

BEFORE THE OREGON LIQUOR CONTROL COMMISSION
of the
STATE OF OREGON

In the Matter of the Full On-Premises)	FINAL FINDINGS OF FACT
Sales License Held by:)	CONCLUSIONS OF LAW
)	AND ORDER
)	
Undeclared Sports Bar, LLC)	OLCC-14-V-013
Johnny Chao, Managing Member)	OLCC-14-V-013A
dba UNDEFEATED SPORTS BAR)	
& GRILL)	
6618 SE Powell Blvd.)	
Portland, OR 97206)	

HISTORY OF THE CASE

On December 23, 2013, the Oregon Liquor Control Commission (OLCC or Commission) issued a Notice of Proposed License Suspension/Civil Penalty to Undeclared Sports Bar, LLC, Johnny Chao, Managing Member, dba Undeclared Sports Bar & Grill, located at 6618 SE Powell Blvd., Portland, Oregon. The Notice charged Licensee with two violations: (1) that on November 1-2, 2013, Managing Member Chao was under the influence of intoxicants on duty in violation of OAR 845-005-0345(1), or alternatively, that he drank alcoholic beverages while on duty; and (2) that on November 1-2, 2013, Managing Member Chao and Licensee's employee Cindy Le permitted minors to be on the licensed premises in violation of OAR 845-006-0335(3)(b). Licensee timely requested a hearing.

The Commission referred Licensee's hearing request to the Office of Administrative Hearings (OAH) on February 5, 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 May 14, 2014. Attorney Benjamin Falk represented Licensee. Anna Davis presented the case for the OLCC.

The following witnesses testified at the hearing on behalf of OLCC: Portland Police Officers Charles Asheim and Brian Dale; and OLCC Inspectors Paul Rosenow and John Mereen. The following witnesses testified on Licensee's behalf: Patrons Greg Pappas, Handerson Sonny Ratanaboud and Daniel Nunnally and Managing Member Johnny Chao.

The record closed on May 14, 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 June 10, 2014.

Licensee filed Exceptions to the Proposed Order on June 25, 2014. Staff filed Comments on the Proposed Order on June 25, 2014. The Administrative Law Judge responded to Licensee's Exceptions and Staff's Comments on June 30, 2014.

On August 21, 2014, the Commission considered the record of the hearing, the applicable law, the Proposed Order of the Administrative Law Judge, Licensee's Exceptions to the Proposed Order, Staff's Comments on the Proposed Order and the Administrative Law Judge's Response to Licensee's Exceptions and Staff's Comments. Based on this review and the preponderance of the evidence, the Commission enters the following:

EVIDENTIARY RULINGS

OLCC Exhibits A1 through A8 were admitted without objection.

ISSUES

1. Whether, on November 1 and 2, 2013, Managing Member Chao 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. Whether on November 1, 2013, Managing Member Chao and employee Cindy Lee permitted three minors (Michael Jackson, McKeever Thompson and Leondrell Mitchell) to be on the licensed premises in violation of OAR 845-006-0335(3)(b)
3. If one or both violations occurred, what is the appropriate sanction?

FINDINGS OF FACT

1. On February 9, 2011, the Commission issued a Full On-Premises sales license to Undeafated Sports Bar, LLC, Johnny Cho, Managing Member, dba Undeafated Sports Bar & Grill, located at 6618 SE Powell Blvd., Portland, Oregon. (Ex. A1.) The premises has a Number I minor posting, meaning that minors are prohibited from the premises at all times. (Ex. A2; test. of Rosenow.)

2. Mr. Chao generally works at the licensed premises every day. On Friday, November 1, 2013, he arrived at the premises between 4:00 and 5:00 p.m. He opened for business and served customers until approximately 8:00 p.m., when his employee, Cindy Le, came on duty. Mr. Chao had scheduled Ms. Lee as the only person on duty that night because he did not expect the premises to be particularly busy.¹ Mr. Chao also planned to stay at the premises that night to play cards (poker) with a group of friends. At about 9:00 p.m., Mr. Chao sat down and began playing cards with several patrons. He had arranged for two persons, Mr. Pappas and Mr. Ratanaboud, to switch off as the dealer. While playing poker that night, Mr. Chao consumed alcoholic beverages, including a shot of Hennessy and a couple of light beers. (Test. of Chao; test. of Pappas; test. of Ratanaboud.)

