

On February 18, 2011, the Commission considered the record of the hearing, the applicable law, the Proposed Order of the Administrative Law Judge, Licensees' Exceptions to the Proposed Order, Staff's Comments on the Proposed Order and the Administrative Law Judge's Response to Licensees' Exceptions and Staff's Comments. Based on this review and the preponderance of the evidence, the Commission enters the following:

ISSUES

1. Whether, on August 29, 2009, Licensees permitted an employee to mix, sell or serve alcoholic liquor for consumption on the licensed premises without a valid service permit in violation of ORS 471.360(1)(b).
2. Whether, on December 12, 2009, Licensees' employee failed to verify the age of two minors before allowing them to buy or be served an alcoholic beverage when they reasonably appeared to be under 26 years of age in violation of OAR 845-006-0335(1)(a)(b)(c).
3. If the violations occurred, what is the appropriate sanction?
4. Whether the Commission has grounds to refuse to renew Licensees' licenses under ORS 471.313(4)(g) because Licensees did not have a good record of compliance with the liquor laws of this state while licensed.
5. If so, whether Licensees have shown good cause to overcome the Commission's refusal to renew the license.

EVIDENTIARY RULING

Exhibits A1 through A19, offered by the Commission, were admitted without objection. Licensees offered Exhibits L1 and L2. Exhibit L2 was admitted without objection. The Commission objected to Exhibit L1 as irrelevant. That objection was overruled and Exhibit L1 was admitted into the record.

FINDINGS OF FACT

1. Licensee Ric Donnelly, dba Lava Lanes of Medford, located at 2980 Crater Lake Hwy in Medford, Oregon, held a Full On-Premises Commercial (F-COM) Sales license for the premises from July 25, 2000 through August 9, 2005. (Ex. A1 at 3.) From August 9, 2005 through the present, Licensee Ric Donnelly and Licensee Kennedy & Donnelly, LLC, Managing Member Kathryn Kennedy, have jointly operated the licensed premises under the name Lava Lanes of Medford/Donnelly's Sports Pub & Grill. Licensees have jointly held an F-COM Sales license for the licensed premises since August 9, 2005. (Exs. A1 and A2.)¹
2. Licensee Ric Donnelly had three violations at the licensed premises prior to August 9, 2005. On March 24, 2003, Mr. Donnelly paid a fine of \$693 for a March 1, 2003 violation of allowing a minor in a prohibited area. On February 7, 2005, Mr. Donnelly was given credit for the purchase of age verification equipment in lieu of paying a fine for a

¹ This finding of fact was revised with the concurrence of the Administrative Law Judge to reflect that there is one license at the premises with two co-licensees.

December 29, 2004 violation. On April 25, 2005, Mr. Donnelly paid a fine of \$693 for a March 25, 2005 violation of failing to verify the age of a person appearing under the age of 26. (Ex. A1 at 2-3).²

3. On March 11, 2008, the Commission issued a Notice of Proposed License Suspension/Civil Penalty to Licensees based on an allegation that on December 15, 2007, two of Licensees' employees failed to verify the age of a minor, who reasonably appeared to be under 26 years of age, before allowing him to buy or be served an alcoholic beverage in violation of OAR 845-006-0335(1)(a)(b)(c), a Category III violation. (Ex. A3.) Licensees resolved the matter by admitting the violation, paying a fine of \$330 and installing age verification equipment to offset a portion of the civil penalty. (Exs. A4, A2 at 1, A1 at 1; test. of Roberts.)

