



Oregon

Theodore R. Kulongoski, Governor

Liquor Control Commission

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December 16, 2009

Elected Officials of the City of Bend
Elected Officials of Deschutes County
Elected Officials of State of Oregon

Re: Letter to Governor Kulongoski from Deschutes County Elected Officials

As you know, this past summer a letter signed by the Mayor of Bend, City Councilors and Deschutes County Commissioners was sent to Governor Kulongoski raising concerns about OLCC's activities in the Bend area. In response to the concerns, the OLCC requested that the Department of Justice conduct an independent investigation into allegations of overzealous enforcement, inconsistent application of laws and policies and arbitrary decision-making on the part of OLCC staff in the region.

This document contains the results of the Department of Justice investigation and the OLCC's commitment for better communication, enhanced relationships with the Bend business community and greater accountability. I appreciate that we may not always agree on the details of a particular event but it is my belief that licensees and OLCC share mutual goals and responsibilities.

We believe the investigation was helpful in that it provided an opportunity for licensees to come forward with questions and concerns and it provided the OLCC an opportunity to examine and continually improve our procedures. The report certainly shows we could have done some things differently and/or better and we are pleased the investigator found there were no violations of laws or rules.

Many of the issues identified in the DOJ investigation involve communication. Following is a list of topic areas and our intentions for improvement and transparency:

Reporting data- OLCC tracks enforcement activities. We will review our current reporting processes and add more information to the data to provide a better understanding of the activities in each region. We will also provide news releases on a monthly basis of enforcement activity by region which includes types of violations and warnings. We will develop processes to analyze data for trends in regions, and statewide, for consistency and to ensure the activities are in line with our mandates.

Better understanding of the application process and decisions made by the Commission-

OLCC publishes a guide to liquor licensing (including Temporary Sales Licenses) on our website and investigators are expected to explain the process and help potential licensees and community members. Complicated reports were sent to our headquarters in Portland for a lengthy review process. We have now expedited many of our licensing decisions. A small number of licensing decisions are made by the Commissioners and/or Executive Director and are based on a variety of factors, i.e., case precedent, rules, and past practice. All decisions are reviewed for legal sufficiency and statewide consistency. Please refer to the OLCC website for the License Application Guide (www.oregon.gov/OLCC on the homepage at "Get a Liquor License" under the Consumer Resources section) In addition to we commit to institute a review



of denied applications on a random basis, as is done with approved applications, to make sure they were handled correctly

Making changes to licensed premises- Within two months we will have a FAQ link on our website for licensees to refer to when they are contemplating changes to the environment of their licensed business. When licensees work closely with OLCC prior to implementing changes to their premises the risk of a violation or a misunderstanding is greatly reduced.

Timely and accurate record keeping by inspectors (notebooks)- Clear and complete entries would serve to improve communication between inspectors and licensees. Our goal is for staff to share concerns and observations with business owners when they happen or within a day or two of the event. Detailed inspector notebooks will provide information about specific observations. OLCC Regional Managers will develop and monitor policies to make sure these informative conversations occur in a timely manner. Our IT Division recently distributed tablet computers to inspectors with networked application access which allows immediate license and service permittee information retrieval. We are committed to further technological advancements to help facilitate timely and effective records and communication.

Staff interactions- Licensees or their employees said they had interactions with OLCC staff that they believed were disrespectful. It is a strongly held value that every OLCC employee will treat customers, the public and each other with dignity and respect. Staff will be reminded of this expectation and held accountable for actions contrary to my directions. This atmosphere will result in a mutually respectful and professional interaction. OLCC staff has represented itself well as dedicated professionals in the vast majority of interactions with the 300+ licensees in the Bend area.

Licensees would like a better understanding of how we assess warnings- A Notice of Warning is a formal notice to a licensee or server of a potential problem. They are usually issued after some education (verbal instruction) has occurred and become part of the license file. The warning is intended to alert licensees of potential compliance problems at their business and to give them an opportunity to correct the problem. Licensee may submit written comments on the notice of warning which will be retained in the file with the warning. The goal of a notice of warning is to prevent future violations and assist the owner in operating a safe and successful business.

Additional areas for review and continuing improvement:

Improved communication to field offices- Field offices do not always have the benefit of immediate conversations that occur in headquarters regarding policy changes or implementation of new statutes or procedures. The Regulatory Services Director will issue formal written directives for staff as to the OLCC role and scope of authority on new laws that are related to licensed premises, i.e. the smoking law. In the coming year, we plan to have some of our Commission Meetings outside of the Portland metro area. This gives Commissioners and Executive Staff the opportunity to hear first hand from local licensees and field offices to better understand regionally specific issues.

Happy hour/minor posting issues- Licensees would like more information as to how OLCC makes decisions about issues of "drinking environment, drinking predominates, happy hour postings, dim lighting," etc. Oregon laws and rules list a variety of factors or conditions but because businesses vary widely, each premises is evaluated individually. To obtain more objective standards would be a decision the Commission would need to research and evaluate.

The Commission has initiated rule changes to allow happy hour in areas where minors are with adults. Also, for any licensee in your community who believes their minor posting was misapplied, I would like to receive information from them for further review. OLCC will continue to look to revise rules that have ceased to be effective or relevant, and change or eliminate them. (i.e. the number of signs in a licensee's windows OAR 845-007-0025, repealed by Commissioners September 1, 2009.)

Licensees questioned the fairness of the penalty schedule and requirements of having attorney representation- Currently the penalty schedule applies across the board, regardless of the size of operation. Licensees believe the impact of a fine is greater on a smaller operation than a large corporation. This issue will be referred to the Commissioners for further evaluation. Also some licensees felt that the requirement to have an attorney represent them at administrative hearings is burdensome. This is currently required by statute (ORS 183.457)

For the future, I have also instituted another avenue for licensees and others to use as part of a progressive problem solving process. The first resource should continue to be the local regional staff and manager, followed by the Regulatory Services Director Linda Ignowski (503-872-5115) then Deputy Director of Public Safety Services Program Rudy Williams (503-872-5017).

We will review the possibility of a direct line to our Internal Audit Committee. The committee is independent of the public safety program and its purpose is to provide independent, objective assurance and services designed to improve OLCC operations. The committee reports to the highest levels of the Commission. We are also exploring the use of personnel that would not have the enforcement responsibility to assist in resolving potential problems identified by licensees prior to actual enforcement discovery or action.

Personnel issues are confidential. However, it is my strong desire and intent to have a skilled and trained workforce who always acts with integrity and credibility. To that end, I commit to:

- continue standardized, on-going training for all inspectors so enforcement practices and standards are the same statewide;
- increase individual oversight for all personnel, so that deviations from agency standards are caught and corrected; and
- enforce OLCC's notebook policy.

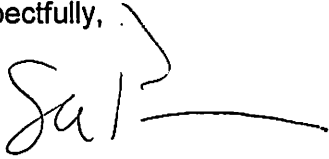
This was a multifaceted and comprehensive investigation that was difficult, and at times stressful. We truly listened and appreciated receiving concerns from our stakeholders and welcome the opportunity to improve the way we do business and the services we provide to the citizens of Oregon.

As you know, OLCC is charged with supporting economic viability for Oregonians. Business people applying for new or renewed licenses often have their livelihoods at stake. Licensees are an important part of the State's hospitality and alcoholic beverage industries. They employ large numbers of people, creating economic viability for thousands. Our task is to work in partnership with the business owners. Our mutual goal and responsibility is to ensure alcoholic beverages are sold and consumed in a safe manner, with an emphasis on preventing minors and visibly intoxicated people from obtaining alcoholic beverages.

The announcement of this report will not be the final step in this process. I appreciate the relationships we've developed over the last few months and hope to keep communication open among all parties. We believe this will promote a stronger partnership and public trust, and that

by doing so we will more fully fulfill our mission and governing principles of good stewardship, economic development and public safety.

Respectfully,

A handwritten signature in black ink, appearing to read "SAP", followed by a long horizontal line extending to the right.

Stephen A. Pharo
Executive Director

JOHN R. KROGER
Attorney General



MARY H. WILLIAMS
Deputy Attorney General

**DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION**

MEMORANDUM

DATE: December 14, 2009

TO: Steve Pharo, Director
Oregon Liquor Control Commission

FROM: Stephen D. Krohn, Assistant Attorney General
Labor & Employment Section

Attached is the report, Investigation of Practices in the Bend Regional Office, which OLCC will be releasing publicly. Please contact me with questions or if you need any additional information.

SDK:DM1718465
Enclosure

REPORT

OREGON LIQUOR CONTROL COMMISSION

**Investigation of Practices in the Bend
Regional Office**

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Overview

A letter dated July 15, 2009, signed by the Bend Mayor and City Councilors along with the Deschutes County Commissioners, was sent to Governor Kulongoski raising general concerns with OLCC's activities in the Bend area. The letter identified categories of concern rather than specific examples.

An attachment to the letter, titled "primary issues," had six enumerated areas that can be distilled to local businesses¹ questioning OLCC functions in the Bend area based on: (a) experiences they believe demonstrates how OLCC rules are drafted and enforced allows arbitrary decision-making without checks and balances; (b) a belief that regional leadership fostered a climate of intimidation and harassment; and, (c) inconsistencies between how the Bend office enforces OLCC regulations compared to other parts of the state disadvantaged the local business community. The investigation focused on facts pertinent to these three areas.

The stated ultimate concern from the letter and attachment was the negative impact these issues are having on the businesses in an already troubled local economy. They impacted tourism, which the Bend community is now highly dependent on, and had become serious enough that help in addressing these issues was requested.

Governor Kulongoski's responding letter, dated August 4, 2009, included a statement that concerns regarding intimidation were taken seriously and needed to be addressed. He explained that OLCC had requested the Oregon Department of Justice to independently investigate the concerns and that OLCC would also evaluate staff placements in the region. The Governor asked the local political bodies to share with the DOJ any specific examples of activities they felt needed to be considered. The Governor closed by noting that with a difficult economy he was sensitive to small business needs and, given the complex mission OLCC has to promote responsible sales and service of alcohol, that his desire was to seek improvement where possible and to address the concerns identified in their letter with a goal of working toward a resolution.

Limitation on Scope of Review

The investigation commenced without a specific set of charges that created an initial hurdle. It was learned during the investigation that the letter to the Governor was drafted by the Executive Director of a local non-profit agency, *Visit Bend*, following several meetings with local politicians and business owners. It was decided that *Visit Bend* would provide the umbrella for identifying general concerns without listing specifics from various experiences described by

¹ All references to "local businesses" or "business establishments" refers only to businesses (a) holding liquor licenses and (b) who came forward with concerns. This does not represent all members of that licensee community. The group identified in this report is primarily from downtown Bend establishments with one out-of-town business handling local events like fairs where there is alcohol sold under a temporary sales license (TSL) and one business in Madras.

local business owners.² In short, this arrangement enabled individuals who had concerns, but were reluctant to lead the way because they continue to be subject to regulation, to provide input.

OLCC requested this investigation to look for any specifics leading to the general dissatisfaction outlined in the letter to the Governor. Discrete, one-time events are documented. However, it was learned that individual concerns over a period of several years had gradually coalesced into a group effort. That evolution cannot be tracked in a single report because it would require a lengthy account of the entire history leading up to each description that was brought forward. Nor were there investigative resources sufficient to gather enough data to make a detailed, event-by-event or establishment-by-establishment comparison and contrast on whether other areas of the state are treated differently.

The investigation accepted and assessed the information offered by the Bend community to determine whether there was a factual basis for the letter to the Governor given the time and resources available. In short, during the investigation it was not possible to develop every piece of potentially relevant evidence or to exhaustively explore any potentially comparative information. Rather, this first level of review is intended to determine if the concerns are factually based and therefore legitimate.³

What is reported invites further consideration by OLCC of: a) how it has interacted in the community; b) whether certain decisions could or should be revisited to ensure the business understands the basis for and rationale behind these decisions; and, c) how the regional office needs to be staffed. Where it is determined that the business has a good faith concern, then the time and effort to review available data to assess how and why the concern has been raised can be developed by OLCC, once the community has confidence that it will be heard and that decision making is fair and even-handed.

