink Landing* (OLCC Final Order, 86-V-052, January 1987). In *Ski Bowl Beer Stube* (OLCC Final Order, 85-V-024, August 1985), the Commission held that where the licensee agreed to have another entity manage the premises, and the management agreement gave the entity control over the daily operation and supervision of the premises but made no provision for salary or other terms of employment, the entity had an unauthorized interest in the business under this rule.

As discussed above, the record establishes that Licensee agreed to have Jim Saunders manage and/or operate the licensed business. Jim Saunders is not an employee of the licensed business, yet he has performed numerous management and operational duties for the licensed business since Licensee obtained the license. Licensee has lived out of state for most of the time since the license was issued and is, in essence, an absentee owner. With Licensee's agreement and approval Jim Saunders was overseeing the daily operation of the licensed premises.

c. Invests money or other property in the licensed business, other than as a stockholder.

OAR 845-005-0311(3)d) deems "any person who invests money or other property in the licensed business, other than a stockholder" as having a financial interest in the business. In *Harry's Stagecoach Inn* (OLCC Final Order, 91-V-102, January 1992), the Commission held that persons who purchased kitchen and food items for the licensed business and spent money upgrading the restaurant's appearance had an interest in the business under this subsection because they invested money in the business.

In this case, Jim Saunders has spent time and money maintaining the licensed premises and has provided property to repair and replace equipment. He also pays for the workers' compensation insurance for Licensee's employees. Saunders has, therefore, invested money or other property in the licensed business as described in this subsection.

In short, the Commission has proven that Licensee knowingly allowed Jim Saunders to obtain an interest in the licensed business as defined in OAR 845-005-0311 without prior Commission approval in violation of OAR 845-006-0475(2).

4. Failure to Have Employees Sign Package Store Brochure

Pursuant to OAR 845-009-0130(2), an off-premises sales licensee must have an employee read, sign and date the Commission-provided brochure, *What Every Store Clerk Needs to Know About Selling Alcohol*, before allowing the employee to sell alcoholic beverages. The licensee is required to maintain the employee-signed brochure as long as the employee is employed by the licensee. OAR 845-009-0130(6).

OLCC Staff alleged that on September 4, 2008 and October 20, 2008 respectively, Licensee failed to have employees Roger Hill and Jessica Breshears read, sign and date the Commission-provided brochure in violation of OAR 845-009-0130(2).

Employee Jessica Breshears: On October 20, 2008, Investigator Evers saw Breshears selling alcoholic beverages as Licensee's employee. When the inspector asked to see Breshears' signed training brochure, Breshears told him she was unfamiliar with the brochure and had not read or signed it. Licensee (through Jim Saunders) acknowledged that Breshears had not read, signed and dated the brochure before she was allowed to sell alcoholic beverages. This violation has been established.

Employee Roger Hill: The evidence also establishes the violation with regard to employee Roger Hill. As noted above, OAR 845-009-0130 requires that the licensee have each sales employee read, sign and date the brochure. Although Hill signed and dated a Commission brochure in April 2006, he was not Licensee's employee at that time.⁶ Nothing in the rule suggests that a licensee may rely upon an employee signing the required brochure while working for another licensee. Rather, the rule requires that every licensee have its employees read and sign the brochure, regardless of the employee's previous employment with another licensee. There is no evidence to establish that Licensee had Hill read, sign and date the brochure once Licensee was issued the off-premises sales license in March 2007. Yet, Licensee employed Hill and allowed him to sell alcoholic beverages at the licensed premises. Therefore, Licensee failed to comply with the rule's training brochure requirement.

5. Alcohol on the Premises that the License Does Not Allow

OLCC Staff also alleged that from about March 26, 2007 to about January 14, 2009, Licensee permitted or had alcoholic liquor on the licensed premises which the license does not allow the licensee to sell or serve in violation of OAR 845-006-0345(6).⁷ Specifically, OLCC Staff asserted that Licensee's employee, Stacey Clark, purchased distilled spirits (whiskey) at the Burns liquor store for Jim Saunders and left the whiskey at the licensed premises for Saunders to pick up.

At hearing, Inspector Brown testified that Stacey Clark told him that while she worked at the licensed premises, Jim Saunders asked her to go to the Burns liquor store and buy him

⁶ The evidentiary record does not disclose where, or for whom, Hill was selling alcohol in April 2006.

⁷ OAR 845-006-0345(6) provides:

(6) Liquor on Premises: No licensee or permittee will have or permit any alcoholic liquor on the licensed premises which the license does not allow the licensee to sell or serve. Notwithstanding this requirement, a limited on-premises or brewery-public house sales licensee may have distilled spirits on the premises if the distilled spirits are used only for cooking, are kept in a container only in the food preparation area, and the container is clearly marked "for cooking only". Violation of this section is a Category V violation.

whiskey. Inspector Brown testified that Stacey Clark told him that she did so, and left the whiskey at the store for Jim Saunders to pick up. Inspector Brown also testified that both Stacey and Randy Clark told him they saw Jim Saunders drinking beer and/or whiskey at the licensed premises.