¹ The premises has a maximum capacity of 85 persons. The typical crowd for a Friday night, when there is no special event planned, is sometimes as few as 10 to 15 people. (Test. of Chao.)

3. At around 10:00 p.m., a group of three or four patrons entered the bar. These patrons, who were not part of the premises' regular crowd, approached the poker table and advised Mr. Chao that they were there to celebrate a birthday. Over the next hour or more, another 30 to 40 persons entered the premises for the birthday party. Among the persons who entered the premises that night as part of the birthday celebration were three minors: McKeever Thompson (age 16 at the time), Leondrell Mitchell (age 16 at the time) and Michael Jackson (age 19 at the time). (Test. of Asheim; Exs. A3 and A4.)

4. By about 10:30 p.m., Mr. Chao took notice of the growing crowd. He became concerned that the group would get rowdy and that Ms. Le would be overwhelmed and unable to maintain control of the premises. At about 11:00 p.m., Mr. Chao called the security company (Extreme Security) with which he had a contract to ask for assistance in controlling the crowd. Mr. Chao placed five calls to the security company over the next hour or so, but he was unable to reach anyone. At about 11:30 p.m., Mr. Chao told Ms. Le to stop serving and shut the party down, because the crowd was getting out of hand.² Despite Mr. Chao's instructions, Ms. Le did not immediately shut down the party. Mr. Chao continued to consume alcoholic beverages at the poker table while he called for security. (Test. of Chao; test. of Mereen; Ex. A7.)

5. On that night, Portland Police Gang Enforcement Team (GET) officers received information of a large party at Undeafed Sports Bar with known Hoover and Unthank gang members in attendance. Officers arrived at the premises about 11:50 p.m., and confirmed that there was a large group, including known gang members, inside the bar. As the officers entered the premises, they noted that Licensee had no security personnel on hand and only one employee on duty. (Exs. A3 and A4; test. of Asheim.)

6. When GET Officer Asheim entered the premises, he saw minor Thompson (who he knew from previous contacts) walk across the room and sit down at a booth with several others. There were alcoholic beverages at the table where minor Thompson seated himself. Officer Asheim knew that minor Thompson was a documented Hoover 107 gang member, that he was on Multnomah County Juvenile probation for Riot and for Unlawful Possession of a Firearm, and that his probation conditions included a 7:00 p.m. curfew, no association with gang members and no new crimes. Based on these circumstances, Officer Asheim contacted minor Thompson and took him into custody on a probation violation. In talking with the officer that night, minor Thompson advised that he learned about the party from Facebook. He also said that no one had checked his identification at the door, so he did not realize he was at a bar where minors were prohibited.³ (Ex. A3; test. of Asheim.)

² At hearing, Mr. Chao testified that he began calling the security company around 10:30 p.m. He also testified that he did not recall what time it was when he first told Ms. Le to shut down the party. Because it is likely that Mr. Chao's recollection of the timing and sequence of events was better when he was speaking with Inspector Mereen on the night in question (and when he used his cell phone's call log to show the inspector that he had placed five calls to the security company between 11:00 p.m. and midnight), the findings in this regard are based on Inspector Mereen's report of his interview with Mr. Chao rather than on Mr. Chao's testimony at hearing.

³ Later, in connection with his probation violation hearing, minor Thompson claimed that he had been at

7. Along with arresting minor Thompson, Portland Police officers also contacted minors Mitchell and Jackson inside the premises. All three minors appeared their true age that night (ages 16, 16 and 19, respectively). Officers escorted minors Mitchell and Jackson from the premises. (Exs. A3, A4, A5 and A6; test. of Asheim.)

8. Other police officers on scene interviewed Mr. Chao and Ms. Le. Ms. Le advised Officer Bocciolatt that she was working alone and had no help. Mr. Chao advised the officers that he was the manager of the premises. He also admitted that he had consumed alcoholic beverages that night. During the interview, Officer Bocciolatt noted that Mr. Chao had slurred speech and bloodshot and watery eyes. (Ex. A4.)

