

**BEFORE THE OREGON 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>CONCLUSIONS OF LAW</b>
	)	<b>AND ORDER</b>
	)	
STIB, LLC	)	<b>OLCC-14-V-008</b>
Charles Kitchin, Managing Member	)	<b>OLCC-14-V-008A</b>
dba <b>THE RED CARPET</b>	)	
3631 Cascade Avenue	)	
Hood River, OR 97031	)	

**HISTORY OF THE CASE**

On December 18, 2013, the Oregon Liquor Control Commission (OLCC or Commission) issued a Notice of Proposed License Suspension (Notice) to STIB, LLC, Charles Kitchin, Managing Member, dba The Red Carpet, located at 3631 Cascade Avenue, Hood River, Oregon. The Notice charged Licensee with a violation of OAR 845-006-0345(1) (employee under the influence on duty or, alternatively, employee drinking on duty), and proposed to suspend Licensee’s license for 30 days. Licensee timely requested a hearing.

The Commission referred Licensee’s hearing request to the Office of Administrative Hearings (OAH) on January 31, 2014. The OAH assigned the matter to Senior Administrative Law Judge (ALJ) Alison Greene Webster.

ALJ Webster presided over the hearing in this matter in Tualatin, Oregon, on October 21, 2014. Attorney Ryan Kroll represented Licensee. Jamie Dickinson presented the case for the OLCC.

The following witnesses testified at the hearing on behalf of OLCC: OLCC Inspector Richard Miller and Hood River Police Officer Jacob Ferrer. The following witnesses testified on Licensee’s behalf: Managing Member Charles Kitchin; Ryan McGough; and Mallisa Smith.

The record closed on October 21, 2014, 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 November 6, 2014. Staff filed Comments on the Proposed Order on November 20, 2014. Licensee did not submit any Exceptions to the Proposed Order. The ALJ responded to Staff’s Comments on December 8, 2014.

On February 27, 2015, the Commission considered the record of the hearing, the applicable law, the Proposed Order of the ALJ, Staff’s Comments to the Proposed Order and the ALJ’s Response to Staff’s Comments. Based on this review and the preponderance of the evidence, the Commission enters the following:

## **EVIDENTIARY RULINGS**

OLCC Exhibits A1 through A14 were admitted without objection. Licensee's Exhibits P1 through P7 were also admitted over OLCC's relevancy objections.

## **ISSUES**

1. Whether, on the night of August 4 to 5, 2013, Licensee's employee, Shawn Robarts, was under the influence of intoxicants while on duty at the licensed premises in violation of OAR 845-006-0345(1). Alternatively, whether, on that same work shift, employee Robarts drank alcoholic beverages while on duty at the licensed premises in violation of OAR 845-006-0345(1).
2. If a violation of OAR 845-006-0345(1) occurred, what is the appropriate sanction?

## **FINDINGS OF FACT**

1. At all times pertinent to this action, STIB, LLC, and Charles Kitchin, Managing Member, dba The Red Carpet, held a Full On-Premises sales license at the premises located at 3631 Cascade Avenue, Hood River, Oregon. (Ex. A1.) The OLCC granted Licensee a license at The Red Carpet on November 1, 2012. (*Id.*) Although the prior licensee at the Red Carpet had a poor record of compliance with the liquor laws, Licensee has no OLCC violations prior to the violation alleged herein. (Test. of Miller; test. of Kitchin.)
2. Under the liquor license, Licensee is permitted to sell and serve alcoholic beverages until 2:30 a.m. But, on the recommendation of the OLCC, Licensee implemented a house rule to stop the sale and service of alcohol at 1:45 a.m. Licensee Kitchin provides training to all of his employees on the liquor laws and the house rules for the sale and service of alcohol. Licensee Kitchin has notified his employees that he expects them to comply with the liquor laws and the house rules and that he will terminate the employment of any employee who fails to do so. (Test. of Kitchin.)
3. On the evening of August 4, 2013, Licensee's employee Shawn Robarts began his bartending shift at approximately 6:30 p.m. He was the only employee on duty that night. Between approximately 8:45 p.m. and 2:00 a.m. on August 5, 2013, while performing his bartending duties, employee Robarts consumed alcoholic beverages. Employee Robarts drank at least four mixed drinks and a shot of Jagermeister during his shift. (Test. of Miller; Exs. A5 and A6.)
4. At approximately 2:00 a.m. a patron entered the licensed premises, approached the bar and ordered an alcoholic beverage. Employee Robarts refused to serve the patron based on Licensee's house rule of no alcohol service after 1:45 a.m. During this brief exchange, the patron noted that employee Robarts appeared intoxicated. The patron left the premises, called 9-1-1, and reported to police that the bartender at The Red Carpet was intoxicated and slurring his words. (Exs. A3 and A4; test of Miller; test. of Ferrer.)

