

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

<b>In the Matter of the Full On-Premises</b>	)	<b>FINAL FINDINGS OF FACT</b>
<b>Sales License Held by:</b>	)	<b>CONCLUSION OF LAW</b>
	)	<b>AND ORDER</b>
	)	
<b>BCK Corporation</b>	)	<b>OLCC-11-V-068</b>
<b>Brad Newberg, Pres/Dir/Stockholder</b>	)	<b>OLCC-11-V-068A</b>
<b>dba DUFFY'S IRISH PUB</b>	)	
<b>679 Main Street</b>	)	
<b>Lebanon, OR 97355</b>	)	

**HISTORY OF THE CASE**

On September 7, 2011, the Oregon Liquor Control Commission (OLCC or Commission) issued a Notice of Proposed License Suspension to BCK Corporation, Brad Newberg, President/Director/Stockholder (collectively Licensee), dba Duffy's Irish Pub, located at 679 Main Street, Lebanon, Oregon. The Notice charged Licensee with a violation of OAR 845-005-0345(1), alleging that, on June 11, 2011, corporate principal Newberg was under the influence of intoxicants on duty or, alternatively, that he drank alcoholic beverages while on duty. Licensee timely requested a hearing.

The Commission referred Licensee's hearing request to the Office of Administrative Hearings on October 21, 2011.

A contested case hearing was held in this matter in Albany, Oregon, on February 15, 2012, before Senior Administrative Law Judge Alison Greene Webster. Licensee was represented by Jennifer Costa, Attorney at Law. Anna Davis presented the case for the OLCC.

The following witnesses testified at the hearing: City of Lebanon Police Officer Stephen Fountain; City of Lebanon Police Sergeant Patrick O'Malley; City of Lebanon Police Officer Travis Luttmer; OLCC Inspector Jacki Miranda; Byron Wolfson, Licensee's security manager; Lynyrd Martinez, Licensee's bartender; Tina Perez, patron; Shawnette Marie, Licensee's karaoke host; and corporate principal Brad Newberg.

The record closed on February 15, 2012, at the close of the hearing.

The Administrative Law Judge considered the record of the hearing and the applicable law and issued a Proposed Order mailed February 29, 2012. Staff filed Comments on the Proposed Order on March 15, 2012. The Administrative Law Judge responded to Staff's Comments on March 20, 2012.

On April 5 and June 7, 2012, the Commission considered the record of the hearing, the applicable law, the Proposed Order of the Administrative Law Judge, Staff's Comments on the

Proposed Order and the Administrative Law Judge's Response to Staff's Comments. Based on this review and the preponderance of the evidence, the Commission enters the following:<sup>1</sup>

### **EVIDENTIARY RULINGS**

OLCC Exhibits A1 through A3 were admitted without objection. Licensee's proffered Exhibit L1 was excluded as not relevant.

### **ISSUES**

1. Whether, on June 11, 2011, corporate principal Brad Newberg was under the influence of intoxicants while on duty at the licensed premises or, alternatively, whether he drank alcoholic beverages while on duty in violation of OAR 845-005-0345(1).
2. If so, what is the appropriate sanction for this violation?

### **FINDINGS OF FACT**

1. On September 29, 2010, the Commission issued a Full On-Premises sales license to BCK Corporation and Brad Newberg, the corporation's president, director and sole stockholder, dba Duffy's Irish Pub, located at 679 Main Street, Lebanon, Oregon. (Ex. A1.)
2. Corporate principal Newberg has a full time job with Dryer's Ice Cream Company. He does not work at the licensed premises on weekends, although he often goes to the premises on weekend nights to socialize with friends and sing Karaoke. When he goes to the licensed premises as a patron, he pays for his own drinks and the drinks he offers to buy for others. (Test. of Newberg.)
3. On the night of June 10, 2011 and into the early morning hours of June 11, 2011, Newberg and his fiancée were at the licensed premises socializing with friends. Newberg was there as a patron and was served and consumed alcoholic beverages, including a Coors beer and a whiskey. Licensee had a full staff on duty that night, including one or two bartenders, security manager Brian Wolfson, and Karaoke host Shawnette Marie. (Test. of Newberg, Wolfson, Martinez and Marie.)
4. At about 1:00 a.m. on June 11, 2011, Licensee's security manager, Byron Wolfson, called 9-1-1 for assistance in removing an unwanted patron. Lebanon police officers Fountain, Luttmner and O'Malley responded to the licensed premises. The pub was crowded with patrons upon the officers' arrival. Officer Fountain and Sgt. O'Malley entered the premises and approached Wolfson and Newberg near the bar. Wolfson and Newberg directed the officers to