9. When Portland Police Sergeant Kraner arrived at the licensed premises, he ordered the closure of the premises for the night. Thereafter, at about 12:09 a.m., Portland Police contacted OLCC and requested that investigators respond to the premises. Inspectors Rosenow, Smith and Mereen arrived at approximately 12:25 a.m. Upon their arrival, Sgt. Kraner advised them that he had closed the premises because of the large crowd of known members there and things were starting to get out of control. Sgt. Kraner also advised them that the manager was intoxicated and there had been only one other employee on duty. After that, Inspector Mereen interviewed Mr. Chao and Inspector Rosenow interviewed Ms. Le. (Exs. A4, A5 and A7; test. of Mereen; test of Rosenow.)

10. Upon contact with Mr. Chao, Inspector Mereen noted the overwhelming odor of alcoholic beverages on Mr. Chao's breath. Inspector Mereen also noted that Mr. Chao had bloodshot and glassy eyes, slurred speech, slow movements and unsteady balance. Mr. Chao had to place his hand on the table next to him to steady his balance as he stood up to talk to the inspector. Mr. Chao admitted to consuming alcoholic beverages that night. He explained that he had only one employee on duty, but when the large group came into the premises he had tried to contact security because the group was getting rowdy. Mr. Chao also advised the inspector that he had told Ms. Le to shut the party down at 11:30 p.m. because the crowd was getting out of hand. (Ex. A7; test. of Mereen.)

11. Ms. Le advised Inspector Rosenow that she was the only person on duty. When the inspector advised Ms. Le that there had been three minors inside the premises, she was adamant that she had checked the identification of every patron in the bar. Considering that Ms. Le was the only employee on duty, that she was tasked with bartending duties behind the bar, and that the crowd in the bar was reportedly up to 50 or 60 when the police arrived, Inspector Rosenow did not believe Ms. Le's claim that she had verified the age of every patron in the bar that night. (Test. of Rosenow; Ex. A5.)

CONCLUSIONS

1. On November 1 and 2, 2013, Managing Member Chao was under the influence of intoxicants while on duty at the licensed premises in violation of OAR 845-005-0345(1).

the premises for about 10 minutes before the police arrived. (Test. of Asheim.)

2. On November 1, 2013, Licensee's employee Cindy Lee permitted three minors (Michael Jackson, McKeever Thompson and Leondrell Mitchell) to be on the licensed premises in violation of OAR 845-006-0335(3)(b).

3. For the violation of OAR 845-006-0345(1), the appropriate sanction is a 30 day license suspension. For the violation of OAR 845-006-0335(3)(b), the appropriate sanction is a 15 day suspension or a civil penalty of \$2,475 in lieu of suspension.

OPINION

As set out above, the Commission asserts that Mr. Chao 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 November 1 and 2, 2013. The Commission also asserts that Mr. Chao and Ms. Le permitted three minors to be on the licensed premises violation of OAR 845-006-0335(3)(b). As the proponent of these contentions, 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).

1. *Violation 1: Under the Influence of Intoxicants While on Duty*

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.)

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); *Duffy's Irish Pub* (OLCC Final Order, 11-V-068, June 2012).

In this case, Mr. Chao does not dispute that on the night of November 1, 2013, he consumed alcoholic beverages at the licensed premises. And, although he claims he was not intoxicated, he does acknowledge that he displayed signs of alcohol intoxication that night. As the Managing Member, Mr. Chao had the authority to place himself on duty.⁴ Consequently, the issues to be resolved are whether Mr. Chao was under the influence of intoxicating liquor that night, whether he performed acts on behalf of the licensee and whether those acts involved controlling conduct on the premises.⁵

As noted above, a violation of OAR 845-005-0345(1) requires that the person be drinking or be under the influence of intoxicants on duty. Under the influence of intoxicants is a different, and lesser, standard than visible intoxication.⁶ Mr. Chao had been drinking at the premises over the course of three hours while playing cards with friends. During his contact with officers and inspectors (which began around midnight), he displayed well-known and easily recognized signs of intoxication: the odor of alcoholic beverages on his breath, bloodshot and glassy eyes, slurred speech, slow movements, and unsteady balance. Having observed these conditions, the responding officers and Inspector Mereen believed that Mr. Chao was intoxicated. This is sufficient to establish that Mr. Chao was under the influence of intoxicants at the time in issue.