5. At approximately 2:10 a.m., Hood River Police Officer Jacob Ferrer responded to the licensed premises to investigate the patron's allegations. He entered the premises and observed employee Robarts behind the bar, operating the cash register. It appeared to Officer Ferrer that Robarts was having finger dexterity problems as he pressed keys on the register. Officer Ferrer then contacted Robarts and asked to speak with him. During their conversation, Officer Ferrer noted that Robarts had slow and slurred speech and the odor of alcoholic beverages on his breath. Officer Ferrer asked Robarts if he had been drinking that night, and Robarts responded, "No." Officer Ferrer then asked if he could check Robarts' eyes. Robarts consented. Officer Ferrer administered a Horizontal Gaze Nystagmus (HGN) test to Robarts and observed all six possible clues: a lack of smooth pursuit, distinct and sustained nystagmus at maximum deviation and the onset of nystagmus prior to 45 degrees in both of Robarts' eyes.<sup>1</sup> The results of the HGN test confirmed Officer Ferrer's belief that Robarts was under the influence of intoxicants.<sup>2</sup> While talking with the officer, Robarts leaned against the door frame. Officer Ferrer told Robarts that, based on his observations, he believed Robarts was intoxicated.<sup>3</sup> Robarts then admitted that he had consumed several alcoholic beverages while working that night. Because it was near closing time and Robarts was the only employee on duty, Officer Ferrer let Robarts go back to work. Robarts assured the officer that he would stay at the premises and not drive home. (Ex. A3; test. of Ferrer.)

6. Patron Ryan McGough, who was at the premises for approximately 50 minutes, from about 1:20 a.m. to the time Officer Ferrer's arrival at 2:10 a.m., did not note any signs of intoxication on employee Robarts. Patron McGough ordered two drinks from Robarts during that time, the first upon his arrival and a second just prior to 1:45 a.m. To McGough, Robarts mixed and served the drinks and completed the sales transaction without apparent difficulty. (Test. of McGough.)

7. At some point subsequent to Officer Ferrer's visit but prior to Licensee Kitchin's arrival at the licensed premises at approximately 4:30 a.m. on August 5, 2013, Robarts wrote a note to Licensee Kitchin about the incident. Robarts wrote as follows:

---

<sup>1</sup> The HGN test is a standardized field sobriety test used by law enforcement officers to determine whether a person is under the influence of alcohol. Studies have shown the test to be a reliable indicator of a person's blood alcohol content. (Test. of Ferrer.)

<sup>2</sup> Officer Ferrer has been trained in the administration of standardized field sobriety tests, including the HGN test, and he administered the test in accordance with his training. Based on his training and experience in investigating the crime of driving under the influence of intoxicants (DUI), Officer Ferrer knew that the results of Robarts' HGN test (the presence of all six clues) indicated that Robarts' blood alcohol content was likely above .08 percent. (Test. of Ferrer.)

<sup>3</sup> Officer Ferrer's belief that Robarts was intoxicated was based upon the following: Robarts' slow and slurred speech, his apparent lack of finger dexterity while operating the till, his lack of balance while standing (leaning against the door frame while talking with the officer), the odor of alcoholic beverages on Robarts' breath, the results of the HGN test and Robarts' admission to consuming several alcoholic beverages during his shift. (Test. of Ferrer.)