4. On June 11, 2009, the Commission issued a Notice of Proposed License Suspension/Civil Penalty and Removal from Responsible Vendor Program to Licensees based on an allegation that on April 16, 2009, Licensees' employee failed to verify the age of a minor, who reasonably appeared to be under 26 years of age, before allowing him to buy or be served an alcoholic beverage in violation of OAR 845-006-0335(1)(a)(b)(c), a Category III violation. (Ex. A5.) Licensees resolved the matter by admitting the violation and paying a civil penalty of \$3,795. In addition, the Commission removed Licensees from the Responsible Vendor Program because the Commission found, as an aggravating factor, that Licensees' employee failed to use age verification equipment prior to selling alcohol to a minor. (Exs. A5 at 1-2, A6.)³

5. On August 29, 2009, OLCC Inspector Matthew Roberts visited the licensed premises for a compliance check. Mr. Roberts observed two women behind the bar serving alcoholic beverages. Mr. Roberts asked both women to show him their OLCC service permits. The bartender, Summer Thompson,⁴ provided a valid service permit. The other employee, Felicia Knutson, provided a photocopy of an expired temporary permit dated April 18, 2008. Ms. Knutson told Mr. Roberts that she had been serving alcohol at the licensed premises for approximately one year. Ms. Knutson also stated that she thought that she might have a valid permit, but had not received it in the mail because she had moved several times. (Ex. A7 at 2-3; test. of Roberts.)

6. Mr. Roberts left the licensed premises and went to the local OLCC office. Mr. Roberts searched the OLCC's database and determined that Ms. Knutson did not have a valid service permit. However, the records showed that Ms. Knutson had completed her server's education coursework on April 18, 2008. (Ex. A7 at 3; test. of Roberts.)

7. Mr. Roberts then returned to the licensed premises and issued Ms. Knutson a criminal citation for serving alcohol without a service permit. Mr. Roberts also informed Ms. Thompson and the manager on the premises of the violation. Mr. Roberts advised the manager that Licensees would likely be receiving an administrative citation for allowing an employee to serve alcohol without a permit. (Ex. A7 at 3; test. of Roberts.)

² This finding of fact was added with the concurrence of the Administrative Law Judge to reflect Licensee Ric Donnelly's compliance history for the period prior to August 9, 2005.

³ This finding of fact was revised with the concurrence of the Administrative Law Judge to include the fact that Licensees were removed from the Responsible Vendor Program for failure to use age verification equipment at the time of the sale to a minor on April 16, 2009.

⁴ Summer Thompson is now known as Summer Williams. Ms. Williams testified in the hearing.

8. Ms. Knutson submitted an application for a service permit to the Commission on September 9, 2009. The Commission issued a service permit to Ms. Knutson on September 15, 2009. (Ex. A11.)

9. On September 30, 2009, Ms. Knutson pled guilty to, and was convicted of, mixing, selling or serving alcoholic liquor for consumption without a valid service permit in violation of ORS 471.360(1)(a). (Ex. A10.)

10. On December 12, 2009, OLCC Inspector William Bedsole conducted a minor decoy operation at a number of locations in Medford, including the licensed premises at issue in this case. Mr. Bedsole did not select the locations at which he performed the operation, but worked from a list prepared by another OLCC inspector. At approximately 4:44 p.m., Mr. Bedsole entered the licensed premises with minor decoys Joshua Mak and Stephen Meador. Mr. Mak, born February 6, 1990, was 19 years old. Mr. Meador, born June 6, 1989, was 20 years old. (Ex. A12 at 2-3.)

11. Mr. Mak and Mr. Meador went to the bar at the licensed premises and sat down. Licensees' employee, Jessie Caldwell, asked each of them what they wanted to order. Each ordered a pint of Bud Light beer. Ms. Caldwell asked to see their identifications. Both young men gave Ms. Caldwell their driver licenses. Ms. Caldwell examined the licenses, gave them back to the gentlemen, and then served them two pint glasses of beer. Mr. Mak then paid Ms. Caldwell \$8.00 for the two beers and the two gentlemen left the licensed premises. Ms. Caldwell did not use age verification equipment to confirm Mr. Meador's and Mr. Mak's ages prior to serving them alcohol. (Exs. A12 and A13; test. of Bedsole & Meador.)⁵

12. Mr. Bedsole then approached Ms. Caldwell and identified himself. Mr. Bedsole informed Ms. Caldwell that she had just sold alcohol to two minors. Ms. Caldwell stated that she had checked their identifications and must have misread them. She told Mr. Bedsole that the two men appeared to be her age, 21. (Ex. A12 at 3.)

