

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

In the Matter of the Full On-Premises)	FINAL FINDING OF FACT
)	CONCLUSIONS OF LAW
)	AND ORDER
Sales License Held by:)	
)	
Oregon Restaurant Services, Inc.)	OLCC-13-V-007
Dan Fischer, Pres./Sec./Dir./)	OLCC-13-V-007A
Marwin Hofer, Vice Pres./Treas/Dir.)	OLCC-13-V-007B
Michael Evans, Director)	OLCC-13-V-007C
Jim Thares, Director)	OLCC-13-V-007D
(605) Holdings, Inc., Stockholder)	OLCC-13-V-007E
)	
dba BRADLEY’S BAR & GRILL #40)	
11995 N. Center)	
Portland, OR 97217)	

HISTORY OF THE CASE

On December 19, 2012, the Oregon Liquor Control Commission (OLCC or Commission) issued a Notice of Proposed License Suspension/Civil Penalty to Oregon Restaurant Services, Inc. (ORSI); Dan Fischer, President/Secretary/Director; Marwin Hofer, Vice President/Treasurer/Director; Michael Evans, Director; Jim Thares, Director; and (605) Holdings, Inc., Stockholder (collectively “Licensee”), dba Bradley’s Bar & Grill #40, located at 11995 N. Center Avenue, Portland, Oregon, 97217. The Notice charged Licensee with two violations of OAR 845-006-0347(3), alleging that Licensee permitted unlawful activity on the licensed premises on two occasions. Licensee timely requested a hearing.

The Commission referred Licensee’s hearing request to the Office of Administrative Hearings on January 25, 2013. The OAH assigned the case to Senior Administrative Law Judge Alison Greene Webster.

On March 4, 2013, the Commission issued an Amended Notice of Proposed License Suspension/Civil Penalty to Licensee, alleging an additional violation, that Licensee’s employees permitted a minor to be on the licensed premises in violation of OAR 845-006-0335(3)(b).

Senior Administrative Law Judge Alison Greene Webster presided over a contested case in this matter in Tualatin, Oregon, on July 23 and 26, 2013. William Rasmussen, Attorney at Law represented the Licensee. Anna Davis presented the case for the OLCC.

The following witness testified on behalf of the Commission: Portland Police Officer Eric Zajac; Portland Police Officer Joshua Buller; Portland Police Officer Robert Simon; Portland Police Sergeant Mark Friedman; Portland Police Officer Ryan Porath; Portland Police Officer James Townley; OLCC Enforcement and Compliance Technician Shannon Hoffeditz; Detective

Mike Hanson of the Oregon State Police Gaming Division; OLCC Inspector David Luster; and OLCC Inspector Jason Tallmadge.

Licensee called the following witnesses: Kimberly Suratt, Licensee's Human Resources Manager; and Bradley's employees Serena Anca, Monica Pulver and Aubrey Spears.

The record remained open for written closing briefs, and closed on October 1, 2013, upon receipt of Licensee's Reply brief.

The Administrative Law Judge considered the record of the hearing and the applicable law and issued a Proposed Order mailed October 11, 2013. Staff filed Comments on the Proposed Order on October 28, 2013. The Administrative Law Judge responded to Staff's Comments on October 31, 2013

On December 12, 2013, 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:

EVIDENTIARY RULING

OLCC Exhibits A1 through A19 were admitted without objection.

Licensee's Exhibits P1, P2.1, P3, P4 and P7.5 and P13.1 through P13.5 were admitted without objection. Licensee's Exhibit's P5, P6, P7, P8, P9, P10, P11, P12 were admitted over Commission Staff's relevancy, hearsay and/or foundation objections.

ISSUES

1. Whether, on October 10, 2012, Licensee permitted unlawful activity on the licensed premises in violation of OAR 845-006-0347(3) when a patron attempted to deliver methamphetamine to a confidential reliable informant in violation of ORS 475.890.

2. Whether, on October 30, 2012, Licensee permitted unlawful activity on the licensed premises in violation of OAR 845-006-0347(3) when a patron delivered methamphetamine to a confidential reliable informant in violation of ORS 475.890.

3. Whether, on December 21, 2012, one or more of Licensee's employees permitted a minor to be on the licensed premises in violation of OAR 845-006-0335(3)(b).

4. If one or more of the alleged violations occurred, what is the proper sanction?

5. If one or more violations is found, whether OLCC officials violated Licensee's rights under the Equal Protection Clause of the 14th Amendment of the United States Constitution.

(////)

FINDINGS OF FACT

1. Licensee Oregon Restaurant Services, Inc. (ORSI) has held numerous liquor licenses in Oregon since at least April 1992. As pertinent to this matter, Licensee has held a Full On-Premises Sales license for Bradley's Bar & Grill #40, located at 11995 N. Center Avenue, Portland, since October 2009. (Ex. A1.) Licensee also operates five other licensed establishments in the Hayden Island area in the immediate vicinity of Bradley's: The Anchor Bar #35 at 11915 N. Center Ave., Rachel's Kitchen #36 at 11919 N. Center Ave., Café Del Toro #37 at 11935 N. Center Ave., Paddy's Old Irish Café #28, 11945 N. Center Ave. and Dotty's #24 at 11955 N. Center Ave. (Ex. A1; test. of Suratt.)