Charlie, I have some bad news. It was 2:10 AM, and the police came in and told me that someone had called them and said I was drinking[.] I had a couple drinks & could not deny it. I am very sorry & I accept the consequences. I understand that I am done & I am sorry to put you in that situation. I will talk to you today. Again I am sorry. I have no excuses. This is very unfortunate but, I know better & made a mistake. Thank you for everything. Let me know what I can do. I know this is not good in any way. I hope everyone learns from it. Shawn.

(Ex. A4.)

8. Sometime prior to 5:00 a.m. (and before Licensee Kitchin discovered employee Robarts' note), Robarts contacted Licensee Kitchin at the licensed premises. Robarts told Licensee Kitchin what had transpired a few hours earlier during his shift. Robarts admitted to drinking on duty. Robarts was very apologetic. Licensee Kitchin immediately terminated Robarts' employment. Licensee Kitchin did not notice signs or symptoms of intoxication on Robarts when they spoke. (Test. of Kitchin.)

9. At 6:50 a.m. on August 5, 2013, Licensee Kitchin emailed OLCC Inspector Rich Miller about Robarts' drinking on duty. Licensee Kitchin wrote as follows:

Hi Rich-Shawn Robarts had an issue with a late customer Monday morning 8/5/13 (came in after 1:45 am) and asked to be served-Shawn told her we stop serving at 1:45 per our house rules) she called the local police and they showed up around 2:10 a.m. and gave Shawn an eye test. He admitted to them as well as me this morning that he had had two drinks closing up. Obviously this is not acceptable and I have fired him.

(Ex. P4.)

10. Later that same day, the Hood River Police Department notified Inspector Miller that Officer Ferrer had responded to a call regarding an intoxicated bartender at the licensed premises. (Ex. A2.)

11. Inspector Miller followed up with both Licensee Kitchin and Officer Ferrer about the incident. In investigating the matter, the inspector reviewed Officer Ferrer's report. He also spoke with the patron who had called 9-1-1. She told the inspector that when she walked into the premises at about 2:00 a.m., she heard Robarts slurring his words and saw him stumble. Inspector Miller also reviewed the surveillance video recordings from the night of August 4-5, 2013 with Licensee Kitchin. Licensee Kitchin then provided the inspector with a copy of the video footage from the camera behind the bar, which showed Robarts' activity that night from approximately 6:30 p.m. to 3:00 a.m. (Test. of Miller; Ex. A2.)

12. Inspector Miller carefully reviewed the surveillance video footage and chronicled Robarts' work activity and drink consumption during the work shift. Because the video frame skipped at one point just after 2:00 a.m., it did not show the 9-1-1 caller's interaction with Robarts. Although the video recording showed Robarts consuming at least four mixed hard

liquor drinks and a shot of Jagermeister during his shift, the video did not, in Inspector Miller's assessment, demonstrate that Robarts was under the influence of intoxicants. In the inspector's opinion, the video footage did not demonstrate Robarts exhibiting signs of diminished mental and/or physical control while performing his work duties. (Test. of Miller; Exs. A2 and P3.)

13. On October 8, 2013, Inspector Miller completed his Compliance Action and Violation Report on this incident. In the report, the inspector concluded that Licensee's employee had violated OAR 845-006-0345(1) by drinking alcohol while on duty. Inspector Miller included the following explanation and analysis in the report's "Additional Information" section:

Due to the signs of intoxication that Ferrer and the caller observed, I viewed the entire recording Kitchin supplied. I didn't see conclusive evidence of any diminished mental and physical control, or obvious visible signs of intoxication, displayed by Robarts that could be directly attributed to being under the influence of alcohol (intoxicants). The quality of the video is not high enough to discern what Robarts' face looked like, for example, to determine if it showed signs of intoxication. Often, even clear, quality recordings won't show this evidence, and can't be relied upon alone.

During the brief periods that the caller and Ferrer had contact with Robarts' near the end of the premises' operation that night, they observed Robarts' display signs of intoxication that could illustrate being under the influence. However, there is no evidence that Robarts had reduced mental or physical control during his work shift from roughly 6:00 pm – 2:03 a.m. In particular, the lack of additional witnesses to observe Robarts' condition during this time, lends to not supporting the charge of being under the influence.

(Ex. P3, emphasis in original.)

