BEFORE THE LIQUOR CONTROL COMMISSION
OF THE STATE OF OREGON

In the Matter of the Revocation of the Service Permit held by:	) **FINAL FINDINGS OF FACT**) **CONCLUSIONS OF LAW**) **AND ORDER**
Trent Trautman	) OLCC-09-SPR-017

HISTORY OF THE CASE

On May 8, 2009, the Oregon Liquor Control Commission (OLCC or Commission) issued an OLCC Service Permit Revocation Notice (Notice) to Trent Trautman. The OLCC alleged that Mr. Trautman had completed diversion for Driving Under the Influence of Intoxicants (DUII) in July 2007 and was convicted of DUII in April 2009. The Notice stated that Mr. Trautman could send a form to establish that he met the criteria to overcome the proposed revocation, but that he could not meet the criteria if, as alleged by OLCC, Mr. Trautman was still on probation and had abstained from the use of alcohol for less than 24 months.

Mr. Trautman made a timely request for hearing. The Commission referred the request to the Office of Administrative Hearings on June 5, 2009. The case was assigned to John Mann, Senior Administrative Law Judge (ALJ). A contested case hearing was held on July 9, 2009 in Tualatin, Oregon, before ALJ Mann. Mr. Trautman was not represented by an Attorney. The OLCC was represented by Kelly Routt, Case Presenter. Ms. Routt testified for the OLCC. Mr. Trautman testified on his own behalf. The record closed at the end of the hearing.

The Administrative Law Judge considered the record of the hearing and the applicable law and issued a Proposed Order mailed September 11, 2009.

No Exceptions to the Proposed Order were filed within the 15-day period specified in OAR 845-003-0590.

The Commission adopts the Proposed Order of the Administrative Law Judge as the Final Order of the Commission and enters the following based on the preponderance of the evidence:

ISSUES

1. Whether Mr. Trautman's service permit should be revoked because he had both a DUII conviction and a DUII diversion in the last three years, at least one of which was within the last 12 months. ORS 471.385(1)(c); OAR 845-009-0020(7)(a)(A); ORS 670.280.

2. If the application should be revoked, whether Mr. Trautman has shown good cause to overcome the revocation. OAR 845-009-0020(3) and (7)(b).

EVIDENTIARY RULING

Exhibits A1 through A4, offered by the Commission, and Exhibits R1 through R4 and Exhibit R6, offered by Mr. Trautman, were admitted to the record without objection. The Commission objected to Mr. Trautman's Exhibits R5, R7 and R8. The objection was overruled with regard to Exhibit R5, which was admitted into the record. The objection was sustained with regard to Exhibits R7 and R8, which were not admitted into the record.

FINDINGS OF FACT

1. The OLCC issued Service Permit No. 239779 to Trent Trautman on September 26, 2005. The Service Permit is scheduled to expire on November 10, 2010. (Ex. A1.)

2. On July 7, 2006, Mr. Trautman entered into a diversion agreement following an arrest for DUII. Mr. Trautman completed the diversion agreement on July 6, 2007. (Ex. A2.)

3. On March 5, 2009, after work, Mr. Trautman drank alcoholic beverages at a non-work location. After drinking, he drove a vehicle and was arrested for DUII. (Test. of Trautman.) On April 23, 2009, Mr. Trautman was convicted of DUII after entering a plea of no-contest. The Circuit Court sentenced Mr. Trautman to five days in jail and bench probation for three years. (Ex. A4.) The Circuit Court set forth the terms of Mr. Trautman's probation using a pre-printed form. One of the pre-printed terms of his probation ordered Mr. Trautman not to "enter or frequent a bar, tavern, or any establishment whose primary income [was] derived from the sale of alcohol." Judge Marcus, who issued the order, wrote the words "[e]xcept for employment" next to that condition. (Ex. R2.) Judge Marcus made this exception because, after considering "the risks involved in [Mr. Trautman's] case, that public safety would best be saved [SIC] by allowing [Mr. Trautman] to remain gainfully employed." (Ex. R3.)

4. Mr. Trautman has been enrolled in treatment with the Avel Gordly Center for Healing, a state certified alcohol treatment program, at Oregon Health and Science University since April 2, 2009. As of the date of the hearing, Mr. Trautman was complying with all treatment recommendations. (Ex. R1; test. of Trautman.) Mr. Trautman has not consumed alcohol since his arrest in March 2009. (Test. of Trautman.)

