

FILED: May 09, 2012

IN THE COURT OF APPEALS OF THE STATE OF OREGON

US MARKET #180, LLC,
dba US Market #180,
Petitioner,

v.

OREGON LIQUOR CONTROL COMMISSION,
Respondent.

Oregon Liquor Control Commission
OLCC08V043, OLCC08L007, OLCC08V043A,
OLCC08L007A, OLCC08V043B, OLCC08L007B

A144311

Submitted on June 16, 2011.

Terence S. McLaughlin filed the briefs for petitioner.

John R. Kroger, Attorney General, Mary H. Williams, Solicitor General, and Judy C. Lucas, Senior Assistant Attorney General, filed the brief for respondent.

Before Armstrong, Presiding Judge, and Haselton, Chief Judge, and Duncan, Judge.

ARMSTRONG, P. J.

Reversed and remanded.

1 ARMSTRONG, P. J.

2 Petitioner US Market #180, LLC,¹ seeks review of a final order of the
3 Oregon Liquor Control Commission (OLCC) that suspended licensee's license to sell
4 alcoholic beverages. Specifically, licensee challenges the OLCC's conclusion that, when
5 one of licensee's employees sold beer to a minor without successfully verifying the
6 minor's age using age-verification equipment, licensee violated OAR 845-005-0355(5) by
7 failing to comply with a restriction on its license. Reviewing the order for legal error,
8 ORS 183.482(8)(a), we agree with petitioner that the OLCC reached that conclusion
9 under an erroneous understanding of the license restriction, and, accordingly, we reverse
10 and remand.

11 We take the pertinent facts, which are undisputed, from the OLCC's final
12 order and the record supporting the order. Licensee owns US Market #180--a
13 convenience store in Albany--and a number of other small markets for which licensee
14 holds licenses to sell alcohol. As a result of numerous violations for selling alcoholic
15 beverages to minors at some of those other stores, the OLCC placed the following
16 restriction, among others, on the license for US Market #180:

17 "Licensee has age verification equipment, as defined in OAR 845-009-
18 0140(1)(b)[,] installed at all of its locations and will install age verification
19 equipment at any new locations at the time of licensure. *Licensee will*
20 *require that all individual employees or licensees use age verification*
21 *equipment to verify the age of any patron who reasonably appears under the*
22 *age of 26 who attempts to purchase alcoholic beverages."*

¹ Consistently with the designation of the parties in the contested case proceeding, we refer to petitioner US Market #180, LLC, and its members, individually and collectively, as "licensee" throughout this opinion.

1 (Emphasis added.) Roughly a month after the license restriction went into effect, the
2 OLCC and the Albany Police Department conducted a minor decoy operation at US
3 Market #180 to test whether Westling, the store clerk working at the time, would sell
4 alcohol to deRueda, who was 19 years old.

5 After grabbing a six-pack of beer from a cooler, deRueda approached the
6 counter to purchase it and gave Westling his driver's license. In accordance with the
7 store's policies requiring that she check the age of anyone attempting to purchase alcohol
8 who appeared to be less than 30 years old, Westling took the driver's license and used the
9 age-verification machine to scan it. The screen of the machine displayed that deRueda
10 was only 19 years old--information that Westling did not notice--and, for some reason,
11 that an alcohol sale to deRueda was "approved." Despite the indications from the
12 machine and on deRueda's license that he was less than 21 years old, Westling, relying on
13 the "approved" designation, sold him the beer. Shortly thereafter, an Albany Police
14 Officer issued a citation to Westling for selling alcohol to a minor. Because Westling had
15 used the age-verification machine and relied on the machine's erroneous "approved"
16 designation, licensee decided to suspend rather than fire her, which, under licensee's
17 policy, was the default consequence for her failure to verify deRueda's age.

18 As a result of the incident, the OLCC proposed cancelling the license for
19 US Market #180 based on licensee's violation of two agency rules: (1) a violation of
20 OAR 845-005-0355(5) because licensee had not complied with the license restriction
21 when Westling failed to verify deRueda's age with the age-verification equipment and (2)
22 a violation of OAR 845-006-0335(1) because Westling had failed to verify deRueda's

1 age--independently of the license restriction--before allowing him to buy the beer.²

2 The critical issue throughout the ensuing contested case proceeding and the
3 determinative issue on judicial review is whether the license restriction, by its terms,
4 imposes on licensee an obligation to require: (1) under licensee's proffered interpretation
5 of the restriction, that licensee's employees use age-verification equipment during
6 particular alcohol sales or (2) under the OLCC's proffered interpretation, that licensee's
7 employees use age-verification equipment and, in doing so, successfully verify that the
8 person attempting to purchase alcohol is old enough to do so.³ An administrative law

² OAR 845-005-0355(5) provides:

"A licensee or permittee who has a restricted license or permit must exercise license or permit privileges only in compliance with the restriction(s). Failure to comply with the restriction(s) is a Category I violation."