The evidence also establishes that by approximately 10:30 p.m., Mr. Chao took notice of the growing crowd. He grew concerned that the crowd would get rowdy and overwhelm Ms. Le, the only employee on duty. At around 11:00 p.m., Mr. Chao began making calls to the security company for assistance in controlling the crowd. At about 11:30 p.m., having had no success in contacting the security company, Mr. Chao directed Ms. Le to shut down the party. The calls to the security company and the instructions to Ms. Le were attempts to control conduct on the premises that Mr. Chao undertook in his capacity as Licensee's managing member. Mr. Chao placed himself back on duty when he took these steps to control conduct on the premises.

The determination that Mr. Chao placed himself on duty by taking steps to control conduct on the premises is consistent with prior Commission case precedent. For example, in *Cactus Bar & Grill*, the Commission held that the licensee placed himself on duty by monitoring the bartender, helping the bartender break up the fight, and escorting and ejecting patrons from the premises. In *Sherry Scott* (OLCC Final Order, 09-V-069, January 2010), a permittee with the authority to put herself on duty did so by representing herself to police officers as the premises

⁴ 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).

⁵ There is no evidence that, after Ms. Le came on duty, Mr. Chao sold or served alcoholic beverages or checked identification.

⁶ See, for example, ORS 471.410(1) which prohibits the sale or service of alcoholic liquor to any person who is visibly intoxicated. Per Commission case precedent, a visibly intoxicated person is one whose physical and mental control is diminished by alcohol or drugs to a point where such diminished control can be seen or observed. *Portland Civic Stadium* (OLCC Final Order, 85-V-032, January 1986).

manager, demanding to know why the police were at the premises and directing them to leave. In *Spot 79*, the corporate principal put himself on duty when he undertook to resolve a dispute with an unruly, intoxicated patron by instructing the bartender to give an off-duty employee some money.⁷ And, in *Duffy's Irish Pub*, the corporate principal who had been at the premises consuming alcoholic beverages placed himself on duty when he put his arm on the shoulder of a problem patron and directed the patron to leave.

In *Duffy's Irish Pub*, the Commission explained the basis for its rule prohibiting a licensee, permittee or employee from drinking or being under the influence of intoxicants while on duty:

[A]s 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.

Final Order at 8.

In this case, although Mr. Chao did not get directly involved with the growing and unruly crowd, he did take steps to control the premises. Mr. Chao was under the influence of intoxicants at the time he performed these acts on the Licensee's behalf. Consequently, the violation of OAR 845-006-0345(1) has been proven.

2. Violation 2: Permitted Minors in a Prohibited Area

The Commission also alleges that Mr. Chao and Ms. Le permitted three minors to be on the licensed premises in violation of OAR 845-006-0335(3)(b). The rule provides that "[n]o licensee, permittee, or licensee's employee will permit a minor: * * * (b) To be on licensed premises or an area of the licensed premises prohibited to minors, except as provided in ORS 471.430, 471.480, 471.482, and this rule."

The evidence establishes that on the night of November 1, 2013, three minors, Thompson (age 16), Mitchell (age 16 at the time) and Jackson (age 19), were inside the premises when Portland Police officers responded to the location. The evidence establishes that all three minors appeared their true age. The issue to be resolved is whether, as alleged, Mr. Chao and/or his employee Ms. Le permitted the minors to be on the premises.

⁷ In *Spot 79*, the visibly intoxicated, unruly patron had 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 present to stop arguing with the corporate principal. To resolve the issue, the corporate principal directed the on-duty bartender to pay Cindy for her shift. Final Order at 3.

In *Lava Lanes of Medford* (OLCC Final Order, 04-V-007, February 2005) the Commission set out the test for “permitting” in the context of OAR 845-006-0335(3)(b):

“Permitting” is proved by establishing that the licensee or permittee had knowledge of or had sufficient time and opportunity to detect and determine the minor’s presence at the premises. * * * It is not necessary to show that the licensee had knowledge of the presence of the minor on the premises; the licensee also permits a minor to remain if the licensee had sufficient time and opportunity to detect the minor.

Final Order at 6 (citations omitted).

In *Lava Lanes*, the Commission held that the server had sufficient time and opportunity to detect the minor where she did not notice the minor decoy seated in an area prohibited to minors for at least 30 minutes. Final Order at 7. In *Lucky Jade Chinese Restaurant* (OLCC Final Order, 09-V-055, April 2010), the Commission found a violation where the minor was only inside the premises for a few minutes, but the evidence demonstrated that the employee was aware of the minor’s presence.

