

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

IN THE MATTER OF:) FINAL FINDINGS OF FACT
) CONCLUSIONS OF LAW
) AND ORDER
SUNSHINEE, INC.) OLCC-10-V-016
HOLLY GADOMSKI,) OLCC-10-V-016A
PRES/DIR/STKHLDER)
JACK GADOMSKI, VP) OLCC-10-V-016B
DBA JAMMERS (F-COM))
1987 12th Street SE)
Salem OR 97302)

HISTORY OF THE CASE

On February 16, 2010, the Oregon Liquor Control Commission (OLCC or Commission) issued a Violation Notice to Sunshinee Inc., Holly Gadomski, President, Director, Stockholder, Jack Gadomski, Vice-President (collectively Licensee), doing business as Jammers, located at 1897 12th SE, Salem OR 97302. The Notice alleged that Licensee permitted alcohol to be consumed on the licensed premises after 2:30 a.m., in violation of OAR 845-006-0425(1). Licensee made a timely request for hearing.

The Commission referred the request to the Office of Administrative Hearings on March 4, 2010. The case was assigned to Robert L. Goss, Administrative Law Judge (ALJ). On September 13, 2010, a prehearing conference was held. Licensee was represented by William Brandt. OLCC was represented by Anna Davis, Case Presenter. At that prehearing conference, a date for the hearing was selected and other procedural dates set. On November 2, 2010, OLCC issued an Amended Notice of Proposed License Suspension/Civil Penalty to Licensee. The Amended Notice alleged aggravating circumstances to the existing alleged violation and proposed a higher penalty for the violation. The OLCC considered Licensee's earlier request for hearing as valid for the Amended Notice and continued the hearing process.

A contested case hearing was held on November 4, 2010 in Salem Oregon. Licensee continued to be represented by Mr. Brandt and OLCC continued to be represented by Ms. Davis. Witnesses for OLCC were: OLCC Inspectors Steve Berrios and Jacki Miranda. Witnesses for Licensee were: Holly Gadomski, Laurie Cates and Michael Eichinger. The record closed at the conclusion of the hearing.

The Administrative Law Judge considered the record of the hearing and the applicable law and issued a Proposed Order mailed January 20, 2011. Licensee filed Exceptions to the Proposed Order on February 1, 2011. The ALJ responded to Licensee's Exceptions on February 2, 2011.

On June 23, 2011, 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:

ISSUES

1. Whether Licensee is responsible for a person consuming alcoholic beverages on the licensed premises after 2:30 a.m. OAR 845-006-0425(1).
2. If the violation is proved, what is the appropriate penalty?

EVIDENTIARY RULING

OLCC's Exhibits A1 through A6 were admitted into the record without objection. Licensee did not submit any exhibits.

FINDINGS OF FACT

1. Sunshinee Inc., Holly Gadomski, President, Director, Stockholder, Jack Gadomski, Vice-President (Licensee), doing business as Jammers, located at 1897 12th SE, Salem OR 97302 has held a Full On-Premises Sales (F-COM) license from the OLCC since October 1, 2007. Licensee has not been disciplined by the Commission before this incident. (Ex. A1.)

2. On January 1, 2010, at approximately 2:29 a.m., OLCC Inspectors Steve Berrios and Jacki Miranda entered the licensed premises to do a compliance check. The inspectors had previously received an anonymous call that the premises was having a 24 hour party for New Years. The caller stated that persons were invited to the bar and party after 2:30 a.m., but were told to bring their own liquor. (Ex. A2 at 1; test. of Berrios and Miranda.)

3. When the Inspectors entered the premises, they were greeted by the manager of the premises, Michael Eichinger. Inspector Miranda spoke with Corporate Principal (C/P) Holly Gadomski about the information stated on the reader board: "24 hour party New Years Rose Bowl." C/P Gadomski told Inspector Miranda that the premises was staying open later into the morning so patrons who had consumed alcohol would not have to leave right away. Inspector Miranda looked around the premises while speaking with C/P Gadomski and noted that most of the patrons were drinking from red plastic cups with ice and straws. C/P Gadomski assured Inspector Miranda that no one was consuming alcohol. (Ex. A2 at 2; test. of Miranda.)