OAR 845-006-0335(1) provides:

"Age Verification:

"(a) ORS 471.130 requires a licensee or permittee to verify the age of a person who wants to buy or be served alcoholic beverages when there is 'any reasonable doubt' that the person is at least 21 years old. * * * 'Reasonable doubt' exists if the person appears to be under the age of 26;

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

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

³ Licensee did not challenge the OLCC's conclusion that--because Westling,

1 judge (ALJ) agreed in her proposed order with licensee's interpretation of the restriction
2 and concluded that the OLCC had not met its burden of proving that licensee had not
3 complied with it. Conversely, the OLCC agreed in its final order with the agency's
4 interpretation of the restriction and concluded, in light of the conflicting results from the
5 scan--*viz.*, the "approved" designation and the indication that deRueda was 19 years old--
6 and the fact that the discrepancy did not cause Westling to rerun the driver's license, that
7 Westling had not verified deRueda's age, and, hence, licensee had not complied with the
8 restriction and, thereby, violated OAR 845-005-0355(5).

9 Licensee seeks judicial review, reprising its argument that the restriction
10 merely imposed an obligation on licensee to require that its employees use the age-
11 verification equipment. In response, the OLCC maintains that it properly construed the
12 restriction. As explained below, licensee has the better of the argument.

13 In ascertaining the purpose of the license restriction, and thereby
14 determining the proper interpretation of it, a brief discussion of the pertinent OLCC
15 administrative rules regarding age verification for alcohol sales provides important
16 context. The OLCC adopted OAR 845-006-0335(1) to create a generally applicable age-

licensee's employee, sold alcohol to deRueda without verifying his age and, under OAR 845-006-0362, which is set out at ___ Or App at ___ n 5 (slip op at 5 n 5), Westling's failure to verify may be imputed to licensee--licensee violated the overarching age-verification requirement under OAR 845-006-0335(1)(a).

We note that, although the OLCC's final order states that licensee violated OAR 845-006-0335(1)(a), (b), and (c), the facts of this case and the agency's reference to OAR 845-006-0362 in the order show that the OLCC specifically determined that licensee violated OAR 845-006-0335(1)(a).

1 verification requirement for its licensees as part of the agency's efforts to prevent the sale
2 of alcoholic beverages to people who are less than 21 years old. To accomplish that goal,
3 the rule has three subsections that impose separate, but related, requirements. The first,
4 OAR 845-006-0335(1)(a), reinforces a licensee's statutory age-verification obligation
5 under ORS 471.130⁴ and explains that "reasonable doubt" under that statute--which
6 triggers the obligation to verify a person's age for an alcohol sale--"exists if the person
7 appears to be under the age of 26." Importantly, even though OAR 845-006-0335(1)(a)
8 only addresses a licensee's obligation, a licensee may also violate the rule if the licensee's
9 employee fails to verify a person's age when the obligation to do so is triggered, because,
10 under OAR 845-006-0362,⁵ responsibility for the employee's failure may be imputed to
11 the licensee.⁶ The second subsection, OAR 845-006-0335(1)(b), addresses the procedure

⁴ ORS 471.130 provides, as relevant:

"(1) All licensees and permittees of the [OLCC], before selling or serving alcoholic liquor to any person about whom there is any reasonable doubt of the person's having reached 21 years of age, shall require such person to produce one of the following pieces of identification[.]"

⁵ OAR 845-006-0362 provides:

"Each licensee may be held responsible for violation of any liquor control law or administrative rule or regulation of the [OLCC] affecting his [or her] license privileges and for any act or omission of his [or her] servant, agent, employee, or representative in violation of any law, municipal ordinance, administrative rule, or regulation affecting his [or her] license privileges."

⁶ As mentioned above, this case presents an example of the interaction between OAR 845-006-0335(1)(a) and OAR 845-006-0362. In its final order, the OLCC concluded that Westling's failure to verify deRueda's age violated OAR 845-006-0335(1)(a) and, "[b]ased on OAR 845-006-0362, [l]icensee is responsible for this

1 that must be followed to comply with subsection (a). Finally, the third subsection, OAR
2 845-006-0335(1)(c), encompasses a freestanding requirement that

3 "[l]icensees *must require* all their employees who sell, serve, oversee or
4 control the sale or service of alcoholic beverages *to verify* age as subsection
5 (a) of this section requires."

6 (Emphasis added.)

7 By its terms, particularly its concluding reference to subsection (a), the
8 objective of subsection (c) is to create an additional layer of administrative regulation of
9 licensees to supplement the general, independent age-verification requirement under
10 subsection (a) by compelling licensees to clearly instruct their employees to comply with
11 the age-verification requirement. Accordingly, if the OLCC were to bring an
12 enforcement action against a licensee for a violation of subsection (c) and not subsection
13 (a), then the agency would not need to prove that the licensee or its employee had failed
14 to verify the age of a person attempting to purchase alcohol who appeared to be less than
15 26 years old. Rather, the OLCC would need to establish only that the licensee had failed
16 to require its employees to comply with subsection (a) before completing an alcohol sale,
17 regardless of whether the employees did, in fact, comply with subsection (a).