5. Mr. Trautman has worked as a bartender for 15 years in several states. He has never been sanctioned by any state for violating a rule related to the sale or service of alcohol. Mr. Trautman has a child due to be born in September 2009 and is concerned that the loss of his service permit will result in the loss of his job and ability to support his family. (*Id.*)

CONCLUSIONS OF LAW

1. Mr. Trautman's service permit should be revoked because, within the last three years, he had a conviction for DUII and a DUII diversion, the last of which was within the last 12 months.

2. Mr. Trautman has not shown good cause to overcome the revocation.

OPINION

The Commission proposes to revoke Mr. Trautman's service permit pursuant to ORS 471.385, which states, in relevant part:

> (1) The Oregon Liquor Control Commission may revoke or suspend a service permit, or impose a civil penalty in lieu of or in addition to suspension as provided by ORS 471.322, if it finds or has reasonable grounds to believe any of the following to be true:
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> * * * * *
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> (b) That the permittee has been convicted of a felony, of violating any of the liquor laws of the state, general or local, or any misdemeanor or violation of any municipal ordinance committed on the licensed premises.
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> (c) That the permittee has performed or permitted any act which would constitute a violation of any provision of this chapter or any rule of the commission, if the act were performed or permitted by any licensee of the commission.

ORS 471.385(1)(b) allows revocation of a service permit if a permittee has been convicted of violating any of the liquor laws of this state. Mr. Trautman has been convicted of DUII, a crime that falls within the parameters of Oregon liquor laws. In addition, Mr. Trautman has a previous period of diversion for DUII. ORS 471.385(1)(c) allows for revocation of a service permit if the permittee performed any act which would violate ORS Chapter 471 or any rules adopted by the Commission. ORS 471.315(1)(a)(F) allows the Commission to cancel or suspend a license if it finds that the licensee is in the habit of using alcoholic liquor to excess. The Commission has previously held that participation in DUII diversion is evidence of using alcoholic liquor to excess which supports a revocation of a service permit. *Becky L. Williamson* (OLCC, Final Order, 96-V-009, June 1996). Thus, the Commission's proposed action in this case is consistent with its authority under ORS 471.385(1)(b).

The Commission also relies upon OAR 845-009-0020(7)(a)(A) which allows the Commission to deny an application for a service permit. The rule provides, in relevant part:

> (7) Driving Under the Influence of Intoxicants (DUII)/Furnishing Alcohol to Minors/Liquor Law Violations:
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> (a) The Commission will deny a service permit if:
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> (A) Within three years the applicant has had two DUII convictions or one diversion and one conviction, any one of which was within 12 months[.]

In this case, the Commission proposes to revoke Mr. Trautman's existing permit, not to deny an initial application. However, in *Michelle L. Haynes*, (OLCC, Final Order, 06-SPR-022,

December 2006) the Commission held that it is appropriate to use the denial criteria in OAR 845-009-0020 to revoke an existing permit. Mr. Trautman completed DUII diversion in July 2007. He was convicted of DUII in April 2009, which is within 12 months of the date of the Commission's notice. He completed diversion in 2007, less than three years ago. Thus, Mr. Trautman meets the denial criteria set forth in the OAR 845-009-0020(7)(a).

Good Cause

A permittee whose permit is denied on the basis of DUII convictions and/or diversions may overcome a denial of a service permit on a showing of good cause. OAR 845-009-0020(7)(b) provides, in relevant part:

> If applicant has DUII convictions or diversions, good cause may apply. Good cause to overcome the criteria in subsection (a)(A) through (C) above is the applicant's sworn statement on a Commission-supplied form that:
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> (A) He/she has not used or consumed alcohol or controlled substances within 24 months; and
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> (B) He/she has successfully completed a state certified alcohol or drug treatment program or is actively involved in a state certified treatment or recovery program, and is following treatment recommendations. If a completion certificate or other proof that the applicant successfully completed a treatment program is available, the applicant will provide a copy to the Commission; and
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> (C) He/she has completed all parole or probation requirements.

Mr. Trautman admitted that he consumed alcohol in March 2009, less than 24 months prior to the Commission's notice. Although he is actively involved in a state certified treatment program, and is following treatment recommendations, he has not yet completed his probation. Thus, Mr. Trautman does not meet the good cause criteria under the rule.