4. At approximately 2:44 a.m., Inspector Miranda observed a male patron sitting at a table approximately three feet from the bar, holding a bottle of Session beer. As Inspector Miranda was about to ask C/P Gadomski about the beer, the patron drank beer from the bottle. Inspector Berrios went to the table and confiscated the partially filled bottle of beer from the patron. (Exs. A2 at 2, A5; test. of Miranda and Berrios.)

5. Inspector Berrios took the bottle of beer back to where Inspector Miranda was speaking with the bartender. At one point, the bartender tried to walk away with the bottle of beer, but returned after being told multiple times by Inspector Miranda not to take the beer bottle. (Exs. A2 at 2, A5; test. of Miranda and Berrios.)

6. Licensee also has a “red cup” policy, under which the servers serve patrons non-alcoholic beverages in red cups. All of Licensee’s employees are aware and understand that drinks in red cups do not contain alcoholic liquor. (Test. of Gadomski.)

7. Licensee’s staff on duty that night were not aware that someone was still drinking alcoholic beverages after 2:30 a.m. Licensee’s policy is to stop offering alcoholic beverages at approximately 1:30 to 2:00 a.m., and then begin taking alcoholic drinks from the patrons shortly thereafter, to have all alcohol removed from the patrons by the 2:30 a.m. deadline. Staff’s effort to remove alcoholic beverages from the patrons usually takes the form of walking through the premises, more than once, and looking for and removing any alcoholic beverages. (Test. of Gadomski.)

8. Before the OLCC inspectors arrived on the premises, C/P Gadomski personally checked the premises and removed any alcoholic beverages that she observed. C/P Gadomski knew the patron who later consumed the beer after 2:30 a.m., as he is a regular customer. When she did her walk through of the premises, C/P Gadomski did not observe any alcoholic beverages in the vicinity of that patron. That patron later told C/P Gadomski that he had hidden the beer in his jacket. The other employees on duty at the premises (Cates, a server, and Eichinger, the bartender/manager) also were involved in making sure that no alcohol remained with patrons after 2:30 a.m. Neither of them saw the patron with an alcoholic beverage before the inspectors observed him consuming the beer. (Test. of Gadomski, Cates and Eichinger.)

CONCLUSIONS OF LAW

1. A violation of OAR 845-006-0425(1) has been proven. Licensee is responsible for a patron consuming alcohol on the licensed premises after 2:30 a.m.

2. A suspension of the license for five days, or in the alternative, a civil penalty of \$825 in lieu of suspension, is an appropriate penalty.

OPINION

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).

Violation

The Commission alleges that Licensee violated OAR 845-006-0425(1) when a patron consumed alcohol on the licensed premises after 2:30 a.m. The rule states:

Except as provided by sections (2) and (3) of this rule, and OAR 845-015-0140, alcoholic liquor may be sold, dispensed, served, consumed on, or removed from licensed premises only between the hours of 7 a.m. and 2:30 a.m.

Subsections (2) and (3) of the rule and OAR 845-015-0140 do not apply here.

In this case, the record supports a finding that a patron consumed alcoholic liquor on Licensee's premises after 2:30 a.m.¹ The main issue, as argued by Licensee, is whether Licensee should be held responsible for that consumption.

Licensee contends that its employees, as well as C/P Gadomski, took every reasonable precaution and measure to ensure that no one was drinking past approximately 2:00 a.m., and that staff had no knowledge that the patron consumed an alcoholic beverage after 2:30 a.m. until an OLCC inspector notified them of the event.

OLCC staff argues that the record does not support Licensee's contention that staff were not aware that the patron had a hidden beer in his jacket and brought it out just before the inspectors arrived. However, the Commission believes the record does support Licensee's version of events. The Commission finds credible Licensee's evidence that C/P Gadomski reasonably attempted to remove all alcoholic beverages away from patrons before 2:30 a.m., but that this particular patron kept his bottle of beer hidden until just before the inspectors arrived. Regardless of whether staff were aware of this patron's actions, Licensee's contention is not a defense to the violation.