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<sup>1</sup> The Commission reverses the analysis, in part, and the legal conclusion of the Administrative Law Judge that Licensee did not put himself on duty controlling conduct on the premises on June 11, 2011. The Commission finds a violation of OAR 845-845-005-0345(1) (intoxicated while on duty). For this violation, the Commission imposes a penalty of 32 days mandatory license suspension.

the problem patron, Scott Swanson. Officer Fountain and Sgt. O'Malley separated Swanson from the crowd and escorted him out of the premises. (Ex. A2; test. of Fountain, Luttmer, O'Malley and Wolfsong.)

5. Swanson told Officer Fountain that he "got into an argument with a guy," who claimed to have a gun and had threatened to shoot him. Officer Fountain later identified the "guy" Swanson was referring to as corporate principal Newberg. Swanson did not know Newberg personally, and did not know that Newberg was the premises' owner. Sgt. O'Malley advised Swanson that Newberg owned Duffy's. (Ex. A2 at 9 and 11; test. of Fountain and O'Malley.)

6. On Licensee's behalf, Wolfsong asked that the officers serve Swanson with a criminal trespass notice for the premises. Officer Fountain completed the notice and served it on Swanson. Swanson accepted the notice and left the area without further incident. (Ex. A2 at 9; test. of Fountain.)

7. All three Lebanon police officers who responded to the licensed premises on June 11, 2011 noted that both Newberg and Swanson appeared intoxicated. Newberg smelled of alcoholic beverages, had watery and bloodshot eyes, a slur to his speech and a slow and methodical walk. (Ex. A2; test. of Fountain, Luttmer, O'Malley.)

8. After removing Swanson from the premises, Sgt. O'Malley interviewed the bouncer, Wolfsong, and Officer Luttmer interviewed Newberg. Newberg told Officer Luttmer that Swanson was trying to start fights with people and refusing to leave. When Officer Luttmer learned from the other officers that Swanson said that Newberg claimed to be carrying a loaded gun, Officer Luttmer asked Newberg if he had any weapons on him. Newberg lifted his shirt to show his abdomen area and stated that he was not carrying a weapon. Officer Luttmer warned Newberg that consuming alcohol and carrying a firearm was dangerous and a bad idea. Officer Luttmer also asked Newberg if he wanted Swanson to leave the premises. Newberg advised that the bartender or bouncer would have to make that decision. (Test. of Luttmer; Ex. A2 at 10.)

9. While Sgt. O'Malley was speaking with Wolfsong outside the premises in the back, Newberg approached them and asked if he could listen to the interview. Sgt. O'Malley told Newberg that he could not do so. Newberg walked away and did not intervene again. (Test. of O'Malley; Ex. A2 at 11.)

10. During the interview, Wolfsong told Sgt. O'Malley that it had been a "weird" night at the premises as there had been several small problems with patrons. Wolfsong also said that Swanson was the only problem patron who had not left the premises upon request. Wolfsong explained that he saw Newberg and Swanson in a heated argument just before the police arrived. Wolfsong added that, just before the officers showed up, Newberg placed his arm on Swanson's shoulder and told him to leave. According to Sgt. O'Malley's report, Wolfsong also said that Newberg had been "helping him throughout the night in dealing with the problems and keeping the peace."<sup>2</sup> (Test. of O'Malley; Ex. A2 at 11.)

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<sup>2</sup> At hearing, Wolfsong testified that Sgt. O'Malley took his statements out of context. Wolfsong claimed that Newberg had helped out in the past but did not do so that night. Also, at hearing, both Wolfsong and

11. On the night of June 17, 2011, OLCC Inspector Jacki Miranda visited the premises to speak with Wolfsong about the incident on June 11, 2011. Wolfsong confirmed that Newberg was at the premises and consuming alcohol that night. Wolfsong stated that Newberg was trying to calm Swanson down and deescalate the situation. While Inspector Miranda and Wolfsong were talking, Newberg approached them. Inspector Miranda noted that Newberg swayed while standing and smelled of alcoholic beverages. She asked Newberg if he had consumed alcoholic beverages that night and he responded affirmatively. Inspector Miranda then told Newberg that she could not talk with him about the events of June 11<sup>th</sup> because he had been drinking alcohol. Newberg acknowledged her statement and said, "Oh, I know the rules." (Ex. A3; test. of Miranda.)

