

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

In the Matter of the License Held by:	) <b>FINAL FINDING OF FACT</b>
	) <b>CONCLUSIONS OF LAW</b>
<b>Masad Nicola</b>	) <b>AND ORDER</b>
<b>Nada Nicola</b>	)
<b>dba Nick's AM/PM</b>	) OLCC-13-V-093
<b>9220 SE Holgate</b>	) OLCC-13-V-093A
<b>Portland, OR 97266</b>	)

**HISTORY OF THE CASE**

On August 12, 2013, the Oregon Liquor Control Commission (OLCC or Commission) issued a Notice of Proposed License Suspension/Civil Penalty (Notice) to Masad Nicola and Nada Nicola, dba Nick's AM/PM (Licensees), located at 9220 SE Holgate, Portland, Oregon. The Notice alleged that Licensees' employee, Jesus Ambriz-Aguirre, failed to verify the age of a minor, Austin Carter, before allowing him to buy or be served an alcoholic beverage, when Mr. Carter reasonably appeared to be under 26 years of age, in violation of OAR 845-006-0335(1)(a), (b), and (c). The Commission proposed to suspend Licensees' license for 12 days or to impose a civil penalty in the amount of \$1,980. Licensees timely requested a hearing.

On September 13, 2013, the Commission referred the case to the Office of Administrative Hearings (OAH). The OAH assigned the case to Senior Administrative Law Judge (ALJ) Monica A. Whitaker.

On December 23, 2013, the Commission filed a Motion for Discovery seeking an order to require Licensees to provide certain specified information. The Commission also requested a prehearing conference to discuss the motion. Presiding ALJ John Mann held a prehearing conference on January 3, 2014. Jamie Dickinson appeared as the Commission's authorized representative. Licensees did not appear. On January 6, 2014, Presiding ALJ Mann issued a Ruling and Order Granting Request for Discovery.

A contested case hearing convened on January 23, 2014 in Tualatin, Oregon, before ALJ Whitaker. Ms. Dickinson represented the Commission. Licensees appeared on their own behalf. The Commission called OLCC Inspector Neel O'Donnell and minor decoy Austin Carter to testify on its behalf. Licensees offered no testimony. 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 February 3, 2014

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

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

### **ISSUES**

1. Whether on July 17, 2013, Licensees' employee, Jesus Ambriz-Aguirre, failed to verify the age of a minor, Austin Carter, when the minor reasonably appeared to be under 26 years of age, in violation of OAR 845-006-0335(1)(a), (b), and (c).

2. If so, what is the appropriate penalty for the violation? OAR 845-006-0500(7)(a)(E), (b), and (c).

### **EVIDENTIARY RULING**

Exhibits A1 through A11, offered by the Commission, were admitted into the record without objection.

### **FINDINGS OF FACT**

1. Licensees have held an Off-Premises Sales License at Nick's AM/PM located at 9220 SE Holgate, Portland, Oregon, since November 4, 1998. (Ex. A1 at 1; test. of O'Donnell.)

2. On March 25, 1999, OLCC charged Licensees with a violation for failing to verify the age of a minor during a police minor decoy operation. Licensees paid a fine in lieu of a six-day suspension. (Exs. A1 at 1; A2 at 1.)

3. On December 2, 2000, OLCC charged Licensees with a violation for failing to verify the age of a minor during a police minor decoy operation or, in the alternative, for selling or furnishing alcohol to a minor. Licensees purchased age verification equipment in lieu of paying a penalty for the violation or serving a suspension. (Exs. A1 at 1; A2 at 2.)

4. On July 17, 2013, OLCC inspectors Neel O'Donnell and Hector Caballero organized and conducted minor decoy operations at a number of locations in Portland, including the licensed premises at issue in this case.<sup>1</sup> (Test. of O'Donnell.)

5. At the beginning of the minor decoy operation, inspectors O'Donnell and Caballero instructed the minor decoy, Austin Carter, to carry only his true Oregon driver license, to produce it if requested by a cashier/clerk, and to answer truthfully if a cashier/clerk asked his age when he attempted to make a purchase. (Test. of Carter, O'Donnell.) At the time of the minor decoy operation, Mr. Carter was 18 years old. (Test. of Carter; Ex. A4.)

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<sup>1</sup> OLCC had received a citizen complaint alleging that Licensees had an employee selling alcohol to minors. This complaint prompted Mr. O'Donnell to include Licensees' premises on the list of minor decoy operations for July 17, 2013. (Test. of O'Donnell.)

6. Inspectors O'Donnell and Caballero and Mr. Carter arrived together at the licensed premises at approximately 9:30 p.m. on July 17, 2013. The inspectors waited outside while Mr. Carter entered the premises. Mr. Carter was wearing a t-shirt, and jeans. He was clean shaven with dark and short cropped hair. He had unlined facial features, a youthful appearance, and appeared his age. (Test of O'Donnell, Carter; Ex. A3 at 1.)

7. After entering the premises, Mr. Carter selected a bag of potato chips and a can of Coors Light beer. He proceeded to the cash register, where Licensees' employee, Jesus Ambriz-Aguirre, was working. Mr. Ambriz-Aguirre did not ask Mr. Carter for his identification or ask Mr. Carter his age was before making the sale. Mr. Carter paid for the items with a \$20 bill that inspectors O'Donnell and Caballero had given him for the operation. He received his change from the purchase, and exited the premises with the chips and beer. Mr. Carter met inspectors O'Donnell and Caballero outside the premises and gave them the change and the items he had purchased. (Test. of Carter, O'Donnell; Ex. A7.)