In *Murphy’s Oyster Bar and Grill* (OLCC Final Order, 85-V-046, December 1985), the Commission found that 15 to 25 minutes provided “ample time” for the licensee’s employees to detect the minor in the lounge. The Commission also noted that the fact the premises was busy was not a mitigating factor, because a licensee has a responsibility to maintain adequate staff to ensure compliance with the Commission’s rules. Final Order at 4-6. In *Tacoma Café* (OLCC Final Order, 86-V-028, March 1987), the Commission found that where the bartender saw two minors enter the premises and walk past the bar to the rear of the premises, “ten minutes was more time than necessary or reasonable” for the bartender to contact the minors. Final Order at 6.

And, finally, in *Sugar Pine Inn* (OLCC Final Order, 02-V-052, July 2003), the Commission found a violation of OAR 845-006-0335(2) where the minor, who looked his true age of 20 “by virtue of a blemished and youthful complexion and overall appearance,” had only been in the prohibited portion of the licensed premises for a brief period before police officers and an OLCC inspector arrived for a compliance check. There, the minor walked in with other patrons. While the licensee’s employees were checking the identification of the others, the minor walked over to a nearby table and sat down. No one had asked him for his identification in the short time before the police arrived. Final Order at 4-6.

In this case, there is nothing to suggest that Ms. Le was aware of the minors’ presence at the premises.⁸ And, although the evidence establishes that all three minors were inside the

⁸ As discussed in more detail below in the sanction section, Licensee should not bear responsibility for Mr. Chao’s own failure to detect the minors’ presence at the premises that night. Although Mr. Chao was at the premises, and (as found herein) he ultimately took steps to control the premises when the crowd became large and unruly, he did not consider himself to be on duty that night. Because he did not consider himself to be on duty, he did not undertake the normal duties and responsibilities of an on-duty employee, duties such as checking identifications, selling and serving alcoholic beverages, dealing with

premises when the officers arrived, the evidence does not disclose how long the minors had been there prior to the officers' arrival. Officer Asheim testified that minor Thompson claimed he had been in the premises about 10 minutes prior to his arrest but, given the circumstances (and the likelihood the minor was trying to minimize his visit to the premises for purposes of his probation violation hearing), this hearsay statement is not entitled to much weight. As for minors Mitchell and Jackson, there is simply no information as to how long they had been inside the premises. But, considering that patrons started arriving for the birthday party at around 10:00 p.m., and that by 11:30 p.m. the crowd was so large and unruly that Mr. Chao directed Ms. Le to shut down the party, it is reasonable to infer that the minors had been inside for several minutes at least when the officers entered the premises. Also, despite Ms. Le's claims that she had checked the identification of every patron in the bar, it is reasonable to infer that she did not, in fact, ask any of the three minors for identification. Had she done so, she would have learned that they were minors.

Because there is no evidence that Ms. Le knew at the time that there were minors in the premises, the question becomes whether, under the circumstances, there existed a sufficient opportunity to detect the minors' presence. As the Commission noted in *Punjab Tavern* (OLCC Final Order, 92-V-088, June 1993), the Commission held that "the opportunity to observe is crucial." *Id.* at 19; *see also Bradley's Bar & Grill* (OLCC Final Order, 13-V-007, December 2013). In this case, there is nothing to suggest that the minors were attempting to hide their presence or avoid detection. Indeed, when the officers entered the premises, minor Thompson was walking across the room to join a group of patrons seated at a table. The other two minors were plainly visible to the officers as well. This suggests that, had the bar not been so crowded, or had Licensee not been understaffed that night, Ms. Lee or another on-duty employee would have had the opportunity to contact the minors and remove them from the presence. The conclusion that, under these circumstances, there existed sufficient time and opportunity for Ms. Le to detect the minors finds support in other Commission cases.