Mr. Trautman acknowledged that he met the denial criteria of OAR 845-009-0020, and also conceded that he did not meet the good cause criteria set forth in the rule. However, he argued that his DUII diversion and conviction did not bear on his fitness to hold a service permit. Mr. Trautman cited to ORS 670.280 which provides:

> **Denial, suspension or revocation of license prohibited solely because of criminal conviction; exception.** Except as provided in ORS 342.143 or 342.175, no licensing board or agency shall deny, suspend or revoke an occupational or professional license or certification solely for the reason that the applicant or licensee has been convicted of a crime, but it may consider the relationship of the facts which support the conviction and all intervening circumstances to the specific occupational or professional standards in determining the fitness of the person to receive or hold such license or certificate.

However, the Commission has previously concluded that DUII convictions are convictions for violations of alcoholic liquor laws and are relevant to a person's fitness to serve and sell alcoholic liquor. *Dorothy J. Hamblin* (OLCC, Final Order, 03-APR-036, December 2003); *Carolyn A. White* (OLCC, Final Order, 98-SPR-050, January 1996). A conviction for DUII, of necessity, involves a judicial determination that a person has engaged in the irresponsible use of alcohol. It is reasonable for the Commission to conclude that the irresponsible use of alcohol in a person's personal life bears a relationship to the person's fitness to sell and serve alcohol to the public.

Mr. Trautman argued that there is no evidence that his personal use of alcohol, or his conviction and diversion for DUII has ever affected his job. He noted a lack of any past violations in Oregon. He also provided undisputed evidence that he worked for several years in other states with no violations of liquor laws while performing his professional duties. While this may be the case, ORS 670.280 does not require a showing that a conviction directly affected an individual's professional duties. Rather, the statute requires the Commission to consider the relationship between the facts underlying the conviction and "the specific occupational or professional standards" of the profession. Thus, it is sufficient for the Commission to consider the general standards applicable to service permit holders; it need not consider whether the conviction directly affected the job performance of an individual permit holder.

ORS 670.280 also requires the Commission to consider "all intervening circumstances" since the commission of the crime. In this case, Mr. Trautman committed the acts that led to his conviction in March 2009. He was convicted in April. The Commission issued its notice in May 2009, less than two months after the arrest. Thus, very little has transpired since the commission of the crime that would bear on Mr. Trautman's fitness to hold a license. In addition, the good cause criteria set forth in OAR 845-009-0020(7)(b) demonstrates that the Commission does consider intervening circumstances and will not revoke a permit when a permittee can demonstrate, among other things, an extended period of abstinence. The Commission considered those factors and determined, under the facts of this case, that revocation was appropriate. The Commission gave adequate consideration to intervening circumstances. Therefore, the revocation of Mr. Trautman's permit is consistent with ORS 670.280.

Mr. Trautman testified about the economic difficulties he could face if he loses his service permit. He noted the poor economy, his 15 years of experience as a bartender, and the fact that he is the father of a baby that is due in September 2009. He also noted that Judge Marcus made an exception to the standard terms of probation because the judge determined that public safety would best be served by allowing Mr. Trautman to be gainfully employed.

While the Commission can appreciate the difficulties that would be faced by Mr. Trautman, they do not provide a basis for overcoming the Commission's denial criteria. Any service permittee facing the loss of a permit would likely face the prospect of unemployment and the economic difficulties that would ensue. Nevertheless, the Commission has been empowered by the legislature to regulate the sale and service of alcohol to the public. That public duty would be frustrated if the Commission could not act due to potential harmful economic consequences to an individual permittee. While it is likely true, as found by Judge Marcus, that

allowing Mr. Trautman to be gainfully employed is consistent with public safety, that does not necessarily mean that the public interest is best served by allowing Mr. Trautman to continue working as a bartender.

Under the Commission's rules, a person who has demonstrated the irresponsible use of alcohol through a combination of DUII convictions and/or diversions over a three year period does not have the requisite fitness to be entrusted with a service permit. This determination is consistent with the authority granted to the Commission by the legislature. Mr. Trautman does not have good cause to overcome the denial criteria under OAR 845-009-0020. Therefore, the Commission may revoke his service permit.

FINAL ORDER

The Commission orders that Service Permit No. 239779, issued to Trent Trautman, be REVOKED.

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

Dated this 1st day of October, 2009.

/s/ Stephen A. Pharo
Stephen A. Pharo
Executive Director
OREGON LIQUOR CONTROL COMMISSION

Mailed this 1st day of October, 2009.

THIS ORDER IS EFFECTIVE ON THE DATE MAILED.

NOTICE: You are entitled to judicial review of this Order. Judicial review may be obtained by filing a petition for judicial review within 60 days from the service of this Order. Judicial review is pursuant to the provisions of ORS Chapter 183.