8. Thereafter, inspectors O'Donnell and Caballero entered the premises and made contact with Mr. Ambriz-Aguirre, who admitted that he had failed to ask Mr. Carter for his identification and otherwise attempt to verify Mr. Carter's age before making the sale. (Test. of O'Donnell; Ex. A9 at 5.)

## CONCLUSIONS OF LAW

1. Licensees' employee, Jesus Ambriz-Aguirre, failed to verify the age of a minor, Austin Carter, when the minor reasonably appeared to be under 26 years of age, in violation of OAR 845-006-0335(1)(a), (b), and (c).

2. The appropriate penalty for the violation is a 12 day license suspension or a civil penalty in the amount of \$1,980.

## OPINION

### 1. Violation

The Commission asserts that Licensees' employee, Jesus Ambriz-Aguirre, violated OAR 845-006-0335(1)(a), (b), and (c) when he failed to verify minor decoy Austin Carter's age before allowing him to buy an alcoholic beverage when he reasonably appeared to be under 26 years of age. As the proponent of this contention, the Commission bears the burden of proof. ORS 183.450(2); *Harris v SAIF*, 292 Or 683, 690 (1983) (general rule regarding allocation of burden of proof is that the burden is on the proponent of the fact or position); *Sobel v. Board of Pharmacy*, 130 Or App 374, 379, (1994), *rev den*, 320 Or 588 (1995) (standard of proof under the Administrative Procedures Act is preponderance of evidence absent legislation adopting a different standard). Proof by a preponderance of the evidence means that the fact finder is persuaded that the facts asserted are more likely true than not true. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390, 402 (1987).

OAR 845-006-0335(1) provides:

(1) Age Verification:

(a) ORS 471.130 requires a licensee or permittee to verify the age of a person who wants to buy or be served alcoholic beverages when there is “any reasonable doubt” that the person is at least 21 years old. The Commission requires a licensee or permittee to verify the age of anyone who wants to drink alcoholic beverages, or is in an area prohibited to minors, if there is reasonable doubt that the person is at least 21 years old. “Reasonable doubt” exists if the person appears to be under the age of 26;

(b) Whenever a licensee or permittee verifies age, he/she must verify it as ORS 471.130 requires (statement of age card or the specified items of identification) and must reject any obviously altered document or one which obviously does not identify the person offering it;

(c) Licensees must require all their employees who sell, serve, oversee or control the sale or service of alcoholic beverages to verify age as subsection (a) of this section requires.

In this case, the record establishes that on the date in question, minor Austin Carter appeared less than 26 years of age and therefore reasonable doubt existed as to whether he was at least 21 years old. The evidence also establishes that Licensees’ employee, Mr. Ambriz-Aguirre, did not ask Mr. Carter for his identification or his age.

At the hearing, Licensees argued that it was unfair to hold them liable for their employee’s actions. OAR 845-006-0362 provides:

Each licensee may be held responsible for violation of any liquor control law or administrative 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.

In *Teri’s Town Tavern*, (OLCC, Final Order, 00-V-018, November 2000), a bartender-in-training sold alcohol to a minor. The Commission sought to hold the licensee responsible for the acts of the bartender. The licensee argued that the bartender who committed the violation was not an employee, but was only trying out for the job. The OLCC determined that the non-employee bartender was “on duty” at the premises at the time of the violation, and therefore, the bartender was the licensee’s servant, agent, employee, or representative for purposes of holding the license responsible under what is now OAR 845-006-0362. Like the bartender in *Teri’s Town Tavern*, Mr. Ambriz-Aguirre was on duty when he violated OLCC’s rules. He was Licensees’ employee and, consequently, under OAR 845-006-0362, Licensees are liable for his conduct.

For these reasons, the Commission has proven that Licensees' employee failed to verify the age of a minor before selling alcohol to the minor, in violation of OAR 845-006-0335(1)(a), (b), and (c).

## **2. Penalty**

Commission staff proposes to suspend Licensees' license for 12 days or to impose a civil penalty in the amount of \$1,980. A violation of OAR 845-006-0335(1) is a Category III violation. OAR 845-006-0500(7)(a)(E). Under the Commissions' guidelines, the standard penalty for a Category III violation is a 10-day suspension or a civil penalty in the amount of \$1,650. OAR 845-006-0500(7)(b). However, as set out in the findings above, Mr. Ambriz-Aguirre failed to use the age verification equipment which was purchased by Licensees as an offset to a previous penalty. The Commission has the discretion to take into account the particular circumstances of each case, and increase or decrease the sanction where there are aggravating or mitigating circumstances. OAR 845-006-0500(7)(c).

Here, Commission staff proposes aggravation of the standard penalty by adding two days to the suspension or \$330 to the civil penalty because of Mr. Ambriz-Aguirre's failure to use the age verification equipment. Considering the facts of this case, it is appropriate to add 2 days to the suspension, for a total of 12 days, or to add \$330 to the civil penalty, for a total of \$1,980.

### **FINAL ORDER**

The Commission orders to impose a 12-day suspension or a civil penalty in the amount of \$1,980 upon Masad Nicola and Nada Nicola, dba Nick's AM/PM, for a violation of OAR 845-006-0335(1)(a), (b), and (c) (failure to verify age).

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 3rd day of March 2014

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Steven Marks  
Executive Director  
OREGON LIQUOR CONTROL COMMISSION

Mailed this 4th day of March 2014

**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.