13. Ms. Caldwell was visibly upset when speaking with Mr. Bedsole. She began to cry, went to the kitchen area, and came back a few moments later with her purse. She gave her identification to Mr. Bedsole, and left again. After several minutes, other employees told Mr. Bedsole that Ms. Caldwell had been terminated and was trying to leave. Mr. Bedsole went outside and met with Ms. Caldwell and with Officer Wulff of the Medford Police Department. Mr. Wulff cited Ms. Caldwell for furnishing alcohol to a minor. (Ex. A12; test. of Bedsole.)

14. Ms. Caldwell had worked for Licensees for only two or three days prior to December 12, 2009. She had a valid temporary service permit at the time. Licensees later discharged Ms. Caldwell for serving Mr. Mak and Mr. Meador. (Test. of Williams and Donnelly.)

15. Mr. Mak appeared to be his true age on December 12, 2009. He was clean shaven, with dark and short cropped hair. He had unlined facial features and a youthful appearance. (Ex. A14.) His driver license on December 12, 2009 showed his true birthdate and

⁵ This finding of fact has been revised with the concurrence of the Administrative Law Judge to reflect that Ms. Caldwell did not use age verification equipment to confirm Mr. Meador's and Mr. Mak's ages prior to serving them alcohol.

included the words “UNDER 21 UNTIL 02-06-2011” in yellow type on a red background square that surrounded his photograph. (Ex. A15.)

16. Mr. Meador appeared to be his true age on December 12, 2009. He was clean shaven, with dark and short cropped hair. He had unlined facial features and a youthful appearance. (Ex. A16.) His driver license on December 12, 2009 showed his true birthdate and included the words “UNDER 21 UNTIL 06-06-2010” in yellow type on a red background square that surrounded his photograph. (Ex. A17.)

17. Mr. Donnelly has monthly meetings with bar employees to discuss various workplace issues. At each meeting he emphasizes the need for servers to check identification. Ms. Caldwell had not attended one of these meetings because she had only worked for Licensees for a short period. Licensees have installed age verification equipment, but have not adopted protocols to govern when it should be used. Licensees have not instructed their employees that they are required to use the equipment. (Test. of Donnelly.)

18. The licensed premises includes a bar, a bowling alley, and an arcade. The business has 63 employees. Its payroll in 2009 was \$573,176.45. It had gross receipts of more than \$224,000 in 2009 plus \$579,644.65 in net proceeds from the Oregon Lottery. However, the business has lost money for at least the last two years. (Test. of Kennedy.) If Licensees lose their licenses, they will also lose their contract with the Oregon Lottery and will probably not be able to continue operating the business. (Test. of Donnelly.)

CONCLUSIONS OF LAW

1. On August 29, 2009, Licensees permitted an employee to mix, sell or serve alcoholic liquor for consumption on the licensed premises without a valid service permit in violation of ORS 471.360(1)(b).

2. On December 12, 2009, Licensees’ employee failed to verify the age of two minors before allowing them to buy or be served an alcoholic beverage when they reasonably appeared to be under 26 years of age in violation of OAR 845-006-0335(1)(a)(b)(c).

3. The appropriate sanction is license cancellation.

4. The Commission has grounds to refuse to renew Licensees’ licenses under ORS 471.313(4)(g) because Licensee did not have a good record of compliance with the liquor laws of this state while licensed.

5. Licensees have not shown good cause to overcome the Commission’s refusal to renew the license.

OPINION

1. Permitting Employee to Mix, Serve, or Sell Alcohol without a Permit

On August 29, 2009, Licensees’ employee Felicia Knutson was serving alcohol at the licensed premises. She did not have a valid service permit at the time. ORS 471.360(1)(b) provides:

No licensee of the commission shall permit any person to mix, sell or serve any alcoholic liquor for consumption on licensed premises unless such person has a valid service permit issued by the commission.