14. On October 9, 2013, Inspector Miller delivered a Notice of Violation to Licensee, charging Licensee with a violation of OAR 845-006-0345(1) based on employee Robarts' drinking on duty during his shift on August 4-5, 2013.<sup>4</sup> (Ex. P1.)

15. After Inspector Miller completed his investigation report and delivered the Notice

---

<sup>4</sup> The October 9, 2013 Notice of Violation also included the following information:

**READ CAREFULLY**

In the case of a **Notice of Violation**, a report concerning the alleged violation(s) listed above will be forwarded to the Administrative Policy and Process Division, OLCC. A charge letter will be sent to you informing you of the specific charges and the sanctions that are being proposed and informing you of your right to request a hearing to contest the charges and/or the proposed penalty.

(Ex. P1.)

of Violation to Licensee, OLCC's Administrative Policy and Process Division (AP&P) directed him to amend the "Additional Information" section of his investigation report by deleting the last sentence in the first paragraph and the last two sentences in the second paragraph. AP&P took the position that these three sentences contained "legal conclusions" rather than investigative conclusions. (Exs. P3 and P7.)

16. On December 18, 2013, OLCC AP&P issued a Notice of Proposed License Suspension to Licensee, charging Licensee with a Category II violation of OAR 845-006-0345(1). The Notice alleged that Licensee's employee Robarts' was under the influence of intoxicants on duty, or alternatively that he drank alcoholic beverages while on duty. OLCC proposed to suspend Licensee's license for 30 days for the alleged violation of OAR 835-006-0345(1). (Notice.)

## CONCLUSIONS

1. Licensee's employee, Shawn Robarts, was under the influence of intoxicants while on duty at the licensed premises in violation of OAR 845-006-0345(1). The alternate violation for drinking on duty should be dismissed.

2. The appropriate sanction for the violation of OAR 845-006-0345(1) in this case is a 26-day suspension.<sup>5</sup>

## OPINION

### *1. Violation*

As set out above, the Commission Staff alleges that on the night of August 4 to 5, 2013, Licensee's employee, Shawn Robarts, was under the influence of intoxicants while on duty at the licensed premises in violation of OAR 845-006-0345(1). As an alternative violation, the Commission Staff asserts that employee Robarts drank alcoholic beverages while on duty in violation of OAR 845-006-0345(1).

OAR 845-006-0345 addresses prohibited conduct. Pursuant to subsection (1) of the rule, "No licensee or permittee will drink or be under the influence of intoxicants while on duty." As pertinent to this case, the rule defines "on duty" as "from the beginning of a work shift that involves the sale or service of alcoholic beverages, checking identification or controlling conduct

---

<sup>5</sup>The ALJ originally found that the appropriate sanction for violation of OAR 845-006-0345(1) in this case was a 26-day suspension or a civil penalty of \$4,620. As further explained in the opinion section of this Order, the Commission finds that the ALJ's conclusion that the penalty for a Category II violation may be mitigated to the same as a Category III violation (and allow the option of a civil penalty in lieu of a suspension) was erroneous. Therefore, the Commission changes the ALJ's conclusion that Licensee is entitled to the option of paying a civil penalty in lieu of a suspension. The Commission agrees with the ALJ's finding that Licensee is entitled to mitigate the mandatory suspension penalty because of good faith efforts and extraordinary cooperation, but disagrees with the ALJ's process of mitigating the sanction to a lower category of violation, and then reducing it further by two days or lessening the fine. The Commission also disagrees with the ALJ's conclusion that Licensee's decision to terminate the offending employee constituted a mitigating circumstance.

on the premises, to the end of the shift including coffee and meal breaks.” OAR 845-006-0345(1)(a).

The Commission has made a distinction between “drinking on duty” and being “under the influence of intoxicants on duty” for purposes of sanctioning a licensee for violating OAR 845-006-0345(1)(a). The Commission has designated “drinking on duty” as a Category III violation, whereas it has designated being “under the influence of intoxicants while on duty” as a more serious Category II violation.<sup>6</sup> OAR 845-006-0500(7), Exhibit 1.