2. The area in which the above businesses operate on Hayden Island, the Harbor Shops at Jantzen Beach, is also referred to as "Lottery Row," because there are twelve delis, bars and restaurants in the same commercial strip mall, all with Oregon Lottery machines. In 2010, Hayden Island residents began to raise concerns about increasing criminal activity in the area in and around Lottery Row. The activities included drug dealing, over-service of alcohol, disturbances, car prowls, and impaired drivers. The neighborhood association's complaints prompted the Portland Police Bureau (PPB) to designate the area as a high crime "hot spot." The PPB began to increase patrols and enforcement efforts to improve the livability in the area. (Ex. P6.14, P6.15; test. of Friedman.)¹

3. In early February 2012, representatives from the PPB, the OLCC and the Lottery Commission met to discuss the ongoing problems with criminal activity in the area around Lottery Row. The agencies agreed to coordinate their enforcement efforts to address the neighborhood association's public safety concerns. (Exs. P6.1 and P6.2; test. of Luster.)

4. On or about June 1, 2012, OLCC Inspectors David Luster, Jason Tallmadge and Jackie Paul went to another one of ORSI's licensed premises on Lottery Row (Café Del Toro) for a food service compliance check. Inspector Luster undertook an inspection of the premises' kitchen, including the food freezer. In the freezer, he found plastic bins covered in ice and frozen stuck to the side of the freezer. He chipped away the ice and removed the plastic bins from the freezer to inspect them. Inside the bins, he found a package of frozen taquitos dated March 27, 2012 and frozen pizzas dated May 15, 2012. Luster's inspection of Café Del Toro's freezer caused chunks of ice to spill onto and melt on the kitchen floor. Upon completing the kitchen inspection, Luster advised the manager on duty that Café Del Toro was not in compliance with OLCC's food service requirements and that a Notice of Violation was pending. (Exs. A20, A21, P.7.2; test of Luster.)

5. On July 12, 2012, representatives from the OLCC (including Inspector Luster), the Lottery Commission and the PPB attended the Hayden Island Neighborhood Association meeting. Representatives from ORSI also attended the meeting. There was a discussion at the meeting regarding the saturation of lottery businesses on Hayden Island and the ongoing problems with criminal activity and alcohol over-service in the area. The Lottery Director

¹ The Commission changed "of the" to "there" to correct the scrivener's error in the first sentence of this Finding of Fact.

reported to the neighborhood association members that the Lottery was working on promulgating new rules to limit the concentration of lottery machines. The Lottery Director also advised that the Lottery was working closely with the PPB and OLCC to use other avenues to address the problems in the area. During the meeting, Luster reported to the attendees that he had made more than 25 compliance visits to the Lottery Row businesses and that the OLCC was working on cases against the bars. In addition, Luster said that he had been “digging through refrigerators” to make sure the licensed businesses were in compliance with the food service rules. (Ex. P7.4; test. of Spears.)

6. On the afternoon of July 15, 2012, a PPB officer on regular patrol observed two men walking through the parking lot of Lottery Row, past the licensed businesses and into the alley behind Bradley’s. The officer contacted the men and engaged them in conversation. During the conversation, the officer learned that one of the men (Dustin Monson) had a warrant for his arrest in Washington. The officer confirmed the arrest warrant and took Monson into custody. In a consensual search of Monson’s backpack, the officer found marijuana, a glass pipe with residue and a spoon inside a baggie with white residue. (Ex. P7.5 at 2-3.)

7. On August 7, 2012, Luster received a telephone voice message from ORSI’s attorney inquiring about a warning letter (referred to as a “drug letter”) that Luster had issued to ORSI in June 2012 regarding drug activity in the area of the Anchor Bar, another of ORSI’s licensed premises along Lottery Row. Luster returned the call and left a voice message for the attorney that same evening. It had been about a month and a half since Luster had sent this drug letter to ORSI and Luster suspected that another more recent drug arrest involving the Anchor Bar may have prompted the attorney’s inquiry. Luster emailed his contact at the PPB to ask if there had been another drug-related arrest at the Anchor Bar in the prior week.² (Ex. A11; Ex. P6.16.)

8. On August 8, 2012, in response to Luster’s request, the PPB forwarded to Luster a copy of the officer’s custody report regarding the July 15, 2012 arrest of Monson in the alley behind Bradley’s. (Ex. P6.16.) That same day, Luster sent Licensee a drug letter based on Monson’s July 15, 2012 arrest. The letter stated, in pertinent part, as follows:

The Oregon Liquor Control Commission is concerned about unlawful drug activity on your licensed premises. On July 15, 2012 at about 4:42 p.m., a person

² In the email to his PPB contact, Luster noted as follows:

Today I received a phone call from Mr. Will Rasmussen, an attorney representing Anchor Bar #35 (Oregon Restaurant Services). Mr. Rasmussen inquired about a drug letter I issued to the premises back on 06/20/2012 and wanted me to define immediate and effective action to prevent further drug arrests.

I am now suspicious that an additional drug arrest may have occurred on the premises within the past week. I contacted PPB records and there is no report as of yet. I am sure you will let me know if you hear anything. Otherwise, if a drug arrest has occurred, I will wait for the report to arrive in my in-box.

(Ex. P6.16.)

was arrested for possession of drugs on your licensed premises. If there is another drug arrest on your licensed premises within six months, it may lead to the suspension of your liquor license. This letter is to notify you of the Oregon Law: OAR 845-006-0348 requires a mandatory suspension of the licensee fails to prevent certain unlawful drug use or sales on premises; civil penalty.

(Ex. P7.5 at 1, emphasis in original.) Even though Monson was not a Bradley's patron and the arrest did not occur inside the licensed premises, Luster sent Licensee the drug letter because the arrest occurred in the immediate vicinity of Bradley's.³ (Test. of Luster.)