In *TJ's Fireside Dining* (OLCC Final Order, 00-V-074, 00-V-006, October 2001), the Commission announced that, in the context of sale or service to a visibly intoxicated person (ORS 471.410(1)), or allowing a visibly intoxicated person to consume alcoholic beverages (ORS 471.412), it would construe conditions under a licensee's control that interfere with compliance or the monitoring of compliance with the liquor laws – conditions such as too few staff to monitor patrons while performing other required job duties – as a presumption that the licensee or permittee had the opportunity to observe the visibly intoxicated person. The Commission reasoned as follows:

A licensee cannot escape the duty to comply with the liquor laws of this state by turning a blind eye and not monitoring compliance, or by maintaining conditions which make effective monitoring of compliance difficult or impossible. When either is done, licensee assumes the risk that violations will occur and may not claim those same conditions excuse liability for the foreseeable violations that do occur.

Final Order at 17-18, n4.

problem patrons, etc.

Although this case does not involve the failure to observe a visibly intoxicated patron, the failure to detect the presence of minors on the premises presents an analogous situation. As noted above, Licensee's understaffing on the night of November 1, 2013 created a situation in which it was difficult or impossible for Ms. Le to adequately monitor the crowd for the presence of minors. Because Licensee should not escape the duty to comply with the liquor laws by maintaining conditions (not enough staff on duty) that made it difficult or impossible to monitor the patrons entering the premises that night, it is reasonable to presume that Ms. Le had both the time and the opportunity to detect the minors' presence. Consequently, under the circumstances, Ms. Le permitted the three minors to be on the licensed premises in violation of OAR 845-006-0335(3)(b).

3. Sanction

As found above, Commission Staff has proven the two violations alleged in the notice. Mr. Chao violated OAR 845-006-0345(1) by placing himself on duty while he was under the influence of intoxicants. Licensee is also liable for violating OAR 845-006-0335(3)(b), in that Ms. Le permitted minors to be on the licensed premises. Pursuant to OAR 845-006-0500, a violation of OAR 845-006-0345(1) (under the influence on duty) is a Category II violation. The standard penalty for a first Category II violation is a 30 day suspension. OAR 845-006-0500(7). A violation of OAR 845-006-0335(3)(b) is a Category IV violation. The standard penalty for a first Category IV violation is a 7 day suspension or a \$1,155 civil penalty. OAR 845-006-0500(7)(a) and 7(b) and Exhibit 1 to OAR 845-006-0500(7). These are Licensee's first Category II and Category IV violations.

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. As pertinent to this case, grounds for aggravation include, but are not limited to, the violation involved more than one patron or employee and/or the violation involved a juvenile. By case precedent, the Commission has also found a basis for aggravation where the licensee personally committed the violation. *See, e.g., P-Mart* (OLCC, Final Order OLCC-92-V-098, April 1993). Also, by case precedent, the Commission will add two days to the penalty for each proven aggravating circumstance and will deduct two days for each proven mitigating circumstance. *Parrilla Grill* (OLCC Final Order, 01-V-082, August 2002).

Violation I. As to the first violation (under the influence of intoxicants on duty), Commission Staff alleges Mr. Chao's personal involvement in the violation as a basis for aggravation. In *Cactus Bar & Grill* the Commission found that "where the licensee's personal involvement is an element of the violation, that fact cannot also be the basis for aggravation." Final Order at 12. However, in more recent cases such as *Spot 79*, OLCC-08-V-005, January 2010; *Duffy's Irish Pub*, OLCC-11-V-068, June 2012; and *Cinnabar*, OLCC-11-V-060, August 2012; the Commission determined that a licensee's personal involvement in the violation of being under the influence of intoxicants while on duty is a basis for aggravation. Following

recent case precedent aggravation of the penalty on the basis of Mr. Chao's personal involvement is appropriate in this instance.

Licensee argues that the sanction should be mitigated because Mr. Chao acted reasonably by taking steps to control the premises once the unexpectedly large crowd became unruly. In an analogous situation, the Commission declined to accept the "choice of evils" defense as a basis for mitigation where a licensee puts himself on duty while intoxicated. In *Cactus Bar & Grill*, the Commission explained as follows:

[The licensee] requests mitigation based on the choice of evils defense. The defense of lesser evils does not negate the charge, but can be the basis for mitigation in some instances. Where, however, a licensee puts himself on duty while intoxicated, even to eject an unruly patron, that licensee will not be rewarded with mitigation. Intoxication impairs the judgment of the actor and further elevates the risk of disorder. No reduction from the suspension is warranted.