Approach

Absent a discrete set of allegations, the investigation started with a number of interviews with OLCC staff at the Milwaukee headquarters to gain an understanding of the basic agency processes and responsibilities, to discuss insights about the Bend community from involved management staff, and review OLCC records related to Bend events to gain a perspective. It was learned there was a historical context to some of the current concerns in that OLCC had investigated allegations made by a Bend business against staff in the regional office. That investigation resulted in a report, dated June 2006, which the agency released to the complainant in Bend.

The initial Bend contacts involved those individuals that were in the historical record as well as a city councilor. It was learned that local businesses were communicating by e-mail and

² The letter was described as purposely conceptual rather than listing specific examples because individuals were not willing to spearhead an effort at complaining because they need a continuing relationship with OLCC.

³ This investigation assessed the general weight of the evidence, which is distinguished from the standard of proof that otherwise might apply in an administrative proceeding or in civil litigation.

the Councilor agreed to communicate by e-mail and advise people of the investigation and invite them to make contact with DOJ. A number of individuals came forward at that point, additional individuals came forward through word of mouth, and at least one individual tracked down the investigator after he had not heard back from OLCC on his request to be contacted.

After contacts with business owners identified their experiences, OLCC regional staff was interviewed to obtain their perspective and explanations for some of the behaviors described by the business owners. The Milwaukee OLCC staff was re-contacted on specific examples from the business community that raised questions on various OLCC processes.

General Observations

First, the Bend business community presented as a group of reasonable people who gave specific examples of concerns and a uniform, although individually stated, desire to work with OLCC but in a reasonable manner that was a partnership to enhance business, encourage it to meet the law but at the same time flourish wherever possible.

Second, OLCC staff in the Milwaukee Headquarters was readily available, answered all questions and was helpful. The Bend regional office staff was also readily accessible, accommodating to both lengthy and tedious interviews and willing to provide information on any subject.

Third, the business community expressed confidence in a number of the Bend regional staff based on their interactions and the regional staff also expressed a positive desire to assist local businesses with licensure issues. Concrete examples are the regional staff already responding to some identified concerns listed in this report.

Caveats

It is not helpful to this investigation, and could be distracting, to name specific businesses or OLCC staff for most of the described interactions. Certainly the context of events or use of position titles will allow those directly involved to recognize their situations. The goal of this report is to address those specific areas of concern leading to what was generally raised in the letter to the Governor. Where discrete contacts are necessary as follow up, OLCC will know the business involved. Some areas of concern are already being addressed by OLCC regional staff as those businesses obviously know.

All but one member of the OLCC staff assigned to the Bend office are represented by a labor organization with specific personnel processes listed in a collective bargaining contract. It was decided the goal of assessing perceived problems would be best accomplished by not using a personnel review of represented staff under contract procedures. Rather the focus was to interact with the represented staff to address the identified concerns from the business community without it turning into individual performance concerns.⁴

⁴ This is not meant to imply that any personnel response was necessary for represented staff, only that such an approach was consciously not used. A number of businesses expressed the opinion they worked well with the OLCC staff.

This investigation also was not a detailed audit to assess all activities of the Bend staff in order to compare a larger portion of their work with some of the discrete concerns addressed in this report. An example is the finding, several times in this report, that notebook entries from the staff are no help in either explaining what their conduct was or rebutting what other individuals described their respective conduct to have been. These observations are limited to only those entries reviewed as the investigation did not make any broad based comparison regarding work product.

The Regional Manager position is not represented by a labor organization. However, historical events for the current occupant, when he held a represented position, can no longer form the basis for any personnel review because such a review would be untimely. Most readers understand that going back in time, for the typical personnel review, would not be fair to employees.⁵ The historical events identified during interviews as a basis of concern are listed only in the context of assessing an OLCC staffing decision regarding the Regional Manager position. The relevance pertains only to the decision-making process and not the individual conduct listed.

Summary of Findings

In brief, the heightened concern from the Bend business community can be attributed to several causes coming together somewhat by coincidence (the “perfect storm” effect). Beyond recognition of this effect, what emerged was an issue about the leadership role for the regional office based both on history as well as recent activities. However, equally clearly, there are other factors.

An example is two decisions connected with the so-called “happy hour” restriction on minors being permitted in licensed establishments. First, OLCC headquarters communicated a decision to enforce the “happy hour” restriction, causing the Bend office to re-evaluate some licensees who had no reported problems. This was an attempt to obtain uniformity of treatment but led to a perception by impacted establishments of over zealous regulatory activity and was viewed as unnecessary scrutiny. Second, OLCC headquarters intervened when a Bend establishment raised practical problems associated with enforcement of happy hour and the result was granting a new minor posting, creating a perceived disparity of treatment by some Bend locations.

Another example is local staff unwittingly tying together decisions on minor postings for two separate establishments having the same owners. The consequence was the belief that the level of minor posting for one establishment was conditioned on acceptance of a decision to restrict minors at the other location. This was viewed as exerting subtle pressure that to gain one approval there had to be submission to a change in the posting at the other.

Some of the heightened concerns can be attributed to factors regarding leadership at the region level. An example is the activities of regional leadership while in an off-duty capacity

⁵ Only to the extent that there is current conduct can there be a legal basis for a review of non-represented staff.

and then using that activity as a basis for formal demands to the local concert venue. Another example was an attempt to solve a problem by an implied promise not to enforce a rule, leaving the business unsure if a rule would or would not be enforced and thus unsure of what could happen in the future. Another is an example of unnecessarily harsh treatment during regulatory functions by regional leadership, raising questions about DPSST certification of “bouncers” in a manner viewed as threatening.

There were descriptions of a perceived “slight” by two employees at a local restaurant toward OLCC which was misinterpreted but became a pivotal issue for the region manager during interactions with the business owner. Another was the use of a non-liquor regulatory law, smoking ban, as primary enforcement mechanism in one situation that was questioned by ownership. Finally, two different interactions with a local business owner were described as rude and condescending by third party observers.

Businesses have independently described interactions with the OLCC that caused what can be objectively described as a reasonable basis for concern. Not all of the interactions were intended as harassing or to intimidate. However, these interactions demonstrate the difficulty for businesses based on application of standards that are viewed as subjective and subject to individual interpretation rather than objective standards. This is why some of the interactions and outcomes appear arbitrary from the perspective of impacted businesses.

Explanation of Pertinent OLCC Activities

A brief overview of OLCC functions is necessary to understand some of the concerns voiced in the community. Those pertinent here include:

(1) Initial licensing. This process includes a written application and an OLCC staff determination regarding the type of license and minor postings that will be granted when the establishment first opens.

(2) Determination of minor posting. OLCC has a series of guidelines about how to determine when (or if) minors should be permitted in establishments serving alcohol.⁶ The question of the appropriate “minor posting” comes up when an establishment first opens and is subject to review at any time. The manner of evaluation involves periodic visits by OLCC staff to a location. The purpose is to determine, during the times the business would like minors present, whether it is a “drinking environment” where minors are not allowed or, a corollary rule of whether “drinking predominates”, which also means minors not permitted.

Criteria on whether it is a drinking environment include factors such as “multiple televisions, bar visible, dim lighting, alcohol advertising, pool tables” and “other” factors based on the staff observations. Whether drinking predominates is based on taking a count at the time of the visit to determine how many patrons are eating compared to how many are drinking. The rules do not list specifically, but decisions appear based on numerical superiority. There have

⁶ Addressing concerns identified by witnesses also required consideration of some of the OLCC regulations to look for answers or explanations.

been examples of OLCC looking at receipts of alcohol versus food sales to determine a particular type of license. The ratio used for decision-making is not listed in the administrative rules.

An adjunct OLCC rule prohibits minors during so-called “happy hours” (reduced drink prices) and this prohibition is “automatic” in that regardless of previous determinations on the hours a business has been allowed to have minors present based on the “drinking environment” or corollary “drinking predominates” criteria minors are not allowed when reduced price drinks are sold.

(3) General enforcement. OLCC Inspectors visit locations in a regulatory capacity to assess factors including whether: (i) visibly intoxicated persons are being served; (ii) adequate ID checking is occurring; and, (iii) serving staff have service permits. There is a great deal of discretion for the OLCC staff person in terms of observations made, duration in a particular location, and frequency of visits.⁷

The discretion for OLCC staff include not only whether to take action but “how” to take action. For example, the establishment or location can be “verbally instructed” by the Inspector, there can be a “warning” letter, or there can be “formal citations.” Each of these three can be reduced to written form and placed in an establishment’s file.

Verbal instruction reports are not sent to any licensee. In contrast, warnings are sent to licensees, but without the underlying report, and there can be no appeal of the allegations in the warning. Citations are subject to contested case proceedings where all reports are provided to the licensee in preparation for hearing.

(4) Special events regulation. Special events include single evening events like music concerts and multiple day events like county fairs/rodeos where alcohol will be served. Special events are preceded by an application process that can include factors such as how and where alcohol will be dispensed, the staffing for I.D. checks, and crowd monitoring. The application is in written form, with attached diagrams, and must be approved by the regional staff. Inspectors also attend special events in a regulatory capacity to assess the same type of criteria and with the same discretion as general oversight of traditional bars and restaurants.

(5) Contested case proceedings. OLCC designates to a unit at headquarters the responsibility for reviewing reports from the field to determine the type of claims that will be made if a formal citation notice is issued. Members of this unit are referred to as “case-presenters”⁸ who present cases before an Administrative Law Judge that is assigned from a separate state agency. Following hearing, the ALJ issues a “proposed order”, which is then submitted to the Commission for a decision and issuance of a Final Order. The Commission is

⁷ While the Region office in Bend covers a large geographic territory, there are satellite offices in Pendleton, Ontario and Klamath Falls. While staff assigned to the Bend office work Deschutes, Jefferson and Crook counties, the practical focus is in Bend as a result of office location. That is, staff balance office work with field work and travel time is factored in the workday.

⁸ The position does not require a law degree although the case-presenters on staff have law degrees and some also have experience as practicing attorneys.

provided advice on the proposed order by in-house staff before a final decision is made. That staff, and the Commission, have access to the entire record, including hearing tapes and physical evidence.

General Concerns Regarding OLCC Processes

Several points about the OLCC system were questioned during the investigation. First, where a business is cited and appeals, if the OLCC later assesses that it will not be possible to prove the allegations, that citation can be changed to a “warning”, in reliance on the same supporting allegation, but there is no right to appeal. The warning goes into the file and may factor into future enforcement actions. Businesses felt this allowed OLCC to charge, use the warning process to avoid having to prove something but still have it in the file.

Second, much of the records generated by OLCC staff concerning businesses are not automatically shared with the business close in the time to when the event or activity occurred so that it can be timely challenged. While a public records request can be made there are times that reports are generated and the business owner may not even know that OLCC was at the establishment so it is not possible to know when to make a request.

Third, businesses that are incorporated, regardless of overall size of the operation, must have an attorney represent them at hearing and even the corporate principles are not allowed to provide lay representation. Fourth, and finally, it was pointed out that the penalty schedule applies across the board, regardless of the size of the establishment or the gross amount of business, so that a smaller operation (much of Bend) is more impacted by the fine schedule than, for example, a larger business with multiple locations. In short, the size of the fine, the need for representation and the offer of pre-hearing settlement bring economic pressure rather than a merit-based decision on whether to appeal, particularly when the OLCC offers a pre-hearing “settlement” that reduces the fine in the range of 30%.

Some of these factors are identified in addressing discrete issues below, but only for that specific purpose. Other than the specific references, the above issues have not been further assessed.

A. Experiences Identified within the Bend Community

The events identified below track the three general categories listed above at the beginning of this memo, as distilled from the letter to the Governor:

- (1) Experiences of local businesses involving enforcement of OLCC rules and the appearance of arbitrary decision-making in the application of those rules, absent any checks and balances on OLCC’s authority;
- (2) A belief that regional leadership fosters a climate of intimidation or harassment in the local business community leading to deep distrust; and,
- (3) Inconsistencies between how the Bend office enforces OLCC regulations as compared to other parts of the state, which has disadvantaged the local business community.

A table summarizing the factual data precedes a narrative discussion of the itemized concerns.