Jim Saunders admitted that he had Stacey or Randy Clark buy whiskey for him from the Burns liquor store, but denied that they brought the whiskey to the licensed premises. Saunders asserted that the Clarks brought the whiskey to the BOPE side of the building. He also testified that he has not drunk whiskey in more than two years, and therefore it was some time ago that the Clarks bought him any whiskey.

After considering the record, the Commission finds that this violation has not been proven by a preponderance of the evidence. To establish the violation, the evidence must show that Stacey Clark, Randy Clark or Jim Saunders brought distilled spirits onto the licensed premises after March 26, 2007. The only evidence supporting this position is the hearsay statements of Stacey and Randy Clark, and their statements are not specific as to when this may have occurred. Also, as noted above, Jim Saunders specifically denied having any whiskey on the licensed premises.

In *Rainbow Market* (OLCC Final Order, 08-V-124, October 2009), the Commission noted that whether an agency decision may rest entirely on hearsay evidence depends on whether the hearsay is reliable or substantial evidence. To determine whether hearsay is substantial evidence, the Commission looks to the “nonexclusive list of five factors” discussed in *Cole/Dinsmore v. DMV*, 336 Or 565 (2004).⁸ Here, on balance, the hearsay statements of Stacey and Randy Clark are not sufficiently reliable to support the determination that Licensee permitted distilled spirits on the licensed premises from March 2007 to January 14, 2009. First, neither Stacey Clark nor Randy Clark was called as a witness at hearing, and their availability, or lack thereof, was not explained. Second, the facts sought to be proven by the hearsay statements—whether and when the Clarks brought whiskey onto the licensed premises, or when they saw Jim Saunders drinking whiskey on the licensed premises—is crucial to whether this particular violation occurred. Third, a key portion of their hearsay statements were disputed at hearing by Jim Saunders, as he denied drinking or having any whiskey on the CS side of the building. Fourth, the efficacy of cross-examination of these witnesses is unknown, although it likely would have helped clarify what they saw and did and when they saw or did it. Fifth, the consequence of the decision (regarding a Category V violation, one of several alleged violations in this proceeding) is negligible, but still favors non-reliance on the hearsay in this context. While it is certainly possible that Stacey Clark, Randy Clark or Jim Saunders had whiskey on the

⁸ The *Cole/Dinsmore* court relied on the analytical model originally set out in *Reguero v. Teacher Standards and Practices*, 312 Or 402, 822 P2d 1171 (1991). In *Reguero*, the court established the following criteria for assessing the reliability of hearsay evidence: (1) whether there are alternatives to relying on the hearsay evidence; (2) the importance of the facts sought to be proved by the hearsay statements to the outcome of the proceeding and considerations of economy; (3) the state of the supporting or opposing evidence, if any; (4) the degree of lack of efficacy of cross-examination with respect to the particular hearsay statements; and (5) the consequences of the decision either way. *Reguero*, 312 Or at 418.

licensed premises at some point after Licensee obtained the license in March 2007, the record does not persuasively demonstrate whether or when this may have occurred. Therefore, as in *Rainbow Market*, this charged violation should be dismissed.

B. Penalty

Commission Staff proposes cancellation of Licensee's license based on the two restriction violations and the unauthorized interest violation. As set out in OAR 845-005-0355(1), failure to comply with a license restriction is a Category I violation. A violation of OAR 845-006-0475(2) is also a Category I violation. OAR 845-006-0500(7), Exhibit 1. A Category I violation makes the licensee ineligible for a license. OAR 845-006-0500(7)(a)(A). Under the Commission's guidelines, the standard penalty for a first Category I violation is cancellation of the license. OAR 845-006-0500(7), Exhibit 1.

In prior cases, the Commission has held that cancellation of a license may only result from substantial violations of license conditions and restrictions. In *Oceanside Restaurant & Lounge* (OLCC, Final Order, 88-V-123, August 1989), the Commission identified the following factors to consider in determining whether a violation of license restrictions is substantial:

- (a) the timing of the violation, with breaches early in the contract considered more likely to be substantial;
- (b) whether the violation was willful;
- (c) the number of violations;
- (d) whether the hardship on the licensee outweighs the importance of the conditions in ensuring compliance with the license condition.