9. On August 27, 2012, the PPB arrested a minor in front of the Anchor Bar. The arrest was for an unrelated burglary charge, but the minor told the police he had been inside the Anchor Bar playing video poker earlier in the night. The PPB notified Luster of the minor's arrest the following morning. At about noon on August 28, 2012, Luster and Inspector Tarkalson went to the Anchor Bar to investigate whether the minor had been inside the premises, and if so, for how long. Luster spoke with an Anchor Bar employee and advised her to tell ORSI's Logistics/Operations Manager (Russ Sheldon) that he needed to see the Anchor Bar's surveillance video footage from the previous night. Luster asked the employee to have Sheldon call him. (Ex. P10; test. of Luster.)

10. On the morning of August 29, 2012, Luster spoke to Sheldon, who agreed to provide Luster with the requested surveillance video footage from the Anchor Bar. Luster spoke to Sheldon again that same afternoon about the investigation. Sheldon agreed to put all of the video footage on a disk and said he would try to have the disk ready for Luster by the following day. (Ex. P10; test. of Luster.)

11. At approximately 9:00 p.m. on August 29, 2012, Luster received a letter, via email, from ORSI's attorney. The letter stated as follows:

This letter follows my voicemails to you over the past four weeks. As you know from my messages, my firm represents Oregon Restaurant Services, Inc. ("ORSI"). We appreciate your 8:01 p.m. message on August 7, 2012, but are displeased that you have not returned my messages since then and continue your aggressiveness towards ORSI staff while not returning my messages. Please call me at (503)205-2308. We are concerned about your behavior towards ORSI staff and the apparent heightened standards being applied by you to ORSI establishments in relation to other bars subject to OLCC oversight.

We received complaints from multiple ORSI staff members who separately have experienced negative encounters with you. These staff members want to remain

³ Although not directly relevant in this case, a drug letter is significant when a licensee is charged with a violation of OAR 845-006-0348 (Unlawful Drug Activity on Licensed Premises). Under this rule, a drug letter serves as notice to the licensee that unlawful drug use or sales have occurred on the licensed premises. If there is another occurrence of drug use or sales on the premises within six months of the drug letter, "a rebuttable presumption exists that the licensee's actions to prevent drug use or sales were not effective." OAR 845-006-0348(2). (Test. of Hoffeditz.)

confidential to avoid possible retaliation from you in your official capacity. We interviewed these staff members independently about their incidents with you and heard similar complaints. Multiple staff members described you as threatening and intimidating, and recounted details that are troubling. Following the interviews, we were left with the impression that you were not behaving in a professional manner and not applying rules to ORSI establishments in the way they are applied to other establishments subject to OLCC oversight.

ORSI has operated establishments in Oregon for several decades and currently operates over forty establishments in Oregon. Operating on this scale requires ORSI to implement uniform procedures and protocols to ensure compliance with state and local rules. ORSI has a track record of being one of the most compliant establishment operators in the state. In decades of operations, ORSI has never had a similar situation with an OLCC inspector and has generally found OLCC staff to be competent and capable of performing their duties with the professionalism required for an OLCC Inspection Officer. We respectfully request that you voluntarily remove yourself from oversight of ORSI establishments to avoid unnecessarily escalating this situation.

(Ex. P5.1.)

12. Shortly after he received this letter from ORSI's attorney, Luster sent an email to his PPB contact stating as follows:

As far as the minor who entered the Anchor Bar on 8/27/2012, I have received a very nasty and character defaming letter from ORSI's attorney Will Rasmussen. I interpret this as having a solid case for permitting a minor into a prohibited area. They are also refusing to supply me video surveillance footage as I requested and will be delivering an administrative subpoena for this evidence on Friday as well.

(Ex. P6.6.)

13. In addition to considering the attorney's letter nasty and character defaming and a refusal to produce the video footage requested from Shelton earlier in the day, Luster also interpreted the letter as an attempt by ORSI's counsel to undermine his investigation of a minor inside the Anchor Bar. Luster interpreted the attorney's letter in this way because the letter did not make any mention of the surveillance video footage. Luster subsequently issued ORSI a Notice of Warning Ticket (NWT) based on the attorney's letter, because he considered the letter as "prohibited conduct" by an agent of the Licensee under OAR 845-006-0345(3)(a)(A).⁴ (Exs.

⁴ OAR 845-006-0345(3)(a)(A) provides:

The Commission holds licensees accountable for the acts of their agents and employees. (OAR 845-006-0362). No employee or agent of a licensee may violate any provision of this rule. A violation of any section of this rule by an employee or agent of a licensee is considered a violation by the licensee.

P6.6 and P10; test. of Luster.)

14. On August 31, 2012, on Luster's request, the OLCC issued an administrative subpoena duces tecum to ORSI for the surveillance video footage from the Anchor Bar for the night of August 27, 2012. The subpoena commanded ORSI to produce the records at noon on September 4, 2012. (Ex. P7.6.) ORSI produced the video footage in accordance with the subpoena on that date. (Ex. P10.)

15. During September 2012, Luster met with his PPB contacts regarding the PPB's enforcement efforts in the Hayden Island/Lottery Row area. He learned that the PPB planned to have more directed missions in the area and planned to continue using confidential reliable informants to make controlled narcotics purchases in the area. Luster also met with the Lottery detective assigned to the area regarding the Lottery's enforcement efforts along Lottery Row. (Ex. P6.7; test. of Luster.)