Id. In this case, Mr. Chao put himself on duty while intoxicated by placing calls to the security company and instructing Ms. Le to shut down the party. As in *Cactus Bar & Grill*, no reduction from the suspension is warranted on this basis.⁹

Licensee also asserts that the sanction should be mitigated because a mandatory 30 day suspension would, in effect, shutter his business. Despite this contention, the Commission does not recognize the potential loss of business as a basis for mitigation. *See, e.g., The Crown Room* (OLCC Final Order, 11-V-071, October 2012) (noting that a license suspension that may cause a licensee financial loss does not render the sanction unduly harsh); *Cinnabar* (OLCC Final Order, 11-V-060, August 2012); *OLCC Agency 183* (OLCC Final Order, 03-RO-002, October 2003) (constitutional prohibitions against "excessive punishment" apply only in the criminal context and not civil administrative actions).

Violation 2. As to the second violation (permitting minors in a prohibited area), Commission Staff seeks aggravation of the standard penalty because there were three minors on the premises, two of which were juveniles, and because two employees (including Mr. Chao) were involved. The fact that the violation involved three minors provides a basis for increasing the penalty by four days.¹⁰ Similarly, the fact that two of the minors were under the age of 18 provides also basis for increasing the penalty by four days. OAR 845-006-0500(7)(c). But, under the circumstances presented, it is not appropriate to impose an additional two days aggravation based on more than one employee's involvement in the violation.

⁹ Even if the choice of evils defense was available in this context, the actions taken by Mr. Chao were not effective in controlling the situation. He did not get a response from the security company and Ms. Le did not immediately close the bar upon his direction. In fact, it was the police (who Mr. Chao did not call) who ordered the closure of the premises for the night.

¹⁰ In *Parrilla Grill*, where the violation involved more than one patron or employee (specifically, in that case, the licensee had three employees without service permits) the Commission added two days suspension or \$330 for each person involved beyond the first one. Final Order at 6.

As noted above, although Mr. Chao eventually placed himself back on duty later in the night when the crowd became overwhelming and unruly, Licensee should not bear responsibility for the fact that Mr. Chao was not personally checking identification and/or monitoring the crowd for minors when he considered himself to be off duty. Licensee had only one employee, Ms. Le, on duty that night. That circumstance likely contributed to the violations. In other words, had there been more than one employee on duty and responsible for monitoring the premises for compliance with the liquor laws that night, the less the likelihood that the three minors inside the premises would have gone undetected. But, because Mr. Chao was not intending to perform acts on behalf of the licensee at the premises that night, he should not be considered as involved in this second violation. Aggravation based on the mere fact that he was present at the premises when the violation occurred is not appropriate. Stated differently, it is not appropriate to sanction Mr. Chao for placing himself on duty while intoxicated and, at the same time, aggravate the sanction for the second violation based on his failure to perform additional work duties.

To summarize, for the violation of OAR 845-006-0345(1), Licensee is subject to the standard 30 day license suspension for a first Category II violation plus an additional two days of suspension due to aggravation of the penalty. For the violation of OAR 845-006-0335(3)(b), Licensee is subject to a 15 day suspension (7 days plus aggravation of 8 days) or a civil penalty of \$2,475 (\$1,155 + \$1,320) in lieu of the 15 days suspension.

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FINAL ORDER

The Commission orders that for the violation of OAR 845-006-0345(1) (being under the influence of intoxicants on duty), the Full On-Premises Sales License held by Undeclared Sports Bar, LLC, Johnny Chao, Managing Member, dba Undeclared Sports Bar & Grill, located at 6618 SE Powell Blvd., Portland, Oregon, be SUSPENDED for 32 days.

The alternate violation of OAR 006-0345(1), alleging drinking on duty, shall be dismissed.

It is further ordered that for the violation of OAR 845-006-0335(3)(b) (permitting minors on premises), Undeclared Sports Bar, LLC, Johnny Chao, Managing Member, dba Undeclared Sports Bar & Grill, located at 6618 SE Powell Blvd., Portland, Oregon be SUSPENDED for a 15 days, or be FINED \$2,475 in lieu of suspension.

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

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

Dated this 26 day of August 2014

/s/ Steven Marks

Steven Marks

Executive Director

OREGON LIQUOR CONTROL COMMISSION

Mailed this 26 day of August 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.