The Commission employs two tests to determine whether a licensee “permitted” the prohibited activity. A licensee may acquiesce by failing to prevent the employee from working without a permit. *See, e.g., Cal Sport* (OLCC, Final Order, 02-V-021, April 2003). In that case, the licensee failed for 16 months to verify whether an employee had a service permit. The Commission has also used a knowledge attribution analysis to find that a licensee permitted certain conduct. In this context, “permitting” involves two elements: knowledge and the failure to take reasonable steps to prevent or control the prohibited activity. With respect to the knowledge element, the Commission imputes an employee’s knowledge to the licensee. If the licensee fails to take reasonable steps to verify the existence of a permit or prevent the employee from serving without one, the licensee has violated ORS 471.360(1)(b). *Cal Sport*, Final Order at 5; *see also Tony's Tavern* (OLCC, Final Order, 06-V-012, August 18, 2006).

Licensees did not dispute this violation. Although Ms. Knutson had completed server education classes and received a temporary service permit in April 2008, that permit expired 45 days after it was issued. As of August 29, 2009, Ms. Knutson had been working for Licensees for approximately one year. Had Licensees asked Ms. Knutson to produce a copy of her permit at any time during that 12 month period, she could not have done so. At the time of the violation, Ms. Knutson told the OLCC inspector that she had moved several times and may simply not have received her service permit. Even if that was the case, however, Ms. Knutson must have known that she had never received one. There is no evidence in the record to suggest that Ms. Knutson had any reason to believe that the Commission had actually issued her a permit. The evidence therefore demonstrated that Licensees permitted Ms. Knutson to serve and sell alcohol without a service permit by failing to verify whether Ms. Knutson had such a permit.

The Commission also alleged, in the alternative, that Licensees failed to verify that Ms. Knutson had a valid service permit or pending application, and/or that Licensees failed to personally deliver a completed service permit application and continue to verify that Ms. Knutson had taken and passed a Server Education Course and been issued a service permit, in violation of OAR 845-009-0015(1)(2)(3)(4). However, because the evidence established a violation of ORS 471.360(1)(b), the alternate violation should be dismissed.

2. Sale of Alcohol to Minors

The Commission also alleged that Licensees’ employee, Jessie Caldwell, failed to verify the age of two minors, Joshua Mak and Stephen Meador, before allowing them to buy or be served an alcoholic beverage when they reasonably appeared to be under 26 years of age, a violation of OAR 845-006-0335(1)(a)(b)(c).⁶

⁶ 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

Licenseses did not dispute the facts underlying this violation. On December 12, 2009, Licenseses' employee, Jessie Caldwell, sold and served alcohol to two minors. Although Ms. Caldwell checked their identification, she apparently did not pay attention to the clear print on the licenses which indicated that both gentlemen were under age 21. Licenseses concede that Ms. Caldwell erred by serving the two minors, but contend that they should not be held responsible for Ms. Caldwell's error which they characterize as "gross negligence."

OAR 845-006-0362 provides:

Each licensee may be held responsible for violation of any liquor control law or administrative rule or regulation of the Commission affecting his license privileges and for any act or omission of his servant, agent, employee, or representative in violation of any law, municipal ordinance, administrative rule, or regulation affecting his license privileges.

Nothing in the above rule absolves a licensee from responsibility for the grossly negligent acts or omissions of its employees. Moreover, the Commission has previously held a licensee responsible for an *intentional* sale of alcohol to minors. In *Main Street Texaco & Mini Mart* (OLCC, Final Order, 00-V-069, October 31, 2001), the licensee's employee sold alcohol to a 17 year-old boy for \$20. Although the alcohol came from the licensee's cooler, the employee kept the money from the sale for himself. The licensee argued that it should not be held responsible for the violation because it occurred outside the course and scope of employment. The Commission rejected that argument and held that it was appropriate to hold the licensee liable because the act occurred when the employee was on duty. *Id.* at 6-8. Thus, the Commission held the licensee responsible even though the employee in that case clearly was acting contrary to the employer's interest, and converted the proceeds from the sale to his own use.