16. On October 24, 2012, Luster received a letter from ORSI requesting information on measures that the company could implement to reduce or eliminate drug activity at their Hayden Island locations. The following day, October 25, 2012, Luster and Tallmadge met with Shelton. Among other things, they reviewed police reports regarding drug activity that had occurred at the ORSI-owned premises of Paddy's Old Irish Café and Dotty's #24. Luster issued ORSI NWTs regarding these incidents, and advised Shelton that any drug-related incidents regarding these two premises in the future would result in Notice of Violation Tickets. (Ex. P9.)

October 10, 2012 Incident

17. On the night of October 10, 2012, the PPB worked a directed mission in the Hayden Island/Lottery Row area. The officers used a confidential reliable informant (CRI) that night to make, or attempt to make, controlled narcotics purchases in the area. (Test. of Zajac; test. of Buller; test. of Simon; Exs. A2, A3 and A4.)

18. At or around 8:00 p.m. that night, officers sent the CRI into Bradley's in an attempt to purchase narcotics. The CRI entered the premises and made contact with an unidentified male at the bar. The two spoke briefly and negotiated a narcotics purchase. The CRI was told that a female (later identified as Dhena Albert) would be delivering the drugs. While the CRI was waiting inside the premises, the bartender on duty (Rachel Robisheaux) asked the CRI to leave because the CRI did not present valid identification. (Test. of Zajac; test. of Buller; Ex. A3.)

19. While the CRI and the unidentified male were at the bar negotiating the drug deal, Ms. Robisheaux was serving drinks at the bar, entering orders, making change at the cash register, clearing tables and taking orders from patrons seated at the tables. Ms. Robisheaux did

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(3) Evidence:

(a) No licensee or permittee will:

(A) Destroy, damage, alter, remove, or conceal potential evidence, or attempt to do so;

not eavesdrop on the conversations between patrons seated at the bar top, including the conversation between the CRI and unidentified male. (Ex. 2.1.)

20. Because the CRI had been asked to leave the licensed premises, the CRI had to make new arrangements to complete the drug transaction. The CRI called Ms. Albert and they agreed to meet inside another nearby establishment, CJ's Deli. Thereafter, the CRI went into CJ's Deli to wait for Ms. Albert. (Test. of Zajac; test. of Simon; Ex. A3.)

21. Less than a half hour later, Ms. Albert entered CJ's Deli and contacted the CRI, who was seated at a lottery machine. The CRI handed a wad of cash to Ms. Albert and she in turn handed the CRI a small item containing narcotics (.88 grams of methamphetamine). After the transaction, as Ms. Albert drove away from the area, a uniformed PPB officer conducted a traffic stop on Ms. Albert to confirm her identity. (Test. of Zajac; test. of Buller; test. of Simon; Exs. A2, A3 and A4.)

October 30, 2012 Incident

22. On the night of October 30, 2012, the PPB conducted another mission in the Hayden Island/Lottery Row area using another CRI to make controlled narcotics purchases. Earlier in the night, out in front of one of the shops, the CRI contacted a methamphetamine dealer (later identified as Melissa Sponsler) and negotiated a deal. Ms. Sponsler said she needed to make a telephone call and would have the drugs in about 10 minutes. She told the CRI to wait for her inside Bradley's. (Test. of Friedman; Ex. A6.)

23. On that night, Ms. Robisheaux was the only employee on duty at the licensed premises. At approximately 11:17 p.m., the CRI entered the licensed premises with \$30 in his pocket to purchase the methamphetamine. He sat at a table in the far corner of the premises, near the lottery machines. An undercover officer also entered the premises to observe the transaction. During this time, Ms. Robisheaux was working behind the bar and conversing with three patrons who were seated at the bar. (Test. of Simon; Ex. A7; Ex. P2.1.)

24. The undercover officer purchased a beer from Ms. Robisheaux at the bar. He then sat down at a table where he had a clear view of the CRI, who was seated at the table in the corner and waiting impatiently for Ms. Sponsler. The CRI got up from the table a couple of times and looked or stepped outside. At about 11:24 p.m., the CRI walked out of the premises. Less than a minute later (at 23:24:58 hours according to Bradley's surveillance video) the CRI reentered the premises. Seconds later (at 23:25:07 hours) Ms. Sponsler entered the premises and greeted the CRI. About a minute after that (23:26:02 hours), the CRI and Ms. Sponsler went to the table in the far corner of the premises to conduct the transaction. The actual exchange took less than 25 seconds to complete. At 23:26:23 hours, Ms. Sponsler walked away from the table to a video lottery machine about six feet away. The CRI held up the folded piece of paper containing the drugs as a signal to the undercover officer that the deal had been made. At 23:26:40 hours, the CRI left the premises and met up with Officer Porath, who was waiting in a vehicle nearby. (Ex. P2.1; test. of Simon; Ex. A7.)

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25. When the actual exchange took place, Ms. Sponsler had her back to the bar and to Ms. Robisheaux. At that time, Ms. Robisheaux was delivering a drink to another table closer to the bar. After delivering the drink, Ms. Robisheaux returned to her duties behind the bar, clearing glasses from the patrons seated at the bar. (Ex. P2.1.)

26. Ms. Sponsler remained at the premises and played video poker for several minutes before exiting the premises (at 23:43:45 hours). (Ex. P2.1; test. of Simon; Ex. A7.)

December 21, 2012 Incident

27. On the night of December 21, 2012, Natalie Cowan was 19 years old. Due to her youthful appearance, she appeared her true age. She did not appear to be 21 years of age or older. (Ex. A16; test. of Simon.)