(1)Local Businesses Experiences

Date	Issue	Description	Page Ref. in Report
2008	1. Change in minor posting	Absent complaints, a brewery's minor posting was changed from a longstanding 8 p.m. to 4 p.m. and then to 6:30 p.m. within a time span of several months.	9 - 10
2008	2. Change in minor posting	Absent complaints and during application process for a separate establishment the posting was changed to "no minors".	10 - 11
2008	3. Change in minor posting	Absent complaints there was proposed change to minor posting based on "happy hour" prohibition, later resolved by new type of posting.	12 - 13
2009	4. Overzealous enforcement - Smoking law	Attempt to enforce new state law viewed as hostile.	13 - 14
2009	5. Determination of "drinking environment"	The process of determining when an establishment is a "drinking environment" appears subjective and arbitrary.	14
2009	6. Surveillance activities	Efforts to assess establishment by use of "outside observations" show widely different explanations of activities and OLCC reports identifying concerns are not shared with impacted establishment.	14 - 16
2008/09	7. Efforts to obtain full liquor license and target of enforcement	The time delay in receiving answers to licensing issues when OLCC headquarters involved and perceived "target" of minor decoy enforcement activity.	16 - 17
2008	8. Unequal treatment	A suspension for first offense was viewed as unequal treatment when owner reviewed case from another region with lesser penalty for second offense	17
2008	9. Change in posting	The manner of notifying establishment of change in minor posting viewed as "power trip".	17
2008/09	10. New licensing	Use of subjective standard on "drinking environment".	17 - 18
2008/09	11. Overzealous enforcement	Concert venue promoter holding special event license describes changing enforcement standards that are different	18 - 19

		from other parts of state and not based on any history of citations or problems at venue.	
2009	12. Overzealous enforcement	Market was cited for various matters, the case was before the Commission for consideration of final order when, one day before the meeting, a second citation was mailed to the market without any notice by the Regional office.	19 – 20

1. Change in minor posting A local brewery has operated for a number of years with a “#4 minor posting” that permitted minors on the premises until 8 p.m. No citations had been issued and no report of problems from OLCC existed. In late 2008, the brewery was visited and the licensee described he was advised that there was a statewide review of minor postings and one would occur at his business. The fact gathering process entails periodic visits by OLCC staff who provide the data for an assessment whether “drinking” predominates over eating.⁹

In this case, OLCC changed the time for the brewery’s minor posting from 8 p.m. to 4 p.m., so that minors were no longer permitted after this new time. This impacted the brewery’s business, and, in particular, families that wished to have their children join them for dinner. The owner described explaining the “curfew” to patrons with children and reported he received comments to the effect that they would leave and look elsewhere for a restaurant where there children could join them and they could order alcohol with their meal. The loss of business was troubling and the owner contacted regional OLCC staff on December 31, 2008 to explain the impact on his business. He inquired whether other local businesses (he named them) were similarly affected and requested to return to the 8 p.m. posting previously in effect.

He re-contacted the office on January 8, 2009 and was more direct with staff in explaining the 4 p.m. time was “ridiculous” and “unfair” because it was not applied to other comparable establishments in the community. He again asked to go back to 8 p.m. posting time. He followed up with a letter on January 29, 2009 asking for a change to 7:30 p.m. which was then followed by a second letter dated January 30, 2009 asking for 6:30 p.m. The last letter was part of working with an OLCC staff (with whom the owner feels he has a good relationship) because the file shows approval on that same date.

The owner also described that during this period of having the 4 p.m. limit that he spoke to OLCC staff about facts like he had a full time cook, a menu exceeding OLCC requirements and music did not start at the earliest until 8 p.m. He offered what else can I do to resolve this? They asked for receipts and he gave them a breakdown of alcohol versus food. He asked what ratio OLCC staff used, thinking that there is a lot of difference between a place like his (\$7 entrees) and a restaurant serving \$25 plates. He was told that OLCC has no formula.

⁹ This is a visual inspection where patrons with alcohol unaccompanied by food are compared with the number of patrons consuming food (alcohol can be present) and this tally is used to decide the time of day that minors can be present (i.e., when eating predominates over drinking).

The owner expressed a belief that regulation is too subjective (“wants a standard, not a gut call”) especially where his personal observation by going to other locations was that other premises within the same area (he listed off three) were not subject to such changes. The owner wondered: (a) with no history of problems why “review” the establishment at all; (b) the process seemed arbitrary in that the 4 p.m. posting was hard to comprehend; and, (c) general stability is lacking if the process is so discretionary that the business can go from a longstanding 8 p.m. to a 4 p.m. and then within weeks to a 6:30 p.m. The owner also described that he uses a doorman to screen for customer id’s with the understanding that the bartender (with the service permit) still has ultimate responsibility not to serve a minor.

Staff involved in this process conduct premises visits although nothing specific came to mind about this establishment when staff were questioned about it. The file materials provided by OLCC show information related to the brewery designating a happy hour after 4 p.m., which is a potentially triggering event for OLCC review because of the general direction from OLCC headquarters to enforce the minor ban during happy hour. However, the ultimate change to 6:30 p.m. is not consistent with this inference. There is data in the OLCC file specific to calendar months November and December 2008 and January 2009. For example, January 2009 has a series of entries of six drop-in visits where various OLCC staff comment on factors either relating to “drinking environment” (lighting, band setting up, disco ball) and/or counting the number of people drinking versus eating (“x” number eating and “x” number drinking). The calendar also shows that the owner provided his sales receipts to OLCC. There is no outcome or conclusion noted in the file regarding the sales receipts provided by the owner.

2. Change in minor posting As of spring 2009, an established restaurant with both alcohol and a sit-down dinner menu was not aware of any concerns that OLCC had about the minor posting hours it had been granted. The owners of this establishment were also in the process of taking over a location across the street by moving their other existing restaurant into the new location (where a prior restaurant had failed). The owner explained significant financing was involved, they have a large staff dependant on the business for income, and it was a financial risk for them as well. As part of the process for taking over the new location, the owners interacted with OLCC staff regarding licensing.

For purposes of this example, the question they raise was the fact that the OLCC tied together a change in the minor posting at the established location as part of the process on what would be approved as the minor posting in the new location. They had so much invested in the new location that not agreeing with the dual approach was too much of a risk from their perspective. Because they had not been informed of any need to change the existing minor posting at the established location, and no citations or service issues had been raised with them, they did not understand why the subject even came up in the context of addressing the minor posting for the new location.

The posting change made at the established premises, by letter dated April 20, 2009 was a “#2 minor posting”, which means no minors allowed on the premises at any time. On the business side, the owners described that a total ban on minors sends the message to any potential patrons approaching the establishment (including tourists) that it is a “tavern”, when that is not

accurate characterization.¹⁰ On the personal side the practical effect of this posting was that the owners could not bring their children down to the location when they were working on the books, even when the establishment was closed to the public. It was described by one of the owners (and confirmed by the OLCC staff member) that the owner started to cry when the scope of the restriction was explained. The staff member had to tell the owners that there were no exceptions allowed by the OLCC regulations. The staff member did suggest the owners write a letter to OLCC asking for some sort of dispensation and the letter would be sent to the headquarters in Milwaukee. The owner wrote a letter and sent it to the Bend regional office, as suggested by the staff.

In discussion with the OLCC staff member involved in this process it was explained that there had been some concern, within the OLCC regional office, about the appropriateness of the minor posting at the established premises and this included some periodic stopping by to resolve (using the visual inspection check of patrons drinking versus eating) several months earlier. Nothing was done about those concerns nor were they shared with the owners at that time. The staff person understood that the change would need to be made and that it was efficient to handle this change concomitantly at the same time there were interactions about the appropriate minor posting at the new location. The belief of the staff member was that there was not real opposition from the owners to this dual approach and it was efficient to take care of them at one time.

The Region Manager became involved after the letter was received. The owners, a male and female, describe that he asked to speak to the male owner alone. When the male owner was not available the region manager waited for the contact until that individual could meet. At that meeting the Region Manager handed the letter back to the one owner, stating that if it was sent to headquarters the answer would be “no” and so, in effect, I am giving it back and will not be sending it. The Regional Manager did offer that enforcing such a restriction was not a “high priority” with the implication that bringing the kids down while doing the accounting work could continue. The owners felt that this was basically inviting them to violate the posting restriction without true authorization. The owners felt that the Regional Manager presented this as a “favor” and that he knew he was granting them a favor. In light of the series of events they were leery of the guidance and uncertain whether to follow his suggestion.

When asked during the investigation, the Regional Manager explained he recognized the problem created by the “no minor” posting and the exclusion of all children, including their own. The Regional Manager felt he was being helpful and that, under the circumstances, he was going to the limit of what he could offer by way of assistance.

3. Change in minor posting. Another establishment at the edge of downtown Bend described three situations regarding OLCC interactions. The first matter is only for context and this investigator did not follow up with OLCC regarding specifics. It occurred during the initial

¹⁰ One owner related an event that unintentionally captures that the restaurant offers a bona fide food service. She related what she saw as a funny event one evening when she was filling in as a dishwasher and learned the restaurant had received a favorable newspaper article about its food from a San Francisco food writer.

licensing phase a number of years ago. The question was allowing minors to be in a movie theater area on the premises. This business has several other locations around the state with the same operating model where OLCC allowed minors in the theater area. A solution was subsequently worked out with the Milwaukee headquarters staff and permitting minors in the theater area was eventually approved over the regional office's initial objection.

The second matter concerns the confluence of established minor postings and the so-called "happy hour"¹¹ exception to minors being allowed, regardless of the terms of the minor posting awarded to a business. The "#4 minor posting", as previously referenced, permits minors during certain designated times which are viewed as "meal hours." The OLCC informed the Bend location that it intended to prohibit minors during "happy hour" under the #4 posting. This was a first for the establishment in Bend and also different than treatment at the organization's other locations, where it was not being directed to prohibit minors during "happy hour" despite the other locations operating under the same #4 minor posting. This decision specific to the Bend establishment had practical impacts on its business plan for this location and how the menu was structured.

At a meeting in the Bend regional office, the establishment representatives wanted to know "why" the issue about minor posting was being raised. They were advised that while no specific problems had come to the attention of OLCC that another establishment wanted "the same" as this place had (minors during happy hours), that all other businesses would be told "no", and that this establishment was also going to have to change.

There was an outcome for this establishment. It involved decision-making by OLCC headquarters staff that resulted in changing the license in the Bend location from a #4 to a #3A posting and this latter license allows minors to be present during times there are reduced drink prices (i.e. a happy hour). This process included reviewing records from the business to show the amount of income from food versus alcohol sales to see if it qualified for the #3A license.

In part, this difference between allowing minors during happy hour under a 3A license while not allowing them during happy hour under a #4 license is not easily explained to the business owners. The 3A license is based on a finding that food service predominates at all hours. OLCC headquarters management had directed that the "happy hour" exception be enforced during a regional manager meeting. The Bend office followed that directive. That resulted in contacts with businesses, including the establishment discussed here, as well as the brewery discussed in #1 above. Thus, it was not driven by any personal motives from Bend staff.

An unintended consequence of enforcing the "happy hour" regulation was that the Bend office understood it needed to review all establishments with a #4 posting to address any happy hour situations. This resulted in OLCC staff reviewing web pages to determine businesses having happy hours and phone calls to verify. There is a collateral regulation prohibiting the advertising of happy hours and this led to a perception voiced by several businesses of concern about overzealous enforcement by calls from OLCC asking about "happy hour" and then coming back with notice that it violated regulations to advertise a happy hour with reduced drink prices.

¹¹ Minors are not allowed when a reduced price on alcohol is offered.

Several individuals commented on calls from OLCC staff that seems like a “set-up” in that the calls were made as if the caller was a potential customer. These matters were anecdotal with no records and additional investigative time was not taken trying to pin down all the details.