By prior Final Order precedent, 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), citing *Black's Law Dictionary* (Fifth ed. 1979). This is the same standard used in criminal cases to determine whether a person is under the influence of intoxicating liquor for purposes of ORS 813.010(1)(b).<sup>7</sup> See *State v. O'Key*, 321 Or 285 (1995); see also *State v. Noble*, 119 Or 674 (1926) (holding that the state does not have to prove defendant drunk or intoxicated, only affected to “some perceptible degree”). Under the influence of intoxicants is different, and a lesser, standard than visible intoxication. *Undefeated Sports Bar* (OLCC Final Order, 14-V-013, August 2014).

In *Eagle's Nest* (OLCC Final Order, 85-V-052, February 1986), the Commission found that a person was under the influence of intoxicating liquor when he was disoriented, unsteady

---

<sup>6</sup> Pursuant to OAR 845-006-0500(7)(a)(B) and (D), Category II violations “create an *immediate threat* to public health or safety,” whereas Category III violations “create a *potential threat* to public health or safety.” (Emphasis added.)

<sup>7</sup> Pursuant to ORS 813.010(1)(b), a person commits the offense of DUII if the person drives while he or she is “under the influence of intoxicating liquor, a controlled substance or an inhalant.” In the context of a DUII proceeding, Oregon’s Uniform Criminal Jury Instructions provide as follows:

“Under the influence of intoxicating liquor” means that [defendant's name]'s physical or mental faculties were adversely affected by the use of intoxicating liquor to a noticeable or perceptible degree.

“Under the influence of intoxicating liquor” includes not only the well-known and easily recognized conditions and degrees of intoxication, but also any abnormal mental or physical condition that results from consuming intoxicating liquor and that deprives the person of that clearness of intellect or control that the person would otherwise possess.

*State v. O'Key*, 321 Or 285, 307 n31 (1995); See also *State v. Robinson*, 235 Or 524 (1963) (upholding a similarly worded jury instruction defining “under the influence of intoxicating liquor”).

on his feet, spoke with a slur and smelled of alcoholic beverages. In *Bill's Place*, the Commission held that a licensee was in violation of the rule when he exhibited slurred speech and was argumentative and belligerent with an OLCC inspector. There, the licensee admitted to drinking three beers while on duty. The Commission found that these alcoholic beverages had affected the licensee's reasoning process, as evidenced by the fact that he failed to accept that the inspector was from the OLCC even after the inspector identified herself, showed the licensee her badge and a window sticker bearing the OLCC name. Final Order at 6.

In *7-Eleven Food Store No. 29526* (OLCC Final Order, 96-V-034, March 1997), the Commission found that a store clerk was under the influence of intoxicants on duty based on the following factors: red and watery eyes, slurred speech, staggering walk, swaying while standing, odor of alcoholic beverages on his breath and unkempt appearance. In *Voodoo Lounge Bar & Grill* (OLCC Final Order, 06-V-041, February 2007), the Commission determined that a permittee was under the influence of intoxicants on duty when she had the odor of alcoholic beverages on her breath and person, slurred speech, poor enunciation and swaying balance. In *Voodoo Lounge*, the permittee told an investigating officer that she drank four shots of alcohol before she came to work and another shot upon her arrival at work. Final Order at 7. Just recently, in *Undefeated Sports Bar*, the Commission found that a licensee who had the odor of alcoholic beverages on his breath, bloodshot and glassy eyes, slurred speech, slow movements, and unsteady balance was under the influence of intoxicants in violation of OAR 845-006-0345(1). Final Order at 6.

In this case, Licensee does not dispute that Robarts violated OAR 845-006-0345(1) by drinking on duty. Licensee contends, however, the evidence fails to demonstrate that Robarts was under the influence of intoxicants on duty. Licensee asserts that although Robarts may have shown some well-known and easily recognized signs of intoxication, he did not exhibit signs of diminished mental and/or physical control while performing his work duties. Like Inspector Miller, Licensee contends that the video footage does not show Robarts as obviously intoxicated. Specifically, Licensee asserts that the video footage does not show Robarts swaying, staggering or stumbling, nor does it show him acting clumsy or having difficulty performing his bartending duties. Licensee also argues that there is no evidence that Robarts' judgment was impaired. To the contrary, Licensee asserts that, in accordance with Licensee's house rules, Robarts turned away a patron who sought to purchase an alcoholic beverage after 1:45 a.m. Licensee also notes that Robarts had the presence of mind to write the note to Licensee Kitchin explaining what had happened and acknowledging his misconduct.