28. At 8:55 p.m. on December 21, 2012, minor Cowan entered the licensed premises through the double doors with a group of four or five other people. Minor Cowan sat at a tall table close to the double doors, approximately 20 to 25 feet from the bar where the two employees on duty, bartenders Serena Anca and Monica Pulver were working. At the time minor Cowan's group entered, there were about 25 patrons inside the premises. This included four or five patrons seated at the bar, patrons playing video lottery games, patrons playing pool, patrons seated at tables and three or four patrons playing shuffleboard. (Ex. P2.1.)

29. While minor Cowan remained at the table near the door, three members of her party (two males and a female) walked up to the bar and ordered a pitcher of beer from Ms. Anca. Ms. Anca verified the patrons' identification and set a pitcher and three glasses on the bar in front of them. The female was very animated as she handed Ms. Anca a \$100 bill to pay for the pitcher. One of the three asked Ms. Anca for additional glasses to go with the pitcher. Ms. Anca advised them that she would need to see identifications of the others who would be drinking the beer before she would provide additional glasses. (Test. of Anca; Ex. P3.3.)

30. At that point, as Ms. Anca was entering the order and making change for the \$100 bill, another person from minor Cowan's group, a male in his 40s, approached the bar. Ms. Anca asked to see his identification. He presented an expired out-of-state license. Ms. Anca asked to see a second piece of identification. The male patron presented a second license from another state, but this license was expired and hole punched. Even though this patron appeared well over the age of 21, Ms. Anca told him that she could not serve him alcohol without valid identification. (Ex. P2.1; test. of Anca; Ex. P3.3.)

31. Ms. Anca also told the male patron that he needed to leave the premises because he did not have valid identification. Ms. Anca's refusal to serve the male patron prompted an animated discussion between the patron, the female who had given her the \$100 bill to pay for the pitcher and Ms. Anca. The female patron got angry that Ms. Anca had refused service to the male and had asked him to leave. The female patron then refused to pay for the pitcher, and screamed slurs and obscenities at Ms. Anca. (Test. of Anca; Ex. P3.3.)

32. During the five minutes or so that Ms. Anca was dealing with these patrons at the bar top, Ms. Pulver was entering orders and serving drinks to other patrons at or near the bar top. She overheard the patrons yelling at Ms. Anca and came over to support Ms. Anca. At 9:00 p.m., after Ms. Anca handed the female patron her change from the \$100 bill, the female grabbed the pitcher from the bar top. She and the male patron without valid identification walked back to the tall table near the side entry door where minor Cowan and another patron were sitting. (Ex. P2.1; test. of Anca; test. of Pulver.)

33. Ms. Anca watched to see if the male patron without valid identification left the premises on her request. When he did not immediately do so, Ms. Anca came out from behind the bar. She walked around the pool table to where the male was standing, in the area between the tall table and the double doors. Ms. Anca confronted the male and again asked him to leave. She told him that she planned to stand there in front of him until he left the premises. This confrontation occurred just behind where minor Cowan was seated. Ms. Anca was facing the male patron and had her back to the high table and to minor Cowan. (Ex. P2.1; test. of Anca.)

34. At approximately 9:01 p.m., the male without valid identification exited the premises. He immediately poked his head back inside and motioned for the female who had been with him at the bar top to come outside. She followed him out. Ms. Anca walked to the window by the pool tables to watch the male patron without valid identification leave the area. Ms. Anca then spoke briefly with a patron in the corner near the pool table before she returned to the bar. During this time, minor Cowan remained seated at the tall table with others from her group. (Ex. P2.1; test. of Anca.)

35. For the next minute or two, both Ms. Anca and Ms. Pulver were busy with customers at or near the bar top. They checked the identifications of patrons who came up to the bar to order drinks, they entered orders, served drinks, made change, and cleared drinks away from the bar and nearby tables. At about 9:03 p.m. and 45 seconds, while standing behind the bar, Ms. Anca made a cell phone call to Café Del Toro a few doors down to warn staff there of the male without valid identification. Ms. Anca continued to serve drinks to patrons at the bar top while she spoke on the phone. (Ex. P2.1; test. of Anca.)

36. A few seconds after 9:04 p.m., several PPB officers entered the premises. Three officers entered through the double door and confronted minor Cowan.⁵ At that point, minor Cowan had been inside the premises for nine minutes and three seconds.⁶ Officers directed

⁵ On the night of December 21, 2012, Portland Police had been working another mission in the area, again monitoring for drug activity and other criminal conduct. An undercover officer working as a spotter in the parking lot saw minor Cowan and her group standing outside Bradley's just before they entered. The group stood in a huddle, as if making a plan for their entry into the premises. The undercover officer noticed that Cowan looked very young, and he suspected that she was under the age of 21. Once minor Cowan and her group entered the premises, the undercover officer notified the uniformed officers on duty that there was an underage female in the bar. The uniformed officers responded to the location and waited about five minutes before they entered the premises. (Test. of Simon; test of Pulver; test. of Townley; Exs. A12 and A13.)

⁶ The precise time calculation is based upon time stamps on Licensee's surveillance video, Exhibit P2.1.

Cowan to leave the premises. A PPB officer contacted Ms. Anca and Ms. Pulver as they were working behind the bar to advise them that there was a minor on the premises. Ms. Anca was still on the phone when the officers contacted her. (Ex. P2.1; test. of Anca.)

37. When Officer Townley interviewed Ms. Anca a short time later and showed her minor Cowan, Ms. Anca advised that she had not seen the minor before. Ms. Anca explained that she had asked for identification from the others in minor Cowan's group when they came to the bar top to order drinks. She added that that she had kicked one person from the group out of the bar because his identification was expired. (Ex. A12; test. of Townley.)