4. Overzealous enforcement - Smoking law. The third matter raised by the business at the edge of the downtown area involved enforcement of the new state law banning smoking inside establishments that went into effect statewide in 2009. Two OLCC inspectors visited the establishment to talk with the manager on January 17, 2009 because the region manager directed them to do so. The manager met with the two staff and was told to stop allowing smoking in a particular bar area. He explained that this establishment had an exemption under the new smoking law. The manager described that one of the OLCC staff “lit into” him, starting out with being told the establishment was in violation of the smoking law and that its liquor license could be pulled. As a result, the manager said that he apologized and assured OLCC staff that the establishment wanted to follow the rules. The OLCC response was close to: “No you don’t!” and then the Inspector brought up the establishment’s packaging of a New Year’s Eve event that was described as advertising all you can drink for a fixed price. The manager generally recalled that OLCC staff gave other examples identifying how the establishment was not following the law.

This issue was discussed with the Bend staff members who interacted with the manager and the region manager, who had directed the staff to attend to this matter. There is a report which was also reviewed. The OLCC staff member present as an observer described the other staff’s manner as generally direct but did not have specific memory of the interaction to share. The staff member engaged in the interaction with the manager stated that he felt he was low key and approached this matter similar to any other enforcement matter in which he is engaged. The staff also described that the Regional Manager instructed him to go down and tell the establishment to halt the smoking. The Regional Manger, when asked about the matter, explained that he intended the purpose was to simply give the business a friendly “heads up” on the matter.

The OLCC report on this visit was reviewed. It has three items, listed chronologically from oldest to newest, under the “complaint summary” section of the form. The first item leading to visiting the establishment was a description of an observation that occurred on November 22, 2008. The investigator inquired about the staff deferring feedback to a separate visit rather than addressing it at the time of the observation. The staff member agreed that it was longer than reasonable to follow up on this listed issue.

The second item listed in the report is dated 1/15/09 and is a statement that the regional manager observed smoking at the establishment two days before the visit. There is no indication of the regional manager interacting with the business at the time of the observation to give a general “heads-up” regarding the smoking issue.

The third item listed in the report was dated the same day as the visit. It shows that something beyond what was initially expected to be discussed was raised during the visit. Two of the three matters were “follow up” items while the third was addressed on-the-spot. The staff member and the regional manager also could not explain a portion of the report where it is

concluded that items 1-2 were “proven” and 3 was “unproven” when the third item was the smoking room issue.

5. Determination of “drinking environment”. One restaurant went through substantial remodeling, to the extent that it was closed for business during a period of time. The owner offered several general concerns in dealing with OLCC regarding the determination by OLCC surrounding when an establishment is considered a “drinking environment” and the impact it has on allowing minors on the premises. His overall reaction, based on his personal experiences in Spring 2009, is that it appears subjective.

Prior to the remodel, the owner had previously had high top chairs in one area of the business with no concerns raised by OLCC. When the chairs were moved to another area as part of the remodel, they became an apparent factor in OLCC finding that the area was now a “drinking environment” and this was a criteria cited for the area being unacceptable for minors. He does not understand how “lighting, TV’s, and access to restrooms” are standards for this determination because they appear so subjective. As an example, he stated that OLCC rules limit the ability of the restaurant to have minors based on a factor like whether minors have to cross through an area posted as “no minors” to use the restroom facilities. His impression from visiting other comparable establishments with similar minor postings is OLCC is inconsistently applying the subject criteria among local businesses.¹²

A final example was that OLCC Inspectors come in to the business to assess food service based solely on the observations during a limited time frame (several minutes) so that he questions whether this can be a valid way to make such a judgment. This is the evaluation of whether “eating predominates” from observations of what patrons are doing. When he inquired of the Regional Manager why the Inspectors could not at least stay longer to develop an accurate picture, the response was that OLCC does not have the resources.

The owner learned that his establishment would be change from a minor posting to posted “no minors” through a phone call from regional staff. He scrambled to work through the issue with OLCC and retained legal counsel to assist. This included sorting out whether he had to abide by the changed posting immediately. The specifics of those interactions with OLCC are discussed in the next section covering concerns in the local community specific to the regional manager.

6. Surveillance activities. The same owner, as referenced in the section above, offered a separate description of interactions with an OLCC enforcement staff. The owner was concerned with overzealous enforcement activities. He gave me a typed statement covering two successive days reflecting the observations of the doorman, who described his interactions with an OLCC Inspector and a statement from the restaurant manager addressing an interaction on one of the two days.

¹² Other establishments were not visited regarding this matter as that would have entailed so much detailed work without helping to understand his concern, which relates to the subjective nature of the criteria.

The statement from the doorman described the setting on the first evening (April 5, 2009) as there being an altercation just down the street and police responded to that incident. An inspector subsequently entered the premises and accompanied by the owner, the inspector questioned the doorman about not calling local law enforcement concerning the altercation. The doorman explained he was unaware of the altercation until the police responded. There were questions that followed by the Inspector concerning whether the doorman had DPSST certification.

The written description of the second evening (April 6, 2009) includes the doorman's observation of vehicle with its motor running parked across the street from the establishment. After about 45 minutes had passed, the doorman went to speak to the driver and discovered the driver was the inspector from the night before. Following the exchange, the inspector moved the car to the entrance and approached the doorman. When the inspector's I.D. was requested, he stated, "Well you wanted my attention, now you have got it." The written description ended with the doorman's impression that the inspector's conduct was "rude, demeaning and unnecessary."

There was also a typed statement was from the restaurant manager who wrote about the second evening (April 6, 2009) and his interactions with the OLCC staff. This description covered the same inspector claiming that the doorman was pointing him out and not being cooperative. The manager said he checked it out with the doorman and everything was ok. He wrote further to the owner: "I cooperated with everything that was asked and took initiative to keep the inspector satisfied. The Inspector threatened that he could revoke our liquor license, and that that was something that myself or the owners would probably not want."

The Inspector was asked by this investigator about his activities on these dates. He provided a couple internal emails sent close in time to the interactions where he described the doorman was acting obnoxiously by pointing to the Inspector while he was conducting an outside observation. The emails do not include any comments about any interactions between the Inspector and the restaurant manager. The email was sent to the other inspectors and the manager, contains information about a prior warning he had prepared and sent to the owner. The email describes that the owner "refuses to call me back" without any reference on why it is viewed as an intentional act. The Inspector did not write up the matter using the OLCC report form so the emails are the extent of the record and it was not shared with the owner. The manager responded that based on some contacts he had made it appeared that they had gotten the owner's attention.

The notice referenced in the email was an earlier Notice of Warning, dated March 18, 2009, that the staff compiled and sent to the owner via mail. That document lists the relevant administrative rules and their respective titles for each violation without any facts or dates of events. The full report was in the establishment's file but was not mailed with the notice of warning. In the full report the dates of the three matters are Feb. 22, March 6 and March 13.

It was learned during the investigation that OLCC management had already received the same reports from the owner's employees and had given the Inspector the written statements from the doorman. The Inspector provided a written response. In it he described the doorman as

acting inappropriately and disagreed with the contents except for one item which he commented "My statement that he quoted is 100% correct.", in reference to the statement, "well you wanted my attention, now you have got it."

It is clear that there are differences of opinion on what happened. There are contemporaneous descriptions independently prepared by both participants. Since the owner was not provided any written description of the information in the emails contemporaneously with the events in question, he had only the version from his staff. Without an opportunity to respond at the time of the events (and the emails were not given to the owner during the investigation) there are two conflicting versions without any resolution at this time. It is not clear how the information developed in the emails will be treated by OLCC with respect to future dealings with this establishment.

7. Efforts to obtain full liquor license and target of enforcement. This establishment has been involved in on-going efforts to obtain a full liquor license.¹³ One of the complaints was that the process took months to resolve and there was a corresponding financial impact to the business because of the delay. There was good faith consideration at OLCC headquarters that required time to review and OLCC went further and followed up with DOJ legal counsel to make sure the analysis was consistent with the statute and it appears no definitive timeline was provided to the applicant.

At the same time, the owner appears caught in a situation that may require a legislative fix because the legal standard being applied for a full liquor license involving "a private club".¹⁴ Neither the time involved nor the resulting financial drain can be directly attributed to the Bend office. This owner's description references that the Bend staff have been offering alternatives, listening to his ideas and forwarding them to OLCC headquarters in an attempt to assist him in obtaining the desired scope of licensure.

This establishment also questioned the timing of a minor decoy operation that occurred in the evening hours after the owner had met with OLCC staff for several hours earlier on the same day. The question was whether the business was targeted because of his efforts to change the scope of the license. The facts show that the computer generated list for minor decoy randomly selected this establishment. The local staff who was to conduct the operation notified the regional manager, just after the meeting with the owner but before the operations were to start, and there was internal discussion amongst the staff about moving forward in light of the lengthy meeting that had just occurred. It was ultimately decided that anything other than using the computer generated list could be considered as showing favoritism.

With the number of staff discussing this issue, the fact that the list was generated in the normal course of business and was used at several establishments on that evening and that it was planned by a staff member who had no part in planning or attending the meeting at the Bend office show very little to no likelihood of any attempt by OLCC to target the establishment. This

¹³ In addition to beer and wine, a full license allows service of distilled spirits.

¹⁴ The statute is ORS 471.001(2).

owner also described some two personal interactions with the Regional Manager that are discussed separately below.

8. Unequal treatment. This business was subject to a mandatory suspension of license for violating a prohibition identified in the OLCC administrative rules. The owner did research OLCC cases to see if he was treated differently. He found another case, from a different region, that cited the same administrative rule. That case listed the same administrative rule and it was the second violation. The outcome was a fine rather than suspension. Since the other case was settled with a monetary fine rather than suspension, and the Bend owner described that he had offered to pay a fine in lieu of a suspension but was not allowed to do so, he felt there was different treatment.

While the same administrative rule was involved in both cases, it was different parts of that rule which applied for the conduct involving each of the respective businesses. Additionally, each of these two parts of the rule had different sanctions. The Bend case was under a part of the rule that only allowed suspension as a sanction while the part of the rule the business in the other region was cited under permitted a monetary fine or suspension at the election of the establishment. The establishment chose to pay the fine. Finally, the final decision on citation and penalties in both of these cases was made by staff at OLCC headquarters and not at the regional level.

9. Change in posting An establishment in the downtown area described how it was notified of the issue regarding the decision to enforce the rule that no minors could be allowed while during "happy hour". This particular owner explained that he received notice of the change during the height of his dinner hours when a letter signed by the regional manager was hand-delivered by an Inspector. It appeared to the owner, who had no advance notice, to be handled as a "power trip" in that it was a directive from the government without any explanation of what was perceived as a sudden change.

In addition, as a result of the decision in Milwaukee to adjust another establishment from a #4 minor posting to a #3A minor posting, it appeared to this owner that different standards were being applied within the community by OLCC. There are emails showing internal discussion among OLCC staff. There is no information in the file about whether this business was offered the same opportunity to submit receipts.

10. New licensing The owners of the two establishments (see discussion under description 2, above) also raised a concern about the mechanics of making the decision on the areas within the new location where minors would be allowed. They were told that the only way that a decision could be made on the time frame when minors would be allowed in the area of the restaurant where the bar was located would be periodic inspections by OLCC staff during which they would visually count who was eating and who was only drinking. Since the visits were periodic and random, the owners had suggested review of actual sales records. The concern was that depending on when the OLCC staff stopped by the various customer tables may show something like wine glasses but no plates even though food had been ordered. They understood that only the actual inspection process could be used.

OLCC has used the receipts process in establishing at least one license change in Bend area, and took in the receipts from another location (referenced in descriptions 1 and 3, above) but it is not clear the detail to which this was explained to this business. It was not offered to this business in any prior dealings.¹⁵

11. Overly zealous regulation. An agent for a concert venue near downtown Bend came forward with concerns about the level of enforcement for concerts where alcohol is served at the venue. The venue owner's staff works with local alcohol retailers and with promoters in order to have entertainment packaged with alcohol sales at the facility. A promoter who works with the venue also provided some insight. The retailer who serves alcohol under the OLCC approved temporary license described its concerns. OLCC both approves any temporary site license (TSL) and sends Inspectors to events for regulatory enforcement, similar to visiting local establishments.