Given that the Commission has held a licensee liable for intentional violations of liquor laws, there is no reasonable basis for exempting a licensee from responsibility for the grossly negligent acts of its employees. As conceded by Licenseses, Ms. Caldwell sold alcohol to two minors despite having seen their driver licenses which clearly showed them to be under age. Licenseses are responsible for that violation of OAR 845-006-0335(1)(a)(b)(c).

3. Sanction

The Commission treats violations of ORS 471.360(1)(b) (allowing sale without a service permit) and OAR 845-006-0335(1)(a)(b)(c) (failure to verify the age of a minor), as Category III violations. The standard sanctions increase in severity for each subsequent violation within a two year period. OAR 845-006-0500(8). For the first violation, the standard sanction is a

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) Licenseses 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.

license suspension of 10 days or a fine of \$1,650. The standard sanction for a second Category III violation is a license suspension of 30 days or a fine of \$4,950. The standard sanction for a third such violation is a 30-day license suspension. The standard sanction for a fourth violation is license cancellation.

Licensees had two Category III violations during the two years prior to the violations alleged in this case. The first was on December 15, 2007, the second on April 16, 2009. Both violations were for failing to verify the age of a minor in violation of OAR 845-006-0335(1)(a)(b)(c). The violations in this case occurred on August 29 and December 12, 2009. Thus, the allegations at issue are the third and fourth Category III violations within a two year period. Because both violations have been proven, the standard sanction would therefore be license cancellation.

The Commission's standard sanctions, however, are guidelines and are not mandatory. OAR 845-006-0500(7)(c) provides

These sanctions are guidelines. 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.

With regard to the violation of ORS 471.360(1)(b), the Commission asserts that the circumstances are aggravated by the length of time that Licensees permitted Ms. Knutson to serve alcohol without a permit. In *Rick's White Horse Restaurant & Lounge* (OLCC Final Order, 04-V0-36, April 2005), the Commission found aggravating circumstances where the licensee permitted his employee to work as a bartender for more than six months without a service permit. In the present case, Ms. Knutson worked for approximately one year without a valid service permit. Therefore, aggravation is warranted.

Licensees argued that the sanction should be mitigated for the violation of ORS 471.360(1)(b) for two reasons. First, Licensees contended that neither Mr. Donnelly nor Ms. Kennedy were personally involved in the violation. This is not a valid basis for mitigation. The Commission has held that *aggravation* is warranted when a licensee personally commits the violation. *P-Mart* (OLCC, Final Order, 92-V-098, April 1993). This implies that the standard sanction assumes a lack of personal involvement by a licensee. The Commission made this point clear in *Dad's Restaurant & Lounge*, (OLCC, Final Order, 06-V-029, December 2007):

The Commission declines to give mitigation for the following * * * *The restriction violations were committed by employees rather than by licensee. Mitigation is not appropriate on this basis.* Violation committed by the licensee personally is a cause for

aggravation; that a violation or violations were not committed by the licensee personally simply results in no aggravation for this factor. (Emphasis in original).

In addition, given the extended period of time that Ms. Knutson worked without a permit, it cannot be said that Licensees had *no* personal involvement. They had the responsibility to ensure that its employees who served alcohol were legally permitted to do so. For a period of approximately one year, they failed to perform that responsibility.

As a separate basis for mitigation, Licensees assert that they took immediate steps to resolve the problem by ensuring that Ms. Knutson secured a service permit shortly after the violation. This argument was rejected by the Commission in *Tony's Tavern* (OLCC, Final Order, 06-V-012, August 2006). In that case, the Commission held that mitigation was not warranted merely because the licensee required its employee to secure a permit *after* the Commission discovered a violation. The Commission noted that licensee's subsequent actions were required to comply with the law and were therefore not a separate basis for mitigation.

With regard to the violation of OAR 845-006-0335(1)(a)(b)(c), the Commission asserts that the circumstances are aggravated by Ms. Caldwell's failure to use age verification equipment purchased as an offset to a previous penalty. This factor is specifically listed as a basis for aggravation in OAR 845-006-0500(7)(c). *See also, Hunter's RV Park* (OLCC, Final Order, 06-V-068, February 2007)(Finding aggravation where a licensee failed to use age verification equipment purchased to offset penalty for previous violation.)