CONCLUSIONS

1. Licensee did not permit unlawful activity on the licensed premises on October 10, 2012 in violation of OAR 845-006-0347(3) when a patron attempted to deliver methamphetamine to a confidential reliable informant.

2. Licensee did not permit unlawful activity on the licensed premises on October 30, 2012 in violation of OAR 845-006-0347(3) when a patron delivered methamphetamine to a confidential reliable informant.

3. Licensee's employees did not permit a minor to be on the licensed premises on December 21, 2012 in violation of OAR 845-006-0335(3)(b).

4. Because no violations were established, no sanction is warranted.

5. Because no violations were established, it is unnecessary to address whether OLCC officials violated Licensee's rights under the Equal Protection Clause.

OPINION

1. Violations

OLCC staff asserts that Licensee violated OAR 845-006-0347(3) on two occasions by permitting unlawful activities on the licensed premises, and that Licensee violation OAR 845-006-0335(3)(b) on one occasion by permitting a minor to be on the licensed premises. As the proponent of these contentions, OLCC 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).

October 10, 2012 – Unlawful Activity

OLCC staff alleges that Licensee violated OAR 845-006-0347(3) on or about October 10, 2012 by permitting unlawful activity on the licensed premises or in areas the Licensee controls that are adjacent to or outside the premises when a "patron delivered or attempted to deliver methamphetamine from the licensed premises to a confidential reliable informant (CRI) in

violation of ORS 475.890.”⁷ (Amended Notice.)

OAR 845-006-0347(3) provides, in pertinent part, as follows:

(3) Unlawful Activity:

(a) No licensee or permittee will permit any unlawful activity on the licensed premises or in areas the licensee controls that are adjacent to or outside the premises. Unlawful activity includes any activity that violates a criminal statute. Examples include, but are not limited to, crimes related to prostitution, public indecency, controlled substances and gambling. The Commission does not require a conviction to establish a violation of this section except as ORS 471.315 and 471.700 requires.

Assuming that unlawful activity occurred on the premises on October 10, 2012,⁸ the issue remains whether Licensee permitted such activity. It is well established Commission precedent that permitting involves two elements:

First, the evidence must prove that the licensee had knowledge of the proscribed activity. The Commission may infer knowledge where the nature of the proscribed activity was such that it would have been evident to persons working in the establishment. The Commission may impute to the licensee the knowledge of the licensee’s employees. *Taylor’s Coffee Shop v. OLCC*, 28 Or App 701, 706 (1977). Second, the evidence must prove that the licensee failed to take reasonable steps to prevent or control the proscribed activity.

The Table Restaurant & Lounge (OLCC Final Order, 03-V-026, April 2004), citing *Don Juan’s* (OLCC Final Order, 88-V-003, May 1988); *see also Interstate Bar & Grill* (OLCC Final Order, 09-V-027, September 2009).

In *The Table*, the Commission held that a licensee did not permit unlawful activity on the premises when the licensee’s employees did not know of, or participate in, drug sales by a patron

⁷ ORS 475.890 provides:

- (1) Except as authorized by ORS 475.005 to 475.285 and 475.752 to 475.980, it is unlawful for any person to deliver methamphetamine.
- (2) Unlawful delivery of methamphetamine is a Class B felony.
- (3) Notwithstanding subsection (2) of this section, unlawful delivery of methamphetamine is a Class A felony if the delivery is to a person under 18 years of age.
- (4) The minimum fine for unlawful delivery of methamphetamine is \$500.

⁸ As noted above, ORS 475.890(1) makes it “unlawful for any person to deliver methamphetamine.” Oregon law defines “deliver,” for purposes of the Uniform Controlled Substances Act, as “the actual, constructive or *attempted transfer*, other than by administering or dispensing, from one person to another of a controlled substance.” ORS 475.005(8) (emphasis added). Therefore, although no drugs transferred hands on the premises that night, there was perhaps an attempted transfer.

at the premises and the transaction was not evident to persons working in the establishment. The Commission also found that, in the context of this rule, “evident” to persons working in the establishment means the unlawful activity was “easily seen or understood; obvious.” Final Order at n. 9.)

In this case, it is undisputed that the employee on duty, Ms. Robisheaux, had no knowledge that a CRI was attempting to make a controlled drug purchase in the premises that night. Further, it was not “evident to persons working at the establishment” that two patrons conversing privately at or near the bar top were negotiating a drug deal, nor was it evident that a patron making a phone call was doing so to make new arrangements for the transaction. Contrary to OLCC staff’s contention,⁹ it is simply not reasonable to expect Licensee’s employee(s) to monitor private conversations between patrons or to listen in on a patron’s phone conversation as a means of preventing unlawful activity on the premises.

In short, OLCC staff has not established that Licensee permitted any unlawful activity on the premises on the night of October 10, 2012 because Licensee’s employee had no knowledge, actual or inferred, of the attempted drug purchase on this night and it was in no way evident to the employee or others at the bar that a CRI and unidentified patron were negotiating a drug deal.¹⁰ Accordingly, charged violation number one must be dismissed.

October 30, 2012 – Unlawful Activity

OLCC staff next alleges that Licensee violated OAR 845-006-0347(3) on or about October 30, 2012 by permitting unlawful activity on the licensed premises or in areas the Licensee controls that are adjacent to or outside the premises when a patron delivered methamphetamine to a CRI inside the premises in violation of ORS 475.890. As above, the determinative question is whether Licensee did, in fact, permit this unlawful activity.