The promoter provided insight from the perspective of having a business that books concerts with venues throughout the state of Oregon and is in a position to compare the role OLCC plays at the Bend venue with his experiences at other Oregon locations. The promoter stated there were differences between the Bend venue and his booking concerts in Troutdale, Jacksonville, Portland (Rose Garden and the Zoo) in terms of lighting requirements and security personnel requirements. Having worked with a number of different venues the feeling he is left with is that Bend is, in his words, "over the top" in terms of regulation. He stated that live concerts are economically rewarding for bands and that they recognize that if there are different restrictions between venues that can affect their preference of location.¹⁶

In addition to his direct observations, the promoter (and venue staff) receives feedback from patrons, either directly or coming through a Band web pages where customers can blog about the concert experience. An example from 2009 was offered where a fan complained about attending a concert in Bend and suggesting that the group come to the Eugene area next time as the experience for the fans will be much better. An email from 2008 was given as an example of how one customer reacted to the OLCC based regulations of lighting and security staff.

These two emails are not compelling evidence of widespread dissatisfaction. They were offered to show how rapidly and easily dissatisfaction can be registered and then reviewed by many more potential patrons. Also, the Bend venue takes a more involved financial commitment for people outside the area to attend events. The idea for the venue is to lure entertainment where

¹⁵ Although not used in this case, it was brought to the investigator's attention that a form for on-site data collection was developed by a staff member in the Bend office. It is a "tool" for staff to record data during on-sight evaluations for the purpose of determining the appropriate minor posting. The form lists the criteria from the administrative rule on "drinking environment" so it can be checked off. In addition the form also has a section to record on-site counting of the number of people drinking v. the number eating.

¹⁶ This is an example where there was neither time nor resources to undertake a venue by venue review. OLCC headquarters provided a description of the named venues and the license type used for events. It would take much more to do a complete comparison and OLCC recognizes that "license" comparisons are difficult because of the fact specific nature of each application.

it may be the only appearance in the state and thus it will attract customers from outside the Bend area who likely will stay at least one if not two nights to make a weekend out of the concert attendance.¹⁷

The venue's representative pointed out that venue takes seriously when it is described as the "worst venue" because of the potential impact on future concerts. It is word getting out, from customers, to bands, to promoters that observations will be shared and they all have the ability to compare different locations in the state. This can affect the groups willing to come, the promoters willing to work at bookings and the customers willing to attend. The goal for the owner's representative is to team with OLCC, not have conditions imposed that are progressively more restrictive without any basis in the venue's history to justify them.

The venue's representative had a memo outlining both a history of the facility operating without warnings or tickets from OLCC since 2003. A description for each succeeding calendar year where the OLCC standards required to obtain a temporary liquor license culminated with the need for either an exclusive beer garden (no family members under 21) or alcohol allowed in a walk-around setting but the sales would have to end from 1 hour and 15 minutes up to 2 hours and 20 minutes before the concert was over. In part, this is seen as contrary to a "family" environment will parents can bring children and enjoy beer or wine without having to "take turns" at the beer garden or, where the walk-around is so limiting that customers must finish drinking long before the show is over.

12. Over-zealous enforcement. A market was cited in January 2009 for allowing unlawful activity on the premises. The underlying facts unfolded during an arrest of an employee of the market, while he was outside the premises after it was closed, and he was discovered to possess methamphetamine. Subsequently, during his booking at jail, less than an ounce of marijuana was discovered in his possession. The legal premise is that the possession of drugs by an employee, while on duty, can form the basis of a rule violation for permitting unlawful activity. The charge, as explained below, however, was not based on the employee's possession of drugs.

The factual key in OLCC moving the charge forward involved statements of the employee to the officer at the time of the arrest that he (the employee) had found the methamphetamine on the floor of the market and picked it up so that no customer would find it. OLCC also relied on the marijuana being on the employee after closing and therefore would have been on his person during work hours. An independent ALJ heard the case on June 23, 2009 and issued a Proposed Order ruling in favor of the OLCC on August 18, 2009, that it had proven its factual charge. It was then submitted to the Commission for consideration of a Final Order.

¹⁷ While totally anecdotal rather than statistically based, during the investigation and without being questioned on the topic, two downtown establishment owners commented spontaneously and separately that they had each had great sales weekends and both related to the fact a concert had taken place at the local venue.

One day before the Commission meeting, the OLCC mailed to the market a notice of proposed cancellation of license based on a statutory claim under ORS 471.315(1)(c) of a “history of serious and persistent problems involving disturbances, lewd or unlawful activities or noise” on the premise or close to the premises and involving patrons.

When the Commission met, it voted unanimously to amend and reverse the Proposed Order from the ALJ, with the effect that it dismissed the charged violation concerning unlawful activity. There was no dispute that the drugs were in the possession of the employee after the close of the business when he was arrested at the premise in the parking lot. However, the Commission’s Final Order stated: “Other than Bryan’s hearsay statement, which the officer did not find to be credible, there is nothing in the record directly linking Bryan’s possession of drugs at 2:20 a.m. outside the premises to possession on the premises while on duty earlier in the evening.”¹⁸

Counsel for the Market questions the timing of the two citations, and the fact that in each case the underlying facts seem to be without a connection to the premises. The decision on filing is based on reports submitted from the Bend office. However, the decision is made by headquarters staff in Milwaukee.

The case that went to hearing was sent to the Milwaukee headquarters in October 2008 and a citation was issued in January 2009. The second (currently pending) matter was compiled in Bend and sent to Milwaukee headquarters on June 11, 2009. The report on the second matter was sent before there was a hearing or Proposed Order in the initial case. It was not sent because of the outcome in the first case. The second matter was issued in October 2009 before the Commission voted on the Order in the first case. Thus, when the second matter was mailed, the OLCC staff person handling the citation could only have know of the ALJ’s Proposed order in the first case (in favor of OLCC) and the second citation was not a retaliatory move because of the outcome in the Final Order in the first case.

2. Regional Leadership Issues

Following the summary chart, each matter is discussed. Items 2 – 7 are limited to the time period since the current Regional Manager assumed the position in April 2008.¹⁹

Date	Issue	Description	Pages
2004/06	1. Historical matter	Information brought forward by business regarding current Regional Manager’s activities as an Inspector in Bend area	21 - 22
2005/09	2. history of harsh	State-wide business providing alcohol/food for special events	

¹⁸ The Final Order noted that hearsay is admissible in these type of proceedings, unless it is unreliable and then outlined why it was not reliable in this particular case. It likewise found insufficient prove to tie possession of marijuana after closing to possessing it while on duty.

¹⁹ During the course of the investigation the Regional Manager was provided all descriptions given by others and allowed to comment on them

	treatment after complaint	claims overly harsh treatment stemming from early complaint about current regional manager as an inspector	22 – 25
August 2008	3. Off-duty actions	Customer at concert venue approaching licensees and following up email several days later directing future changes	25 - 27
January 2009	4. Enforcement decision	Directing an inspector to address the “smoking law” enforcement issue	27
March 2009	5. Enforcement action	During inspection activities threats to an employee filling in as identification checker	27 – 29
April 2009	6. Licensing action	While at establishment and later during meeting at OLCC offices, focus on employees “laughing at OLCC” raised as issue	29 – 31
April 2009	7. Interactions with owner	Third party descriptions of condescending approach with local owner on two occasions	31 - 33

There are three individuals who came forward to discuss their historical concerns with the current region manager when he worked as an Inspector in the Bend office. The history was raised in the context that several individuals understood that the OLCC had addressed the earlier matter by transferring the involved staff (based on what they observed and the cryptic reference in the prior investigative report which they received from OLCC). Two of these individuals attended and spoke at the public forum OLCC held in Bend and raised objections regarding the regional manager position before the letter was received by Governor Kulongoski.

Because the history was raised by OLCC staff and during the investigation, a variety of materials were reviewed and considered to help understand the basis of concern. At this point in time, there is little to add to the written opinion which set out a credibility determination adverse to the now Regional Manager. OLCC records and interviews explain that all Proposed Orders are subject to an internal review process by staff with full access to the entire record. The Commission receives staff advice before it makes a decision. The credibility determination remained part of the Final Order.

1. Historical matter: After the Final Order on this case, the OLCC staff who assessed the proposed order and advised the commission provided an explanation to the OLCC staff with the adverse credibility determination (current regional manager) that outlined the factual basis of the credibility determination retained in Commission’s Final Order. The information presented has been reviewed and it is clear and understandable as to why the determination was made by the ALJ and sustained by the Commission.

Separately, OLCC also had an investigation conducted based on concerns raised by the business and an outside investigator submitted a report dated June 14, 2006. That report concurred with the finding made by the ALJ in the contested case proceeding and stated that OLCC had "dealt with the issue." OLCC released that report to the then (and one of the current) complainants. That case and the report are now generally known in the Bend community. The Regional Manager stated during this and the prior investigation that he stands by his testimony in that case as being truthful.²⁰

In terms of a limited context to what happened after the case was over, in response to the Final Order (dated August 17, 2005) the former Regional Manager advised the Inspector (now regional manager) to work other than downtown Bend establishments. When interviewed the current regional manager recalled that this admonition was short lived and not a serious matter. In terms of whether the admonition was serious, there is an email from the then regional manager to the Inspector, dated February 11, 2006 asking for a "detailed account of how you came to observe an alleged" [illegal activity] at the [subject establishment] on 2/10/06. The manager requested an explanation for not contacting him first. The responding email set out some of the details and there was a follow up email where the current regional manager opines that there may be a disciplinary review. There is no other follow up documentation on what, if anything, happened after these emails.

The only other follow up was to review OLCC cases where the Regional Manager was a witness to see if the credibility finding was an anomaly. Several cases prior to the case in Bend show no issue about his credibility as a witness. There was one case, the Final Order dated December 18, 2007, where a different ALJ also made a credibility determination adverse to the Regional manager's testimony and the Commission retained the determination in the Final Order. The then Regional Manager recalled the case because he was out of the area when the conduct occurred and the two Inspectors were called to OLCC headquarters for a discussion of the physical restraint placed on the employee. This was before there was a hearing or Final Order in the case and based on the physical activities at the location and not the quality of any testimony.²¹ By the time the final order was issued, the current regional manager had transferred to Nyssa in October 2007 where he worked until taking the Regional Manager position in April 2008.

2. History of harsh treatment after complaint. A business owner (from the Salem area) came forward during the investigation and wanted to discuss what he feels has been a running battle over a roughly five year time frame with getting OLCC service from the Bend office. The business specializes in providing food and alcohol services for special events like county fairs, rodeo or other similar events that last one to a few days and often reoccur annually. The business regularly operates in central and eastern Oregon providing services for the above

²⁰ The Regional Manager also stated (i) that he believes the local attorney who handled the case continues in this matter "to make a name for himself" and (ii) the person from Visit Bend orchestrated the letter to the Governor and that organization had prior financial problems in the nature of a local scandal.

²¹ The case charges against the employee (service permit holder) originally included interference with an investigation and permitting disorderly activities but those two charges were dropped and the matter of the staff activities was handled internally.

described events and this means regular contact with the Bend office. Much of the history is not directly pertinent and only five discrete events are discussed below, after a brief history of the event leading to the assertion of unfair treatment.

The following matters are not in dispute. This business has been operating for over 20 years. The owner was presented an award from OLCC in 1999 for the “best public event” and the owner is involved in a rules making committee that OLCC established. In 2003 the business had an interaction with the then Inspector and now Regional manager that resulted in a “warning” letter from OLCC for issues at a county fair in a small population area of eastern Oregon.

The owner, several months after receiving the letter, approached the former regional manager to discuss the warning and the way the Inspector had acted toward the owner’s employees. While each side remembers differently the reasons for doing so, it is agreed that the warning was “removed” by the then region manager and is not part of the file. Subsequently, this business was later cited at an event in May 2007 (by a different inspector) for having a server who did not have a valid server permit and was also given a “warning” for alcohol leaving the designated area and failure to have minimum food available. The ticket was challenged and went to hearing. OLCC prevailed in the proceeding before an independent ALJ, whose proposed order was ratified in substance by the Commission in its Final Order.

(a) The 2007 citation and warning process is a representative example of OLCC processes on enforcement. An Inspector visited the premises, discovered the service permit issue and other matters and wrote a report. The report notes that the business had “No violation history” and recommended that two of the three matters addressed in the report be given a “warning” instead of a citation.