In this case, Licensees noted that Ms. Caldwell was a new and inexperienced employee. Licensees also asserted that they held regular staff meetings at which they stressed the importance of checking identification. However, because Ms. Caldwell had worked for Licensees for two or three days, she had never been to such a staff meeting. Moreover, it is unclear how such a staff meeting would have made a difference in this case. Ms. Caldwell *did* check identification, but failed to observe clear evidence on the documents indicating that the two gentlemen were under age 21. If Ms. Caldwell had used the age verification equipment, it is likely she would have discovered her error. However, Licensees had no protocols in place that required Ms. Caldwell, or any other employee, to use of that equipment. Had Licensees implemented such protocols, it is more likely that their employees would have avoided serving alcohol to persons under the age of 21. Thus, in this case it is appropriate to treat the failure to use age verification equipment as an aggravating factor.

Licensees also contend that the Commission unfairly timed the December 12, 2009 decoy operation so as to allow it to issue a fourth Category III violation within two years. Licensees correctly observe that if the violation occurred a mere four days later, then it would have been only the third violation within a two year period and the standard sanction would not be license cancellation. Licensees also assert that the Commission acted improperly by not citing them for the August 29, 2009 violation until February 2010, after the December 12, 2009 violation.

It is unclear why Licensees believe that the Commission's actions were improper. Licensees cite to no authority for the proposition that the Commission was required to issue a citation for the August 29, 2009 violation before the December 12, 2009 incident. Licensee Donnelly asserted that if he had been put on notice that he had incurred a third Category III violation in August, he could have taken steps, such as hiring additional security staff, to prevent a fourth violation. This argument appears to suggest that Licensees were willing to take a risk

that they would incur a third violation, but would have been extra vigilant to prevent a fourth. In effect, Licensees argue that they relied on the existence of only two Category III violations and were willing to accept the risk of a third one. However, Licensees were under the same obligation to comply with the law regardless of the number of violations or the potential consequences. The Commission's failure to cite Licensees for the August incident did not cause Ms. Caldwell to misread the identifications. Nor could Licensees have relied on the absence of an earlier citation in electing not to establish protocols for use of the age verification equipment. In short, Licensees would have been under the same legal duty in December 2009 even if the August violation had not occurred.

Licensees also assert that the loss of their liquor license would have a negative impact on the local economy. Licensees employed 63 people in 2009 with a payroll of more than \$573,000. Should they lose their liquor license, they would also lose their Oregon Lottery Contract and thereby lose two revenue streams. Licensees contend that because the business has been losing money for the last two years, such a loss in revenue would likely make continued operation impossible.

While these consequences are unfortunate, they do not provide a valid basis for mitigating the penalty. The standard penalty in this case is license cancellation. Such a penalty would likely have drastic financial consequences for *any* licensee. However, the Commission is not required to ignore its penalty matrix, or to forego license cancellation, based solely on the economic consequences that might befall the licensee.

Licensees also note that if they were to cease operations, it would lead to the loss of employment and economic activity in the local community. Licensees argue that the legislature requires the Commission to take into account broader economic consequences when enforcing state liquor laws. ORS 471.030 sets forth the public mission of the OLCC as follows:

- (1) The Liquor Control Act shall be liberally construed so as:
 - (a) To prevent the recurrence of abuses associated with saloons or resorts for the consumption of alcoholic beverages.
 - (b) To eliminate the evils of unlicensed and unlawful manufacture, selling and disposing of such beverages and to promote temperance in the use and consumption of alcoholic beverages.
 - (c) To protect the safety, welfare, health, peace and morals of the people of the state.
- (2) Consistent with subsection (1) of this section, it is the policy of this state to encourage the development of all Oregon industry.