Again, there is no evidence that the employee on duty, Ms. Robisheaux, had actual knowledge of the drug transaction between the CRI and Ms. Sponsler. The evidence also fails to show that this drug transaction was so evident that knowledge of the unlawful activity may be inferred. Indeed, had Ms. Robisheaux stopped performing her bartending duties and instead just focused on monitoring patrons’ conduct that night, she would have seen the CRI enter the premises and sit at a table away from the bar, near the lottery machines. She would have seen that he appeared impatient, as if waiting for another person to arrive. She would have seen him

⁹ Commission staff argues that, akin to a licensee’s requirement to monitor patrons for signs of visible intoxication, a licensee has a duty to monitor patron activity at the licensed premises. Specifically, staff contends that, to prevent unlawful activity at the premises in this case, Ms. Robisheaux had a duty to listen in on the patrons’ conversation at the bar top and/or recognize the (unspecified) “unique and subtle signals” of a drug negotiation. Although a licensee has a general duty to monitor the premises and patrons for compliance of the liquor laws, I decline to find that this duty extends so far as to require that a licensee or permittee eavesdrop on patron conversations and/or watch for subtle and surreptitious hand offs among patrons.

¹⁰ Because the record fails to demonstrate that Licensee had knowledge of this unlawful activity it is unnecessary to address the second element, *i.e.*, whether Licensee failed to take reasonable steps to prevent or control the proscribed activity.

go or look outside a couple of times and then return to the premises, again as if he was waiting to meet someone who was running late. A patron who enters a bar without ordering a drink, and who appears to be impatiently waiting for another to arrive is not unusual, nor is it the type of behavior that suggests, more likely than not, that the patron is intending to engage in illegal activity.

Again, had Ms. Robisheaux done nothing but carefully monitor the patrons behavior that night, she would have seen Ms. Sponsler enter the bar about eight minutes after the CRI first walked in. She would have seen the CRI and Ms. Sponsler greet each other, talk briefly and walk to a table in the back corner. A minute or so later, if Ms. Robisheaux had excellent eyesight and an unobstructed view of this corner of the premises, she possibly would have seen Ms. Sponsler remove a small item from her purse. Because Ms. Sponsler's back was to the bar blocking Ms. Robisheaux's view of the table and the CRI, Ms. Robisheaux would not have seen the actual exchange of money for a folded piece of paper containing methamphetamine. Seconds later, Ms. Robisheaux would have seen Ms. Sponsler turn away from the CRI and walk over to a nearby lottery machine. If Ms. Robisheaux immediately returned her focus to the CRI, she would have seen him hold up a folded piece of paper and then leave the premises. Even if Ms. Robisheaux had been aware of the brief interaction between the CRI and Ms. Sponsler, it would not have been evident that they were engaged in a controlled drug deal. Even if Ms. Robisheaux saw the CRI briefly hold up the folded paper, it would not have been evident that he was doing so to signal to an undercover police officer that he had completed a controlled drug purchase.¹¹

In short, and contrary to OLCC staff's contention, the drug transaction between the CRI and Ms. Sponsler was not obvious and evident to anyone working in the licensed premises. This illegal activity was surreptitious and subtle and, under these circumstances, knowledge of its occurrence cannot be inferred to Licensee. As above, because the evidence fails to establish that Licensee had knowledge of this controlled drug purchase, it is not necessary to address whether Licensee failed to take reasonable steps to prevent or control the proscribed activity. Licensee did not permit unlawful activity on the licensed premises on the night of October 30, 2012 and, for that reason, charged violation number two must be dismissed as well.

December 21, 2012 – Minor on Premises

OLCC staff also alleges that on December 21, 2012, Licensee's employees permitted a minor to be on the licensed premises or in an area of the licensed premises prohibited to minors 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."

¹¹ Because the undercover officer was seated at a table with a clear view of the CRI and Ms. Sponsler, and he knew what was to transpire between the CRI and another patron, it may have been obvious to him when the transaction occurred. That does not mean, however, that the unlawful activity would have been evident to any employee working in the establishment that night.

On the night of December 21, 2012, minor Cowan was 19 years old and appeared her age. She was inside the licensed premises (an area prohibited to minors) for nine minutes and three seconds before the police entered and directed her to leave. Once again, the issue is whether Licensee's employee's permitted the minor to be on the premises.

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 openly sitting and awaiting service 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), a minor and his companions entered the lounge (an area prohibited to minors) where they remained for 15 to 25 minutes. The group then left the lounge and went to the patio, where the minor stayed for about 45 minutes and consumed two glasses that were purchased by his companions. 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. There, the bartender, who was ten minutes away from completing her shift, decided not to immediately contact the two minors because she was busy with other duties, namely serving customers and setting up clean glasses for the next bartender scheduled to come on duty. In finding the licensee liable for the violation, the Commission noted that the bartender "should have given higher priority" to contacting the minors than to her other duties of serving patrons and setting up clean glasses for the next shift. *Id.*

It is undisputed that, in this case, Licensee's employees were unaware of minor Cowan's presence in the premises until after the police arrived. Therefore, whether a violation of OAR 845-006-0335(3)(b) occurred in this case turns on whether Licensee's employees had "sufficient

time and opportunity to detect” her presence during the nine minutes and three seconds she was inside the premises before the police came in. As discussed above, in terms of time, the Commission has held that even when a premises is busy, 10 or 15 minutes was more than enough time to detect a minor’s presence. None of those cases, however, involved a disturbance such as the one that occurred in this case. And prior Commission cases provide less guidance when determining what constitutes a sufficient *opportunity*.