Licensee is correct that the video footage is not definitive. While the video does show Robarts steadying his balance by stepping back at one point, it does not show him obviously swaying, staggering or stumbling. It also does not show him having difficulty performing his bartending duties. And, it is true that Robarts appropriately turned away a late arriving customer and that he wrote an explanatory note to Licensee Kitchin. However, there is other persuasive evidence in the record, specifically the testimony and report of Officer Ferrer, to establish that Robarts was under the influence of intoxicants on duty in violation of OAR 845-006-0345(1)(a).

Robarts was still on duty when Officer Ferrer contacted him at 2:10 a.m. At that time, Officer Ferrer noted Robarts' slow, slurred speech and the odor of alcoholic beverages on

Robarts' breath. The officer saw Robarts having difficulty with finger dexterity and saw that Robarts leaned against the door frame for support while he talked with the officer. Slurred speech, the odor of alcoholic beverages, lack of finger dexterity and lack of balance while standing are all well-known and easily-recognized signs of intoxication. In addition, the officer, who has training and experience in investigating alcohol impairment and the crime of DUII, observed on Robarts an abnormal physical condition (horizontal gaze nystagmus) that comes as a result of indulging to a significant degree in intoxicating liquors. Officer Ferrer administered a HGN test to Robarts and noted the presence of all six possible clues. The results of the HGN test and the other signs and symptoms of intoxication that Officer Ferrer observed cannot be overlooked. This evidence demonstrates that, more likely than not, Robarts was under the influence of intoxicants on duty in the early morning hours of August 5, 2013.<sup>8</sup> See *Undefeated Sports Bar*, Final Order at 6.

The violation of OAR 845-006-0345(1)(a) (under the influence of intoxicants while on duty) has been proven. Pursuant to OAR 845-006-0362, Licensee bears responsibility for the violation.

## 2. *Sanction*<sup>9</sup>

As discussed above, a violation of OAR 845-006-0345(1)(a) (under the influence of intoxicants while on duty) is a Category II violation. The standard penalty for a first Category II violation is a 30-day suspension. Pursuant to OAR 845-006-0500(7)(c), the Commission also 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. Grounds for mitigation include good faith efforts to prevent a violation and extraordinary cooperation in the Commission's violation investigation. Grounds for aggravation include, but are not limited to: intentional violations; violations that involve more than one patron or employee; and violations that result in injury or death. *Id.*

By past practice and case precedent, the Commission has determined that for each

---

<sup>8</sup> Also supporting the determination that Robarts was under the influence on duty are the hearsay statements of the 9-1-1 caller. She reported to both the police and Inspector Miller that Robarts was visibly intoxicated, as evidenced by his slurred speech and lack of balance. In *Voodoo Lounge*, the Commission noted that whether a person is under the influence of alcohol is a matter of common knowledge about which a lay witness is competent to render an opinion. Final Order at 8 (citing *State v. Bybee*, 131 Or App 492 (1994) and *State v. Rand*, 166 Or 396 (1941)).

<sup>9</sup> As noted above, the Commission finds that the ALJ's Proposed Order recommends a sanction that is not consistent with agency rules and prior precedent. Specifically, the ALJ's determination that the sanction for a Category II violation can be mitigated down to the equivalent of a Category III violation by offering a civil penalty was erroneous. See *H2O Martini Bar & Restaurant*, (OLCC Final Order 06-V-014, December 2006) (noting that "the Commission has previously held that where, as here, the penalty schedule specifies a standard penalty of suspension only, mitigation does not apply to give a licensee the option of paying a monetary penalty in lieu of suspension." (citing *Express Mart*, (OLCC Final Order 97-V-067, July 1988))). Further the Commission has previously determined that Category II violations "create an immediate threat to public health and safety." Category II violations are more serious than Category III violations and must be treated as such. Under the current penalty schedule, found in OAR 845-006-0500, there are no civil penalty options for Category II violations. Therefore the Commission changes the ALJ's sanction to its sanction listed here, consistent with the agency's schedule for Category II violations and appropriate mitigating factors.

aggravating factor, two days shall be added to the suspension or \$330 to the civil penalty. Similarly, for each mitigating factor, two days shall be deducted from the suspension or \$330 from the civil penalty. *See, e.g., Parilla Grill* (OLCC Final Order, 01-V-082, August 2002).