While subsection (2) of the above statute suggests that the Commission may not ignore economic effects of its actions, that consideration is expressly subordinate to the provisions of subsection (1) which requires the Commission to regulate the sale of alcoholic beverages to prevent abuse and to protect public safety, health, welfare and morals. Thus, the Commission cannot excuse violations of liquor laws under the general rubric of economic development. Any

actions taken by the Commission to encourage economic development must be consistent with the express public welfare provisions set forth in ORS 471.030(1)

Again, while the economic consequences that may befall the community are unfortunate, they flow directly from the Licensees' failure to adhere to the legal responsibilities associated with holding liquor licenses. The Commission is not required to allow Licensees to continue in operation indefinitely, despite repeated violations of liquor laws, simply to avoid potential economic harm. To the contrary; ORS 471.030 requires the Commission to first consider protection of the public from problems associated with the sale and consumption of alcohol. Any consideration of economic consequences must be subordinate to that duty.

4. License Refusal

a. Record of Compliance When Previously Licensed.

Pursuant to ORS 471.313(4)(g), 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.

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, Licensees were given reasonable notice of the charges at issue in this case and were provided an opportunity to contest them. In the course of this contested case, the Commission has proven that Licensees committed two Category III violations. The next question is whether these violations, and the two previously adjudicated violations, give the Commission "reasonable grounds to believe" that Licensees "did not have a good record of compliance" sufficient to justify the refusal to renew the license.

Between December 15, 2007 and December 12, 2009, Licensees committed four separate Category III violations, three of which involved the failure of an employee to verify the age of a minor. Licensees installed age verification equipment to offset the penalty for one of those violations, but then failed to ensure that the equipment was used, leading to two additional Category III violations; one on April 16, 2009 and finally on December 12, 2009. In addition, Licensees allowed an employee to work in a position serving alcohol for approximately one year without a valid service permit. It thus appears that over a period of two years, Licensees failed to take even minimal steps (such as verifying the existence of a service permit, or requiring the use of age verification equipment) to prevent violation of liquor laws. This constitutes a poor record of compliance while licensed, which entitles the Commission to refuse to renew Licensees' license.

b. Good Cause Exception.

The Commission has held that a prior record of violations may be overcome as a ground for refusal where the evidence shows that despite the violation record, the applicant would not be a poor risk for future compliance with the alcoholic beverage laws. *See, e.g., Crane Supply Tavern* (OLCC, Final Order, 85-L-019, August 1985) (evidence established that future violations were unlikely and the area had a need for the license); *Hale's Tavern* (OLCC, Final Order, 85-L-010, June 1985) (good cause shown where applicant had only one violation in nine years as a licensee, the violation was committed by applicant's employee rather than the applicant personally and the applicant took swift action to prevent recurrence of violation). 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. *See, e.g., Quincy Store* (OLCC Final Order, 02-V-008/L-001, December 2002.)

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 this case, Licensees did not offer any evidence to demonstrate that future violations would be unlikely. Despite repeated sanctions, including payment of civil penalties and installation of age verification equipment, Licensees have not shown an ability to establish business operations that would prevent future violations. Furthermore, the evidence established that there were aggravating factors in both of the two most recent violations at issue. The evidence did not establish that Licensees have good cause to overcome the license refusal. Therefore, the Commission is entitled to refuse to renew Licensees' license applications.

FINAL ORDER

The Commission orders that the Full On-Premises Sales licenses held by Ric Donnelly and by Kennedy & Donnelly, LLC, Managing Member Kathryn Kennedy, dba Lava Lanes of Medford/Donnelly's Sports Pub and Grill located at 2980 Crater Lake Hwy in Medford, Oregon, be CANCELLED.

The Commission further orders that the application to renew the Full On-Premises Sales licenses held by Ric Donnelly and by Kennedy & Donnelly, LLC, Managing member Kathryn Kennedy, dba Lava lanes of Medford/Donnelly's Sports Pub and Grill located at 2980 Crater Lake Hwy in Medford, Oregon, be REFUSED.

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

Dated this 23rd day of February 2011.

/s/ Stephen A. Pharo

Stephen A. Pharo

Executive Director

OREGON LIQUOR CONTROL COMMISSION

Mailed this 23rd day of February 2011.

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.