One of the two issues covered in the “warning” was liquor leaving the area designated for alcohol. The two observations in the report were: (a) two male patrons with partially consumed beers “walk from the license area to the brick restroom building, which are about 50 yards west of the licensed area, realize these restrooms were locked and return to the license area”; and, (b) a male and female customer walked from the licensed area to the arena, talked to some minors who were setting up the teen center for the next day and then return to the licensed area. The second issue where a “warning” was issued addressed a lack of food during the entire evening. It was based on the inspector’s discussion with a person at the premises.

The first time that the owner of the business knew of these issues was receipt of the report some months later after he had appealed the citation on the permit issue. The frustration for the owner is that the premises control and food service issue could not be challenged in the hearing process. As a result, there is a warning in his file although he had a letter from the very same person identified in the report as the source of information that food was not available and her letter stated in some detail why food was available all evening.²² The issues (alcohol leaving

²² During the interview with the Inspector there was a lengthy give-and-take discussion about what the person had said about food (the report attributed to her the comment “everyone was done eating by about 8:30”) and whether the inspector had actually verified, because it was not in the report, that the area designated for food was empty. This was raised during the interview because her letter explained that

area and insufficient food) are OLCC rules. The owner is concerned whether such warnings will be used to evaluate this business as it conducts business in the future, particularly where there is no meaningful opportunity to respond.

(b) The business owner was present at the Jefferson county fair in 2007 and noted that the same inspector who had previously cited the business showed up on two nights, one as an OLCC Inspector, where he asked for all the service permits and the second night, as a reserve deputy and also asked for all service permits. The owner felt this was an example of excessive enforcement and that in all his years of work in central Oregon no law enforcement person had ever asked to see service permits that are required by OLCC. During the interview the inspector did not recall this matter. However he explained that while conducting work as a reserve deputy sheriff he will use opportunities to educate fellow officers about OLCC regulations by going through things like permit checks.

(c) The owner described an event in Madras in 2007 where three OLCC inspectors (including the current regional manager) stood for approximately three consecutive hours within 10 feet of the area the owner had set up for alcohol sales. During all the time they were just observing, which he interpreted as some sort of show of force. The owner stated he did not approach them because he did not want to risk "paying for it later."

Each of the three OLCC staff were interviewed about this matter. Two reviewed notebooks they maintain for on-duty activities to show information about their activities or whether they were even present as claimed by the business owner. The notebook of the most junior inspector for the date in question shows coming on duty at 1600 and going with another inspector (current regional manager) to the event in question. The next entry is "clear 2010" which is leaving the event. Given travel time (Bend to Madras) the total time of 4 hours and 10 minutes is not inconsistent with the owners recollection of the matter. The other inspector's notes shows he arrived at the event at 4:30 p.m., stopped by another alcohol distributor's booth, saw beer in the parking lot at 6:02 and left at 8:59. The time frame from 6 to 9 is not detailed on what events or actions he engaged in. Neither recorded entries in the notebooks contradict the recollection of the owner.

(d) In tracking down information about this business and interactions in central Oregon, the Bend office had an email sent in June 2008 from the current regional manager to his two higher level managers in Milwaukee. It explains that this business owner is objecting to a condition made to his application to serve food and alcohol at a round up event in June. The email was a heads up because of the statement attributed to the owner that he was going to take his concerns to the headquarters. In the process of giving a heads up, the Regional Manager's email contains the following statement: "I have not spoken or dealt with [owner] regarding this particular event, but I know from our past dealings with him that he has received multiple tickets for violations at special events." Since it is stated as based on personal knowledge the record was requested to see if it verified that this was accurate. The record for this long-term business is one citation in its history with OLCC and a warning from the same event.

that she "set up and cleaned up between 10 and 11 p.m." and threw away 10 gallons of spaghetti, 2 bowls of salad and 5 loaves of garlic bread.

(e) In 2008, this business made an application for a special event license to run for three days at a rodeo event. The current regional manager took on the matter and stated he would only approve the application for one day and would come out and inspect to see if the other days would be approved. This is not the normal process according to other staff. Staff will review and either approve, request modifications before approval, or not approve. The owner saw this as the use of power to hold it over his head that two of the three days were up in the air and it is not his experience to have multiple day applications approved on a piecemeal basis.

3. Off-duty actions: A group of individuals came forward regarding a discrete interaction with the current regional manager at the Bend concert venue. It was offered as an example of a government regulator coming in as a customer and then proceeding to dictate results from his alleged observations without any input from the venue or the licensee.

The manager was off-duty and a patron at a concert in August 2008. When the concert was over, he approached the local retail staff operating under the TSL. The retail staff present recalled they observed the Regional Manager go through the liquor line several times during the concert and purchase alcohol. After the concert, he lectured staff about “problems”, which staff understood were based on his limited perspective while engaged as a customer.

The retail staff representative stated that his business has a policy that if one has consumed any alcohol it is not appropriate to carry on business. He thought this rule should apply to the Regional Manager. Another licensee staff stated he had observed the Regional Manager drinking beer (he stated that the manager was certainly not a visibly intoxicated person (“VIP”) but did see him consume) and he has been in this business long enough to know when someone has been drinking. He was left with the feeling that the Regional Manager had overstepped his bounds, presents himself as a customer, and then takes on an aggressive role as a government employee just because he feels like it.²³

Several days after the concert there was an email from the Regional Manager, in his official capacity, that summarizes the “problem” areas that he had observed. It then concluded with terms that OLCC was going to mandate to “rectify all of the above concerns”, which the venue manager viewed as a directive issued by OLCC. The email details several examples from the off-duty observations.

From the perspective of the venue and the licensee the email was sent without first attempting a meaningful discussion or input from either of them. The email was only addressed to the licensee, who forwarded it to the venue manager. In his response to the Regional Manager, the venue manager pointed that the police liaison – who was at the same concert - had

²³ During the interview the witness was challenged as to why he would say he felt the current regional manager did not want to work with the business community. He said it was from experience and described an interaction with the current Regional Manager at the venue in a prior year where he overheard the manager’s aggressive and threatening approach to an ID checker that caused the witness to intercede and ask the regional manager to tone down.

applauded the work of the security staff.²⁴ The venue manager also had a description from a security guard that a person (possibly the regional manager) came up to him, started telling him what to do without any identification of who he was and had obviously been drinking so the security staff told him to mind his own business. Following the email from the Regional Manager, the venue was notified by letter (part of the file) that in its next operating year (2009) additional restrictions would be imposed.

The regional manager was asked about the email sent to the venue licensee in one interview and did not offer any details about interactions at the event itself with the TSL staff. He was later directly asked about his role while off-duty and then said he recalled there was some interaction but he thought it was the following day. When the observations of the licensee staff were shared with the manager he stated he did not recall any specifics, but then stated it did not appear like an approach he would have taken.

The regional manager stated he had very little to drink at the concert (less than a beer) and that he was concerned about some of his observations. During the interview he spontaneously volunteered at one point that he is very clear about the distinction that if he is off-duty he is not going to be doing work. He will not take action but call authorities or refer to an Inspector who was on-duty. He did not seem to recognize that despite having this clear distinction he did interject himself, regarding OLCC related matters, on the night of the concert rather than contact local law enforcement.

It was later discovered that one of the Bend Inspectors attended the concert, walking in with the Regional manager's group of friends whom he had met up with at a restaurant close to the venue. He described that the manager had nothing to drink from his observations pre-concert and that he felt he would have seen him if he went through the liquor line (which he did not see happen) and that he was around at the end, was introduced by the regional manager to the licensee, and the interchange was friendly. He then left while the manager stayed.

The Inspector was not in a position to address what happened after he left. He personally had not observed any regulatory concerns/issues at the concert that he recalled. He also offered that he draws a bright line distinction that when off-duty he does not engage in work related activity. Had he observed any conduct he felt needed to be addressed regarding alcohol, he would call law enforcement but not interject himself into the situation.

The TSL holder has for six years provided alcohol services for concerts at the venue in a loose partnership with the venue owner and promoters. The TSL's representative stated that the business will no longer partner with the venue nor seek the OLCC TSL because it has become too difficult to meet the OLCC standards and the posture of being on-guard whenever the regional manager may show up. In reflecting on the last six years, the representative described that the venue had started out as a very good arrangement, and was very good economically for the community, but over the years it regressed from a best year where there were 11 shows to the most recent when it fell to 6 events. The quality of the concerts went from an "A" to "B." While not all attributable to OLCC, this business now feels that the level of OLCC scrutiny and the

²⁴ This was confirmed during an interview with the police liaison.

issue of potential for retribution was too much for the diminishing return. He wondered why, after 6 or 7 years of a track record without problems, this history was not meaningful to the OLCC as it over regulated the event from his perspective.

4. Enforcement decision: The interaction at the establishment with a smoking area was engaged in by the Inspector at the request of the regional manager (discussed at pages 13 – 14 *supra*). The Inspector advised he was instructed to go and tell the establishment to stop the smoking area. His report shows that the regional manager was the person who first observed the smoking room a couple of nights earlier when he was at the establishment. The regional manager stated during his interview that he intended for the inspector to give a “heads-up” to the establishment about the matter. It is not clear why he could not have done so himself several days earlier when he was at the location.

The Bend office, before the interaction, contacted the city (who had legal responsibility for enforcement of the smoking law) and learned that the establishment was in the process of obtaining an exception to the law. The city was not asked to follow up on the matter. Why it was deemed significant enough to send an Inspector for the sole purpose of giving a “heads up” on the issue of the smoking ban, when there was evidence that they were applying for exception is also not clear.²⁵

5. Enforcement action: The local establishments typically have a larger group of customers on certain holidays, including St. Patrick’s day. The manager of the establishment on the edge of downtown described his part of an interaction at the business with the regional manager on March 17, 2009. The employee directly involved was then interviewed. He has worked full time for the establishment since it opened. He started out doing more physical work but now has limitations (joint replacement surgery) and work has evolved into more being more office oriented. He is called upon two or three times a year to check I.D.’s during special events at the establishment and he was asked to do so on St. Patrick’s Day of this year.

As he describes, he was on-duty checking identifications at the door on March 17, 2009 and a line of customers was waiting to get in. He noticed the OLCC Regional Manager was in line, accompanied by what appeared to be a much younger individual, and the employee’s first thought was that it may be an OLCC minor decoy operation. The Regional Manager, when he reached the employee, asked to see the employee’s DPSST card.²⁶ The employee had an old

²⁵ In terms of priorities it was described that the Bend regional office covers a number of counties and a large geographic area. That is correct although the staff in Bend do not. There are offices in Klamath Falls, Pendleton and Nyssa. The Bend office staff have office related responsibilities like reviewing TSL applications and reviewing police reports so they work for part of the shift at a desk. The practical effect is the areas where enforcement can occur are limited by time since the end of the shift must also be at the Bend office to return the state vehicle. As a result, if there is limited time, downtown Bend is an area with a number of establishments consolidated so that they can all be visited in a shorter period of time. It is not as easy to travel to the nearby communities given time constraints. This matter was not exhaustively studied in terms of enforcement patterns or time spent in various areas.

²⁶ DPSST enforces a statute covering certification for individuals employed to act as “bouncers” and OLCC staff will ask about this certification both as an “assist” to DPSST efforts and because lack of certification is a possible “unlawful activity” matter which can be a basis for an OLCC citation.

expired card from prior employment and he complied and gave it. Noting it was expired the Regional Manager then asked for other I.D., received a driver's license and started writing down information in his notebook.

In substance, the interaction proceeded with the regional manager stating it was a crime to work security without a valid DPSST card. The employee recalls being nervous when he first heard the Regional Manager state this, thinking he may have inadvertently violated the law. His being nervous caused him to ask what kind of trouble could he get into and the response from the Regional Manager was words to the effect that "I'm going to call Bend PD and they will arrest you for this." The employee became more concerned and pulled out his cell phone to call for a manager from the business to come up. At that point the Regional Manager stated words to the effect that the employee could not call anybody while looking directly at the employee. The employee said you are not my boss and made the call.

He reached the facility manager who said he would come up. Another manager arrived first and she, the employee, and the regional manager moved off to the side. She explained that the DPSST licensed security staff was onsite. The employee recalls the Regional Manager saying something about this being fine and continued to write something in the notebook. The regional manager showed I.D., the other person with the Regional Manager kept walking saying he was with Liquor Control. The employee stated he still needed to see I.D., it was shown and that was the end of it. The manager had earlier described being called up to the location. By the time he arrived the parties were gone.