Because Licensee contends that C/P Gadomski and the staff were not reasonably aware that a patron had kept a bottle of beer and consumed it after hours until the inspectors saw it occur, Licensee argues that it did not "permit" the violation, referring to OAR 845-006-0347. That rule discusses other violations not at issue here (Noisy, Disorderly or Unlawful Activity and Drinking Alcohol Outside the Premises) and includes "permitting" as an element of the violation. However, the violation at issue here, OAR 845-006-0425(1), does not include an element of "permitting." In *McAnulty and Barry's* (OLCC Final Order, 93-V-048, October 1993), the Commission held that licensees are held responsible for violations of OAR 845-006-0425(1) whether or not they permitted the act. Also, in *Balzer's Pub and Grill* (OLCC Final Order, 99-V-019, March 2001), the Commission held that "allowing" an act need not be proven in order to hold a licensee responsible for the violation of alcohol consumption after hours.

Licensee argues that they did not willfully or negligently violate the rule, however, those criteria are not elements or defenses to this violation.

Licensee contends that they made a "good faith effort" to remove alcoholic beverages from the patrons before the 2:30 a.m. deadline. "Good faith" is described as an element of a violation not charged here (OAR 845-006-0345(9), failing to prevent further consumption of

¹ Consistent with the evidence in the record and the undisputed findings of fact, the Commission corrected the time from 2:20 a.m. to 2:30 a.m.

alcohol by visibly intoxicated persons.) The rule also adds “knowingly” as an element of a violation. Neither “good faith” or “knowingly” are defenses to a violation of consuming alcohol after hours. Good faith efforts can be a basis for mitigation of a penalty, and Licensee’s efforts in this regard are discussed below in the penalty section of this order.

Licensee also argues that OLCC took an unreasonable amount of time after the violation to begin the violation process. The violation occurred on January 1, 2010. After review by OLCC’s Regional Manager, the violation was served on Licensee on February 16, 2010. Licensee requested a hearing on March 2, 2010. *Alder Street Market* (OLCC Final Order, 89-V-102, November 1989) held that a delay in notice of a violation to a licensee of six weeks after the Commission received the complaint was not unreasonable. In that case, the Commission noted that the licensee did not show substantial prejudice where it had a full opportunity to cross examine the witnesses and examine the documentary evidence. In this case, the Notice of the Violation was issued six weeks after the inspectors observed the violation and Licensee was aware of the potential violation when the inspectors spoke with C/P Gadomski on January 1, 2010. In any event, the delay in issuing the Notice of Violation was not unreasonable. Licensee’s argument is not persuasive. See also *OLCC Agency 1158* (OLCC Final Order, 098-RO-002, December 2009) (finding no unreasonable delay where Notice of Violation issued eight months after sale to visibly intoxicated patron.)

Licensee also argues that it should not be held responsible for this violation because the Commission did not prove that Licensee sold the beer to the patron. OAR 845-006-0425(1) does not require that alcoholic liquor consumed after hours be sold to the patron by the licensee. Any of the separate actions described in the rule (selling, dispensing, serving, consuming on or removing from the premises) is a basis for the violation.

A violation of OAR 845-006-0425(1) has been established.

Penalty

Licensee is charged with a Category IV violation, and the standard sanction for the first such violation is a seven day license suspension or a fine of \$1,155. See OAR 845-006-0500. This is Licensee’s first violation. OLCC staff also alleges two aggravating circumstances, the first being that two or more employees were involved in the violation. OAR 845-006-0500(7)(c) includes the involvement of more than one employee in a violation as an aggravating factor. OLCC staff alleges a second aggravating circumstance, that C/P Holly Gadomski was personally involved in the violation. Prior Commission case law establishes that “penalties shall be aggravated when violations are committed personally by licensees.”² *P-Mart* (OLCC Final Order, 92-V-098, April 1993). In *Parrilla Grill* (OLCC Final Order, 01-V-082, August 2002), the Commission established the basic rule that each proven aggravating factor will increase the standard suspension length by two days or add \$330 to the standard civil penalty amount. Here, given the strict liability nature of the offense, and that the employees and Licensee were present, but not facilitating the offense through actions other than keeping the premises open, the Commission declines to impose aggravation. OAR 845-006-0500(7)(c) (“The Commission may

² Pursuant to OAR 845-006-0301 and 945-006-0475(1)(d), principal officers “are included as licensees under the license.”

always increase or decrease a sanction to prevent inequity or to take account of particular circumstances in the case.”).