18 If a licensee violates OAR 845-006-0335(1), then the OLCC has authority
19 under OAR 845-005-0355(1)(b) to impose a specific restriction on the licensee's license
20 in an effort to prevent a recurrence of the conduct that led to the violation.⁷ Importantly,

violation by its employee."

⁷ The OLCC can also impose a license restriction when the agency could "cancel, suspend/fine or deny the license," OAR 845-005-0355(1)(a), and when a restriction

1 OAR 845-005-0355 does not expressly limit the OLCC's discretion as to the content of
2 the restriction; in other words, the OLCC enjoys wide latitude in deciding what restriction
3 to place on the license and how to phrase the restriction.

4 With those principles in mind, we turn to the wording of the license
5 restriction chosen by the OLCC in this case. Again, the pertinent part of the restriction,
6 which was imposed as a result of earlier violations of the general age-verification
7 requirement in OAR 845-006-0335(1) at licensee's other stores, states: "Licensee *will*
8 *require* that all individual employees or licensees *use* age verification equipment to verify
9 the age of any patron who reasonably appears under the age of 26 who attempts to
10 purchase alcoholic beverages." (Emphasis added.) The purpose of the restriction, in
11 light of the previous violations that spawned it, is to create an additional layer of
12 administrative regulation to supplement the general age-verification requirement, which
13 continues to operate independently of the restriction, by compelling licensee to ensure
14 that its employees use age-verification equipment. To accomplish that objective, the
15 OLCC chose the emphasized phrasing, which is akin to the phrasing used to create the
16 supplemental requirement in OAR 845-006-0335(1)(c). Similarly to that rule, the
17 restriction *specifically refers to licensee's obligation vis-à-vis its employees--viz., that*
18 *licensee ensure that the employees use age-verification equipment--and both the rule and*
19 *the restriction conclude with references to the requirement that they supplement, viz., the*

would be in the public interest, OAR 845-005-0355(1)(c).

1 general age-verification requirement.⁸

2 Moreover, the OLCC's decision to choose a license restriction involving
3 age-verification equipment as a means to prevent future violations of OAR 845-006-
4 0335(1)(a) by licensee is not a surprising one. OAR 845-009-0140 (2008)⁹ provided, as
5 relevant:

6 "(2) For the first or second violation of [OAR] 845-006-0335(1) in a
7 two-year period, the licensee may choose to purchase age verification
8 equipment in lieu of the standard first level * * * sanction * * *.

9 "* * * * *

10 "(6) The licensee *must use* the equipment at every point of sale used
11 to sell alcoholic beverages."

12 (Emphasis added.) Put differently, in order to avoid the sanction that would otherwise
13 result from a violation of OAR 845-006-0335(1)(a), the offending licensee could
14 purchase and use age-verification equipment. The use requirement under OAR 845-009-
15 0140(6) (2008) encompassed both individual licensees and, through OAR 845-006-0362,
16 the licensee's employees. Accordingly, a licensee that decided to comply with OAR 845-
17 009-0140(6) (2008) and hopes to maintain that compliance will likely require that its
18 individual licensees and employees use the age-verification equipment when making an

⁸ In that regard, OAR 845-006-0335(1)(c) concludes with the phrase "to verify age as subsection (a) of this section requires" and the restriction concludes with the phrase "to verify the age of any patron who reasonably appears under the age of 26 who attempts to purchase alcoholic beverages."

⁹ OAR 845-009-0140 was amended effective November 1, 2011. Because the OLCC imposed the license restriction in this case in March 2008, we apply the version of the rule in effect at that time--the 2008 version.

1 alcohol sale. The terms of the license restriction in this case reach the same result.

2 Therefore, contrary to the OLCC's argument, we conclude that the license
3 restriction, by its terms, imposes an obligation on licensee only to require that licensee's
4 employees use age-verification equipment when the employee, during a sale of alcoholic
5 beverages, is fulfilling his or her *freestanding* age-verification obligation under OAR
6 845-006-0335(1)(a).¹⁰ Accordingly, the OLCC reached its conclusion that licensee had
7 violated OAR 845-005-0355(5) based on an erroneous understanding of the license
8 restriction.

9 Reversed and remanded.

¹⁰ Conversely, if the OLCC had chosen to impose a license restriction such as "licensee will utilize age verification equipment to verify the age of every person who reasonably appears to be under the age of 26 and who attempts to purchase alcohol," then the understanding of licensee's obligations advanced by the OLCC would be correct.