The OLCC staff person accompanying the regional manager recalled being present with the Regional Manager. He had a very general recollection of hearing something about "DPSST" but he did not recall any further details. When he was provided a full description of what the employee had related the OLCC staff stated he thought it was not likely that it occurred in that way because he felt he would have remembered it. He reviewed his notebook. All it listed was the name of the establishment and the time.

The regional manager was asked by this investigator about the interaction dating back to March 2009. His recollection was that there might have been an issue about "outdoor lighting" and he vaguely recalled making a request that the lights be turned up. He then consulted his notebook. It showed he was present on the date, time of day, and the particular establishment. The entry listed the name of the employee and date of birth.

After looking at the notebook entry the regional manager was asked if this refreshed his memory and he stated he did not recall the matter at all. He described that typically, if he is out with other staff, they will take the lead. When the description from the employee was provided the regional manager stated that he thinks he would not say "arrest" because the law did not permit that for a violation and calling law enforcement is not something he would think he would say. He did say that the DPSST issue is something where the OLCC will provide an assist when interacting with "bouncers" to provide them a heads-up concerning legal requirements.

6. Licensing action. At the time one establishment was reopened following a remodel, the status of the minor posting came to a critical point because OLCC discovered that the #4

posting (minors during specified times) sign was missing from the front of the building. The owner had placed it in a frame and bolted it on the outside of the building near the entrance. Another OLCC staff member reported this to the Region Manager and he directed that the posting would be immediately changed to a #2 (no minors at any time). The regional manager and another staff visited the location to deliver the new posting.

They left a business card at the front area and were looking over the establishment to generally assess. As they were walking through the establishment the manager approached and offered to help. He was told they were fine and did not need any assistance. As the Regional Manager and the other OLCC staff were leaving, the Regional Manager pulled the manager aside and asked who the person was (described as a male in the beanie) because that person was talking with a female and being derogatory about OLCC. The regional manager then told the restaurant manager that he did not appreciate them mocking the OLCC. The response was that the establishment takes the OLCC very seriously and asked what they had said. No specifics were given.

Thereafter, the two OLCC staff left the premises. The manager went to the male employee and asked about the conversation between himself and the female employee. It was described to the restaurant manager that the male staff was kidding the female staff about her Dad being a "meat-smuggler" and they had both had been laughing. The restaurant manager also spoke with the female staff and she described the same. The restaurant manager then called the OLCC regional manager (within minutes) and let him know the situation and what had happened. He had wanted to put the regional manager at ease that the exchange had nothing to do with OLCC's presence.

Within a day there was a meeting at the OLCC office regarding the OLCC decision to designate the business as no minors allowed. It was just prior to the weekend and the business had an event that would include minors on the weekend. It was an emergency meeting in the sense of the urgency for the owner and he brought an attorney with him. In attendance were the two OLCC staff who had gone to the establishment earlier, the owner, and his counsel. During the meeting, the other OLCC staff was working through issues with the owner to see what could be done. The Regional Manager, after some time had passed, made comments to the owner about him not thinking the rules applied to him, the owner objected, and the Regional Manager added at some point that the owner should not let his staff laugh at OLCC.

The attorney recalls that the regional manager made a statement along the lines of "staff should not be laughing at us." The other OLCC staff person recalls the subject being brought up at this meeting and she also recalled seeing the two employees in the restaurant and that it was obvious to her they had been flirting with each other. Both the attorney and the OLCC staff observed the meeting regressed because the comments from the Region Manager negatively affected the dynamics of the interactions. The OLCC staff person interjected and suggested that she and the Regional Manager take a break. She talked with him about a possible resolution. They resumed the meeting with all four participants and the ideas the staff suggested were offered by the Regional Manager to the owner and attorney as a way to resolve the matter.

When interviewed, the Regional Manager said that he observed the two employees laughing at the OLCC staff person with him while they were at the restaurant. It did not make a very good impression on him. During the emergency meeting the Regional Manager does not recall talking about the laughing incident. He also did not recall the break during which the OLCC staff person came up with the solution which they went back in and offered the business. Both the attorney and the owner recalled the break and that after it there was some resolution offered. The Regional Manager did not recall the restaurant manager calling him to clarify the situation.

In summary, three of the four participants did not see the comment as helpful, the attorney questioned how to advise his client given the observed behavior of the regulatory agency manager, the OLCC staff got the meeting back on track by suggesting that she and the regional manager talk privately during which she convinced him of an approach, and they went back into the meeting and solved the problem. Why it became a point during the emergency meeting is not clear although most participants said it did and that it was not at all helpful.

7. Interactions with owner. This description is limited to two discrete interactions between the Regional Manager and the owner of a private club: (a) when the Regional Manager stopped by the business at the request of the Director in light of a complaint coming into the headquarters and (b) an interaction at a local park while neither was working and the day after the minor decoy operation described at pp. 16 – 17 *supra*.

(a) Interaction at business: The owner described that the Regional Manager showed up at the establishment without a prior appointment and sequentially asked (i) if the owner had received a letter from OLCC (declining the application for a full liquor license) and the owner stated “yes” and the next question was (ii) if the owner had read the letter, again the answer was “yes” and the final question was (iii) why are you contesting this? It was described as a condescending approach with clipped questions (asking someone if they read a letter after they say they received it and then asking why would you challenge the decision). Several times the owner said he asked why the Regional Manager was at the business and did he want to check service permits or the license.

The regional manager described his going to the establishment at the request of the Director, who wanted to make sure the establishment understood the OLCC process since a communication from a state or local politician had come in regarding how this business had difficulties with getting a full license. The manager was returning to Bend from Milwaukee headquarters and wanted to take care of this request as soon as possible so he stopped by the Bend office to get a copy of the letter declining the application and went that evening to the establishment.

The Regional Manager described the interaction as the owner getting a bit testy (that it appeared to the Regional Manager that the owner was reacting as if OLCC sent the manager to rub his nose in the denial status) and that the owner was not overtly rude but standoffish (arms folded when talking) during the interaction, with a sarcastic tone of voice. He recalls asking if the owner received the letter, if he read it, any questions about reason denied and did he

understand his options. He felt the owner's demeanor was unnecessary based on him just trying to deliver the information that the Director had requested.²⁷

The Regional Manager gave me the email he sent to the Director as confirmation of taking care of the Director's request. The email reported that the meeting happened and that all the questions the owner had were answered. It did not state anything about the owner's demeanor but made the following statement attributed to the owner: "[owner] then stated he had hired a high-powered attorney whose law firm had connections to the Governor, and that his attorney's people had called their Governor connections to put pressure on the OLCC."

The contents of the email led to a follow up with the owner. When asked about the comments attributed to him, the owner wrote:

"[Regional Manager] showed up at the [business] holding a certified letter, and asking if I had received it. I said that I had received it, and that my attorney had responded to the letter. [Manager]'s basic response was, "...well, we declined your proposal, why are you contesting it?" I said that my attorney had been in touch with the governor's office about the matter, in order to see if the law could be interpreted differently... basically an opinion from a third party. I certainly did not use the term "high-powered", or imply in any way that we had "connections" or that I intended to "pressure" the OLCC."

The regional manager identified two other persons who were present that I could contact. I spoke with one of them. This person was at the establishment because there was a gathering to celebrate a birthday. He stated he did, as the Regional Manager described, observe the interaction. He confirmed it was in the location at the establishment described by the regional manager.

This individual observed that the Regional Manager "summoned" the owner to a hallway area, had the letter in his hand, asked if the owner knew about the letter and had a tone of "I don't know why you would dispute something that has already been denied. The feeling this observer had was that it was over-zealous to hand-deliver a letter that had already been mailed. The witness was questioning if the Regional Manager was there just to give the owner a bad time."²⁸

(b) Interaction at local park: The morning after the minor decoy operation at the establishment²⁹ the owner with his family (spouse and child) were walking in a local park. The

²⁷ The regional manager also contrasted some owners as more responsive than this person. At an earlier point he had been asked about the interactions described in the previous section and volunteered, toward the end of discussions about the laughing issue, that the owner of that establishment was more responsive than the person he encountered at the private club who was more standoffish (arms folded when discussing).

²⁸ This individual was also present at the off-duty actions by the regional manager discussed at pp. 25 - 27

²⁹ Discussed in the first section above at pp. 16 - 17

owner stated that they ran into the Regional Manager and the owner acknowledged the manager. The Regional Manager acknowledged the owner and said something like “[first name], how is it going” and then laughed at the owner in front of the owner’s wife. The owner does not think it was a coincidence.

The Regional manger described that they did run into one another and that the owner was with a woman and pushing a baby stroller. He was at first unsure if this was the morning after the minor decoy operation. His description was that there was no conversation. When asked why not talk to him he explained that he felt it would do more damage than good. That is also when he recalled that it was right after the minor decoy operation that this occurred. Later when more questions were asked during the interview the Regional Manager recalled thinking it was ironic that of all the people he should run into it would be [this owner].

The spouse of the owner was interviewed regarding this interaction. She recalled being with her family in the park, that she did not know who the person was that her husband was interacting with at that time and that the two did make eye contact as she observed. Her husband made some sort of acknowledgement of the other man and that man either smirked or laughed at her husband. She did not recall specifically what was said although she does recall that the other man acted in a negative manner toward her husband.

The reason she recalled it was negative was that right after the man communicated with her husband she said to her husband words to the effect: “lets not make a big deal of this” and they kept walking. She was concerned that what she observed of the tenor of the communication would make her husband angry. She did not want her husband to react with anger because, from her perspective but not communicated to her spouse, she did not want something unpleasant to escalate with the whole family present and she did not want her husband to say something in anger that could be used against him. She recalled when they got to the family car that her husband was saying this was not a coincidence. She recalls thinking that that it was more likely to be simply a matter of coincidence so did not agree with her spouse on that point but that she definitely viewed the other person’s behavior as showing “arrogance.”

The Regional Manager was accompanied by his girlfriend who described the interaction as well. While leaving the park area (they were exercising their dog) she was getting the dog leashed up at the gate area and she heard the manager say “hey [first name]” in his typical friendly tone of voice. The other person responded with “hi” back in a tone of someone who knows but is not a direct friend of the person they are acknowledging. She was focused on getting the dog through the gate area and did not get a good look at the other person. She volunteered that she can not say what the licensee looks like even to this day. Shortly after the interaction the manager asked her if she knew who that was and she said to him that she kind of figured it was this particular licensee. When asked why during the interview she explained that the manager had described meeting this licensee and his brother at some earlier point in time and the first name was a clue.

She also explained that the licensee was accompanied by his spouse (she assumes spouse) and they were pushing a stroller. It was she and the manager side-by-side and the other couple also side-by-side. She volunteered that the interaction occurred in May and the meeting at

the park was coincidental. The verbal exchange was not unusual and “not a big deal” based on what she heard.

3. Disparities in Enforcement among the OLCC Regions

There is anecdotal information on this topic from individuals in the Bend area, including some of the OLCC staff, and two observations from individuals doing business in other areas of the state (promoter and establishment operating statewide). There was also a limited piece of information from a patron at the Bend outdoor concert venue who lives in Eugene and made a complaint about the Bend venue, throwing in a contrast from that person’s experience in a Eugene venue.

For the most part the information points to an issue that goes beyond perception although it lacks sufficient specifics for a finding. It does justify further study by OLCC for several reasons. First, while limited, what has been identified appears to have some validity. One example is the promoter who came forward with his experiences in other parts of the state where concerts are held and he described Bend as the most difficult in dealing with alcohol regulations.

The other example comes from the representative for the state-wide establishment who offered the same basic description. He recalled being told by an OLCC staff member in the region office that he would find “Bend is different” regarding OLCC. He offered that this stuck in his mind because it should not be an acceptable standard or point of view of the OLCC.

He then described that the issue with minors at happy hours was not an issue at any establishment but the one in Bend. The manager in Bend for this same establishment offered anecdotally that when he worked for the business in both Corvallis and Eugene that the OLCC, if an establishment did not serve during a minor decoy operation, would come into the business immediately afterward and praise the staff for following the law in what he considered an example of positive reinforcement from the regulatory agency.