12. On July 12, 2011, Inspector Miranda met with Newberg regarding the events of June 11, 2011. Newberg asserted that all said to Wolfsong that night regarding the problem patrons was, "You may want to check the front or the back." Newberg also told Inspector Miranda that he did not believe that making this suggestion placed him on duty. (Ex. A3; test. of Miranda.)

### CONCLUSIONS

1. The record establishes that corporate principal Brad Newberg was on duty at the licensed premises while under the influence of intoxicants in violation of OAR 845-005-0345(1).
2. For this violation, a sanction of 32 days mandatory suspension is warranted.

### OPINION

As set out above, the Commission asserts that corporate principal Newberg violated OAR 845-005-0345(1) by either being under the influence of intoxicants or consuming alcoholic beverages while on duty at the licensed premises on June 11, 2011. As the proponent of this contention, 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).

OAR 845-005-0345(1) provides as follows:

Drinking on Duty: No licensee, permittee, employee or agent will drink or be under the influence of intoxicants while on duty. "On duty" means from the beginning of a work shift that involves *the sale or service of alcoholic beverages, checking identification or controlling conduct on the premises*, to the end of the shift including coffee and meal breaks. "A work shift that involves the sale and service of alcoholic beverages" includes supervising those who sell or serve, check identification or control the premises.

(Emphasis added.)

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Newberg testified that, when Newberg placed his arm on Swanson's shoulder, he offered to buy him a drink and rather than tell him to leave the bar. (Test. of Wolfsong and Newberg.)

The Commission has held that a person is “under the influence of intoxicating liquor” when that person:

displays not only all well-known and easily-recognized conditions and degrees of intoxication, but any abnormal mental or physical condition which is the result of indulging in any degree in intoxicating liquors, which tends to deprive one of that clearness of intellect and control of himself which he would otherwise possess.

*Bill's Place* (OLCC Final Order, 88-V-001, July 1988); *Voodoo Lounge Bar & Grill* (OLCC Final Order, 06-V-041, February 2007).

The Commission has also held that a person is “on duty,” when the person has the authority to put him or herself on duty and does so by performing acts on behalf of the licensee. See *Cactus Bar & Grill* (OLCC Final Order, 03-V-014, June 2004); *The Sportsman Club* (OLCC Final Order, 87-V-002, June 1987).

In this case, corporate principal Newberg does not dispute that on June 11, 2011 he consumed alcoholic beverages at the licensed premises and displayed signs of alcohol intoxication. Newberg also concedes that, as the corporate principal, he had the authority to place himself on duty.<sup>3</sup> With these concessions, the issues to be resolved are whether Newberg performed acts on behalf of the licensee that night and whether those acts involved controlling conduct on the premises.<sup>4</sup>

In *Cactus Bar & Grill*, the licensee remained at the premises after his shift and consumed several alcoholic beverages. He drank at the bar so that he would be available to the bartender, who was a trainee. When a fight broke out inside the premises, the licensee assisted the bartender and other employees in ejecting patrons from the premises. The licensee represented himself as the owner to patrons and got into a scuffle with a patron while escorting him from the premises. The Commission held that the licensee placed himself on duty by monitoring the bartender, helping the bartender break up the fight and escort a patron out and ejecting other unruly patrons.

Conversely, in *Marks Tavern* (OLCC Final Order, 89-V-30, July 1989), the Commission found that an employee did not place herself on duty when she instructed the on-duty bartender not to sell a beer to a male patron. The Commission found the employee gave the instruction as part of her personal dispute with the male patron, that the employee did not have authority to place herself back on duty, and that she was not acting for the benefit of licensee’s business when she asked that the bartender not sell the patron the beer.

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<sup>3</sup> See, e.g., *Spot 79* (OLCC Final Order, 08-V-045, January 2010) (recognizing that the owner of the licensed premises had the authority to put himself on duty).

<sup>4</sup> There is no evidence that Newberg sold or served alcoholic beverages or that he checked identification on the date in issue.