In a case preceding the above-cited cases, *Punjab Tavern* (OLCC Final Order, 92-V-088, June 1993), the Commission held that “the opportunity to observe is crucial.” *Id.* at 19. In that case, two minors entered an area prohibited to minors and sat at a table that was not within the bartender’s plain view, due to the crowd of patrons in the bar and the location of the table. The minors were in the premises approximately 10 to 15 minutes and, during that time, they drank from beers that had been served to others at the table prior to the minors’ arrival. In finding that no violation of *former* OAR 845-06-035(b) occurred because the bartender did not have sufficient time or opportunity to see the minors, the Commission compared these circumstances to prior cases in which the minor was in the server’s plain view for at least 10 minutes and the bar was not crowded.¹² *Id.* at 19.

Here, as noted above, minor Cowan was inside the premises for nine minutes and three seconds which, under prior Commission case precedent, may constitute a sufficient time.¹³ The closer call is whether, during those nine minutes and three seconds, Licensee’s employees also had a reasonable opportunity to detect the minor’s presence. Licensee has shown that for the majority of the time minor Cowan was in an area prohibited to minors Ms. Anca’s attention was directed towards resolving a dispute involving other members of minor Cowan’s party. The circumstances also affected Ms. Pulver’s attention and actions.

When minor Cowan’s group entered the premises at 8:55 p.m., minor Cowan sat at a table near the entry door while three others from the group (two males and a female) walked to the bar top and ordered a pitcher. Ms. Anca checked the identifications of these three patrons. When they asked for additional glasses for others, Ms. Anca advised she would need to see identification for the others. At that point, another male member of the group approached the bar

¹² In *Punjab Tavern*, the Commission cited to *Union Gap Tavern* (OLCC Final Order, 91-V-140, March 1992) (the bartender had sufficient opportunity to detect the minor where the minor was seated at a table for 10 minutes in a direct line of sight from the bar and the bar was not crowded) and *Murphy’s Tavern* (OLCC Final Order, 86-V-060, April 1987) (violation found where the bartender was aware of the minors’ presence as they sat at the bar and drank a pitcher of beer), in addition to other cases which are less relevant to the facts at hand.

¹³ Commission staff asserts that the facts of this case are similar to *Lucky Jade Chinese Restaurant* (OLCC Final Order, 09-V-055, April 2010), where the Commission found a violation when a minor was only inside the premises for “a few minutes.” Despite staff’s contention, *Lucky Jade* is distinguishable. There, the evidence demonstrated that the licensee was aware of the minor’s presence at the premises. The evidence also demonstrated that the licensee was aware that the minor was, in fact, a minor. The licensee acknowledged that the minor had been to the premises several times previously to play the lottery machines. Here, on the other hand, Licensee’s bartenders were completely unaware of minor Cowan’s presence.

top and handed Ms. Anca an identification card. Ms. Anca refused to serve this patron because his identification was not valid. The female patron who had ordered the pitcher and who had handed Ms. Anca a \$100 bill to pay for it became angry that Ms. Anca had refused service to her friend. This prompted an animated discussion between the three, during which the female patron yelled slurs and obscenities at Ms. Anca. This discussion was such that it drew Ms. Pulver's attention, who was also working behind the bar at that time. She came to offer Ms. Anca support.

When these patrons left the bar top (at approximately 9:00 p.m., five minutes after minor Cowan's group entered the establishment), Ms. Pulver returned her attention to other patrons at the bar top.¹⁴ Ms. Anca watched to see if the man without valid identification left the premises. When he did not immediately do so, Ms. Anca walked over and confronted him and again asked that he leave. Although the confrontation occurred just behind where minor Cowan was seated, Ms. Anca's attention at the time was focused on the man without valid identification. When this man exited the premises (at 9:01 p.m.), Ms. Anca watched out the window briefly to ensure that he left the area.

Ms. Anca returned to the bar top and, for the next minute or two, both she and Ms. Pulver were busy attending to patrons at or near the bar top. They checked identifications, entered orders, served drinks, made change, and cleared glasses from the bar top and nearby tables. Ms. Anca also picked up the phone and called a neighboring establishment to warn the staff there about the man without valid identification. Seconds later (at approximately 9:04 p.m.), PPB officers entered the premises and contacted minor Cowan.

The Commission finds that, in this case, Licensee's employees did not have sufficient opportunity to detect minor Cowan's presence and determine that she was in fact a minor because the disruptive patrons created circumstances which required the employees' immediate attention and interrupted the employees' duties, including the detection of minors in the licensed premises. *Punjab Tavern*, Final Order at 19-20. Based on the facts of this case, no violation of OAR 845-006-0335(3)(b) occurred.

Charged violation three should be dismissed as well.

2. Penalty

Because none of the three alleged violations have been established, no sanction is warranted.

¹⁴ A busy premise is not a mitigating factor when an employee has sufficient time to detect and determine a minor is present. *Murphy's Oyster Bar and Grill* (OLCC Final Order, 85-V-046, December 1985). And the detection of minors in prohibited area should be given a higher priority than the performance of routine duties such as serving customers. *Tacoma Café* (OLCC Final Order, 86-V-028, March 1987). The Commission adheres to those principles and finds that the facts of this case are different from those in *Tacoma Café* and *Murphy's Oyster Bar and Grill*. The totality of the circumstances in this case, of which the disturbance is given significant consideration, show that neither Ms. Anca nor Ms. Pulver had a sufficient opportunity to detect Ms. Cowan's presence and determine she was a minor.