Commission staff has not alleged any aggravating or mitigating circumstances and proposes to impose the standard Category II penalty of a 30-day license suspension. Licensee, on the other hand, contends that the penalty should be mitigated down to a Category III violation. As grounds for mitigation, Licensee cites to his good faith efforts to prevent liquor law violations both before and after the violation at issue (*i.e.*, the house rules regarding alcohol service and his ongoing training for employees), his immediate termination of Robarts' employment, his immediate reporting of this incident to the OLCC and his cooperation in the violation investigation. Licensee also contends that a 30-day suspension of the liquor license would likely result in the permanent closure of the business.

On the one hand, the Commission has held that economic harm or the potential loss of a licensee's business that may result from the imposition of a penalty does not provide a valid basis for mitigating the penalty.<sup>10</sup> *See, e.g., Undefeated Sports Bar*, Final Order at 11; *The Crown Room* (OLCC Final Order, 11-V-071, October 2012); *Lava Lanes of Medford* (OLCC Final Order, 10-V-018, February 2011).

On the other hand, the Commission has mitigated a penalty based on a licensee's prompt reporting of a violation to the OLCC and extraordinary cooperation in the violation investigation. *The Grove Restaurant & Bar* (OLCC Final Order, 13-V-026, July 2014); *Main Street Texaco & Mini Mart* (OLCC Final Order, 00-V-069, October 2001) The Commission has also awarded mitigation where the licensee made good faith efforts to obtain compliance. *See, e.g., 7 Eleven Food Store No. 14495D* (OLCC Final Order, 98-V-003, May 1998); *Flight 99 Tavern* (OLCC Final Order, 87-V-033, February 1988).

The Commission has also, on occasion, found a licensee's firing of the employee who committed the violation as evidence of a licensee's remedial efforts to avoid further violations to be a basis for mitigation. *See, e.g., Captain Kidd's* (OLCC Final Order, 88-V-027, August 1988) (the licensee's firing of the employee who disregarded the licensee's instructions and served a visibly intoxicated person was a mitigating circumstance); *see also Mark's Tavern* (OLCC Final Order, 89-V-030, July 1989) (the licensee's effort to avoid future violations by firing the permittee who committed the violation was a basis for mitigation.)

---

<sup>10</sup> In Staff's Comments on the Proposed Order, OLCC staff requested that the ALJ remove a footnote on the basis that it was not relevant because no civil penalty option should be awarded. Staff's Comments at 3. The ALJ did not specifically respond to this requested change, but given the ALJ's Response to Staff Comments in general it is clear the ALJ considered a civil penalty an appropriate option in this case. Because the Commission disagrees for the reasons stated herein, the footnote identified by OLCC Staff as irrelevant has been removed.

In the more recent cases of *Aminata's* (OLCC Final Order, 11-V-003, August 2011), *Thrifty Nifty Market* (OLC Final Order, 05-V-011, October 2005), and *Circle K Store #468* (OLCC Final Order, 03-V-017, October 2003), however, the Commission has clarified that the discharge of an employee is not generally a basis for mitigation.<sup>11</sup>

In this case, Licensee is entitled to mitigation based on his prompt reporting of the incident to Inspector Miller and his ongoing cooperation in the violation investigation. As the Commission noted in both *The Grove Restaurant & Bar* and *Main Street Texaco & Mini Mart*, the Commission wishes to encourage and reward licensees and employees who self-report violations and assist the Commission in investigating violations of the law. Licensee's good faith efforts to avoid violations by providing employee training<sup>12</sup> also provide a basis for mitigation.