Applying the *Oceanside Restaurant & Lounge* factors in this case demonstrates that the restriction violations were substantial. First, at least one of the violations occurred immediately. Even before the license was issued, Licensee gave Jim Saunders power of attorney to sign contracts and handle the bank accounts for the licensed premises. Once the license was issued, Saunders began overseeing the register receipts and bank accounts. This factor therefore weighs against Licensee. Second, Licensee was well aware of the restrictions when he allowed his brother to manage the licensed business. Inspector Fetterhoff explained to Licensee that because the Commission deemed Jim Saunders unlicensable, Saunders could not participate in the management or ownership of the business. Licensee assured Inspector Fetterhoff that Jim Saunders would not be involved in the licensed business. Then, contrary to his assurances, Licensee gave Jim Saunders power of attorney to sign contracts and handle the business bank accounts. Even though Licensee may have had legitimate reasons for returning to California and leaving Saunders in charge of the licensed premises, his violation of this restriction was nevertheless willful. The third factor also weighs against Licensee, because the violations were repeated. Finally, the hardship on Licensee does not outweigh the importance of the restrictions in ensuring compliance with the liquor laws.

In *Dad's Restaurant & Lounge* (OLCC Final Order, 06-V-029, December 2007), citing to *La Macarena* (OLCC Final Order, 00-V-116, August 2002), the Commission found that the fourth *Oceanside* factor counts against a licensee where "the breach strikes at the very heart of

the restriction or condition placed on the licensee, as the licensee would not be a good risk for compliance with alcoholic beverage laws without the restriction.” *Dad’s*, Final Order at 15. Here, as discussed above, the restrictions were imposed because the Commission considered Jim Saunders to be unlicensable. Without placing the restrictions on the license, the Commission had grounds to refuse the license because, as the real property’s owner, Jim Saunders had a financial interest in the licensed business. For these reasons, Licensee’s breach strikes at the very heart of the restrictions, and shows that Licensee is not a good risk for compliance with the liquor laws.

Licensee’s three Category I violations (two substantial license restriction violations and the unauthorized interest in the licensed business violation) warrant cancellation of the license. Having found that cancellation is the appropriate sanction for these three violations, it is not necessary to impose a separate sanction for the Category IV violation of failing to have employees read, sign and date the Commission-provided training brochure.

C. Refusal to Renew the License

The Commission also proposes to deny renewal of Licensee’s liquor license. Pursuant to ORS 471.313(4), the Commission “may refuse to license any applicant * * * if the Commission has reasonable ground to believe any of the following to be true”:

(4) That the applicant:

* * *

(g) Did not have a good record of compliance with the alcoholic liquor laws of the state and the rules of the Commission when previously licensed.

(h) Is not the legitimate owner of the business proposed to be licensed, or other persons have ownership interests in the business which have not been disclosed.

With regard to subparagraph (g), the Commission may count as evidence of a poor record of compliance charges that are proved for the first time during the license refusal contested case, as long as the Commission gives reasonable notice of the charges and provides the applicant an opportunity to contest the charges. *Riverside Restaurant & Lounge* (OLCC, Final Order, 94-L-008, December 1996).

In this case, Licensee was given reasonable notice of the charges and an opportunity to contest them. In the course of this contested case, the Commission has proved that Licensee violated both restrictions on the license and allowed his brother Jim Saunders to have an unauthorized interest in the business. Given this conduct, the Commission has grounds to refuse to renew the license.

When the refusal to renew is based on the licensee’s poor compliance record, the burden is on the licensee to demonstrate that it is a good candidate for future compliance with the liquor laws. See *Dad’s Restaurant & Lounge*, OLCC Final Order at 23. In *Quincy Store* (OLCC Final Order, 02-V-008/L-001, December 2002), the Commission found that factors to be considered in determining the existence of good cause include the period of time without violations as a licensee, the nature and seriousness of the violations, whether the violations were mitigated or aggravated, and acceptance of responsibility for the violation.

Licensee has not shown good cause to overcome the grounds for refusing the license. The restriction violations, particularly Jim Saunders' participation in the management or operation of the business and his unauthorized interest in the business, began when the license was issued in 2007 and have continued since then. The violations were substantial and serious, and Licensee has not accepted responsibility for them. Licensee is not a good candidate for future compliance with the liquor laws. Therefore, the Commission is entitled to refuse to renew Licensee's license.

FINAL ORDER

The Commission orders that the off-premises sales license held by Daryl W. Saunders, dba CS CONVENIENT SERVICES, 493 S. Kearney, Burns, Oregon be CANCELLED.

It is further ordered that the application to renew the off-premises sales license held by Daryl W. Saunders, dba CS CONVENIENT SERVICES, 493 S. Kearney, Burns, Oregon, be REFUSED.

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

Dated this 24th day of June, 2010.

/s/ Stephen A. Pharo

Stephen A. Pharo

Executive Director

OREGON LIQUOR CONTROL COMMISSION

Mailed this 24th day of June, 2010.

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.