In *Mac Club* (OLCC Final Order, 99-V-110, December 2000), the Commission found that the licensee placed himself on duty after drinking alcoholic beverages at the licensed premises by deciding the cost of a drink and overruling the bartender's decision not to serve a patron a double serving of wine in a beer glass. The Commission noted, however, that the act of signaling to the bartender that a customer wanted a drink was consistent with something any customer might do and did not amount to controlling conduct on the premises. Final Order at 7.

In *Spot 79* (OLCC Final Order, 08-V-045, January 2010), the Commission confirmed that actions taken by a corporate principal, even those not directly tied to mixing, sale or service of alcoholic beverages, can amount to controlling conduct on the premises. There, after finishing his shift, the corporate principal remained at the premises to socialize with others. He consumed alcoholic beverages while doing so. At some point, he noticed that an ATM machine on the premises was out of cash. He undertook to refill it with cash from the business office. At another point, a visibly intoxicated and unruly patron approached the corporate principal and complained that his friend Cindy, who had tended bar at the premises a few days earlier, had not been paid for her shift. The unruly patron ignored requests from Cindy and others to stop. To resolve the issue, the corporate principal directed the on-duty bartender to pay Cindy for her shift.

In finding a violation of OAR 845-006-0345(1), the Commission explained:

As to the decision to fill the ATM machine, the Commission concludes this kind of action is not closely enough related to the sale or service of alcoholic beverages or to controlling conduct on the premises to find a violation. \* \* \*

However, the decision to resolve a dispute with an unruly, intoxicated patron by instructing the bartender to pay an employee is distinguishable from the routine business administration act of refilling an ATM machine. The decision to instruct a subordinate to pay [Cindy] came in direct response to the demands of an unruly customer. It is [the corporate principal's] interaction directly with an intoxicated patron, and his resolution of the dispute by directing an employee to pay the employee as the patron demanded, that provides the connection to controlling the premises.

Final Order at 6.

In this case, Newberg exchanged words with an unruly patron (Swanson) whom the police eventually removed from the premises. Licensee disputes the evidence (as set out in Sgt. O'Malley's report) indicating that Newberg and Swanson had a heated argument and that Newberg placed his arm on Swanson's shoulder and told him to leave. At hearing, Newberg and Wolfson testified that Newberg attempted to calm Swanson down by putting his arm around him and offering to buy him a drink. Considering the totality of the circumstances, however, it is unlikely that Newberg simply offered to buy Swanson a drink.<sup>5</sup> It is more probable than not that

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<sup>5</sup> In weighing the conflicting evidence regarding the interaction between Newberg and Swanson, the Commission gives more weight to the officers' testimony and written reports. At hearing, Newberg denied arguing with Swanson. He testified that he walked to the bar, saw Swanson there and offered to

Newberg and Swanson argued and that, during the exchange, Newberg placed his arm on Swanson's shoulder and told Swanson to leave the premises.<sup>6</sup>

Newberg's action of placing his arm on Swanson's shoulder and directing Swanson to leave the premises constitutes an action taken for the benefit of licensee's business (an attempt to rid the premises of a problem patron). This was an action taken by Newberg in an attempt to prevent disorder by ejecting a disruptive patron, and as such was an action taken to control conduct on the premises. Newberg, the corporate principal, has an inherent authority to eject a patron which he can choose to exercise at any time; he knows it and his staff knows it. He exercised this authority by attempting to eject Swanson. More likely than not, his staff followed his lead and called the police to have Swanson removed when Swanson refused Newberg's direction. Swanson remained engaged in this effort by pointing out the problem patron to police officers upon their arrival.

In addition, Newberg said to Wolfsong at some point earlier that night that Wolfsong may want to check the front or the back of the bar, in relation to problem patrons. That comment, coming from the owner, is unlikely to be taken by an employee as a mere suggestion, but, instead, as an indirect command. It is an action taken for the benefit of the licensee's business and is related to controlling conduct on the premises.