A number of people had general observations that events such as concerts at the Rose Garden in Portland that they attended would serve alcohol and the lights would go down during the actual concert. This left them with the perception that the standards were certainly different for the Bend venue.³⁰

It was also described that OLCC maintains and disseminates electronically a compendium of enforcement activities. The distribution is statewide and occurs on a daily basis. It seems that this data could be assessed for trends and to see if there is both consistency and that the activities undertaken are consistent with agency objectives.

³⁰ OLCC provided a memo outlining the types of licenses for some of the venues the promoter listed as places he had booked entertainment without the level of hassle from the OLCC. The descriptions show that a lot more work would be needed to track down the degree of difference, if any, and this investigation did not pursue the matter further. It is something OLCC can assess based on information it maintains.

Additional Considerations

In the course of this fact-finding, additional factors emerged that coalesced in three areas: (i) recognition of some responses undertaken by Bend staff; (ii) an assessment of the Regional Manager position; and, (iii) positive feedback about the incumbent in the position. These areas are discussed sequentially:

Responses by Bend staff: At least two businesses that described their respective concerns have already been contacted by OLCC staff to explain and, where appropriate, revisit some decisions previously made. This is a starting point for rebuilding trust between OLCC and the local community.

Along the same lines, there are other instances where an explanation by OLCC would be helpful to clear the air. For example, explaining the steps of the application process and fixing deadlines for future decision-making by OLCC so that the process does not appear arbitrary. Additionally, some concerns in the local community arose based on decisions made at OLCC headquarters, but were attributed to the regional office by the local business community. For example, the enforcement of the happy hour rule that effectively trumps any prior minor postings, which triggered a review of businesses where there was no recent history of complaints or enforcement actions.

Regional manager position: The position description is a starting point to assess the responsibilities of the position. In effect, this document provides direction to the occupant on the “primary purpose” of the position. It defines “managing activities” as covering the activities of assigned staff and all the licensees within the region. It also states that the position:

[E]xercises leadership which sets the tone for regional performance by effectively meeting the needs of the staff, licensee, local governments, law enforcement agencies and the general public; adapts operational management to meet local needs.³¹

The position description also recognizes that the position adheres to guidelines because they “provide a structure for the use of discretionary authority.”³² In effect, the exercise of judgment is tempered by application of specific rules and processes.

Here, the historical information impacts the working relationships between the Bend businesses and the Regional Manager. It is not realistic to expect the local community to simply suppress its collective memory of what it recalls as troubling or arbitrary actions attributed to the Regional Manager. To the extent that OLCC did not recognize the historical experience base in the Bend area when it selected the incumbent, it must now consider what, if anything, is appropriate to proactively address the fracture in the relationship between that individual and the Bend businesses. In short, if the incumbent failed to satisfactorily meet the requirements of the position, as defined by the position description, it means that both the individual staff involved

³¹ From the most recent Position Description, Section 2b. “Describe the primary purpose of this position, how it functions within this program” which was signed in May, 2009.

³² PD at Section 5 – “Guidelines.”

and the local community were not well served by the selection. On the other hand, if the incumbent can perform the defined duties of the position but the community, for the historical reasons identified in this report, perceives fault in the incumbent, a more complex solution will need to be evaluated. Apart from this conundrum, there are recent behaviors identified in this report to be evaluated.

Positive comments about the current regional manager. Law enforcement provided positive comments in two contexts: i) while he worked as an Inspector based in Nyssa; and ii) as regional manager in Bend.

(i) Stationed in Nyssa. An officer, located in one of several cities served by the Inspector position stationed in Nyssa, offered praise for the Regional Manager during the six months he was the Inspector at that office. The officer related that both professionalism and honesty were keys to working with law enforcement and that the Regional Manager showed professionalism and there was no reason to ever doubt his honesty during that time. He did not have a chance to observe the Inspector interact with local businesses, but was very impressed with being kept apprised of the work the Inspector was performing and that he was “tremendous” in the enforcement role. He felt that “reading between the lines” of recent press coverage in Bend, that he was of the opinion that it involved a person who was just trying to do his job, had a high energy level, and most likely had “stepped on some toes” in the Bend area. He prefaced this with the statement that he knew he did not have both sides of the story.

A second law enforcement officer from the same location also worked with the current Regional Manager and likewise offered praise, couched as the most outstanding OLCC Inspector he had worked with in his law enforcement career. The area had a couple of “problem” bars, the locals had tried to work with them without success, and had wanted OLCC to be more aggressive. The officer was not in a position to observe the Inspector interact with regulated businesses, but also did not hear of complaints during the six months that the individual was in the Nyssa office prior to his promotion. He felt the Inspector provided great service, kept law enforcement in the loop with status reports, and that law enforcement’s concerns were being heard.

(ii) Region manager work. An officer in Bend attended a meeting with the Region Manager to address concerns for a local establishment. He described the manager’s working style as excellent in communicating effectively a local establishment owner during the meeting. There was praise for the manner in which he explained the concerns related to the business, that options were offered and that it was both a proactive and problem solving approach.

The owner of the business who attended the meeting was also contacted. He described the Region Manager as professional and “tough, but fair.” He recognizes there has been concern expressed by some businesses in the Bend area, but feels that his experience has been different regarding interactions with the Region Manager. He offered that he has had many years of experience working with OLCC and, to the extent he voiced a concern, it was a general observation of lack of uniformity in enforcement based upon either the individual inspector’s lack of understanding of the regulations or bias.

Conclusion

It appears that the situation leading to the Governor's letter evolved from a series of independent actions. Each of the actions impacted the local business community in different ways with the common thread being lack of trust. That lack of trust stemmed from actions that appeared arbitrary, from enforcement tools that appeared to give too much discretion, and from conduct that was viewed as unacceptable. These different concerns have coalesced and, although none, standing alone, would have likely caused the level of concern that exists, they collectively have risen to that level.

There are examples where, absent a decision on enforcement or the manner in which it was executed, businesses would not have come forward. Had there been no decision on enforcement of the "happy hour" ban on minors, at least two businesses, with no recent alcohol related problems, would not have had impacts on longstanding hours where minors were allowed under the #4 licenses. Miscommunication and misplaced assumptions with a third licensee led to the perception by the licensee of having no choice but to accept a change in minor posting to ensure a favorable outcome on a separate initial license decision. This same business felt the mechanism for determining when minors would be allowed – the observation period to determine "drinking environment" – seems overly mechanistic without serving either the interests of the public or the business.³³

There are examples where decision-making at the regional level appeared abrupt and punitive in nature or over-zealous. One was a local business that experienced a sudden change from a #4 minor posting to a #2, which prohibited minors altogether. This was viewed as an overly harsh reaction to a lost posting. This one business also experienced random enforcement activities leading to widely different interpretations of events between employees and an Inspector with only the Inspector's viewpoint captured in the OLCC record.

Another example was the business that was notified of the change in the posting because of "happy hour," and concomitantly was subjected to enforcement of the smoking ban. That enforcement contact was made a couple of weeks before the ban took effect, with OLCC having notice that the business had an application submitted for exemption, and it involved a law the City of Bend had authority to enforce. This contact from OLCC made the business question OLCC priorities and whether it was over-zealous.³⁴

³³ The approach of visiting the premises during the time period covered in the request for allowing minors with the counting process of patrons eating versus drinking interjects a number of discretionary decisions by the OLCC staff. There is no set number of visits, the visits are a snap-shot, with staff making a specific count over several minutes rather than doing an assessment for the entire time frame requested. Further, this process does not look at other quantitative and potentially meaningful data, such as food versus alcohol sales receipts. For example, under the present system, if a patron has a drink while waiting for dinner, the count will show them as drinking only despite having ordered food. OLCC staff explained that they try and enlist someone from an establishment when conducting the on-site review so that the business can verify the particulars which is helpful.

³⁴ The OLCC report, showing a November date for one activity in question and contact in mid-January, raises issue of whether waiting such a lengthy period of time to discuss a concern was building

The level of regulation at the concert venue where the business held a temporary service license, absent problems over several seasons, did not appear to serve anyone's interest from the perspective of the businesses.³⁵

Several businesses questioned decisions that it turned out had factual and logical support. This included misunderstanding the use of the minor decoy at one location, the rationale for suspension of a Bend establishment as opposed to a fine, and the timing of a second citation at an establishment just one or two days before the Commission dismissed an earlier charge. Each was justified by the law and OLCC policies.

Much of the above described events were also beyond the control of the Region Manager and are not attributable to his decision-making. However, his direct involvement in two of them was viewed as making the situations worse. First, after the abrupt change of one business from a #4 to #2 license, the focus on the whether employees were laughing at OLCC was viewed as a vindictive regulatory approach. Second, the process of offering to, in effect "look the other way" regarding another #2 posting, so a parent-owner could have her children come to a closed establishment while she was balancing the books, made the owners ill-at-ease. This informal approach was also in contrast to the approach with respect to the minor decoy operation – that to be fair it must go forward.

There were other events where the Regional Manager had direct control from the start. First, engaging in off-duty enforcement work at the concert venue created distrust within a segment of the community. The manager had options, like the OLCC staff who attended the concert with him, of contacting on-duty authorities to address concerns. The concern voiced was that there was no way for a business to counter undocumented concerns, made by a person who was off-duty, that ultimately resulted in an email containing an directive on how the next season at the venue would be handled. The venue felt that while a police liaison was reporting just the opposite observations from those of the regional manager, those were never considered by the manager before he issued his directive.

Second, the actions while engaging in enforcement – the Regional Manager telling the person at the door checking I.D. on March 17th that the police will be called to have them arrested and then telling the person at the door that he cannot make a phone call – is not

up a justification for the real reason the staff was sent – that is to tell the business to stop the smoking area. Other information in the report also supported the description by the establishment manager of feeling "slammed" by OLCC regulatory activity. That is, when he attempted to explain how the business had followed the rules, he was rebuffed, and then the Inspector spontaneously brought up another claimed violation on the spot.

³⁵ The Liquor Control Act broadly prevents abuses in sales/consumption of alcohol ("promote temperance in the use and consumption") and, to the extent efforts are consistent with preventing abuses, the legislative policy is "to encourage the development of all Oregon industry." ORS 471.030. The venue did not see the latter part of the law being applied to it over the years.

acceptable nor even consistent with OLCC policy guidance.³⁶ It is similar to the special event business owner's observation in 2007 of a consecutive three-hour enforcement presence by OLCC, where the records show the OLCC presence, and in this context appears as more than an overly sensitive reaction.³⁷

Apart from discrete conduct by any OLCC staff, increased record distribution at the time reports are generated could be considered to allow a more transparent operation. Such tools would minimize reactions by businesses and individuals that agency discretion is without checks and balances.

In addition, there are also some rules and policies that could be assessed by OLCC to assist staff in enforcement activities and to make the standard more clear to the public.³⁸ From most indications, the businesses generally want to work with OLCC to solve these concerns as they are not opposed to regulation, only that it should be with the same goal of healthy regulation of businesses that remain viable.³⁹

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c: Kelly Skye, General Counsel, Office of the Governor

³⁶ OLCC currently has a rule on appropriate DPSST certification, which, if invalid, presents an issue of "unlawful activity" that would be subject to OLCC citation. Enforcement Manual, Chapter 400, at p. 47 of 89. The available field notes do not address recommended action if a genuine issue about certification is presented.

³⁷ The current Regional Manager has held the position since April 2008 and OLCC can only lawfully consider recent activities identified in the investigation when making personnel decisions.

³⁸ For example, Bend staff recognized the rule on how to determine when an establishment is a "drinking environment" (minors excluded) has specific criteria in the administrative rules but the criteria is general and ultimately not defined. In other words, how to determine "dim" lighting or how many criteria must exist to meet the standard of a drinking environment is not defined. The Bend staff member who developed the form used for field inspections showed initiative and a step in the right direction by developing an inspection form because the data is at least captured and placed in the file. The form does not resolve the ambiguity in the criteria.

³⁹ The business community's perspective appears consistent with the legislative direction for OLCC in ORS 471.030 (1) and (2).