Mitigating factors must be considered as well. First, Licensee claims that its lack of prior violations should mitigate or eliminate the penalty. In the past, mitigation was allowed on this basis, but the Commission removed that as a mitigation factor from the rule, effective May 2009. In effect, the Commission’s current penalty structure already takes into account the past history of violations, or lack thereof, by starting sanctions at a lower level for licensees with no prior violation history, and then raising the level of sanctions if a prior history of violations is proven. No further mitigation is available on this basis.

Second, as discussed in the Violation portion of the Opinion above, while “good faith” may not be a defense to this violation, it may serve as a mitigating factor. Mitigation has been found to be appropriate where a licensee made good faith effort to avoid violations. *O’Ryan’s Irish Sports Pub* (OLCC Final Order, 89-V-190, November 1990.) Licensee argues that its staff acted in good faith and made reasonable attempts to clear alcoholic beverages from the premises before the 2:30 a.m. deadline. In that regard, OLCC staff cites to *Don Juan’s* (OLCC Final Order, 88 V-003, May 1988), which held that compliance efforts are not mitigating circumstances where some efforts are made to address problems, but those efforts were lacking in many respects. And, if a licensee could have reasonably done more to prevent violations, that factor can offset the good faith mitigation. *Casa Del Rio* (OLCC Final Order, 88-V-033, August 1988). OLCC staff contends that the Licensee could have done more to prevent after hours consumption.

While a licensee may always have the ability to do more to prevent after hours consumption, the standard is whether those required further efforts were reasonable. Here, Licensee set a clear policy that required employees to make multiple rounds of the premises after 2:00 a.m., and remove any alcoholic beverages found. Licensee also attempted to make it easier to distinguish alcoholic beverages from non-alcoholic by dispensing non-alcoholic beverages in red cups. Here, the record establishes that a patron hid a bottle of beer in his jacket as employees made their rounds, and then brought it out in the open afterwards. There is no evidence that the patron had the beer out before the inspectors arrived, as they were the first persons to see him with it after hours.³ Therefore, C/P Gadowski and the other employees would not have reasonably been aware that the patron had a beer until the observations by the inspectors. On these facts, it would not be reasonable to expect staff to pat down or physically search every patron to ascertain if the patron was hiding alcoholic beverages.

In *O’Ryan’s Irish Sports Pub*, cited above, mitigating circumstances were established when a licensee had planned to have enough employees on hand to handle a large crowd, but due to circumstances beyond licensee’s control, two persons whom he had anticipated being able to

³ The Commission recognizes that the ALJ’s statement that “[t]here is no evidence that the patron had the beer out before the inspectors arrived” appears to conflict with the prior statement that the “patron kept his bottle of beer hidden until just before the inspectors arrived.” This was not raised by licensee in its exceptions nor by OLCC staff. This possible conflict is immaterial to the mitigation analysis. Regardless of whether the patron revealed the beer before 2:29 a.m., when the inspectors arrived, or thereafter, it is clear that the patron was hiding the alcohol from Licensee and that the first time either Licensee or OLCC saw the beer was at 2:44 a.m.

work were not able to do so, and a sale to a minor resulted. That determination is analogous here, in that a patron hiding an alcoholic beverage was not reasonably within Licensee's control. Under these circumstances, a mitigating circumstance has been shown, and the sanction should therefore be reduced by two days or \$330.

The record establishes that the standard suspension period for this violation of seven days is reduced by one mitigating factor down to five days. Similarly, the record established that the standard civil penalty of \$1,155 is reduced by one mitigating factor to \$825. Consequently, the appropriate penalty for Licensee's violation of OAR 845-006-0425(1) is a five day suspension of Licensee's license or a civil penalty of \$825.

FINAL ORDER

The Commission orders that the Full On-Premises Sales (F-COM) license held by Sunshinee Inc., Holly Gadomski, President/Director/Stockholder, Jack Gadomski, Vice-President, doing business as Jammers, located at 1897 12th SE, Salem, Oregon, be suspended for five (5) days for violation of OAR 845-006-0425(1). Licensee may pay a civil penalty of \$825 in lieu of the suspension.

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

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

Dated this 5th day of July, 2011.

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

Mailed this 5th day of July, 2011.

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.