There is also some evidence, specifically a passage in Sgt. O'Malley's report, that indicates Newberg was "helping [Wolfsong] throughout the night in dealing with the problems and keeping the peace." At hearing, both Wolfsong and Newberg denied that Newberg helped deal with any problems at the premises that night. Wolfsong testified that Sgt. O'Malley took his statements out of context. But, even without giving weight to Wolfsong's and Newberg's testimony in this regard, this passage in Sgt. O'Malley's report is insufficient to conclude that Newberg placed himself on duty and exercised control over the premises with respect to them,

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buy him a drink to be nice. The officers' testimony and reports, on the other hand, document that Swanson and Newberg got into an argument. Officer Fountain reported, "Swanson told me that he got into an argument with a guy who was later identified as Newberg." (Ex. A2 at 9.) Officer Luttmner reported, "Wolfsong stated that [Swanson] and Newberg got into an argument and [Swanson] was asked to leave." (Ex. A2 at 10.) Sgt. O'Malley reported, "Wolfsong told me he was near the back of the bar when he saw Mr. Newberg and Swanson near the bar getting in a heated argument. \* \* \* [Wolfsong] saw Newberg place his arm on Swanson's shoulder and tell him to leave." (Ex. A2 at 11.) Despite Licensee's attempt at hearing to impeach Sgt. O'Malley's testimony and report, a preponderance of the evidence establishes that Newberg argued with Swanson and suggested that he leave the premises.

<sup>6</sup> The evidence also establishes that at the time Newberg and Swanson exchanged words, Swanson had no knowledge that Newberg was the premises' owner. The ALJ reasoned that Newberg's actions were consistent with what a patron might do, and, absent some show of authority over the licensed premises, these actions would not amount to exercising control over the premises. It is immaterial whether a problem patron knows that an instruction to leave the premises is coming from an owner (a person with actual authority to evict) or another patron, in order to find that the owner is exercising control over the licensed premises. An owner is not like any other patron when he or she is at their licensed premises, because the owner carries an inherent authority to control the premises that can be exercised at any time, which is known to staff.

without additional evidence to establish the nature and extent of Newberg's involvement in these unidentified, earlier events.

Finally, as a matter of public policy, the Commission's rule against placing oneself on duty while under the influence of intoxicants is intended to prevent individuals with impaired judgment from making decisions about the sale or service of alcohol, the age of a patron, or from intervening in an altercation or taking other actions required to control the premises. The facts of this case illustrate the wisdom of that public policy. Here, Newberg, while under the influence of intoxicants, argued with a problem patron, and took an action and chose words that escalated the conflict with the patron.

Newberg had the implicit authority to place himself on duty, and the evidence in this record establishes that he exercised this authority and attempted to control conduct on the premises that evening. Based on the evidence presented, the Commission staff has proven by a preponderance of the evidence that Newberg placed himself on duty at the licensed premises on June 11, 2011, after becoming intoxicated. A violation of OAR 845-006-0345(1), intoxicated while on duty, is established.

Because a violation of OAR 845-006-0345(1), intoxicated while on duty, has been established, the alternate violation (drinking on duty in violation of OAR 845-006-0345(1) should be dismissed.

#### **SANCTION**

OAR 845-006-0500(7)(a) sets forth categories of license violations. Under that rule, being under the influence of intoxicants while on duty, in violation of OAR 845-006-0345, is a Category II violation, "[v]iolations that create an immediate threat to public health or safety." Exhibit 1 of the rule lists guidelines for the applicable sanctions within each category. The standard sanction for a Category II violation is a 30 day license suspension. If OLCC finds aggravating or mitigating circumstances, it may assess a greater or lesser sanction. OAR 845-006-0500(7)(c). The Commission adds 2 days penalty for each aggravating circumstance proven, and deducts 2 days for each proven mitigating circumstance. *Parilla Grill* (OLCC Final Order, 01-V-082, August 2002).

OLCC has established one aggravating circumstances due to Licensee's personal involvement in the violation. Addition of 2 days suspension to the standard penalty is appropriate. Licensee has not established cognizable mitigating circumstances. Accordingly, a sanction of 32 days mandatory suspension applies to this violation.

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## FINAL ORDER

The Commission orders that the Full On-Premises Sales (F-COM) license held by BCK Corporation and Brad Newberg, President/Director/Stockholder, doing business as DUFFY'S IRISH PUB, located at 679 Main Street, Lebanon, Oregon, be suspended for thirty-two (32) days for violation of 845-006-0345(1), due to being intoxicated on duty on June 11, 2011.

It is ordered that the alternate violation of OAR 845-006-0345(1), due to drinking on duty, be dismissed.

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

Dated this 13th day of June 2012.

/s/ Steve Pharo

Stephen A. Pharo

Executive Director

OREGON LIQUOR CONTROL COMMISSION

Mailed this 13th day of June 2012.

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.