As noted above, the standard penalty for a first Category II violation is a mandatory 30-day suspension. There is no authority to mitigate the penalty down to the equivalent of Category III violation, as Licensee suggests.<sup>13</sup> However, given the mitigating circumstances (self-reporting /extraordinary cooperation with the OLCC, and good faith efforts), it is appropriate to reduce the sanction by four days. Accordingly, under the circumstances, the proper penalty for Licensee's employee's violation of OAR 845-006-0345(1)(a) (under the influence of intoxicants while on duty) is a 26-day license suspension.

---

<sup>11</sup> The ALJ concluded that Licensee's immediate termination of employee Robarts was a mitigation factor, referring to the Commission's decisions in *Captain Kidd's* and *Mark's Tavern* as analogous to the case at hand. Contrary to the ALJ's interpretation, however, *Captain Kidd's* and *Mark's Tavern* do not stand for the general proposition that termination of employees is considered a mitigating factor; rather those cases reflect decisions by the Commission where termination of offending employees offered examples of a licensee's remedial efforts to avoid further violations. More recently, in cases such as *Thrifty Nifty Market*, *Circle K Store #468*, and *Aminata's*, the Commission has clarified that the Commission does not consider discharge of a culpable employee as a basis for mitigation. In the Proposed Order and Response to Staff's Comments, the ALJ seems to have interpreted those cases to apply only in cases involving offenses related to minors. The Commission clarifies that it was not its intent to draw that distinction. This position is evident in cases such as *Duffy's Irish Pub*, OLCC Final Order 05-V-032, February 2006, where the termination of an employee who was drinking on duty was not a mitigating factor. The Commission takes this opportunity to confirm that in general, termination of a culpable employee is not a circumstance the Commission considers for mitigation.

<sup>12</sup> In the Proposed Order the ALJ initially included "house rules" as a measure of a good faith effort by Licensee. See Proposed Order, Finding of Fact 2. This fact finding was not specifically addressed in Staff's Comments or the ALJ's response. In past cases "house rules" has not typically been a factor the Commission considers as evidence of a good faith effort to avoid or prevent violations. See, e.g., *Dad's Restaurant & Lounge* (OLCC Final Order, 06-V-029, December 2007) (noting the ALJ's error in finding mitigation due to Licensee's posting and instructing employees on rules related to licensing restrictions, as Licensee was required to do both). Because there is evidence in the record of employee training, however, the Commission does not further decide whether "house rules" established a good faith effort in this case.

<sup>13</sup> The ALJ relied on *US Market #145* (OLCC Final Order, 11-V-009, February 2012) as a basis for reducing the sanction of a suspension to the option a fine in lieu of suspension. Contrary to the ALJ's interpretation, however, *US Market #145* does not stand for the general proposition that mitigating factors warrant reduction of a sanction by a full level on the penalty schedule. As noted above, prior agency precedent has made clear that where the standard penalty is suspension only, mitigating factors are not applied to reduce the penalty to a fine in lieu of a suspension.

## FINAL ORDER

The Commission orders that for the violation of OAR 845-006-0345(1)(a) (under the influence of intoxicants while on duty) the Full On-Premises Sales License held by STIB, LLC, and Charles Kitchin, Managing Member, dba The Red Carpet, is SUSPENDED for 26 days.

Because the violation of OAR 845-006-0345(1)(a) (under the influence of intoxicants while on duty) has been established, the alternate alleged violation for drinking on duty shall be dismissed.

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

Dated this 16th day of March 2015

/s/ Steven Marks  
Steven Marks  
Executive Director  
OREGON LIQUOR CONTROL COMMISSION

Mailed this 17th day of March, 2015

THIS ORDER IS EFFECTIVE ON THE DATE MAILED. The suspension will begin at 7:00 AM on Wednesday, April 1, 2015 and end at 7:00 AM on Monday, April 27, 2015.

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.

---

*See, e.g. H2O Martini Bar & Restaurant, supra* at n. 5 (citing *Express Mart, supra*). *US Market #145* is distinguishable because it involved a Category I violation, where the standard sanction is cancellation. In such a case, the only option to account for mitigation is to drop the sanction to the next level. In cases such as the present one, the appropriate mechanism for reducing the sanction due to mitigating factors is to subtract days from the standard suspension period.